STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| ROCK COUNTY ATTORNEY'S ASSOCIATION, | | |
| Complainant, | : | Case 195<br>No. 34759 MP-1692 |
| vs. | : | Decision No. 22679-A |
| COUNTY OF ROCK, | : | |
| Respondent. | : | |

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of the Rock County Attorney's Association.

Mr. Thomas A. Schroeder, Rock County Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the County of Rock.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Rock County Attorney's Association filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on March 15, 1985, and an Amended Complaint of prohibited practice with the Commission on March 20, 1985, in which the Rock County Attorney's Association alleged that the County of Rock had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA). The Commission, on May 21, 1985, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes. A hearing date, mutually agreeable to the parties, was set for June 20, 1985, but was postponed, at the request of the parties, to August 6, 1985. A hearing was held on August 6, 1985, in Janesville, Wisconsin. The transcript of that hearing was provided to the Examiner on August 16, 1985. The parties filed briefs and reply briefs in the matter by September 30, 1985.

## FINDINGS OF FACT

1. The Rock County Attorney's Association (the Association), is a labor organization which filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission against the County of Rock on March 15, 1985, and an amended complaint on March 20, 1985. At the time of the filing of the complaint and the amended complaint, the Association maintained its offices in c/o 217 South Atwood, Janesville, Wisconsin 53545, and at the time of the hearing on the complaint on August 6, 1985, in c/o of 250 Garden Lane, Beloit, Wisconsin 53511.

2. The County of Rock (The County) is a municipal employer which has its principal offices located at 51 South Main Street, Janesville, Wisconsin 53545.

3. The Association functions as the exclusive collective bargaining representative for certain attorneys employed by the County. The County and the Association were parties to a collective bargaining agreement which, by its terms, was in effect from January 1, 1984, through December 31, 1984.

4. The County employed Bruce Patterson, an independent consultant, to negotiate the 1984 labor agreement between the County and the Association. Sometime in mid-November of 1984, the County Board (the Board) authorized Patterson to negotiate a successor agreement to the 1984 agreement, with the goal of reaching tentative agreement with the Association within certain Board set limits. Patterson and the County negotiating team did meet with the Association's negotiating team in an attempt to reach an understanding on the terms of a successor contract. After several unsuccessful meetings, the parties met on or about December 7, 1984, with a member of the Commission's staff, who acted as a mediator. During that session, the parties reached agreement on a number of

language items. The parties also discussed wages during that session and Association representatives indicated to the mediator that the Association would not agree to anything less than a four percent increase in the contractual wage rates. Patterson indicated through the mediator that he would take a four percent wage increase proposal back to the County Board Staff Committee (the CBSC) and would favorably recommend to the CBSC that it authorize him to make an offer to the Association which included the items on which tentative agreement had been reached as well as a four percent wage increase.

5. The County Board usually does not afford Patterson sufficient authority on monetary items to be able to settle a labor agreement without coming back to the Board or the appropriate committee for further authority. On a contract proposal that Patterson lacks authority to indicate tentative agreement to, Patterson first seeks further authority from the CBSC to make an offer to the bargaining unit involved. If the CBSC authorizes the offer, the union or association involved is notified and asked to ratify the proposed agreement. If the union or association formally ratifies the proposed agreement, County representatives prepare a formal resolution which the CBSC considers in a meeting open to the public at which the CBSC determines if it will formally recommend the tentative agreement to the full County Board. After the CBSC meeting the Board votes on the proposed agreement. Patterson followed this procedure regarding the proposed agreement reached in early December, 1984, and informed Association representatives he would do so. Patterson followed the same procedure in handling the proposed agreement which eventually became the 1984 labor agreement between the County and the Association which is mentioned in Finding of Fact 3 above.

6. Sometime in January of 1985, prior to the 24th, Patterson appeared before the CBSC and recommended it authorize an offer to the Association which included a four per cent increase on the contractual wage rates. The CBSC voted four to three to accept Patterson's recommendation. James Bryant III, the County's Personnel Director, after verifying that the Association had ratified the proposed agreement, drafted a resolution, dated January 24, 1985, which states:

. . .

