STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1162, AFSCME, AFL-CIO, Complainant, vs. GREEN COUNTY (PLEASANT VIEW NURSING HOME), Respondent.	Case LXVI No. 30284 MP-1375 Decision No. 20030-D

Appearances

Mr. Jack Bernfeld, Staff Representative, AFSCME, District Council 40, appearing on behalf of the Union.

Mr. Jack D. Walker, Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Green County having filed, on June 22, 1982, with the Wisconsin Employment Relations Commission, a petition for referendum to determine the continuation of a fair-share agreement involving certain municipal employes of the Green County Pleasant View Nursing Home; and Local 1162, WCCME, AFSCME, AFL-CIO, having filed on August 24, 1982 and October 5, 1982, a complaint with the Wisconsin Employment Relations Commission alleging that Green County had committed prohibited practices within the meaning of Sec. 111.(3)(a)1, 2 and 4, Stats.; and the Commission having ordered the two cases consolidated for purposes of hearing and having appointed Robert M. McCormick, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matters; and hearing in the matters having been held at Monroe, Wisconsin, on November 22, 1982 and December 14, 1982; and the parties having filed briefs by March 1, 1983; and the Examiner having considered the evidence and arguments of the parties, 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 Local 1162, WCCME, AFSCME, AFL-CIO, hereinafter Complainant or Union, is a labor organization which functions as the exclusive bargaining representative for certain employes of the Green County Pleasant View Nursing Home; and that it maintains its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That Green County, hereinafter County, is a municipal employer; that among its various governmental functions the County maintains and operates Pleasant View Nursing Home which maintains its offices at P. O. Box 158, Monroe, Wisconsin 53566; and that at all times material herein the following individuals acted as agents of the County: Robert Hoesly, Acting Chairman of the Green County Board of Supervisors, Forrest Fellows, Administrator of the Pleasant View Nursing Home; Roger Goepfert, Assistant Administrator; Elizabeth Boland, Director of Nursing; and that Jack Walker, acted as Attorney and Negotiator for the County for certain times material herein.

3. That in March of 1982, during negotiations for a collective bargaining agreement for the calendar years of 1982 and 1983, the Union and Employer agreed to the following Fair Share provision:

> Effective May 1, 1982, the County hereby recognizes the "Fair Share" principle as set forth in Wisconsin Statute, 111.70 as amended. A deduction from each employee shall be made from the paycheck each month in the amount as certified by the Union as the uniform dues.
>
> The Union, as the exclusive representative of all the employees in the bargaining unit, will represent all employees, Union and non-Union, fairly and equally, and all

employees in the Unit will be required to pay their proportionate share of the costs of collective bargaining and contract administration by the Union. No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply, consistent with the Union constitution and By-Laws. No employee shall be denied Union membership because of race, creed, color, sex, or age.

The Union shall indemnify and hold the County harmless against any and all forms of liability that may arise out of or by reason of action taken under this Section;

that on or about April 13, 1982, the Union and the County ratified the collective bargaining agreement containing the above provision; that since May 1, 1982, the Employer has made monthly fair share deductions from the paychecks of bargaining unit members in accordance with the agreement; that in May of 1982 Steven Chenous, a County employe and member of the bargaining unit, independently initiated a petition requesting a referendum to determine if the bargaining unit members desired a continuation of the fair share agreement and independently solicited signatures from other bargaining unit members; that having collected signatures from at least 30% of the bargaining unit members, Chenous requested Robert Hoesly, Chairman of the County Board of Supervisors, to sign and file a petition for continuation of fair share referendum with the Wisconsin Employment Relations Commission, which Hoesly did on June 22, 1982; that the County did not initiate, aid or abet the employe campaign to request a fair share referendum.

