STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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-Petitioner.

## ORDER MODIFYING THE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 9, 1982, Examiner Mary Jo Schiavoni issued Findings of Fact, Conclusions of Law and Order, with accompanying Memorandum, in the above-entitled matter. The Examiner dismissed those portions of the Complaint alleging violations of Secs. 111.70(3)(a)1 and 5, Stats., finding that the Complainants had failed to exhaust their contractual remedies and that the record would not support a finding of an independent act of interference. The Examiner further found that the Respondents Brown County, Donald J. Holloway, and Norbert R. Froelich, had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by unilaterally changing a practice relating to a mandatory subject of bargaining, and thereby also committed a derivative violation of Sec. 111.70(3)(a)1, Stats. The Examiner ordered the Respondents to cease and desist from their refusal to bargain and granted certain affirmative relief to remedy the violation found.

The Respondents timely filed a petition, pursuant to Sec. 111.07(5), Stats., stating that they were dissatisfied with the Examiner's decision and requesting the Commission to review said decision. The parties filed briefs, the last of which was received on July 15, 1982. The Commission has reviewed the entire record, the petition for review, and the briefs, and on that basis is satisfied that the Examiner's Findings of Fact should be revised, that the Examiner's Conclusions of Law should be revised (affirmed in part and reversed in part), and that the Examiner's Order should be modified.

NOW, THEREFORE, it is

## ORDERED

I. The Examiner's Findings of Fact are hereby revised to read as follows:

1. 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. 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. Donald J. Holloway has been at all pertinent times the County Executive for Respondent County. Norbert J. Froelich has been at all pertinent times the Sheriff for Respondent County. Said individuals are named as Respondents herein in their official capacities as agents of Respondent County.

3. At all times material hereto, Complainant has been the bargaining representative for a unit consisting of "the enforcement personnel of the Brown County Sheriff-Traffic Department", by reason of Respondent County's previous voluntary recognition of Complainant as such.

4. 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. Said labor agreement contained provisions relating to fair share, job posting, and the following provisions:

BROWN COUNTY SHERIFF-TRAFFIC DEPARTMENT
NON-SUPERVISORY LABOR CONTRACT

This Agreement, made and entered into according to the provisions of Section 111.70 Wisconsin Statutes by and between Brown County as municipal employer, hereinafter called the "County" and the Bargaining Unit of the Brown County Sheriff-Traffic Department, Non-Supervisory personnel, hereinafter called the "Bargaining Unit".

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 2. RECOGNITION

The County agrees to recognize the Bargaining Unit as the bargaining agent for the enforcement personnel of the Brown County Sheriff-Traffic Department in the matter of wages, hours of work, and working conditions, except in situations wherein this contract is in conflict with existing Wisconsin Statutes. In the case of conflict, the statute will apply. The Personnel Committee of the Brown County Board of Supervisors and its delegated staff shall represent the County in bargaining conferences and negotiations. Prior to any negotiations, the Personnel Committee shall be furnished with a list of the membership on the bargaining unit, and noting those empowered to act for the unit in negotiations and matters pertaining to those negotiations.

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 47. GRIEVANCE PROCEDURE

Both the bargaining unit and the County recognize that grievances and complaints should be settled promptly and at the earliest possible stage, and that the grievance process must be initiated within fifteen (15) days of the incident or of learning of such. Any grievance not reported or filed within fifteen (15) days shall be invalid.

Any difference of opinion or misunderstanding which may arise between the County and the bargaining unit shall be handled in the following manner:

. . .

If the grievance is not settled at Step 4, the aggrieved party may, within five (5) days of the mediation session, submit the grievance to an arbitrator. The arbitrator shall be selected by the Wisconsin Employment Relations Commission. The decision of the arbitrator will be final and binding on all parties except for judicial review. The cost of the arbitration will be borne equally by the County and the bargaining unit.

It is not the intention of the parties hereto to circumvent or contravene any County ordinance or State law. If there is any

conflict or ambiguity insofar as any phrase, sentence or paragraph of this contract is concerned, then the ordinance or state law shall apply.

Nothing herein shall limit any employee from his rights to a hearing pursuant to Wisconsin Statutes in case formal charges are being filed against him.

. . .