RESOLUTION TO RATIFY THE 1985 LABOR AGREEMENT

BETWEEN ROCK COUNTY AND
ROCK COUNTY ATTORNEYS ASSOCIATION

> WHEREAS, the County is subject to Section 111.70 of the Wisconsin Statutes; and,
>
> WHEREAS, representatives of the Rock County Attorneys Association have met with the County Negotiator and the Personnel Director in an attempt to arrive at a mutual agreement in wages and conditions of employment; and,
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> WHEREAS, this unit has ratified the proposed settlement; and,
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> WHEREAS, a summary of the contractual agreement is attached; and,
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> WHEREAS, the proposed settlement represents an approximate wage increase of 4% effective January 1, 1985 as detailed in the fiscal note.
>
> NOW, THEREFORE, BE IT RESOLVED, that the Rock County Board of Supervisors assembled this ___ day of _____ , 1985 hereby ratify the terms and conditions of the County's agreement with the Rock County Attorney's Association.

The County Board considered this resolution at a meeting on February 28, 1985. At the February 28, 1985, Board meeting, twenty-two of the Board's twenty-nine members were present. This constituted a quorum, so the Board proceeded to consider various items of business, including the proposed agreement with the Association. After some discussion, the Board voted to adopt a resolution to ratify the proposed agreement with the Association on a vote of fourteen to eight. After the conclusion of that meeting, Bryant talked with John Halla, an Assistant District Attorney for the County and presently Chief Spokesman for the

Association. Bryant communicated to Halla his satisfaction with closing the negotiations for a successor agreement to the expired 1984 agreement. Bryant was unaware at that time of any movement by the Board to reconsider its actions. Sometime after the February 28, 1985, meeting, certain Board members determined that the resolution ratifying an agreement with the Association should be reconsidered. The County did not execute the agreement voted on by the Board on February 28, 1985. On March 12, 1985, Bryant issued the following memo to "TO WHOM IT MAY CONCERN:"

> Because the proposed 1985 Labor Agreement between Rock County and Rock County Attorneys' Association has not received final approval of the Rock County Board of Supervisors, the County will be unable to sign said Agreement on March 12, 1985. The Labor Agreement will be considered by the County Board on March 14, 1985.
>
> This document is provided at the request of Association member William Hayes.

The Board's next meeting following the February 28, 1985, meeting occurred on March 14, 1985. The agenda for that meeting lists the "Resolution to Ratify 1985 Labor Agreement Between Rock County and Rock County Attorney's Association" as an item of "UNFINISHED BUSINESS". Twenty-six of the Board's twenty-nine members were present at the March 14, 1985, meeting. This constituted a quorum, so the Board proceeded to consider various items of business including the ratification of the proposed agreement with the Association. One of the Board members who had, at the previous meeting, voted in favor of the resolution to ratify the proposed agreement with the Association moved to reconsider that resolution. That motion passed on a vote of sixteen to ten. The reconsideration motion itself resulted in eighteen out of the twenty-six members present voting to reject the resolution to ratify the proposed agreement with the Association. The Board has not executed a 1985 labor agreement with the Association.

7. Patterson can not vote on resolutions before the County Board. Patterson does not have the authority to bind the County Board on any item of negotiation, although Patterson can recommend the action he deems appropriate to the Board which may vote to accept the position Patterson recommends. Sometime after February 28, 1985, but before March 14, 1985, Patterson appeared before the Board in a session closed to the public, during which Patterson recommended to the Board that it vote not to reconsider the February 28, 1985, resolution to ratify the agreement with the Association.

8. The County Board annually conducts a reorganization meeting in April. During the course of that meeting, the Board adopts rules of procedure which will govern Board proceedings for that year. This meeting is open to the public, and is duly noticed. The published rules adopted by the Board to govern its proceedings from April of 1984 to April of 1985 state at "Rule X, C":

> . . . Unless otherwise provided for, Robert's Rules of Order, 1970 Edition, with latest O. Garfield Jones commentary shall govern the action of the Board.

The O. Garfield Jones commentary referred to in Rule X, C provides the following under the heading "TO RECONSIDER":

> TO RECONSIDER
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> Rules
>
> 1. Has high privilege for entry but not (necessarily) for consideration and vote.
>
> 2. May interrupt a member who is speaking (for entry, but not for consideration and vote).
>
> 3. Must be moved by one who voted with the prevailing side (unless vote was by ballot).