4. That on or about July 15, 1982, the County notified officers and members of the Union local that the County intended to reduce the labor force at the nursing home effective August 1, 1982; that Union representative David Ahrens requested a meeting to discuss the staff reduction; that Ahrens met with County agents on July 28, 1982 and again on July 30, 1982; that at the July 30 meeting the parties discussed various methods of reducing staff; that the County's Office Manager, Linda Sonnenburg, brought a one page list to the July 30 meeting which contained a list of 28 active employes, which list suggested a distribution of reduced days for the array; that said document (Exhibit 4) reads as follows:

Lorene Babb - on leave

Changes

	From	To
L. Lattin	A.M. 3 days	P.M. 3 days
R. Rateike	A.M. 3 days	P.M. 3 days
M. McKee	A.M. 3 days	P.M. 3 days
D. Oates	A.M. 3 days	P.M. 3 days
S. Towne	A.M. 4 days	P.M. 3 days
D. Frenzel	Night 3 days	P.M. 3 days
I. O'Brien	Night F.T.	P.M. 4 days
D. Brown	Night F.T.	P.M. F.T.
D. Whitehead	Night F.T.	P.M. F.T.
K. Fernandes	Night 3 days	P.M. 3 days
T. Lynn	change weekends	

DeBruin (26 1/2 in 2 weeks)
Schadewalt (32 hrs. in 2 weeks)
Penninston (26 1/2 in 2 weeks)

Layoff

C. Schuette	13	
D. Holcomb	23	
J. McKee	24	
B. Fortney	33	Short 4 people on each weekend
B. Larse	23	
C. Morgan	13	
S. Richardson	3 is quitting	Nights -
C. Miller	25	Short 2 people on 1 weekend and
S. Rabb	23	Short 4 people on the other weekend
P. Kingston	23	

S. Tracy	23	14 people every other weekend
T. Tullis	23	
P. William	33	
L. Potter	23	

that the method of staff reduction embodied in Complainants Exhibit No. 4 was never offered as a formal proposal by the County; that at the end of the July 30 meeting the County and the Union were at impasse with regard to the method of staff reduction; that on or about August 16, 1982 the County implemented a method of staff reduction which was consistent with its final proposal to the Union at the July 30 meeting.

5. That on August 17, 1982, four bargaining unit members, accompanied by a Union representative, Rebecca Brown, approached Elizabeth Boland, the Director of Nursing, to express their concern that because of the recent change in scheduling, they would be short a day of work for that week; that after learning of the exact nature of their concern, Boland assured them that they would experience no adverse consequences from the change in schedule that week and that after Boland's explanation, she ordered Brown back to her usual work station.

6. That Boland's actions in August of 1982, in ordering Brown and other employes to cease their conversations and return to work, and in inspecting Brown's work, do not constitute harassment, interference, or coercion.

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

CONCLUSIONS OF LAW

1. That Green County or its agents did not commit any acts of interference within the meaning of Sec. 111.70(3)(a)1 of MERA in connection with the independent circulation of a petition for a Continuation of Fair Share Agreement Referendum by an employe of Green County, one Steven Chenuous.

2. That Green County did not commit any refusal to bargain and did not violate Secs. 111.70(3)(a)5 or (3)(a)1 in that regard by its agent Robert Hoesly, Chairman of County Board, signing and filing with the Wisconsin Employment Relations Commission a petition for Referendum to Determine Continuation of a Fair Share Agreement based upon evidence that 30% of its employes in the existing bargaining unit presented such a petition to the County through the circulator, Steven Chenuous; and that Green County's filing of said petition is permitted by Sec. 111.70(2) of MERA; and the County, by said filing, has not violated Sec. 111.70(3)(a)2 of MERA.

3. That Green County by meeting with Union representatives on July 28 and 30, 1982 to discuss staff reductions which the County planned to make on August 1, 1982, and by not agreeing to any Union suggestions for the method of such reductions by July 30, and by implementing its plan for staff reduction on August 16, 1982, did not, and is not now committing, any violation of Secs. 111.70(3)(a)(4) and (3)(a)(1) of MERA.

4. That Green County, by the conduct of its agent, Elizabeth Boland, Director of Nursing, on August 17, 1982, in sending employes and Union activists Rebecca Brown and four other bargaining unit members back to their worksite on the basis that the City had answered and settled said employes' concern over a shortened work week and loss of hours attending the County's change in scheduling; did not thereby commit, and is not now committing, any violation of Sec. 111.70(3)(a)1 of MERA.