5. Respondent County and Sheriff Froelich had, from 1972 to the present, utilized various individuals as "special deputies" on at least forty (40) occasions. 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. 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. It utilized two (2) male special deputies on one (1) occasion to pick marijuana. It utilized two (2) male special deputies on another occasion to check taverns for underage persons. Occasional male special deputies were also utilized for other diverse purposes.

7. 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<br>Prisoner Transport | 1 |
| | Robert Young | Guard on Prisoner at Hospital | 1 |
| 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 |

(continued)

| Year | Special Deputy (Retiree) | Task | Occasions Utilized |
|---|---|---|---|
| | 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. The guarding of prisoners in the hospital and the transportation of prisoners, except where female prisoners are involved, is work which has in the past been performed by full-time bargaining unit personnel undisputedly represented by the Complainant. These officers have been supplemented by both off-duty officers belonging to the bargaining unit and retirees. If the prisoner was a female, Respondents routinely requested a married officer to call upon his wife or another female relative to accompany him as a special deputy matron. The Complainant was aware of that procedure and did not object to said procedure at any time prior to November 16, 1981.

9. Neither the terms of the 1981 agreement nor the history of bargaining between Respondent County and Complainant are consistent with the existence of a mutual understanding that the retirees and others assigned occasionally as "special deputies" over the years are either covered by the 1981 agreement or included within the bargaining unit represented by Complainant. Such personnel are not included within the bargaining unit of County employes represented by the Respondent and are not covered by the terms of the 1981 agreement noted above.

10. 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. 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 Determnine 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. 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. 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. Holloway specifically encouraged Baye to continue the use of retirees in areas such as prisoner transportation.

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

14. 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 that new rate.

15. The Complaint giving rise to this proceeding was filed by Complainant on December 4, 1981. Complainant alleged therein that Respondents were violating Sec. 111.70(3)(a)1, 4, and 5, Stats.: by assigning bargaining unit police work functions -- such as transporting prisoners from the jail to various locations, guarding prisoners at hospitals and other locations -- to part-time "special deputies" in contravention of the agreement posting provisions; by failing to apply the agreement wage and fair share provisions to said part-time special deputies; by failing and refusing to bargain upon request concerning the wages, hours and conditions of employment of such personnel; and by unilaterally setting and increasing the wage rate paid to such personnel. In its Complaint, Complainant requested declaratory, injunctive and make whole relief including a declaration that Respondent County is obligated to bargain with Complainant about the wages, hours and conditions of employment of part-time special deputies and to apply the terms of the existing agreement to them.

16. During the pendency of this complaint proceeding, Complainants sought and obtained a temporary injunction in Brown County Circuit Court restraining Respondents, during the pendency of the WERC proceedings, "from employing any individuals outside of the (Complainant) Association for the purposes of performing functions of prisoner transportation, prisoner guarding and criminal process. . .until such time as a final determination is made with regard to the instant Complaint.

17. In its answer to the Complaint and in a motion to dismiss made at the outset of the hearing before the Examiner, Respondents argued the Complaint allegations constituted matters which under the terms of their 1981 agreement the parties had agreed would be resolved exclusively through the grievance and arbitration procedure contained therein and that Complainant had failed to exhaust said procedure as regards each of said allegations. The Examiner took said motion under advisement and directed the parties to present evidence and arguments on the merits of the Complaint allegations.

18. During the course of the hearing before the Examiner in this matter, the parties presented evidence bearing on the issues of whether Respondent County had an established practice prior to November of 1981 of offering available police work assignments to off-duty full-time bargaining unit members before offering same to a special deputy and whether Respondents changed that practice beginning in November of 1981 by offering such assignments to special deputies without first offering same to off-duty full-time bargaining unit members. Both parties' post-hearing briefs contained arguments concerning those factual issues

and the issue of whether the Respondents had thereby committed a violation of Sec. 111.70(3)(a)4, Stats. At no time, however, was there a formal amendment of the Complaint to incorporate such a specific allegation or to conform the Complaint to the evidence adduced on those matters.

19. At no time have the matters alleged in the Complaint or the matters referred to in Finding 18, above, been processed as grievances under the parties' Article 46 grievance procedure.

20. It is highly probable that submission of the disputes noted in Finding 18, above, to grievance arbitration under Article 46 of the parties' 1981 Agreement would result in an award constituting an interpretation and application of that 1981 Agreement that would fully resolve complainant's claim (noted in Finding 18) that Respondents violated Sec. 111.70(3)(a)4 by impermissibly changing the overtime assignment procedure for full-time bargaining unit personnel.

