STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION, Complainant, vs. GREEN COUNTY, Respondent.	:	Case 69 No. 31044 MP-1433 Decision No. 20308-B

Appearances:
Kelly, Haus and Katz, S.C., Attorneys at Law, 302 East Washington Avenue, Madison, Wisconsin 53703, by Mr. William Haus, appearing on behalf of the Complainant.
Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, Suite 600, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin 53701, by Mr. Jack D. Walker, appearing on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Lionel L. Crowley having, on August 26, 1983, issued his Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded the Respondent had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)(1) and 4, Stats.; and the Complainant and Respondent having both, on September 15, 1983, timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on January 17, 1984; and the Commission having taken official notice of certain additional matters by letter to the parties dated July 23, 1984, and having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and having reviewed the decision of the Examiner, and being satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order should be modified.

NOW, THEREFORE, it is hereby

ORDERED 1/

A. That the Examiner's Findings of Fact, Conclusion of Law and Order are hereby modified to read as set forth below, and as so modified are hereby adopted by the Commission.

MODIFIED FINDINGS OF FACT

1. That Green County Deputy Sheriff's Association, hereinafter referred to as the Union, is a labor organization existing for the purposes of representing law enforcement employes through collective bargaining, and its offices are located at P.O. Box 455, 2827 - 6th Street, Monroe, Wisconsin 53566.

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 judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.
(Continued on Page 2)

2. That Green County, hereinafter referred to as the County, is a municipal employer with its offices located at the Green County Courthouse, Monroe, Wisconsin 53566.

1/ (Continued)

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

3. That the Union and the County have been parties to a series of collective bargaining agreements, the most recent of which, by its terms, covered the period January 1, 1980 through December 31, 1981; and that said agreement contained the following provisions:

ARTICLE I
RECOGNITION AND UNIT OF REPRESENTATION

1.01 The Employer (a Municipal Employer) recognizes the Union as the exclusive certified collective bargaining representative for all regular full-time and regular part-time sworn deputies in the employ of Green County in its Sheriff's Department, excluding managerial, supervisory and confidential employees.

ARTICLE II
NEGOTIATIONS

. . .

2.02 Negotiations shall proceed in the following manner: the party requesting negotiations shall notify the other party in writing of its desire to negotiate a successor collective bargaining agreement one hundred twenty (120) days prior to the expiration of this contract. Within thirty (30) days of the request for such meeting, an initial meeting of the parties shall be held. At such meeting, the party making the request shall present its proposals. The party to whom the proposals are made shall have the opportunity to study such proposals and to respond and present proposals and counterproposals within fifteen (15) days thereafter; and negotiations shall continue thereafter upon a mutually agreeable basis with a view towards an amicable settlement.

. . .

ARTICLE XVIII
HEALTH INSURANCE

18.01 For full-time employees who elect family coverage, the County agrees to pay 90% of the monthly premium for the health insurance coverage which was in effect as of January 1, 1980. For full-time employees who elect single coverage, the County agrees to pay 100% of the single premium for such coverage.

. . .

ARTICLE XXIII
DURATION

23.01 This Agreement shall go into effect January 1, 1980 and continue until December 31, 1981, and shall be considered automatically renewed from year to year thereafter, unless prior to September 1st, either party shall serve written notice upon the other that it desires to renegotiate, revise or modify this Agreement.

4. That on August 14, 1981, the Union gave written notice to the County of its desire to negotiate a successor agreement to the 1980-81 collective bargaining agreement; that the initial bargaining session between the parties was held on September 16, 1981, and the Union submitted its proposals for a successor agreement at said meeting, including a proposal that the County pay 100% of the health insurance premium; that a second bargaining session was held on October 7, 1981, at which the Union submitted additional proposals and the County submitted its initial proposals; that at said session, the County informed the Union of the health insurance rates which the then current carrier proposed for 1982, and invited the Union to attend a meeting with the carrier to discuss the matter; that the parties scheduled a bargaining session for October 28, 1981; and that the Union did not attend any meeting with the carrier and the County.

5. That on October 19, 1981, the Union filed a petition for final and binding arbitration with the Commission under Sec. 111.77, Stats., and the October 28, 1981 bargaining session was cancelled; that the Commission appointed a member of its staff to conduct an investigation in the matter; and that on November 11, 1981, the Investigator confirmed the scheduling of a meeting with the parties for January 12, 1982.

6. That on December 14, 1981, the County, by its Attorney, sent to the Union's Attorney three health insurance brochures and an accompanying letter which stated, in part, as follows:

> "The County hereby proposes this health insurance plan in its bargaining with you, to be effective as soon as possible after contract expiration on December 31, 1981, and as a substitute for the existing plans.
>
> We offer to bargain about this change."

and that on December 22, 1981, the County submitted this health insurance proposal to the Commission's Investigator.

7. That on January 5, 1982, the County, by its Attorney, sent a letter to the Union's Attorney, which stated as follows:

> "Please take notice that Green County presently intends to implement its health insurance proposal to you, effective February 1, 1982.
>
> The County offers to bargain with you about this matter, to the extent that it is properly and mandatorily bargainable at this time."

8. That on January 12, 1982, the parties met with the Commission Investigator and the issue of health insurance was discussed; that the Union indicated that it would agree to the County's insurance proposal if the County would agree to pay 100% of the premium rather than 90%; that the County counter-proposed to pick up $200 of the co-insurance if the Union accepted its proposal; and that at this meeting no agreement was reached on the issue of health insurance.

9. That on January 18, 1982, the Union's Attorney responded to the County's Attorney's January 5, 1982 letter and made known its objection to any unilateral change in health insurance and indicated that substantive discussions on it first occurred on January 12, 1982 and unilateral implementation would thwart bargaining; that the County responded to this letter on January 21, 1982 indicating that it was available to bargain on its proposal and that implementation would be unlikely before March 1, 1982; that on January 26, 1982, the Investigator confirmed an exchange of initial final offers by February 12, 1982 and scheduled a meeting with the parties for March 16, 1982; and that on February 9, 1982, the County adopted a resolution changing the health insurance provider effective March 1, 1982.