5. That the County, by its agent, Boland in directing Brown and others to cease their conversations over the resolved dispute and directing them to return to the work place, did not commit any act of interference violative of Sec. 111.70(3)(a)1 MERA; and that the County, by its agent Boland, inspecting Brown's work after the directive to the aforementioned employes to return to their work site on August 17, 1982, did not constitute an act of interference violative of Sec. 111.70(3)(a)1 of MERA.

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

ORDER 1/

That the complaint, in its entirety, in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 10th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Union argues that the County's participation in the efforts toward discontinuation of fair share, after having agreed to fair share only three months earlier in contract negotiations, demonstrates that the County previously bargained in bad faith and thus violated its statutory obligation to bargain in good faith. The Union points out that the person who actually signed the petition was not only the Chair of the County Board of Supervisors, but also Chair of the County Negotiating Committee and an active participant in the most recent negotiations at which the fair share referendum was agreed to. The Union further alleges that the County aided and abetted the employe who actually solicited petition signatures through advice and allowing the use of County facilities and work time to solicit signatures. As further demonstration of County involvement, the Union alleges that the County's counsel did legal work regarding fair share during the period immediately before the filing of the fair share referendum petition.

In regard to the County's actions in staff reduction, the Union contends that in a meeting on July 30, 1982, the County made a final written proposal to the Union which called for a number of involuntary shift transfers, a reduction of hours for a few employes and complete layoff for approximately fourteen employes. The Union asserts that after the Union representative rejected said proposal, the parties were at impasse, and the County then implemented a staff reduction via a method inconsistent with its last offer to the Union. The Union concludes that this sequence of actions constitutes a prohibited practice, either as a unilateral change in working conditions, or as general bad faith bargaining. The Union has not alleged nor argued that the County's actions constituted a breach of the collective bargaining agreement.

Finally, the Union alleged that on or about the date that staff reductions were implemented, the Director of Nursing at the Home engaged in a series of acts of harassment against Union officers and proponents, for example, by refusing to allow the presence of a shop steward during a grievance investigation.

The Union seeks an order directing the County to implement its last offer in regard to layoff, to withdraw its petition for a referendum on continuation of fair share, and to cease and desist from its interference with and discouragement of the labor organization.

The County argues that the fair share provision agreed to in the collective bargaining agreement does not expressly prohibit the County from petitioning for a referendum; it merely incorporates the statutory principles regarding fair share to be found in Sec. 111.70; such principles include the right to petition for a continuation referendum. The County further argues that an agreement not to petition after a 30% showing of interest would be in violation of public policy and that it had a duty to file the statutory petition once it was presented with the employe petition indicating that at least 30% of the employes desired a referendum. The County denies that it initiated, aided, or abetted the deauthorization activity in any way. Rather, County agents Mr. Hoesly, the County Superintendent, and Mr. Fellows, properly informed the employe leading the deauthorization effort that it would not participate in the effort, and that signatures could not be collected on work time. The County argues that there is no evidence regarding the nature of the legal work done on fair share and that the Union's allegation that such work indicates County involvement is pure speculation.

The County denies all allegations of harassment or interference, contending that the facts demonstrate that the County was acting appropriately in each of the incidents cited by the Union.

In response to the allegation that it implemented, after impasse, a staff reduction proposal inconsistent with its final proposal to the Union, the County relies on the testimony of three witnesses who were present and represented the County at the final meeting prior to the staff reduction. The County asserts that the document alleged to be a proposal was never offered as a proposal but was

merely a hypothetical and unofficial exploration of a possible method of reducing staff; the County notes that such a method of staff reduction would have been inconsistent with the financial and staffing interests of the Home. Further, the County contends that the method of staff reduction finally implemented was consistent with the final proposal actually made to the Union. The County requests that the complaint be dismissed in its entirety.

Also, on February 2, 1983, during the extended briefing period, the County filed a motion seeking an expedited referendum election, notwithstanding the pendency of a complaint of prohibited practice and a motion seeking an order that all fair share dues withheld from the employes be refunded by the Union, in the event that it loses the referendum, at least retroactive to the date the Union filed a prohibited practice. Said motions were denied in the course of hearing, and the latter motion, with regard to the refund of dues by the Union, should the Commission conduct a continuation referendum and the proposition fails by the employes rejecting fair share, will be disposed of by this decision.