II. The Commission hereby revises the Examiner's Conclusions of Law to read as follows:

## CONCLUSIONS OF LAW

1. 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 and Commission will not assert the jurisdiction of the Commission to determine whether or not Respondents committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats.

2. By their conduct in this matter, Respondent County and Respondents Holloway and Froelich did not independently commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

3. 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, Respondents did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

4. Although not formally pleaded, the Complainant's claim (described in Finding 18 above) that Respondents violated Sec. 111.70(3)(a)4, Stats., is a matter properly before the Examiner and the Commission in this proceeding. The fact that both parties submitted proofs and arguments bearing on that issue warrants the conclusion that it would not violate the principles of due process for the Commission to treat that claim as if it had been alleged in the Complaint and answered by Respondents' answer and motion to dismiss herein.

5. In view of Finding 20, above, and of the Respondents' objection to the assertion of Commission jurisdiction in the first instance to resolve the disputed matters described in Finding 18, above, it is permissible and appropriate for the Commission to defer to the parties' 1981 contractual grievance arbitration procedure for resolution of the related contractual interpretation and application to that claimed violation of Sec. 111.70(3)(a)4.

III. The Commission hereby revises Examiner's Order in this matter to read as follows:

## ORDER 1/

1. The portion of the Complaint alleging violation of Sec. 111.70(3)(a)5, Stats., is hereby dismissed.

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1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for

1/ (continuation of footnote)

judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

2. The portion of the Complaint alleging violation of Sec. 111.70(3)(a)4, Stats., regarding establishment of a wage rate for special deputies is hereby dismissed.

3. The portion of the Complaint alleging an independent violation of Sec. 111.70(3)(a)1, Stats., is hereby dismissed.

4. The claimed violation of Sec. 111.70(3)(a)4, Stats., regarding the alleged change in overtime assignment procedure noted in Finding 18, above, is hereby deferred to the parties' 1981 contract grievance arbitration procedure and further Commission action with respect to that claim is hereby held in abeyance. The Commission will dismiss this aspect of the instant matter on motion of either party upon a showing that the subject matter of the claimed violation of Sec. 111.70(3)(a)4, Stats., has been resolved in a manner not clearly repugnant to the underlying purposes of MERA. The Commission will proceed to review the Examiner's Findings, Conclusion and Order regarding said claim on motion of either party upon a showing that said claim has not and will not be resolved in a fair and reasonably timely fashion through contractual grievance arbitration.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

## MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

### BACKGROUND:

The matter before the Commission is a Petition for Review of an Examiner's decision that the Respondents, Brown County and its agents, committed a violation of Sec. 111.70(3)(a)4, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats., by unilaterally changing a policy with respect to the assignment of overtime work. The Examiner's dismissal of an alleged violation of Sec. 111.70(3)(a)5, Stats., and an independent violation of Sec. 111.70(3)(a)1, Stats., are not contested in the Petition for Review on appeal, and a review of the record amply supports the Examiner's decision in those regards. The Commission's review will, accordingly, be focused on the facts and arguments concerning the allegation of a refusal to bargain in good faith. 2/

The essential facts in this matter are as follows. The Complaint represents the enforcement personnel of the Respondent County's SheriffTraffic Department. For years, the Respondent County has followed a practice of utilizing "special deputies" (women relatives of bargaining unit members, retired officers and individuals with special skills) to supplement bargaining unit members in the ancillary functions of the Department. Among the duties performed by these special deputies was accompanying officers on the transport of prisoners and the guarding of hospitalized prisoners. Complainant claims that from 1972 to November 16, 1981, Respondent County followed a practice of first seeking volunteers for these duties from among the off-duty members of the bargaining unit, and of only assigning the work to special deputies if no such volunteer could be found. In November of 1981, Complainant claims, Respondent County adopted a policy of directly securing the services of the special deputies for these tasks, rather than first seeking volunteers from the unit.