10. That on February 12, 1982, the parties submitted their respective initial final offers to the Commission's Investigator; that on this same date, the County notified its then present health insurance carrier that it was cancelling its health insurance plan effective April 1, 1982; that the Commisson's Investigator exchanged the parties' final offers on February 16, 1982; that on February 18, 1982, the Union objected to the form and clarity of the County's final offer; that on February 24, 1982, the Union, by letter, objected to the County's unilateral change in health insurance coverage and demanded retention of the current coverage; that the Union's initial final offer contained a provision on health insurance which continued the then-existing plan with employes contributing $12.50 per month; that on February 26, 1982, the County submitted a final offer which contained the following proposal on health insurance:

> "8. Change Section 18.01 to read:
>
> For full-time employees who elect family coverage, the County agrees to pay 90% of the monthly premium for the health insurance coverage which was in effect as of April 1, 1982, by Board resolution, including County payment of the first $200 of major medical expense incurred by an insured during each deductible year."

that on February 26, 1982, the County's Attorney responded by letter to the Union's Attorney's letter of February 24, 1982, as follows:

> "The County believes that it has fulfilled each legal obligation to your Union regarding the change in policy.
>
> Moreover, the County continues to offer to bargain about the matter.
>
> However, the Association has not, as of this time, persuaded the County to change its position.
>
> Should you have other arguments, or positions, or any other matters you wish to bargain about, please contact me."

11. That on March 16, 1982, the parties met again with the Commission Investigator and agreed to another exchange of final offers; and that on March 18, 1982, the parties, by letter, notified the Commission Investigator that they had agreed to reconsider their positions on the remaining issues in light of the agreement reached between the County and those units represented by AFSCME.

12. That on April 1, 1982, the County implemented its insurance proposal which changed the carrier and affected the substance of its insurance plan for employes represented by the Union.

13. That on May 20, 1982, prior to the submission of the above-mentioned final offers, the Union filed with the Commission a motion requesting that portions of the County's February 26th offer be stricken and that the County be ordered to rescind its unilateral action regarding insurance coverage; that such motion was subsequently withdrawn on January 18, 1983; and that on January 18, 1983, the Union submitted another final offer which included a proposal that the County maintain the then current level of coverage and pay the full premium.

14. That on January 20, 1983, the Union filed the instant complaint alleging that the County violated Secs. 111.70(3)(a)1 and 4 by its April 1, 1982, unilateral change in the health insurance plan theretofore in effect for bargaining unit employes.

15. That on March 4, 1983, the Union again submitted another final offer which contained a health insurance proposal identical to that submitted by the County on February 26, 1982.

16. That on April 4, 1983, the County filed a petition for declaratory ruling with respect to certain proposals (not related to insurance) contained in the Union's final offer; and that on November 1, 1983, the Commission issued its declaratory ruling on the above-mentioned petition.

17. That the Examiner issued his decision in this case on August 26, 1983.

18. That on November 30, 1983, and December 14, 1983, the County and the Union respectively, submitted their last round of final offers; that the County's offer reflected no change from its previous health insurance proposal; that the Union's proposal contained the following proposal on health insurance:

> For full-time employees who elect family coverage, the County shall pay 90% of the monthly premium for the health insurance coverage which was in effect as of January 1, 1980, (the coverages and benefits set forth in the WPS-HMP plan, which coverages and benefits are hereby incorporated by reference). For full-time employees who elect single coverage, the County agrees to pay 100% of the single premium for such coverage.
>
> NOTE: It is the intent of this proposal that the parties' rights and obligations with respect to health insurance benefits for the period from April 1, 1982 until such time as this Agreement is put into effect shall be in accordance with the final disposition of the following matter currently pending before the Wisconsin Employment Relations Commission: Green County (Sheriff's Department), Case LXIX, No. 31044, MP-1433.

19. That on January 3, 1984, the parties advised the Commission Investigator that they did not wish to further amend their respective final offers; that on January 4, 1984, said Investigator advised the Commission that he had closed the investigation on the basis of his conclusion that an impasse existed between the parties on the issues outlined in their final offers; that on January 11, 1984, the Commission issued its Certification of Results of Investigation and Order Requiring Arbitration in the matter; and that on February 23, 1984, the Commission appointed Ms. June Weisberger as arbitrator, pursuant to the parties' selection from a list previously supplied by the Commission.

MODIFIED CONCLUSION OF LAW

1. That Respondent Green County, by implementing a change in the health insurance plan for bargaining unit employes on and after April 1, 1982, before either reaching unconditional agreement with Complainant Association concerning that change or receiving a Sec. 111.77, Stats., interest arbitration award concerning the terms of a successor collective bargaining agreement with Complainant Association, committed a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats.

MODIFIED ORDER

IT IS ORDERED that Respondent Green County, its officers and agents, shall immediately:

1. Cease and desist from implementing such unlawful unilateral changes in health insurance plans covering employes represented by the Union.

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

> a. Make all employes in the bargaining unit represented by the Union whole, with interest, 2/ for any out of pocket losses caused by the County's above-noted change in insurance plan, which losses were experienced between April 1, 1982, and the earlier of the parties' unconditional agreement concerning health insurance or the parties' receipt of a Sec. 111.77, Stats., interest arbitration award concerning a successor collective bargaining agreement.
>
> b. Notify its law enforcement bargaining unit employes by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". That notice shall be signed by an authorized representative of the County's Board of Supervisors and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to ensure that said notices are not altered, defaced or covered by other material.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The instant complaint was filed on January 20, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983).

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

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

APPENDIX A

NOTICE TO EMPLOYES

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

1. We will not commit unlawful unilateral changes in the health insurance plan covering bargaining unit employes represented by the Green County Deputy Sheriff's Association.

2. We will make whole with interest bargaining unit employes represented by the Green County Deputy Sheriff's Association for out of pocket losses due to the change of health insurance plan incurred during the period April 1, 1982, through the earlier of an unconditional agreement between the parties regarding health insurance or the parties' receipt of a Sec. 111.77, Stats., interest arbitration award concerning the terms of a successor agreement.