DISCUSSION:

Fair Share Referendum

The Union contends that the County's participation in the fair share referendum process constitutes a prohibited practice. While the Union's brief is not specific in indicating exactly which statutory provisions are claimed violated by the County's activities with respect to the referendum petition its initial complaint contains alleged violations of Secs. 111.70(3)(a)1, 2 and 4 of MERA. The Union has failed to introduce any evidence, or advance any legal authority for the proposition that the County is in violation of Sec. 111.70(3)(a)(2) of MERA, the so called "domination provision."

As outlined in Finding of Fact 3, the County and Union tentatively agreed in negotiations for a successor collective bargaining agreement to include a fair share provision in March of 1982, and ratified the entire agreement on April 13, 1982. On June 22, 1982, a petition for referendum to determine the continuation of the fair share agreement was filed with the Commission, having been signed by Robert Hoesly, Chairman of the County Board and a chief negotiator for the County.

Those portions of MERA which govern the issue of fair share evince a concern for the interests of municipal employes, municipal employers and labor organizations in the public sector. An examination of Section 111.70(2) of MERA demonstrates that while employes have a right to refrain from forming, joining or assisting a labor organization, the legislature expressly qualified that right by authorizing the execution of a collective bargaining agreement which would require that bargaining unit employes make fair share payments. 2/

MERA does not require that a referendum be held before a fair share agreement is entered into, or first implemented, although an employer and labor organization can jointly request by stipulation that the Commission conduct a referendum prior to the implementation of a fair share agreement. 3/ MERA does provide, however, a mechanism by which either an employer or a labor organization can file a petition to request a referendum in which bargaining unit employes can decide whether they wish a fair share agreement to continue. Sec. 111.70(2) provides, in pertinent part:

> Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission

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2/ Town of Allouez, Dec. No. 15022-B (1/77); and see Sec. 111.70(2), Stats.

3/ See Commission Rule ERB 15.02 of the Wisconsin Administrative Code; Madison Metropolitan School District, Dec. No. 15134 (12/76); Marathon County, Dec. No. 15307 (3/77).

shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. (Emphasis added).

The Commission rules governing referenda with respect to fair share agreements further state:

> (2) Time for filing. A petition for an initial referendum to determine the continuation of a fair-share agreement shall be entertained by the commission, provided said petition is filed at any time following the implementation of the fair-share agreement involved. 4/ (Emphasis added)

In contrast, the only provision in MERA by which a single employe can initiate action with respect to a fair share agreement is that portion of Sec. 111.70(2) which allows any municipal employe to come before the Commission and ask that a fair share agreement be suspended because a labor organization discriminates on the basis of race, color, creed or sex with regard to membership.

On their face, the statutes and rules governing fair share agreements contain no express limitations on the right of an employer to petition for a referendum on fair share other than a showing that 30% of its employes desire the termination of fair share payments. In the past, the Commission has been reluctant to limit that right to petition. For example, in Town of Allouez, 5/ the municipal employer argued that a petition requesting final and binding interest arbitration should be dismissed because, inter alia, to subject the fair share question to interest arbitration would defeat the right of the parties to petition the Commission to conduct a referendum on the continuation of the fair share agreement during the term of the agreement. The Commission found the argument to be without merit, pointing out that the legislature, while expressly authorizing such fair share agreements, also expressly stated that they are subject to the right of the municipal employer or labor organization to petition for a continuation referendum as provided for in Sec. 111.70(2), Stats.

Similarly, in City of Milwaukee, 6/ the Commission found no merit in a union argument that a petition for a fair share continuation referendum was time-barred by the results of previous contract ratification votes and by the percentage of employes who have had dues deduction authorizations in effect at certain times.

The right to petition for a continuation referendum, if supported by a 30% showing of interest, appears to be a protected right, and the Examiner finds no prohibited practice based on the mere fact of filing. At this point, it is not necessary to decide if a municipal employer and a labor organization could mutually agree to a fair share provision which would expressly prohibit an employer from filing a petition for the term of the collective bargaining agreement since there is no allegation that the County violated the contractual fair share provision, and therefore, Sec. 111.70(3)(a)5 of MERA. The Examiner would note, however, that the pertinent fair share provision agreed to between the parties appears to merely incorporate the fair share principles set forth in the statutes without any express limitations.