Although the collective bargaining agreement contained a provision for final and binding arbitration, the Complainant did not file a grievance over this alleged change, but instead adduced evidence about it in a prohibited practice proceeding before the Commission concerning other allegations against Respondents of interference, refusal to bargain and violation of a collective bargaining agreement. The claimed change in procedure with respect to assignment of transporting prisoners and guarding hospitalized prisoners and other duties was not alleged in the initial Complaint or in any amendment thereof, but evidence regarding that claim was adduced at the hearing and the parties addressed the claimed 3(a)4 violation and related factual disputes in their post-hearing briefs.

### THE EXAMINER'S DECISION:

The Examiner dismissed the complaint in all respects except the unilateral change refusal to bargain matter concerning the claimed change in procedure regarding assignment of work to special deputies. The Examiner determined that a binding practice of first offering such work to unit members had been shown to exist historically in the Department, and that the unilateral elimination of this practice had the effect of also eliminating the opportunities of unit members to

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2/ We do however think it appropriate to note that the Examiner at page 13 of her decision inaptly stated the applicable standard for finding a violation of Sec. 111.70(3)(a)1, Stats. Actions which are not "calculated" to interfere with employes' exercise of Sec. 111.70(2), Stats., rights are nonetheless violative of Sec. 111.70(3)(a)1, Stats., if they have a reasonable tendency to so interfere.

earn overtime pay. Citing several decisions of the National Labor Relations Board 3/, the Examiner concluded that the procedure for allocation of work affected overtime opportunities for bargaining unit personnel and hence was a mandatory subject of bargaining. Although the pleadings did not allege a violation of the Respondents' duty to bargain over this change in procedure, the fact that the issue was the subject of the parties' hearing evidence and post-hearing written arguments led the Examiner to conclude that the issue was properly before her for decision. The Examiner found that the Respondent had committed an unlawful unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., and had thereby also committed a derivative violation of Sec. 111.70(3)(a)1, Stats.

THE PETITION FOR REVIEW:

The Respondents filed a timely petiton for review pursuant to Sec. 111.07(5), Stats., 4/ alleging that they were dissatisfied with the Examiner's decision. Specifically, the Respondents alleged therein that the Examiner's decision was contrary to the facts and the law and against the great weight of the evidence. The Respondent asserted that the Examiner had "created" the past practice with regard to the assignment of work transporting prisoners and guarding hospitalized prisoners in the face of overwhelming evidence that no such practice existed. The Respondent further asserted that the Examiner's treatment of the past practice issue was at odds with the prior approach of a member of the Commission's staff to the same issue in another case, and was thus questionable as a matter of law. The Examiner's conclusion that the refusal to bargain over the policy change could be decided even though not pleaded, is challenged as unwarranted because of the Respondent's initial objection to the proceedings as a whole, in the form of a motion to dismiss the complaint and defer to grievance arbitration all of the matters alleged. The Examiner reserved a ruling on the motion until her issuance of Findings, Conclusions and Order in the matter. The Respondents argue that, in light of the motion and reserved ruling, their decision to litigate and brief the refusal to bargain allegation should not be interpreted as acquiescence to consideration of the issue in absence of a motion by the Complainant to amend its pleadings. The petition finally complains that the remedy granted by the Examiner is incapable of meaningful interpretation and implementation and goes well beyond the relief requested in the original pleadings.

THE POSITIONS OF THE PARTIES:

The Respondents' brief renews the argument that no past practice of calling off-duty members of the bargaining unit for transport work was proven by Complainant. The Respondents assert that the departmental records entered into evidence disclose hundreds of examples of special deputies being assigned to transport work. The Chief Deputy testified that there had been no change in procedure in November of 1981. The "decision" in November of 1981 to use special deputies for this work was therefore no decision at all merely a continuation of the past practice of using special deputies. As there was no change, there was no duty to bargain the change. The Respondents also urge that the decision in Brown County (Library), Case CXLIII, No. 28917, MA-2265 (Shaw, 5/82), indicates that an established past practice does not constitute a waiver of a party's right to grieve or make the argument for a different interpretation of the language in issue. Thus, even if a past practice had been established by the evidence, the Respondents had the right to argue for a different interpretation of the practice than that shown. Since it was open for a different interpretation, the practice was ambiguous and could not bind the Respondents. Finally, the Respondents assert that no request was ever made to bargain over the findings of the consultant's study which led to the alteration in practice. In the absence of a request to bargain, there can be no refusal to bargain of any kind in the circumstances.