4. For actual consideration and voting its precedence is that of the motion to which it applies.

5. It suspends action on the motion to which it applies until it has been decided.

6. It is in order at the same meeting or during the next succeeding legislative day ONLY after the vote to which it applies was taken.

7. May be applied to all motions except to adjourn, to suspend the rules, or to table.

8. Requires only majority vote in all cases.

9. Has no privilege for consideration other than that of the motion to which it applies.

10. Not debatable if motion to which it applies was undebatable.

11. No question can be twice reconsidered.

12. Action that cannot be reversed cannot be reconsidered.

13. Can not reconsider negative vote on motion to postpone indefinitely.

14. Can not reconsider negative vote on a motion that may be renewed "after progress."

In a memorandum to the "Rock County Board of Supervisors" dated "June 22, 1983", Thomas Schroeder, the County Corporation Counsel, stated the following on the subject of "Reconsideration Motions":

> On May 26, 1983 the County Board, by acclamation, adopted a County Citation Ordinance. At the June 9, 1983 meeting of the County Board a motion to reconsider that action was made and seconded. This reconsideration action was not contained in the Agenda for that meeting.
>
> I stated at the June 9th meeting that reconsideration motion can only be made by a supervisor who voted on the prevailing side initially and that such a motion was in order on the day the initial vote was taken or on the next succeeding legislative day. Supervisor Mawhinney raised a question concerning such reconsideration in relation to Wisconsin's Open Meeting Law. The Motion to reconsider was withdrawn and Supervisor Mawhinney's question became moot.
>
> However, as it is possible for this question to arise in the future, I felt some sort of decision on it would be necessary.
>
> In my opinion, even though Robert's Rules of Order provide that a reconsideration motion is in order on the next succeeding legislative day, that is not sufficient public notice. Pursuant to sec. 19.84 (2), Wis. Stats., notice must be sufficient to reasonably apprise the public as to what will occur at the meeting.
>
> Therefore, it will be necessary to have any reconsideration motion properly placed on the agenda pursuant to Rule III - D of the Board Rules of Procedure in order for the Board to take action on it.

9. The 1984 labor agreement mentioned in Finding of Fact 3 was subject to a Board reconsideration action before that agreement was executed by Association and County representatives. During the Board meeting of August 9, 1984, the County Board voted fourteen to thirteen, with two members absent, to reject a resolution "To Ratify the 1984 Labor Agreement Between Rock County and the Rock County

Attorney's Association". A quorum was present at that meeting. The rejection was subject to a reconsideration motion brought at the Board meeting of August 23, 1984. A quorum was present at that meeting, and a reconsideration motion adopted at that meeting placed the original resolution "To Ratify the 1984 Labor Agreement Between Rock County and the Rock County Attorney's Association" before the Board. The Board voted fifteen to twelve, with two members absent, to adopt the original motion. The adoption of that resolution ultimately resulted in the execution of the 1984 labor agremeent between the County and the Association. In the one year period preceding August 6, 1985, the County Board acted on two occasions to reconsider resolutions passed during a prior Board meeting. One involved a County jail project, and the other involved the taking of tax days. The procedures set forth in Schroeder's memo of June 22, 1983, were followed in each of the reconsideration actions discussed in this Finding of Fact.

10. Association negotiators were aware, during the negotiations for a 1985 labor agreement, of the effect of the 1984 reconsideration action on the 1984 labor agreement. The County has not demonstrated what, if any, basis the Board had to undertake the reconsideration action which was voted on during the meeting of March 14, 1985. The reconsideration procedure was known to both parties as a feature of the Board's ratification process, and execution of the proposed 1985 collective bargaining agreement during the period between February 28, 1985, and March 14, 1985, was not a ministerial act.

## CONCLUSIONS OF LAW

1. The Rock County Attorney's Association is a "Labor Organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County of Rock is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The County has not wrongfully refused to execute a collective bargaining agreement covering 1985 between the Association and the County in violation of Sec. 111.70(3)(a)1 or 4, Stats., since a resolution voted on by the Board on February 28, 1985, to ratify such an agreement was subject to a reconsideration action at the time the County refused to execute the agreement, and since the reconsideration action undertaken at the March 14, 1985 meeting resulted in the rejection of the original resolution to ratify such an agreement.