The Union also appears to be contending that the County's totality of conduct in aiding and abetting the referendum drive constitutes bad faith bargaining or interference with the rights of the municipal employes and/or with the administration of the labor organization. The record evidence indicates that the Union has failed to prove that the County actually initiated the referendum petition or sought to influence the employes in any way connected with its circulation. The record shows that a single employe, Steven Chenous, initiated the collection of employe signatures needed to demonstrate a showing of interest and independently

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4/ Wis. Adm. Code section ERB 15.04 (2).

5/ Town of Allouez, Dec. No. 15022-B (1/77).

6/ Dec. No. 14819 (8/76).

solicited those signatures. He testified that he personally drove to Madison to discuss the relevant statutes with both a Commission staff member and a private lawyer. He further testified that he was not on working time when he solicited signatures, nor were the employes who signed the petition. The mere fact that he used the employe break room to solicit signatures is not evidence of County action since off duty employes typically have access to that room. Mr. Chenous' testimony was unrefuted and is credited with regard to his claim that his efforts to discontinue the fair share arrangement were not aided or abetted by the County, as the Union argued.

Finally, the Examiner agrees that any inferences drawn from the mere fact that the County's counsel did some research on fair share at approximately the period of the discontinuation efforts would be pure speculation. Therefore, the Examiner has dismissed any allegations that the County engaged in any prohibited practices with respect to the petition requesting a fair share continuation referendum.

Staff Reduction

The duty to bargain to agreement or impasse during the term of an existing collective bargaining agreement extends to any mandatory subject of bargaining to which the Union has not waived its right to bargain, or which is not addressed in the existing agreement. 7/ It is only after impasse has been reached that an employer can unilaterally implement a change in wages, hours or working conditions, and that unilateral change must be consistent with the employer's final proposal to the union. 8/

Neither party has argued that there was not an obligation to negotiate the method of staff reduction. After the County gave notice, on or about July 17, 1982 of its intent to reduce staff effective August 1, 1982, several meetings took place. County agents met at least twice with the president of the Union local and solicited the Union's position on the reduction. In addition, Ahrens, the Union's District Representative, met on or about July 28, 1982 with several County agents and made several Union proposals, specifically that full layoffs occur according to a seniority list, but on a bifurcated basis of separate full-time and part-time seniority lists. A final meeting between Ahrens, several County Agents and the County's counsel (the events of which are the basis of the present dispute) occurred on July 30, 1982.

Further, the parties each argue in their respective briefs that after this last meeting, they were at impasse over the method of staff reduction. Shortly after that meeting, the County implemented a plan of staff reduction. The issue in dispute is a factual one: did the method of staff reduction actually implemented conform to the County's final proposal to Ahrens at the July 30 meeting?

Present for the County at the July 30 meeting were Linda Sonnenburg, Office Manager for the Nursing Home, Forest Fellows, the Home's Administrator, Roger Geopfert, the Assistant Administrator, and Jack Walker, the County's Counsel. The only Union representative present was Ahrens.

The meeting apparently lasted for some time and a number of proposals were made. It was Ahren's testimony that the County's final proposal was that embodied in Complainant's Exhibit No. 4, which called for: the required reduction of approximately 14 of the least senior employes who would be placed on full layoff status; a number of other employes would retain employment but experience involuntary shift changes and continue working the same number of hours; a very small number of employes would suffer a reduction in hours. The County argues that on July 30, the employe list (Exhibit No. 4) was never a formal proposal; and that it subsequently made a proposal which differs from whatever method the Union now perceives from Exhibit No. 4.

7/ Brown County (Dept. of Social Services, (Dec. No. 20620, 20623) 5/83; City of Kenosha, (Dec. No. 16392-B) 1/79; Racine Unified School District No. 1, (Dec. No. 18848) 6/82.

8/ Jt. School District of Winter, et al. (14482-B) 3/77; Marinette School District, (19542-B) 6/83, City of Appleton, (18171 and 18171-A) 1/82.