3. We will not in any other or related manner interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

Dated at _____, Wisconsin this _____ day of _____, 1984.

By _____
for the Green County Board of Supervisors

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

GREEN COUNTY (SHERIFF'S DEPARTMENT)

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

BACKGROUND

In its complaint initiating this proceeding, the Union alleged that the County committed a prohibited practice within the meaning of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act (MERA) by unilaterally changing the health insurance plan covering its unit employes. The County denied that it committed any prohibited practice.

THE EXAMINER'S DECISION

The Examiner found applicable herein a rule that an employer may unilaterally implement a change in terms and conditions of employment after having first bargained the same to impasse with the collective bargaining representative. The Examiner found, however, that no such impasse had been reached under the facts of this case. The Examiner concluded that by substituting the Blue Cross-Blue Shield plan for the WPS-HMP plan on April 1, 1982, the County violated Secs. 111.70(3)(a)1 and 4 of MERA.

In reaching this conclusion the Examiner relied on what he interpreted as the County's relatively late introduction of the proposed change into negotiations, the failure of the County to prove any real urgency as to the issue, the continuing flexibility displayed by the Union and the limited number of face-to-face discussions held by the parties on this issue.

The Examiner also concluded, contrary to the contention of the County, that the Union had not waived its right to bargain on the issue by its responses or non-responses to the County's offers to bargain on the issue.

Having determined that no impasse existed at the time of the unilateral change, the Examiner found it unnecessary to determine what impact, if any, Sec. 111.77, Stats., has on post-petition unilateral implementation after impasse has been reached.

In his remedial order, the Examiner limited his make-whole order to the period between April 1, 1982, and March 4, 1983, based on the fact that on the latter date the health insurance proposal submitted by the Union in its final offer of that date became identical to that of the County. The Examiner thus concluded that as of that date the parties had effectively reached tentative agreement on the issue such that no further remedial relief was necessary or appropriate.

THE COUNTY'S PETITION FOR REVIEW AND SUPPORTING ARGUMENTS

In its petition for review the County alleges that the Examiner erred in not finding that the parties had reached impasse prior to the County's unilateral implementation of its health insurance proposal, and in his subsequent finding of a violation based on the lack of impasse. The County contends that there is substantial evidence in the record which supports a finding of impasse.

In support of its argument that impasse existed, the County contends that it satisfied its duty to bargain with the Union by giving it adequate notice and opportunity to bargain over the proposed change in insurance and that it was not obligated under this duty to concede its position or encourage the Union to bargain by suggesting dates and meetings. The County contends that, despite its willingness to bargain, the Union never really requested bargaining but rather only raised objections to the County's proposal and that the raising of objections without more is not equivalent to bargaining. However, the County also contends that with respect to what bargaining did take place, contrary to the finding of the Examiner, the Union did not display continuing flexibility but rather any changes made by the Union were regressive in nature, providing further evidence of the existence of impasse. The County further points out that because of the potential for increased premium costs, it was within its rights to press for a prompt resolution of the insurance issue and that the parties could and did reach impasse on the single issue of health insurance despite the existence of other unresolved issues. The County maintains that the Union should not be allowed to

now claim that no impasse existed because it failed to actively pursue meaningful bargaining. Moreover, the County argues that it was not required to plead impasse as an affirmative defense because (1) the Union had the burden of proving the absence of impasse as proof of a Sec. 111.70(3)(a)4 violation and (2) the issue was sufficiently raised at the hearing on the instant complaint.

With respect to the impact of Sec. 111.77, Stats., the County argues that the statute does not prohibit post-petition unilateral changes. In support of this argument the County points to the language of Sec. 111.70(4)(jm)13, which the County notes absolutely prohibits post-petition unilateral changes affecting Milwaukee Police Department personnel, and to the absence of such language under Sec. 111.77, Stats. Moreover the County argues that Sec. 111.77, Stats., requires only that the terms of the predecessor agreement be maintained for sixty days after notice of the proposed change is given to the other party, and that the County met that obligation.

The County also argues that adoption of the Union's position would yield an anomalous result because although after bargaining to impasse an employer may implement its proposal on a mandatory subject of bargaining during the term of an existing agreement (citing, City of Appleton, Dec. No. 18171 (WERC, 10/80)) the County would be prohibited from implementing its proposal by reason of impasse after the contract has expired. The County concedes that mid-term contract disputes are not subject to the impasse resolution procedures of 111.70(4)(cm) (citing, Dane County, Dec. No. 17400 (WERC, 11/79) and City of Green Bay, Dec. No. 12307 (WERC, 2/79)), but argues that whether or not such a distinction exists under Sec. 111.77, the statute ought not be interpreted to create the anomalous result noted above.

Additionally, the County argues that implementation of its health insurance proposal after discharging its duty to bargain or after the parties reach impasse is consistent with "the law in Wisconsin since enactment of MERA." In this regard the County cites Greenfield Schools, Dec. No. 14026-B (WERC, 11/77) and Racine Schools, Dec. No. 14722-A (WERC, 8/78). The County further asserts that prior to enactment of the Sec. 111.70(4)(cm), Stats., mediation-arbitration procedure (effective January 1, 1978), unilateral implementation was permitted despite MERA's ban on strikes. The County also argues that "the right to implement after impasse does not require the correlative right to strike as the Wisconsin experience has repeatedly demonstrated," and that the right to implement after impasse is not consistent with interest arbitration.

The County further contends that adoption of the Union's position would extend the terms of the collective bargaining agreement indefinitely in violation of MERA's ban on contracts of greater than three years' duration (citing, City of Sheboygan, Dec. No. 19421 (WERC, 3/82)).

Finally, the County argues that even if its post-petition implementation were somehow held by the Commission to be a prohibited practice, the appropriate remedy would be to defer to the outcome in the interest arbitration proceeding (citing, Turtle Lake School District, Dec. No. 16030-B (McCrary, 3/79)). The County maintains that the interest arbitrator is empowered to grant retroactive remedial relief and that the Commission should not grant the Union relief in addition to that available under Sec. 111.77, Stats.