4. The County, by failing to demonstrate a bona fide basis for the reconsideration action of March 14, 1985, has failed to meet its duty to bargain in good faith with the Association, in violation of Sec. 111.70(3)(a)1 and 4, Stats.

## ORDER 1/

The County of Rock, its officers and agents, shall immediately:

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

   (a) Upon request, bargain collectively with Rock County Attorney's Association for a successor collective bargaining agreement to that which was in effect

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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

(Footnote 1 continued on Page 6)

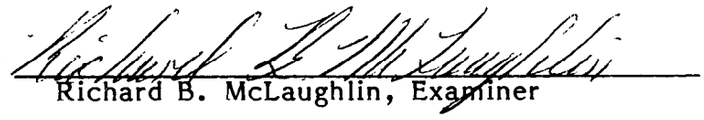
from January 1, 1984, through December 31, 1984, and if an understanding is reached, embody the understanding in a signed collective bargaining agreement.

(b) Post in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached to this Order and marked "APPENDIX A". This copy shall be signed by an authorized representative of the County, shall be posted as soon as possible after receipt of a copy of this Order, and shall remain posted for a period of thirty days. Reasonable steps shall be taken to insure that this notice is not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 24th day of January, 1986.

WISCONSIN EMPLOYMENT RELATONS COMMISSION

By 
Richard B. McLaughlin, Examiner

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(Footnote 1 continued)

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.

## APPENDIX A

## NOTICE TO ALL EMPLOYES

As ordered by the Wisconsin Employment Relations Commission, and in order to fulfill the policies of the Municipal Employment Relations Act, we notify our employes that:

> We will, upon request, bargain collectively with the Rock County Attorney's Association for a successor collective bargaining agreement to that which was in effect from January 1, 1984, through December 31, 1984, and if an understanding is reached, embody the understanding in a signed collective bargaining agreement.

Dated at Janesville, Wisconsin, this _____ day of _____ , 1986.

By _____
On behalf of Rock County

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

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

### The Parties' Positions

The Complainant, in a "Memorandum of Authorities" filed as its initial brief, asserts that both state and federal precedent establish the propriety of ordering an employer to adopt a tentative agreement reached by its negotiators. The Complainant asserts that even assuming no enforceable collective bargaining agreement had been reached in the present matter, "there can be no doubt regarding the existence of the tentative agreement", and that tentative agreement, the Complainant argues, should be "adopted by and enforced against the County . . ."

The County argues that the present matter poses three issues for determination. The first is: "Has the County committed a prohibited practice by its failure to sign a 1985 labor agreement?" According to the County, it "has not agreed to the proposed collective bargaining agreement" because the agreement "did not receive the final approval of the County Board." Thus, argues the County, there has been no refusal "to execute a collective bargaining agreement previously agreed upon" in violation of Sec. 111.70(3)(a)4, Stats. The County urges that a review of the facts establishes that it followed the duly adopted procedures of "Robert's Rules of Order, 1970 Edition, with latest O. Garfield Jones commentary" as those rules are applied in light of "Wisconsin's Open Meeting Law" in acting on the motion to reconsider the Board action of February 28, 1985. Noting that the same procedures were followed regarding the execution of the 1984 labor agreement between the parties, with the exception that the 1984 reconsideration motion produced an executed labor agreement, the County asserts: "A process that was legitimate when used to the benefit of the Union is no less legitimate when it results in a position distasteful to the Union." There being no labor agreement, there can be, according to the County, "nothing for the County to execute . . ." The second issue is: "Do the parties have a binding labor agreement notwithstanding the County's failure to sign?" Even though certain Union and County representatives expressed satisfaction that the 1985 bargaining had been completed after the February 28, 1985, meeting, the County urges that neither party can be bound "until a written agreement was signed." This point has yet to be reached in the present matter, and the "congratulatory pleasantries" that followed the February 28, 1985, meeting can not alter this fact, according to the County, especially since none of the bargaining representatives present at the February 28, 1985, meeting was aware "of any contemplated reconsideration motion." The third issue is: "Has the County acted in bad faith and refused to bargain collectively with Complainant and thereby committed prohibited practices?" The County contends that this issue too must be answered in the negative. Specifically, the County argues that its negotiator "did everything that was expected of him by the Municipal Employment Relations Act and Commission decisions interpreting that Act." In addition, the County contends that the "County Board followed its legitimate, publicly-adopted Rules of Procedure" in ratifying the proposed agreement, and then in reconsidering the ratification. Since the County would have signed the labor agreement had the reconsideration motion failed, it follows, according to the County, that it "has not acted in bad faith nor refused to bargain collectively with the Union."