There are several weaknesses in the Union's reliance on Complainant's Exhibit No. 4. First of all, on its face, the document is not a descriptive statement of a method of staff reduction, such as might be found in a collective bargaining agreement, but is a handwritten list of names arranged in basically two different categories with various abbreviated notations apparently referring to shifts, shift changes, and numbers of days typically worked. The document on its face does not contain any statement that it is either a preliminary or final County proposal.

Moreover, the testimony of all of the County's agents who were present at the meeting disputed the Union's claim that Exhibit No. 4 was a final proposal. The Office Manager who actually prepared the document and brought it to the meeting testified that it was not offered at that meeting as a proposal (T. 142) and that she expressly stated at the time that, "it was nothing official." (T. 120) Fellows the Administrator, testified that the document was not a proposal, but a possible method as to what shifts might be made (T. 141), with the list of fourteen people at the bottom of the document being a list of those employes who would not be guaranteed a specific shift but allowed to sign up for various openings, such as weekends (T. 140, 147). Goepfert, the Assistant Administrator, testified that he did not hear the details of Complainant's Exhibit No. 4 offered as a proposal, nor any County statement that 14 employes would be placed on layoff (T. 150). Finally there is no evidence that the Union proposed the principles it believed were implicit in Exhibit No. 4, as a reduction plan.

After close examination of the witnesses testimony, the Examiner concludes that Complainant's Exhibit No. 4 was neither intended nor offered as a formal County proposal in the manner argued by the Union. While the document contains the word "lay-off" above the fourteen names, it became evident during the course of the testimony that some County officials, and especially the Office Manager who prepared the document, do not make a clear distinction between a full layoff and a reduction of hours (T. 119). It is possible that a certain amount of confusion attended the on-going discussion that afternoon. Furthermore, the County's witnesses consistently testified that their actual proposed method of staff reduction to the Union was made subsequent to the discussion centered around Exhibit No. 4 (T. 139, 141); that the staff reduction actually implemented conformed to the County's final statement to the Union of what it intended to implement. The Union has failed to prove that Complainant's Exhibit No. 4 was the County's final proposal or indeed a proposal at all. Therefore, the Examiner has found no violation of the duty to bargain arising out of the County's actions with regard to the staff reduction of August, 1982.

Alleged Harassment and Interference

In its complaint, the Union alleged that the Director of Nursing engaged in a series of acts of harassment against Union officers and proponents, including a refusal to allow the presence of a shop steward during a grievance investigation. The Union has not commented upon these allegations in its brief. Based upon the record facts as stated in the Findings of Fact, the Examiner concludes that such allegations are without substance.

The Commission, shall direct a vote on the petition for continuation of fair share agreement referendum, pursuant to Sec. 111.70(2) Stats., with the removal of the "blocking complaint" by the issuance of the decision.

REMEDY:

On February 2, 1982, the County filed a motion in writing wherein it requested that the Examiner (Commission) issue an interim order, which would grant the County's request for an expedited continuation referendum vote, or in the alternative, an interim order that the Union be directed to remit all dues collected to the employes, retroactive to August 24, 1982, the date it filed a prohibited practice complaint, in the event the Union loses the fair share referendum. The Examiner denied the Motion for an interim order, and indicated (20029-B and 20030-B) 2/83, that the alternative request for retroactive refund of fair share deductions would be decided in the instant decision on the merits.

The Commission has no prehearing investigatory function or summary judgment discretion under Chapter 227. It is in no position to determine when a complaint filed by a Union "is frivolous, where the affect of filing is a blocking charge" to the conduct of a continuation referendum. As is the case with representation elections, the filing of a complaint of prohibited practice alleging certain

violative conduct of the Municipal Employer which, if proven violative, potentially may hinder or obstruct the free choice of employes over the continuing fair share proposition just as well as it could interfere with their free choice where a question of representation is pending.

The Commission held in City of Appleton (11043) 6/72, that pendency of a fair share referendum does not require that the employer hold the dues deducted in escrow. In that case, the Commission stated, "if the employes do not favor the continuation of fair share, all dues deducted . . . prior to certification of the results of referendum are payable to the Union and thereafter all fair share deductions shall cease." The Examiner has no authority to ignore the result in City of Appleton.

Dated at Madison, Wisconsin this 10th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M McCormick
Robert M. McCormick, Examiner