THE UNION'S PETITION FOR REVIEW AND SUPPORTING ARGUMENTS

In its petition for review the Union alleges that the Examiner erred as a matter of law by (1) basing his decision on a rule that an employer can unilaterally implement changes in mandatory subjects of bargaining prior to the completion of final and binding interest arbitration and (2) by limiting his make-whole remedy to the period from April 1, 1982, to March 4, 1983. Rather, the Union contends that Sec. 111.77, Stats., does not allow for unilateral implementation upon impasse and that the Examiner's remedy should be amended to extend its application until such time as either the parties agree to implementation or the balance of the issues outstanding are decided by an interest arbitrator.

In its brief in support of its petition the Union contends that the fact that during the course of the investigatory phase of the interest arbitration procedure it submitted a "final offer" containing a proposal identical to that submitted by the County, does not require it to stay with that proposal. It maintains that the process contemplates package proposals and that in the absence of agreement on the entire package, the County was not entitled to selectively pick from the proposals

contained in the Union's package for implementation. The Union points out that it has a statutory right to change the composition of its "final offers" until such time as the WERC investigator certifies the final offers to the Commission. Thus it argues that for remedial purposes it cannot be bound to contents of any of its earlier offers. It further argues that these "early" final offers do not rise to the level of a tentative agreement and the Commission has already ruled that an employer cannot unilaterally select and implement tentative agreements. Citing, Ozaukee County, Dec. No. 18384-A (7/81).

The Union also rejects any contention by the County that the entire matter be deferred to the interest arbitrator for resolution. It argues that the arbitrator is not fully empowered to remedy nor specifically concerned with remedying prohibited practice violations since that is not the issue before the arbitrator. Furthermore, the Union argues that Sec. 111.77(3), Stats., which provides that a prohibited practice proceeding shall not interrupt a Sec. 111.77, Stats., arbitration proceeding, supports the proposition that the two proceedings are to be kept separate.

In its brief opposing the County's petition for review, the Union maintains that the impasse defense was neither available to the County nor properly before the Examiner because the County failed to plead impasse as an affirmative defense as required under ERB 12.03(4) and (7), thus waiving that defense.

Secondly, the Union contends that the County did not satisfy its duty to bargain in good faith on the health insurance issue because throughout the negotiations the County displayed an inflexible and preconceived position on the issue of health insurance, as evidenced by its unwillingness to modify its position and by constant threats of implementation. The Union also argues that the County's interest in an expeditious resolution did not entitle the County to unilaterally isolate the health insurance issue from the other unresolved issues and that the Union was not obligated to bargain the health insurance issue separately.

Finally, the Union contends that the concept of unilateral implementation by the County is not allowed by Sec. 111.77, Stats., because it provides for interest arbitration as the exclusive dispute resolution mechanism for parties involved in its procedures.

MATERIAL DEVELOPMENTS AFTER ISSUANCE OF THE EXAMINER'S DECISION

At the time the Examiner issued his decision on August 26, 1983, the interest arbitration proceeding between the parties was still ongoing. As indirectly noted in the parties' arguments summarized above, the Union modified its contemplated final offer as regards the health insurance issue on December 14, 1983. Specifically, the Union changed its offer from one that was identical to the County's proposal on that subject to one proposing a prospective-only changeover to the health insurance arrangements that had been proposed in the Union's initial set of bargaining proposals. The Union's final offer was also modified to expressly incorporate the relief it is granted (if any) in the instant complaint proceeding.

Because that fact and other background information concerning the processing of the interest arbitration matter after August 26, 1983, appear relevant to our resolution of issues raised in the instant review proceeding, we have formally taken notice of certain additional matters contained in the interest arbitration case file. 3/ Neither party has objected to our taking notice of said matters, and we have incorporated same into our modified Findings of Fact.

DISCUSSION

Existence and Nature of Impasse Defense in Disputes Subject to Sec. 111.77 Arbitration

It is well established that, absent a valid defense, a unilateral change in a mandatory subject of bargaining constitutes a per se violation of the MERA

3/ Green County (Sheriff's Dept.), Case LVI, No. 28741, MIA-604.

duty to bargain and hence of Sec. 111.70(3)(a)4, Stats. 4/ Clear and unmistakable evidence of waiver of the Complainant's right to bargain has been recognized as a valid defense, 5/ and the possible availability of a defense based on necessity has also been mentioned. 6/ A number of MERA cases refer to an additional valid defense where the bargaining involved has reached an impasse. 7/ The Union's Petition for Review takes issue with the Examiner's premising his decision on the notion that an impasse (as defined in private sector case law) constitutes a valid defense to a unilateral change where, as here, the dispute involved is subject to the Sec. 111.77 impasse resolution procedures.

The Examiner found that since there was no impasse under private sector analysis it was unnecessary for him to determine the effect, if any, of Sec. 111.77 on the rights and obligations of the parties in the instant circumstances. However, the Examiner's application of private sector principles seems necessarily to imply that Sec. 111.77 does not foreclose a defense based on impasse defined in private sector terms.

For that reason, we find it both appropriate and necessary in this case to consider whether an "impasse," however defined, constitutes a valid defense to a unilateral implementation of a previous proposal on a mandatory subject in a contract negotiation dispute subject to the binding interest arbitration (municipal interest arbitration, i.e. MIA) procedures in Sec. 111.77, Stats.

This is essentially a case of first impression for the Commission as a whole. A right to implement at impasse (as defined in the private sector cases) has been recognized in cases arising under MERA, 8/ but this appears to be the first in which the Commission is squarely presented in a petition for complaint review with

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4/ E.g., Mid-State VTAE, Dec. No. 14958-B, C (5/77) aff'd, 14958-D (WERC, 4/78).

5/ E.g., City of Brookfield, Dec. No. 11406-A, -B (WERC, 9/73) aff'd (CirCt Waukesha, 6/74).

6/ Racine Schools, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 56. cf. Milwaukee Schools, Dec. No. 15829-D (Yaeger, 3/80) at 5, 13 aff'd by operation of law, Dec. No. 15829-E (4/80). In the private sector, see, e.g., Standard Candy Co., 147 NLRB 1070 (1964) (change justified as good faith response to need to conform with minimum wage provisions of the Fair Labor Standards Act); and AAA Motor Lines, 215 NLRB 793, 88 LRRM 1253 (1974) (change justified by union's dilatory and unlawful bargaining tactics combined with need to change in order to avoid employe losses of certain fringe benfits after contract expiration.)