The Complainant, in reply to the County's brief, and after a review of the three fundamental assumptions it perceives in that brief, specifically asserts that "an enforceable tentative agreement was consumated" concerning a 1985 labor agreement. Even if County assertions regarding the limits of its negotiator's authority are accepted, the Complainant argues that the action of the CBSC in authorizing a four percent wage offer gave rise to an enforceable tentative agreement. After an examination of certain provisions of Sec. 111.70(4)(cm), Stats., and of the policy provisions of Sec. 111.70(6), Stats., the Complainant asserts that the statutory purpose of expeditiously resolving labor disputes would be thwarted if the County is allowed to unilaterally repudiate its tentative agreement with the Complainant. This assertion is, according to the Complainant, further supported by the Commission's case law. In addition, according to the Complainant, the Commission has consistently refused to allow "a party to delay dispute resolution procedures by challenging matters which are not 'in dispute'." Although this case law concerns declaratory ruling procedures, the Complainant

contends it is applicable to the present matter since under either procedure: "a 'dispute' does not exist within the meaning of the Act when both parties' duly authorized negotiators reach an agreement." Citing a different line of Commission cases, the Complainant urges that the County "has violated MERA for failure to bargain in good faith." The Complainant argues that permitting the County to contend that its negotiator had no authority to negotiate on its behalf would represent nothing less than permitting a "quintessential example of bad faith in collective bargaining" to occur. The Complainant concludes its reply by challenging the County's assertion that it followed its own procedures in the reconsideration, and the related assertion that even if it had not, the Complainant would have to be estopped from contesting any deviation. Regarding the issue of the County's compliance with its own procedures, the Complainant asserts: "A municipal employer's duty to bargain in good faith is not satisfied merely because its decisions are reached under the color of process." Arguing that the propriety of the Complainant's procedures must be assessed by current and viable labor law precepts and precedent, the Complainant disputes the applicability of the County's cited precedent, and concludes that the County's estoppel argument is inapplicable, or if applicable, favors the Complainant's position.

The County replies to the Complainant's memorandum of authorities by distinguishing each of the cases cited in that memorandum from the facts of the present matter. Specifically, the County notes that its negotiator had no vote in Board ratification proceedings, but did act to favorably recommend the proposed labor agreement. The Complainant also notes that the CBSC is composed of nine Board members who can not bind the full Board. In addition, the County notes that the Complainant was fully aware of the County's ratification procedures, including the possibility of a reconsideration motion. According to the County, whether the state or federal precedent cited by the Complainant is examined, the conclusions remain the same:

> With regard to the terms, as proposed, the County of Rock has exercised its right to refuse to make an agreement . . . Respondent has bargained in good faith. Because of a successful reconsideration action, the proposed agreement has not received final approval of the County Board. As no collective bargaining agreement has been "agreed upon", there is no agreement to sign.

Discussion

The Association alleges that County bargaining behavior during the negotiation and attempted ratification of a 1985 labor agreement constitutes a violation of Sec. 111.70(3)(a)1 and 4, Stats. 2/ Because the Association's allegations challenge bargaining behavior, there is no reason to separately analyze the two statutory provisions at issue. Sec. 111.70(1)(a), Stats., defines "Collective bargaining" and reads, in relevant part, thus:

> . . . "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided in s.40.81(3), with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. . .

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2/ The amended complaint can be read to allege a violation of Sec. 111.70(3)(a)3, Stats., and questioned events beyond the reconsideration procedure. The Association, at the hearing, stated it was specifically limiting its argument to Sec. 111.70(3)(a)1 and 4, Stats. This decision will thus be limited to Sec. 111.70(3)(a)1 and 4, Stats., and will be limited, as was the presentation of evidence, to the reconsideration procedure.