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3/ Central Missouri Electric Cooperative, Inc., 222 NLRB 1037 (1976); Wilumet Industries, Inc., 220 NLRB 707 (1975); Colonial Press, Inc., 204 NLRB 852 (1973); and Master Appliances Corporation, Inc., 158 NLRB 1009 (1966).

4/ Made applicable to prohibited practice cases by the terms of Sec. 111.70(4)(a), Stats.

The Complainant avers that the record fully supports the Examiner's finding of a past practice of giving unit members a "right of first refusal" on transport work. They note the Chief Deputy, who testified that no change in policy was made, had almost no involvement in the process of securing personnel for these duties. The Chief Deputy did, however, testify that normal procedure called for attempting to secure the services of an off-duty officer before calling on a special deputy. With respect to the Respondents' motion to dismiss, the Complainant notes that this motion was based on the principle that a contractual violation should be treated as a subject for grievance arbitration (where it is provided for in the collective bargaining agreement) rather than prohibited practice proceedings under Sec. 111.70(3)(a)5, Stats. Since the Examiner ruled in favor of the Respondents with regard to all such violations, and found a statutory violation only with respect to the refusal to bargain -- a complaint Complainant views as not amenable to arbitration -- the Respondents' claim that the Examiner failed to consider its motion to dismiss is not correct. Finally, the Complainant notes that its prayer for relief included "such other orders as the Commission feels are just and reasonable." The relief granted was therefore well within the boundaries of that which was requested, as well as the authority of decision-makers under Sec. 806.01(1)(c), Stats. 5/ The relief granted is specific and proper, and can be easily implemented by the Respondents.

DISCUSSION:

In our view, the two questions presented in this review are:

1) Does the unpleaded nature of the disputed claim of unlawful unilateral change in overtime procedure render the Examiner's Findings, Conclusions, and Order based thereon erroneous; and

2) If not, was the Examiner's disposition of that claim appropriate in the circumstances.

While it would have been procedurally preferable -- at or even after the hearing -- for the Examiner to have entertained a motion to amend the pleadings to specify the unilateral change in overtime assignment policy claim, we do not find it a violation of due process for the Examiner to have treated that claim as before her for decision in the matter. For, by eliciting evidence and by presenting post-hearing arguments on the point, the parties revealed a mutual understanding that it was a matter before the Examiner. We note in that regard that there was no specific objection put before the Examiner by Respondents with regard to the absence of a specific complaint allegation on the point.

In fairness to Respondents, however, we are treating that claim as subject to its answer and Motion to Dismiss. The latter motion was predicated on the Respondents' view that the matters in dispute are subject to the contract grievance procedure and therefore ought not be dealt with in prohibited practice proceedings.

With regard to the appropriateness of the Examiner's disposition of the disputed claim (and the implicit denial of Respondents' Motion to that extent) we conclude that the Examiner erred in not deferring this particular claim of unlawful unilateral change to the parties' contractual grievance arbitration procedure.

We so conclude because there is a high probability that a grievance arbitration would fully resolve the unlawful unilateral change claim and because the Respondents have, as noted above, objected to WERC exercise of prohibited practice jurisdiction of this essentially contractual issue. More specifically, the analysis and the remedies (if any) in a grievance arbitration of the dispute are quite likely to fully determine the Sec. 111.70(3)(a)4 issue and to satisfactorily remedy any unlawful unilateral change in overtime assignment

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5/ Section 806.01(1)(c): "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the pleadings."

procedure involved. The disputed existence of the alleged status quo (an established practice of giving off-duty officers a right of first refusal of assignments before special deputies are assigned the work) would be a necessary element in resolving a contractual claim that the change violated, for example, Articles 1 and 9. Similarly, the arbitrator will be squarely faced with whether the County, in fact, deviated from that status quo and, if so, whether it was authorized to do so by the terms of the agreement. Conventional arbitral remedies would also appear likely to suffice in resolving the dispute in a manner not clearly repugnant to the underlying purposes of MERA.