7/ See cases cited at Note 8, infra.

8/ See, Greenfield Schools, Dec. No. 14026-A (10/76), aff'd as modified, Dec. No. 14026-B (WERC, 11/77); Racine Schools, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78); Winter Schools, Dec. No. 14482-B (McGilligan, 3/77), aff'd by operation of law, Dec. No. 14482-C (4/77); City of Appleton, Dec. No. 18171 (10/80) aff'd, Dec. No. 18171-A (1/82); Racine Schools, Dec. No. 14722-A (WERC, 8/78); Turtle Lake Schools, Dec. No. 18198-A (Pieroni, 8/81), aff'd by operation of law, Dec. No. 18198-B (WERC, 10/81); Turtle Lake Schools, Dec. Nos. 16030-B, -C (McCrary, 3/79) aff'd by operation of law, Dec. No. 16030-D (WERC, 4/79); Mid-State VTAE, Dec. No. 14958-B (5/77), amended 14958-C (5/77), aff'd, 14958-D (WERC, 4/78); Fennimore Schools, Dec. No. 11865-A (Fleischli, 6/74) aff'd by operation of law 11865-B (WERC, 7/74); Milwaukee Schools, Dec. No. 15829-D (Yaeger, 3/80), aff'd by operation of law, Dec. No. 15829-E (WERC, 4/80); City of Sheboygan, Dec. No. 17823-A (Schoenfeld, 1/81), aff'd by operation of law, Dec. No. 17823-B (WERC, 2/81); LaCrosse County, Dec. No. 13284-A (Yaeger, 12/75), aff'd by operation of law, Dec. No. 13284-B (WERC, 3/76); and City of Wisconsin Dells, Dec. No. 11646 (WERC, 3/73).

the question of whether such a right exists as regards a dispute subject to final and binding Sec. 111.77, Stats., interest arbitration. 9/

While the waiver and necessity defenses are not, in our view, affected by the availability of compulsory final and binding interest arbitration, the same cannot be said of the impasse defense. The Sec 111.77 provisions making compellable final and binding arbitration an available statutory procedure for resolving contract negotiation disputes in certain law enforcement and firefighting bargaining units departs radically from the comparatively free exercise of economic strength preserved in the private sector law as available means of resolving bargaining impasses. Therefore, although the general refusal to bargain language introduced into MERA in 1971 parallels its private sector precursors 10/ under which an impasse defense has long been recognized, 11/ the provisions in Sec. 111.77 warrant a different rule.

Thus, we conclude that the binding interest provisions of Sec. 111.77 make inappropriate an application of the private sector impasse defense principles to disputes subject to that final and binding impasse resolution procedure. In our view, the underlying purposes of MERA and Sec. 111.77 warrant and require the conclusion that there is no available impasse-based defense in disputes subject to compulsory final and binding interest arbitration under Sec. 111.77, Stats.

We do not agree with the County that Sec. 111.77(1) constitutes an implied authorization of unilateral changes such as those at issue herein or any

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9/ The Greenfield Schools, 14026-A, -B, and Racine Schools, 14722-A, supra, cases relied upon by the County did not involve disputes that were subject to any final and binding interest arbitration procedure. Rather, Greenfield Schools case involved a dispute that arose and was resolved before the January 1, 1978, effective date of the Sec. 111.70(40(cm), Stats., mediation-arbitration procedure, and the Racine Schools dispute arose during the term of an existing agreement so that med-arb was not available. See, Dane County (Handicapped Children's Education Board), Dec. No. 17400 (WERC, 11/79) (mediation-arbitration is available only as regards negotiation disputes concerning new agreements or arising out of formal reopener provisions in existing agreements.

None of the other cases listed in Note 8, above, involved a full Commission decision on the issue of availability of an impasse-based defense in a negotiation subject to final and binding interest arbitration. Racine Schools 13696-C/13876-B, City of Appleton and Milwaukee Schools all involved in-term disputes. Winter Schools, Fennimore Schools, LaCrosse County, and City of Wisconsin Dells all involved pre-January 1, 1978, disputes. In the Turtle Lake Schools cases, the Examiners found certain changes unlawful such that their comments concerning under what circumstances the changes would have been lawful are dicta; moreover, those cases were not appealed to the Commission and there was no separate decision by the full Commission issued in either matter. The Mid-State VTAE dispute arose prior to January 1, 1978, and the Commission's decision in the matter did not address the availability of an impasse defense in disputes subject to mediation-arbitration. Finally, in City of Sheboygan, the examiner found no change in the status quo such that his comments about an impasse defense were dicta; moreover, that case was not appealed to the Commission and there was no separate decision by the full Commission issued therein.

10/ Compare Sec. 111.06(1)(d), Stats., and NLRA Secs. 8a5 and 8b3 with Secs. 111.70(3)(a)4 and (3)(b)3, Stats.

11/ Almeida Bus Lines, Inc. 33 Fed. 2d 729, 56 LRRM 2548 (CA 1 1964); Eddies Chop Shop 165 NLRB 861, 65 LRRM 1408 (1967); Taft Broadcasting Co. 163 NLRB 475, 64 LRRM 1386 (1967); American Laundry Machinery Co. 107 NLRB 1574, 33 LRRM 1457 (1954). See also, NLRB v. Katz 369 U.S. 736, 50 LRRM 2177 (1962).

others. 12/ The 60-day limitation provided therein, where applicable, 13/ constitutes a pre-condition on termination or modification of an existing agreement. The language of that provision prohibits changes (during the 60-day period specified) in any of the terms and conditions of the parties' existing agreement, not merely those that constitute mandatory subjects of bargaining. Therefore, in our view, the 60-day provision is an additional pre-condition to--rather than a substitute for--the otherwise existing limitations on unilateral changes in mandatory subjects imposed by MERA as regards disputes subject to Sec. 111.77 compulsory final and binding interest arbitration.

The three-year limit on the duration of collective bargaining agreements in Sec. 111.70(3)(a)4 relied upon by the County is not contravened by our holding herein. The duty to refrain from unilateral changes in mandatory subjects after expiration of a predecessor agreement derives from the statutory duty to bargain (and in this case from the implications of the statutory procedure for final and binding contract negotiation dispute resolution), not from an extension of the term of the predecessor collective bargaining agreement. Thus, post-expiration unilateral changes in permissive subject agreement provisions are not per se violations of the statutory duty to bargain. 14/ The duty to bargain in good faith requires the parties to continue the status quo wages, hours and conditions of employment until the party seeking to change the status quo has a valid defense for doing so, whether or not three years have passed since the effective date of the predecessor agreement. To hold otherwise would, for example, remove any limits on unilateral changes in mandatory subjects immediately after expiration of a three year agreement--an interpretation that would ill serve the underlying purposes of MERA. Nevertheless, as is discussed more fully below, in conforming our outcome herein to the underlying purposes of MERA, we have taken into account the possibility of a prolonged period in which the party seeking change is precluded from implementing that change.

We are also cognizant that--unlike Sec. 111.77--the separate interest arbitration procedure for Milwaukee Police personnel in Sec. 111.70(4)(jm) contains an express provision prohibiting the parties to such disputes from unilaterally altering any mandatory subject of bargaining from the time either party has filed a petition to initiate the interest arbitration process to the time that the matter is resolved by execution of a successor agreement. 15/ We do not, however, view the Legislature's silence on that subject in Sec. 111.77 as an indication that the Legislature made any specific judgment as to the availability of an impasse defense in disputes subject to final and binding arbitration under Sec. 111.77.

12/ Section 111.77 states that in the relationships to which it applies, the parties "have the duty to bargain collectively in good faith including the duty to . . . comply with . . . procedures . . ." including an express obligation "(1) . . . Not to terminate or modify any contract in effect unless the party desiring such termination or modification (inter alia) . . . (d) Continues in full force and effect . . . all terms and conditions of the existing contract for a period of 60 days after (certain) notice is given or until the expiration date of the contract, whichever occurs later."

13/ That provision is addressed only to a subset of unilateral changes, to wit, changes in terms and conditions contained in an agreement. Thus it does not apply to unilateral changes in matters not contained in the expiring agreement.

14/ See, e.g., City of Madison, supra, Dec. No. 17300-C (WERC, 7/83) (Timing of implementation of permissive subject changes can, in some circumstances, contribute to the conclusion that the totality of a party's conduct is not consistent with the requirements of good faith bargaining.)

15/ Section 111.70(4)(jm)13, Stats., reads as follows:

> Subsequent to the filing of a petition (to initiate final and binding interest arbitration) before the commission pursuant to subd. 1 and prior to the execution of an agreement pursuant to subd 9, neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department.

The Legislature cannot, for example, be deemed by its silence to have intended that disputes subject to Sec. 111.77 interest arbitration would be subject to a rule that is just the opposite of that expressly contained in the Milwaukee Police provision. For that conclusion would mean that either party is free at any time after the petition is filed for municipal interest arbitration under Sec. 111.77 to make any unilateral changes it chooses, whether previously proposed or not, and regardless of the status of the bargaining. Such would obviously be inconsistent with the duty to bargain in good faith and with the underlying purposes of MERA.

It is arguable that the Legislature's silence on the subject represents its intention that the pre-existing case law on the subject continue in effect. However, in 1971 the Commission case law in the municipal sector was not developed to such a point as would define when the MERA duty to bargain was exhausted or an "impasse" had been reached such as would entitle a party to implement a proposal it had previously offered in bargaining. Indeed, the MERA duty to bargain itself was introduced in a 1971 enactment. Even at present it is by no means clear that a party in a dispute subject to compellable but nonbinding fact finding is entitled to make unilateral changes consistent with its prior proposals in bargaining during the pendency of a petition for fact finding, during fact finding itself, and during a reasonable period of post-fact finding bargaining. Most other public sector tribunals that have addressed the question have limited impasse-based defenses to situations in which available statutory impasse resolution procedures have been exhausted. 16/

In any event, we find that the Legislature, by its silence in Sec. 111.77 (as compared with the Milwaukee Police language) concerning unilateral changes, was intentionally leaving the question of whether there is an impasse defense available in disputes subject to Sec. 111.77 for interpretation by the Commission and the Courts in the subsequent administration of MERA consistent with its overall purposes. We proceed below with an analysis of the question along those lines.

The Legislature has included in Sec. 111.70(6) of MERA an express DECLARATION OF POLICY as follows:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

16/ See, e.g., State of Washington Public Employment Relations Commission Rule 391-45-552, WAC (12-1-83) (by rule, agency provides that in disputes involving teachers, employer must exhaust mediation and fact finding prior to unilateral change in status quo where specific statute--Ch. 41.56.470, RCW--states that in disputes involving uniformed personnel, neither party may make changes in status quo "during pendency of the proceedings before the arbitration panel"). Pennsylvania Labor Relations Board v. Millcreek School District, 8 PPER 47 (Pennsylvania L.R.B. 1976); AFSCME Local No. 2752 v. WASCO County, 4 PECBR 2397 (Oregon PECBR, 1979) aff'd 46 Ore. App 859 (1980); School Board of Orange County v. Palowitch, 367 S.2d 730 (Fla. CtApp, 1979); In Re Piscataway Township Board of Education, PERC No. 91 (NJ. PERC, 1975); and Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191. See also, In the matter of Triborourgh Bridge and Tunnel Authority, 5 PERB 3064 (N.Y. PERB, 1972) (prior to legislation specifically prohibiting unilateral changes, N.Y. PERB held that employer was prohibited from unilaterally changing mandatory subject of bargaining contained in expired contract prior to exhaustion of statutory conciliation procedures). But see, Commonwealth of Massachusetts (Unity), MLC Case No. Sup-2497 (1982) and Southwest Michigan College, 1979 Michigan ERC Lab OP 908, (citing private sector cases, agencies hold unilateral implementation lawful once parties are deadlocked, i.e., exhaustion of mediation and fact finding not required.)

Contrary to those express statutory purposes, the Examiner's and County's approach of directly applying private sector impasse defense principles to disputes subject to final and binding Sec. 111.77 interest arbitration would, in our view, create an incentive for parties to render less speedy and less effective the statutory processes for peaceful resolution of disputes that the parties are unable to resolve voluntarily through collective bargaining. For, in the absence of a collective bargaining agreement in force, and after the 60-day period specified in Sec. 111.77, a party could propose any change in the status quo that is unacceptable to the other side, maneuver to an impasse in the private sector sense, implement the proposed change, and simultaneously prevent the immediate referral of the dispute to an interest arbitrator by filing a petition for a declaratory ruling on the mandatory/non-mandatory status of certain of the other party's proposals. That, in our view, is not a scenario consistent with or promotive of peaceful resolution of disputes.

It could be argued, of course, that the further into the bargaining and Sec. 111.77 process a party must go before it may lawfully implement a previously proposed change in the status quo, the greater the incentives for the party favored by the status quo to (1) avoid or delay reaching that point in the statutory process at which the other party is permitted to implement its proposed change in the status quo; and (2) avoid or delay reaching a voluntary settlement on other, less favorable terms. On that basis it could be argued that to adopt the Union's view that there can be no valid impasse defense to a unilateral change in a dispute subject to Sec. 111.77 might tempt some parties opposed to changes in the status quo to drag out the statutory process. However, in our view, creative retroactivity proposals can be proposed which--if agreed upon or included in the final offer selected by the arbitrator--would eliminate much of the advantage of such delaying tactics. 17/ In an extreme case, unlawful abusive delay of the statutory process (not present here) might be sufficient to render lawful a unilateral change previously proposed. We recognize that in many instances where both parties are acting in exemplary good faith the statutory processes continue well beyond expiration of any predecessor agreement and that some changes will be difficult to implement retroactively. Nevertheless, we are persuaded that the underlying purposes of MERA and Sec. 111.77 are better served if the parties focus on achieving solutions to retroactivity problems and the rest of their bargaining objectives through bargaining and the statutory procedures rather than through unilateral action.

Contrary to the County's contention, we find nothing anomalous about an interpretation of the legislative scheme wherein an impasse defense is available as regards in-term unilateral changes in subjects not covered by the existing agreement but not available in post-expiration disputes. The critical difference is the non-availability of a statutory method for resolving such in-term disputes as compared with the availability of such a procedure for resolving negotiations disputes concerning new agreements and arising out of formal reopener provisions contained in existing agreements.

17/ For example, the County in the instant case could have made a proposal as follows concerning retroactive implementation of its health insurance modification which, if selected, would have closely approximated the outcome it sought to achieve by its unilateral change herein:

> In the event that an agreement containing the foregoing health insurance arrangements is not entered into between the parties prior to April 1, 1982, the foregoing provision shall, to the extent possible, be retroactively implemented so as to charge the employes involved (including those who may have quit or been discharged in the interim) as if the employer had been entitled throughout the period since April 1, 1982, to deduct from their pay the portions of health insurance premium costs attributable to the general employe contribution provided above plus the full costs of incremental premiums attributable to the County's provision of additional insurance benefits provided for in the predecessor agreement but not provided for in the health insurance provision above.

It could be argued that an impasse defense to unilateral changes should be recognized in Sec. 111.77 disputes once the Commission has formally declared that the parties are at impasse and certified their respective final offers to an arbitrator under Sec. 111.77. However, we conclude that it is more consistent with the final and binding interest arbitration provisions of Sec. 111.77 to require the parties to pursue their bargaining objectives to voluntary agreement and (if necessary) the peaceful statutory interest arbitraton procedures, than it would to authorize parties at any point in the process to pursue their bargaining objectives through unilateral action by reason of an impasse.

Thus, we conclude that there is no available impasse-based defense to a unilateral change in a mandatory subject in disputes that are subject to final and binding Sec. 111.77 interest arbitration. 18/ That conclusion, in our view, will encourage the parties to utilize the fair and peaceful statutory procedure to achieve proposed changes in the status quo regarding mandatory subjects rather than resort to self-help unilateral action to that end. Making changes in the mandatory subject status quo achievable for the most part 19/ only through the procedures provided by law will encourage voluntary agreements and will promote the speed with which such disputes are processed in Sec. 111.77 arbitration, rather than focusing the attention of the parties on potentially less peaceful self-help methods (e.g., unilateral changes) of pursuing their bargaining objectives. 20/

Accordingly, we reject the analytical framework within which the Examiner addressed the lawfulness of the County's April 1, 1982, unilateral change. Nonetheless, on the basis of the analysis set forth above, we have affirmed the Examiner's basic conclusion that the County did not have a valid defense to the Union's complaint of Sec. 111.70(3)(a)4 unilateral change refusal to bargain. Hence, we have modified the Examiner's Findings of Fact, Conclusion of Law and Order to conform to our analysis herein.

The insurance change at issue herein was implemented by the County before the parties either had reached an unconditional agreement concerning that change in health insurance or had received a final and binding Sec. 111.77 arbitration award concerning the terms of their successor agreement. Under our analysis above, the County has no valid defense based on an impasse, however defined. Furthermore, we agree with the Examiner's reasons for rejection of the County's contention that the Union waived its bargaining rights in the circumstances, and the facts do not constitute the sort of circumstances that might justify recognition of a necessity defense to the complaint of unilateral change herein. Thus, the County had no valid defense for its unilateral change in the mandatory subject involved herein.

REMEDY

Contrary to the County's contention, it is our view that the pendency of final offer arbitration concerning the County's proposal for a retroactive contract provision consistent with the health insurance change it implemented on April 1, 1982, does not render moot the instant complaint concerning that implementation and does not bar otherwise appropriate make whole relief. 21/

18/ In another decision issued today, we have reached the same conclusion as regards disputes subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

19/ As noted, this decision does not affect the continuing validity of defenses based on waiver or necessity in disputes subject to Sec. 111.77, Stats. (See cases cited in Notes 5 and 6, supra), and an extreme case of unlawful abusive delay of the statutory dispute resolution process may be another exception.