Sec. 111.70(3)(a)1 and 4, Stats., enforce the duty to bargain collectively. Sec. 111.70(3)(a)4, Stats., reads, in relevant part, thus:

> . . . The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon.
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> . . .

What emerges from these provisions is that collective bargaining is a process and, conceivably, a result -- an enforceable agreement. The line between the process and the result can be thinly drawn, since the parties can not be compelled to make a concession, but can be compelled to execute "a collective bargaining agreement previously agreed upon." The present matter focuses on that fine line.

The parties dispute whether or not an enforceable agreement was reached when the Board acted, on February 28, 1985, to adopt a resolution to ratify a 1985 labor agreement with the Association. The Association urges that, notwithstanding the County's refusal to sign the agreement, the Board's actions created an agreement enforceable by the Commission. Even if an enforceable agreement was not created, the Association's arguments question whether the County's actions can be characterized as bad faith bargaining. This latter point has remedial implications, since bad faith bargaining, traditionally enforced with a bargaining order, is not dependent on whether the parties ever reached an enforceable labor agreement. To examine the Association's allegations, it is first necessary to determine if the parties reached a collective bargaining agreement on February 28, 1985, which the County wrongfully refused to execute in March of 1985, and which is enforceable by the Commission under Sec. 111.70(3)(a) 1 and 4, Stats.

The enforceability of the asserted collective bargaining agreement turns on whether the execution of the agreement which was the subject of the resolution adopted by the Board on February 28, 1985, can be considered a ministerial step. Resolution of this point turns solely on the Board's behavior. The parties do not dispute that the County's negotiator reached a tentative agreement with the Association's bargaining team subject to Board and overall Association approval. Neither party disputes the fact that the County negotiator recommended to the Board that it act to ratify the proposed agreement. The record regarding the behavior of the CBSC is less clear, but there is no persuasive evidence that the CBSC acted to undermine the ratification of the understanding tentatively reached in December of 1984. Thus, the Board's conduct is the sole focus of the issues presented here, and since it is undisputed that the Board conducted its business of February 28, 1985, at a duly noticed public meeting at which a quorum of Board members was present, 3/ it follows that the County's sole defense centers on the validity of its reconsideration procedure.

The specific question concerning the validity of the Board's reconsideration procedure focuses on whether that procedure can be considered a valid step in the ratification process, thus precluding a conclusion that the execution of the agreement voted on by the Board at its February 28, 1985, meeting constitutes a ministerial step. Before examining this issue, it is necessary to note that there has been no demonstrated basis outside the provisions of the MERA at issue here to question the validity of the County's reconsideration procedure.

The validity of the reconsideration procedure must be considered a mixed question of law and fact, turning on the particular facts of the present matter. It is impossible to conclude the presence of a validly enacted reconsideration procedure constitutes, standing alone, either a violation of the MERA, or a defense to a charge of prohibited practice under the MERA. The general provisions of Sec. 111.70(3)(a)1 and 4, Stats., can not be considered, in themselves, to afford a basis to override the duly enacted reconsideration procedure. The MERA provisions are general, and contain no specific guidance regarding what constitutes an appropriate or inappropriate ratification procedure. While the

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3/ Cf. Board of School Directors of the City of Milwaukee v. WERC, 42 Wis. 2d 637 (1969), Joint School District No. 1, Chippewa Falls, Dec. No. 14517-A (Yaeger, 8/76), aff'd by operation of law, Dec. No. 14517-B (WERC, 9/76); see also Sec. 19.85(3) Stats.

County's reconsideration procedure does introduce an element of uncertainty and cumbersomeness to its transaction of business, the County, as a political body, has been statutorily entrusted with considerable latitude to determine how to transact its own business. 4/ To override the County's procedural enactment as a matter of law under the provisions of Sec. 111.70(3)(a)1 and 4, Stats., grants too broad a scope to the general MERA provisions, and too narrow a scope to the County's own enactment.