The Commission has previously stated that Sec. 111.70(3)(a)4 refusal to bargain allegations will be deferred to the contract grievance arbitration forum in appropriate cases 6/ in which the Respondent objects to Commission exercise of jurisdiction in the matter. 7/ Such deferral advances the statutory purpose of encouraging voluntary agreements 8/ by not undercutting the method of dispute resolution agreed upon by the parties in their collective bargaining agreement. Indeed, if the Commission were to indiscriminately hear and decide every claim that a party's alleged deviation from a contractually specified standard is an unlawful unilateral change refusal to bargain, it would undermine the Commission's longstanding policy of ordinarily refusing to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction absent exhaustion of contractual grievance procedures.

In sum, because Respondent has consistently urged WERC deferral of the disputed claim of unlawful unilateral change in overtime assignment procedures to the contract grievance arbitration procedure and because there is a substantial probability that submission of the merits of that dispute to that arbitral forum will resolve the claim in a manner not repugnant to MERA, deferral is appropriate in this aspect of the case. 9/

Obviously, if Respondent County raises a procedural defense before the arbitrator, such as untimely grievance filing, the merits of the dispute would remain unresolved and subject to subsequent Commission review of the Examiner's decision on the merits. For, the Commission's discretionary decision to defer -- for probable resolution via contractual procedures -- alleged non-contractual violations of the Statutes it enforces ought not and does not preclude the Commission from fully adjudicating such claims if they are not resolved on the merits in a fair and timely fashion and in a manner not repugnant to the Act. 10/

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6/ Menomonie Schools, 16724-B (1/81) at 5-6. See also Milwaukee Schools, 11330-B (6/73) at 17.

7/ Compare with the statements referenced in the preceding footnote cases in which the Commission was not urged to defer and did not do so: e.g., Nicolet Union High School, 12073-C (10/75).

8/ Section 111.70(6), Declaration of Policy.

9/ By contrast, it was appropriate that the Examiner reached the merits of the other refusal to bargain allegations in the case rather than deferring. For those allegations required a bargaining unit clarification determination and involved a request for an order that Respondent County bargain with Complainant about special deputies' wages, hours and conditions of employment. Such representation issues and remedies would be, in our view, sufficiently less likely to be resolved compatibly with MERA in an arbitration proceeding to warrant non-deferral. Representation issues and bargaining orders are much less the grist of the arbitral mill than the claimed change in overtime policy discussed above. Hence, we do not disturb the Examiner's resolution of these other issues and would not have deferred these matters even if they had been the subject of a petition for review herein.

10/ Milwaukee Elks, 7753 (10/66); Milwaukee Schools (Vrsata), 10663-A (3/72); Milwaukee Schools, 11330-B (6/73).

The factors cited by the Examiner for her refusal to defer are unpersuasive when weighed against the foregoing. While acknowledging that "even a cursory review of the parties' agreement suggests that the dispute could be determined by criteria contained in the collective bargaining agreement", the Examiner concluded that deferral was inappropriate essentially because the case presented the novel question of the mandatory-permissive nature of overtime assignment procedures and because as a practical matter the parties had already fully litigated the issue in the Examiner proceeding. It does not appear that the Respondent, in its arguments to the Examiner, ever disputed the mandatory nature of the overtime procedure subject matter claimed changed. Hence, the Examiner appears to have somewhat overreached in attempting to bring this case within what could be called the "important policy question requiring Commission attention" exception to the deferral policy described in the Commission's Milwaukee Schools 11/ and Menomonie Schools 12/ cases. The Examiner's legitimate concern about the impracticality of putting the parties through an additional (arbitration) hearing on the issue after having presented proofs and arguments on it before the Examiner cannot control either. For, reliance on that factor amounts to bootstrapping in this circumstance since the Respondents at all times opposed proceeding in the prohibited practice forum with any of the issues raised by Complainant, asserting that the grievance procedure was the appropriate forum, and the Examiner directed that a hearing on the merits be taken with a ruling on the Respondents' motion to dismiss taken under advisement.

Accordingly, the Commission has revised the Findings and Conclusions to avoid reaching the factual determinations and contractual interpretation and application involved in the claimed change in overtime assignment procedure issue and is holding Commission review of the Examiner's Findings, Conclusions and Order on those matters in abeyance. On motion of either party, and upon a proper showing as described in the Order, the Commission shall either dismiss this remaining aspect of the proceeding or proceed to review the Examiner's determination of the merits of the claimed unlawful unilateral change in overtime assignment procedure.

Dated at Madison, Wisconsin this 30th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

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11/ Supra, note 5.

12/ Supra, note 5.