20/ Our conclusion above does not affect the municipal employer's right to implement changes in permissive subjects of bargaining recognized expressly by the Commission in City of Madison (Police), supra, Note 14.

21/ We note that an award selecting the Union's final offer was issued on August 7, 1984. However, because it is not relevant to our outcome or analysis herein, we have not taken official notice of that award or treated it as a part of the record herein.

Examiner McCrary's Turtle Lake Schools decision 22/ cited by the County reached a different conclusion in that regard. We note, however, that the Commission's affirmance in that case was by operation of law rather than by decision upon the filing of a petition for review. We do not find the rationale in Turtle Lake persuasive, and to the extent that it is inconsistent with our holding and rationale herein, that decision is hereby overruled.

Neither the potential MIA award nor the collective bargaining agreement that would be entered into pursuant to it could be deemed to be a Union waiver of the Union's rights to a determination of the merits of its allegations and to an order providing a remedy for the violation found. A waiver of statutory rights by contract must be established by clear and unmistakable contract language or bargaining history, 23/ and that test is not met herein. Indeed, the Union's final offer expressly states the Union's intention to pursue a remedy for the unilateral change at issue herein outside of the interest arbitration proceeding.

The Union's allegation of a County prohibited practice would not be answered or otherwise rendered of no consequence by the issuance of a Sec. 111.77 interest arbitration award, and it is not rendered moot by the pendency of the arbitration proceeding. The extant standards for mootness have not been met. 24/

The question of what remedy for a prohibited practice will best effectuate the underlying purposes of MERA is a matter for determination by the Commission pursuant to Sec. 111.07(4), rather than for the interest arbitrator. The interest arbitrator is called upon to determine which of the two final offers is more reasonable in consideration of the statutory criteria. Whether or not the County has fashioned the more reasonable of the two offers is not determinative of whether a prohibited practice has been committed or of what remedy, if any, will best effectuate the underlying purposes of MERA. The County could not mandatorily bargain for the Union's waiver of the Union's complaint and request for remedial relief herein. The Union ought not, therefore, be expected or required to fashion its final offer in such a way as to seek a remedy for the County's unlawful conduct through the interest arbitration process. Nor should the potential outcome in the final offer proceeding be deemed conclusive as to the propriety or availability of make whole relief.

The Commission's remedial authority includes requiring the person complained of to take such affirmative action . . . as the Commission deems proper." 25/ The MERA Declaration of Policy set forth in Sec. 111.70(6), Stats., calls for the parties to have an opportunity to reach a voluntary settlement through collective bargaining. Unlawful unilateral changes such as that committed by the County herein tend to undercut both the integrity of the statutory bargaining process and the status of the Union as the exclusive collective bargaining representative,

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22/ Turtle Lake Schools, Dec. No. 16030-B, C (McCrary, 3/79) aff'd by operation of law, Dec. No. 16030-D (4/79).

23/ E.g., City of Brookfield, supra, Note 5.

24/ A moot case has been defined as,

> . . . one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 9/ (Footnote omitted)

Racine Schools Dec. No. 11315-D (WERC, 4/74), citing WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, (1948). See also, Milwaukee Police Ass'n. v. Milwaukee, 92 Wis.2d 175 (1979); Milwaukee Professional Firefighters, Local 215 v. City of Milwaukee, 78 Wis.2d 1 (1976).

25/ Sections 111.70(4)(a) and 111.07(4), Stats.

thereby interfering with employe rights to bargain collectively through their chosen representative.

The conventional remedy for a unilateral change refusal to bargain includes an order to reinstate the status quo existing prior to the change and to make whole affected employes for losses they experienced by reason of the unlawful conduct. 26/ The purposes of reinstatement of the status quo ante is to restore the parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view, the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations in the future.

In our view, relief closely approximating that conventional remedy described above should have been ordered in this case. The fact that the Union had--as of the time of the Examiner hearing in this matter--submitted a contemplated final offer that would have adopted the changes in the status quo proposed by the County is of no consequence. Contemplated final offers are subject to unilateral change by the parties prior to the close of the investigation. 27/ Had there been an unconditional agreement reached between the parties that the change should be made and had they further specifically agreed that such change should be put into effect on and after a date certain, then, but only then, would it have been appropriate to expressly limit the back pay period to which the instant remedial order applies. Since there was no such unconditional agreement reached herein, we have ordered the County to make whole the affected employes for the losses they experienced from and after the date of the implementation and throughout the period until a successor agreement was executed. For, by implementing and keeping in effect its change in health insurance from April 1, 1982, through the time the parties either unconditionally agree on the change or receive a Sec. 111.77 award, the County's conduct constituted a prohibited practice.

If the Commission does not make the employes adversely affected by those changes whole for losses caused by the County's unlawful conduct, there would be no meaningful disincentive for the County and other parties to commit similar violations in the future. While making whole the employes in that way may in some circumstances give the employes a benefit they are ultimately unable to achieve through the collective bargaining and final offer arbitration processes, we find that to be the necessary and appropriate consequence of the unlawful conduct involved.

Therefore, we have extended the remedy ordered by the Examiner to cover the period from initial implementation of the change until the earlier of the time the parties reach an unconditional agreement concerning that change or receive an

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26/ See, e.g., Mid-State VTAE, Dec. No. 14958-C (5/77) aff'd Dec. No. 14958-D (WERC, 4/78); and Milwaukee Metropolitan Sewerage District, Dec. No. 17123-B (3/81) aff'd, 17123-C (WERC, 3/82).

27/ ERB 30.08, Wis. Administrative Code states:

> ERB 30.08 Amendment of offers during investigation or hearing. Either party, prior to the close of either the informal investigation or the close of the formal hearing, may amend their positions with repsect to any matter in issue.

See also, Sec. 111.77(4)(b), Stats.

interest arbitration award concerning the terms of a successor agreement. We have added the usual interest applicable to back pay orders to this remedial amount, as well. 28/

Dated at Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

28/ Wilmot Union High School, supra, Note 2.