It is also inappropriate to conclude as a matter of law that the presence of a validly enacted reconsideration procedure constitutes a defense against a prohibited practice charge under Sec. 111.70(3)(a)1 and 4, Stats. The Commission stated in Joint School District No. 5, City of Whitehall et. al.:

> A municipal employer, who is required to hold a public hearing on matters concerning the public interest, cannot avoid its duty to bargain in good faith, as required in the Municipal Employment Relations Act, by merely opening the hearing to the public and then changing its attitude toward a tentative agreement reached by it, without a bona fide basis for the change of said attitude. 5/

The Whitehall matter is factually distinguishable from the present matter, but the cited language serves to underscore the essential point that the County can not, through its own procedures, empower itself to violate the provisions of the MERA.

The issue of the validity of the reconsideration process questions the appropriate relation of the MERA to a County enactment and demands that the two be harmonized to as great a degree as possible. To do so requires, as noted above, treating the issue as one of fact, or of mixed fact and law requiring an examination of the circumstances of this case to determine if the County had a "bona fide" reason to reconsider the ratification of the 1985 labor agreement. What constitutes a bona fide reason can not, in all probability, be precisely defined, but must not, in any event, include a deliberate attempt to delay the negotiations process, to undermine the authority of the collective bargaining representative, or to use the ratification procedure as a means of discovery, and not as a means to finalize agreement.

An examination of the facts of the present matter precludes a finding that the parties reached an enforceable collective bargaining agreement on February 28, 1985. There is no dispute that the Association was, throughout the negotiations for a 1985 labor agreement, aware of the reconsideration procedure which ultimately produced a 1984 labor agreement. 6/ The Association had, in fact, benefitted from the procedure in 1984 since the conclusion asserted by the Association in the present matter, if applied to the 1984 negotiations, would demand that the County's initial rejection of the proposed labor agreement stand unmodified. There is no persuasive evidence that the Association objected to the County's reconsideration procedure prior to the demand that prompted the issuance of Bryant's memo of March 12, 1985. There has been no showing that the County followed different procedures in 1985 than it followed in 1984, or behaved in a manner calculated to delay the negotiations process, to undermine the authority of the Association, or to use the reconsideration procedure as a means of discovery. Thus, it can not be said that the signing of the 1985 labor agreement represented a ministerial step, to which a reconsideration motion had no relevance. Both parties were aware of the reconsideration procedure, even if that procedure did not appear to be a significant probability on February 28, 1985. Against this background, the County's refusal to execute the 1985 labor agreement and its subsequent reconsideration can not be considered wrongful under the provisions of Sec. 111.70(3)(a)4, Stats., and, derivatively, of Sec. 111.70(3)(a)1, Stats. The

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4/ See, generally, Chapter 59, Stats.

5/ Dec. No. 10812-B (WERC, 12/73) at 7.

6/ Cf. Hartford Union High School District and the Board of Education of Hartford Union High School District, Dec. No. 11002-A (Fleischli, 2/74) and Dec. No. 11002-B (WERC, 9/74).

Association's demand on the County to execute the agreement voted on by the Board on February 28, 1985, did not, then, seek a ministerial step from the County, but sought a departure from a procedure known to each party.

The conclusion that the Association's awareness of the reconsideration procedure precludes finding the resolution of February 28, 1985, constitutes an enforceable collective bargaining agreement must be restricted to the facts of this case, and requires some further discussion in light of the parties' arguments. The County has argued that the Association has waived, or should be estopped, from asserting the amended complaint. "Waiver" has been defined as "(t)he intentional or voluntary relinquishment of a known right." 7/ The amended complaint challenges the totality of the County's bargaining behavior and not just the enforceability of the February 28, 1985, resolution. The County asserts the Association, by its conduct, has waived its right to pursue the amended complaint. Waivers of statutory rights must be clear and unambiguous. 8/ The Association's awareness of, and acquiescence in, the reconsideration procedure of 1984 does undermine the persuasive force of its assertion that the reconsideration procedure is irrelevant to the 1985 ratification process. It does not, however, establish that the Association intentionally relinquished its right to challenge the totality of the County's bargaining conduct under the MERA, whether or not an enforceable agreement was reached. Thus, the County's broad assertion of waiver must be rejected.

As the Association points out, the doctrine of estoppel has been defined thus:

> The defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment . . It is elementary, however, that the reliance on the words or conduct of the other must be reasonable. 9/

That the reliance must be reasonable dooms the Association's estoppel claims against the County. Having accepted the reconsideration procedure to void an unfavorable result in 1984, whatever reliance the Association has demonstrated in 1985 regarding the Board's initial acceptance of the proposed agreement can not be characterized as reasonable. Nor is the County's estoppel argument any more persuasive. It is improbable the County undertook the 1985 reconsideration process in reliance on the Association's acquiescence to the 1984 reconsideration process. It is more probable that the County, in both years, acted as it did in the belief that its reconsideration procedure was a valid enactment, unchallengeable by the Association. The soundness of that conclusion is questionable, and remains to be further discussed. Even if the County's estoppel argument could be considered persuasive, the argument would not translate into a broad prohibition against the Association's assertion of a claim challenging the totality of the County's bargaining conduct. At best, the argument addresses only the issue of whether or not the County can be considered to have wrongfully refused to execute a previously agreed upon collective bargaining agreement.

In sum, the Association was aware of the reconsideration procedure and this awareness precludes the conclusion that, following the Board's actions of February 28, 1985, all that remained of the ratification process was the ministerial step of executing a previously agreed upon collective bargaining agreement. It is, then, impossible to conclude the Board's resolution of February 28, 1985, created an agreement enforceable by the Commission under Sec. 111.70(3)(a)4, Stats.

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7/ Black's Law Dictionary, (revised Fourth Edition, West, 1968).

8/ Chief Donald Bloedorn and City of Wauwatosa, Dec. No. 19310-C, 19311-C, 19312-C (WERC, 4/84).

9/ Kohlenberg v. American Plumbing Supply Co., 82 Wis. 2d 384,396 (1978). Citations omitted.

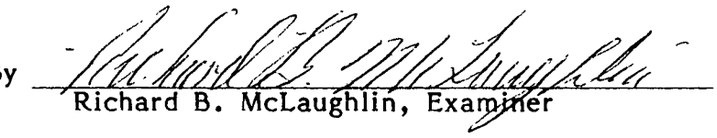
It does not, however, follow from this that the County has bargained in good faith in the present matter. Just as the presence of a validly enacted reconsideration procedure does not provide an absolute defense to a prohibited practice charge without regard to the facts of the matter, the Association's awareness of the reconsideration process can not operate to, in itself, make that procedure unchallengeable under Sec. 111.70(3)(a)1 and 4, Stats. In the present matter, the Association has demonstrated that the County's negotiator, the Association's bargaining team and the County's Personnel Director were, as of February 28, 1985, satisfied that the bargaining process had been resolved. The subsequent reconsideration effort appears to be an entirely Board inspired phenomenon by which the Board completely isolated itself from the members of its own bargaining team, to say nothing about the Association's bargaining team and its membership. This effort interjected an element of discord and divisiveness into the bargaining process on both sides of the table. It is safe to say the effort significantly interfered in the bargaining process and in the Association's protected rights to engage in that process.

The County has, however, assumed the validity of the reconsideration procedure as a County enactment and has demonstrated no reason why the Board undertook the reconsideration action. As noted above, however, some bona fide reason is necessary to avoid arrogating to a County procedural enactment a scope which overrides the provisions of the MERA. In sum, the County's conduct, though not demonstrated to have been willful, significantly interfered in the bargaining process and did so for no apparent reason other than that the Board had a change of heart. The resolution the Board voted on during its meeting of February 28, 1985, can not be treated so lightly, and the County's failure to demonstrate a bona fide reason for the reconsideration demonstrates a failure to bargain in good faith in violation of Sec. 111.70(3)(a)1 and 4, Stats.

That the record regarding the basis of the reconsideration is sparse is understandable. No Commission case law clearly addresses the points raised in the present matter. The Board's behavior does not, at present, demonstrate the disregard of the bargaining process demonstrated in the Whitehall case discussed above, and cited by the Association for the proposition that the Commission should enforce the proposed agreement voted on by the Board on February 28, 1985. Against this background, the County's behavior can not be considered to warrant a remedy beyond the bargaining order and notice posting set forth above.

Dated at Madison, Wisconsin this 24th day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner