STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ONEIDA COUNTY EMPLOYEES LOCAL 79, AFSCME, AFL-CIO, Complainant, vs. ONEIDA COUNTY, WISCONSIN AND ITS AGENTS Respondents.	Case 53 No. 39720 MP-2039 Decision No. 25229-A

Appearances:

Mr. Steve Hartmann, Staff Representative, AFSCME Council 40, PO Box 676, Rhinelander, WI 54501, appearing on behalf of Complainant.

Mr. Lawrence R. Heath, Corporation Counsel, Oneida County Courthouse, PO Box 400 Rhinelander, WI 54501, appearing on behalf of the Respondents WI 54402-1004.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 27, 1987, the abovenoted Complainant filed with the Commission a complaint alleging that the abovenamed Respondents had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by refusing to negotiate about Highway Department unit issues with a Union bargaining team including County employes in the Courthouse unit. The Commission appointed the undersigned Marshall L. Gratz, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats.

Pursuant to notice, the Examiner conducted hearing in the matter on April 20, 1988 at the Oneida County Courthouse in Rhinelander, Wisconsin at which the parties were given full opportunity to present their evidence and arguments. During the course of the hearing Complainant moved that Respondent be foreclosed from disputing the material facts alleged in the Complaint on the grounds that Respondent failed to answer the complaint prior to the hearing. As is detailed in Finding of Fact 4, below, the Examiner took that motion under advisement, conditionally allowed Respondent to answer the complaint on the record, and heard evidence on the issues conditionally joined by that answer. During the course of the hearing the parties agreed that the Examiner should take administrative notice of the contents of the Commission's election case file in Oneida County, Case 52. The parties presented their closing arguments on the record. The transcript of the hearing was received by the Examiner on May 25, 1988. The Examiner has considered the evidence and arguments concerning both the Complainant's motion and the merits of the complaint and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Oneida County Employees Local 79, AFSCME, AFL-CIO, (herein Complainant or Union or Local 79) is a labor organization with a mailing address of PO Box 676, Rhinelander, Wisconsin 54501. As noted in Finding of Fact 7, below, Complainant is also known as "Oneida County Highway Employees, Local 79, American Federation of State County and Municipal employees, AFL-CIO" and as "Oneida County Courthouse, Local 79, American Federation of State County and Municipal employees, AFL-CIO".

2. Respondent Oneida County is a municipal employer with offices at the Oneida County Courthouse, PO Box 400, Rhinelander, Wisconsin 54402-1004.

3. On November 27, 1987, Complainant filed with the Commission a complaint containing the following allegations and request for relief:

> 1. That the Complainant, Oneida County Employees Local 79, is affiliated with AFSCME, AFL-CIO and is represented by Mr. Guido Cecchini, P.O. Box 676, Rhinelander, Wisconsin 54501, telephone number (715) 282-6059.
>
> 2. That the Respondent is Oneida County, Wisconsin and its Agents, represented by Mr. Lawrence Heath, Corporation Counsel, P.O. Box 400, Rhinelander, Wisconsin 54501, telephone number (715) 369-6155.
>
> That the following individual members of the Oneida County Board of Supervisors' Personnel Committee are Agents and named Respondents:
>
> Howard Lovestead, 115 N. Oneida, Rhinelander, WI 54501
> Oscar Copes, 10329 Lylas Road, Tomahawk, WI 54487
> Beverly Fagan, 6459 Highway 47 S., Lake Tomahawk, WI 54539
> Ludwig Strenz, 3412 Highway 8 E., Rhinelander, WI 54501
> Pat Stafford, 633 Arbutus, Rhinelander, WI 54501
>
> 3. That the Complainant Union is the exclusive representative of two separate and distinct bargaining units of employes in the employ of the Respondent.
>
> That such bargaining units are defined as:
>
> a. All regular full-time and regular part-time employees of the Oneida County Courthouse covered by the Labor Agreement, but excluding all elected personnel, supervisory personnel, confidential personnel and managerial personnel as defined by M.E.R.A.
>
> b. All permanent, regular part-time, and seasonal employees in the Oneida County Highway Department whose classifications are covered by the Labor Agreement, but excluding the Highway Commissioner, Patrol Superintendent, Shop Superintendent, temporary, part-time and student employees.
>
> 4. That the above indicated bargaining units are parties to two separate Labor Agreements each one covering, exclusively, the wages, hours, and conditions of employment of the distinct and separate bargaining units represented by the complainant.
>
> That Exhibit 1 attached hereto is a true and correct copy of the Labor Agreement exclusively covering employes of the Courthouse bargaining unit, which expires on December 31, 1987.
>
> That Exhibit 2 attached hereto is a true and correct copy of the Labor Agreement exclusively covering employes of the Highway Department bargaining unit, which expires on December 31, 1987.
>
> 5. That the Respondent violated Wisconsin Statutes 111.70(2), (3) and (4), on November 19, 1987, in Rhinelander, Wisconsin, when it refused to negotiate with certified representatives of the Highway Department collective bargaining unit on matters relating to wages, hours and conditions of employment.

That, specifically, the Respondent refused to negotiate with the Union's Bargaining Committee because it contained employee representatives of both bargaining units represented by the Complainant.

That, the Respondent refused to negotiate with the Complainant's Bargaining Committee even though the subjects to be negotiated upon were exclusively proposed by the Highway Department bargaining unit for changes exclusively intended for the Highway Department bargaining unit's successor Labor Agreement.

6. That no coalition negotiations were demanded, or insisted upon, by the Complainant.

7. That there is a representation election pending in the above indicated courthouse bargaining unit and that by its action of refusing to negotiate with the Complainant the Respondent is violating Section 111.70(3)1, 2, 3, 4 and 5.

PRAYER FOR RELIEF

The Complainant prays that the representation election or the outcome of said election be set aside until such time as this complaint is adjudicated or otherwise settled;

That the Respondent be ordered to cease and desist from refusing to negotiate with representatives of the employes' own choosing;

That the Respondent be ordered to pay, to employes, interest on any future economic compensation which may result from negotiations ordered by the Commission pursuant to this complaint;

That the Respondent be ordered to pay all cost of representation incurred by the Complainant as a result of the Respondent's refusal to negotiate with the Complainant and for its impact on the pending election for representation.

4. On March 2, 1987, the undersigned Commission-appointed Examiner caused a Notice of Hearing to be mailed to the parties. That Notice was received by the County on March 4, 1988. It provided for an April 20, 1988 hearing and contained a further notification that the County had the right "to file an answer to the complaint . . . on or before March 10, 1988" and directed that the County serve a copy thereof on the Complainant. Prior to the April 20, 1988 hearing, the County filed no answer and did not request an extension of time in which to do so. At the outset of the April 20 hearing, Complainant, citing Commission Rule ERB 12.03(6), Wis. Adm. Code, requested that the Examiner declare the County's failure to file a timely answer as an admission of and a waiver of hearing as to the material facts alleged in the complaint. The County, citing ERB 10.01, requested that the Examiner waive the requirements of ERB 12.03(6) either because of extenuating circumstances or because the Complainant would not be prejudiced thereby. The Examiner advised the parties that he would allow the County to conditionally answer the complaint on the record, that he would hear the parties' arguments and evidence on their respective procedural requests and on the merits of the complaint, and that he would rule on the procedural requests as a part of his post-hearing written decision in the matter.

5. The County has not shown any extenuating circumstances justifying its failure to timely file an answer to the complaint.

6. The Union has not shown that it would be prejudiced by a waiver of the requirements of ERB 12.03(6) in order that this matter be adjudicated on the merits of the complaint and of the answer stated on the record at the

hearing.

7. As of November 19, 1987, the Union was the exclusive collective bargaining representative of two separate collective bargaining units of County employes, the Courthouse unit and the Highway unit. The Union and the County have historically entered into separate collective bargaining agreements covering those respective units. In the series of agreements covering the Highway unit, Complainant has been referred to as "Oneida County Highway Employees, Local 79, American Federation of State County and Municipal employees, AFL-CIO". In the series of agreements covering the Courthouse unit, the Union has been referred to as "Oneida County Courthouse, Local 79, American Federation of State County and Municipal employees, AFL-CIO". Nevertheless, Complainant is a single local union with one set of executive officers. There have historically been separately elected grievance committees for the two respective units. Prior to the negotiations for successor agreements to those for 1986-87, the Union and County had negotiated the separate agreements for the Highway and Courthouse units in a single set of meetings between Union and County bargaining representatives. The Union bargaining team in those joint negotiations consisted in part of Highway unit employes and in part of Courthouse unit employes and also included the AFSCME Council 40 Staff Representative.

8. The 1986-87 Highway unit agreement contained the following provision concerning negotiations:

> Article 2 - Union Management Relations
>
> Section A: All negotiations with respect to wages, hours, and working conditions and other conditions of employment, shall be conducted by the Personnel Committee in conjunction with the Highway Committee and Commissioner, representing the County Board and the Negotiating Committee and/or representatives appointed by the highway employees to represent them.
>
> Section B: Results of such negotiations must be ratified by the Oneida County Board and shall then become effective when signed by representatives of the County board and representatives of the employee's Union.

Neither the 1986-87 Highway unit agreement nor its predecessor agreements contained any reference to joint bargaining with the Courthouse unit.

9. The Courthouse unit agreement for calendar year 1985 contained the following provision:

> ARTICLE II - REPRESENTATION
>
> Section 1. The Union shall be represented in all such bargaining or negotiations with the County by such representatives as the Union shall designate. The Union Bargaining Committee shall consist of four (4) members and staff representative.
>
> Section 2. The County shall be represented in such bargaining or negotiations by the Personnel Committee as designated by the County Board.
>
> Section 3. Employees covered by this Agreement shall negotiate jointly with employees from the Highway Department unit.

The Courthouse unit agreement for 1986-87 contained the same provisions but without Section 3.

10. In the negotiations leading to the 1986-87 Courthouse agreement, the Union and the County agreed to delete the abovequoted Section 3 at the request of the County based on the County's assertion that it was a permissive subject of bargaining. Neither that agreed-upon deletion nor the

bargaining history associated with it constitute clear and unmistakable evidence of a Union waiver of its right to unilaterally determine the identity and composition of its Highway unit bargaining team in the subsequent round of contract negotiations.

11. On November 19, 1987, Union and County representatives were scheduled to meet for collective bargaining negotiations concerning a successor to the parties' 1986-87 agreement covering the Highway unit. As of that date, a representation election was scheduled to be conducted in December of 1987 in the Courthouse unit pursuant to a petition for election filed by another labor organization on June 24, 1987 and a subsequent stipulation executed by that labor organization, the Union and the County.

12. When the November 19, 1987 Highway unit negotiation session was convened, present for the Union was a bargaining team consisting in part of Highway unit employes, in part of Courthouse unit employes and in part of an AFSCME Staff Representative. During the course of the November 19, 1987 meeting, the County's representatives stated that they would negotiate with a Union bargaining team consisting of Highway unit employes and the Council 40 Staff Representative but not with the bargaining team then present for the Union because it included Courthouse unit employes. The Union bargaining team responded that the entire team present had been duly designated as the Union's Highway unit negotiating committee and that the Union would not agree to bargain with less than its full team present. The meeting thereupon came to an end.

13. During the November 19, 1987 meeting, the Union had sought only to bargain about the terms of the successor Highway unit agreement, and it did not seek to bargain about the terms of a successor to the Courthouse unit agreement.

14. Courthouse unit representation election balloting was conducted by the Commission on December 17, 1987. No objections to the conduct of the election were filed; and, in Decision No. 24844-A (WERC, 1-1-88), the Commission certified Wisconsin Professional Police Association/LEER Division as exclusive representative of the Courthouse unit.

CONCLUSIONS OF LAW

1. The instant complaint sets forth facts which would be sufficient to constitute a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., and that claim is not moot.

2. Although the County has not shown any extenuating circumstances within the meaning of ERB 12.03(6), Wis. Adm. Code, such as would justify the County's failure to timely file an answer to the complaint in this matter, the Examiner finds it permissible and appropriate to waive the requirements of ERB 12.03(6) because the Union has not shown that it would be prejudiced by a waiver of the requirements of ERB 12.03(6) in order that this matter be adjudicated on the merits of the complaint and of the answer stated on the record at the hearing.

3. The County would not have acted unlawfully and would not have destroyed the laboratory conditions necessary for a fair Courthouse unit election in December of 1987 had it negotiated on and after November 19, 1987 with the designated Union Highway unit bargaining team (including Courthouse unit employes) about the terms of a successor to the 1986-87 Highway unit agreement.

4. The County has not shown by clear and unmistakable contract language or bargaining history either that the Union agreed not to include Courthouse unit employes on its Highway unit bargaining team for the negotiations about the terms of a successor to the parties' 1986-87 Highway unit agreement or, therefore, that the Union partially waived its Sec. 111.70(3)(a)4 and (2), Stats., right to unilaterally determine the identity and composition of its Highway unit bargaining team.

5. The County, by its bargaining representatives' November 19, 1987 refusal to bargain with the Union's designated Highway unit bargaining team unless the Union excluded the Courthouse unit employes from that team,

committed a refusal to bargain prohibited practice within the meaning of Sec. 111.70(3)(a)4 and a derivative interference prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

6. The County's conduct noted in the Findings of Fact, above, did not constitute a domination/assistance prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats., and did not constitute a discrimination prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats. Because of the result reached in Conclusion of Law 5, above, it is unnecessary to determine whether the County's conduct also consituted a violation of collective bargaining agreement prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

ORDER 1/

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

1. Cease and desist from refusing to negotiate with the Highway unit bargaining representatives designated by Complainant Local 79, AFSCME, AFL-CIO, even if those representatives include County employes in another bargaining unit of County employes and even if an election petition is pending in that other unit challenging the continued majority status of Local 79 as exclusive representative of that other unit.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act: cause the attached notice in "Appendix A" to be signed by the Chairman of the Oneida County Board and posted for not less than 30 days in places where County notices to Highway unit employes and Courthouse unit employes are customarily posted.

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., reads as follows:

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

3. Except as noted above, the instant complaint is dismissed and the requests for additional relief contained therein are denied.

Dated at Madison, Wisconsin, this 15th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

APPENDIX "A"

NOTICE TO ALL HIGHWAY UNIT AND COURTHOUSE UNIT EMPLOYES

Pursuant to an order of a Wisconsin Employment Relations Commission examiner in Oneida County, Case 53, No. 39720, MP-2039, and in order to effectuate the purposes of the Municipal Employment Relations Act, you are hereby notified that:

> ONEIDA COUNTY WILL NOT, in the future, refuse to bargain with the Highway Unit bargaining representatives designated by Local 79, AFSCME, AFL-CIO, concerning Highway unit wages, hours and other conditions of employment, even if Local 79's designated representatives include Courthouse bargaining unit employes.

_____ _____

Chairman, County Board of Supervisors date

THIS NOTICE SHALL REMAIN POSTED FOR NOT LESS THAN 30 DAYS AND SHALL NOT BE COVERED OR DEFACED.

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

BACKGROUND

The relevant background is noted in the preface and Findings of Fact, above, and need not be repeated here.

POSITION OF COMPLAINANT

The Examiner should apply ERB 12.03(6), Wis. Adm. Code, and decide the case by treating all of the material factual complaint allegations as admitted by the County's failure to timely file an answer. There were no extenuating circumstances since the Courthouse election was concluded some four months prior to the scheduled hearing in this matter. The County's failure to timely answer deprived the Union of advance knowledge of the County's position and put the Union at a disadvantage at the hearing since it did not have an opportunity to prepare its case to meet the County's contentions. While it is appropriate that the Commission's rules be liberally construed to effectuate the underlying purposes of MERA, it would undercut those purposes if the County is permitted to completely ignore the rules to the detriment of Complainant as has occurred here.

In any event, it is undisputed that on November 19, 1987 the County's representatives refused to negotiate with Local 79's Highway Unit bargaining team because it included Courthouse unit employes. The Union sought only to bargain about the contents of the Highway unit agreement, not about Courthouse unit issues. It is well settled that each side is free to designate its bargaining representatives free of interference by the other. The Courthouse representatives were duly designated and active participants in Union caucus decisionmaking. The County's refusal to deal with the Highway unit team because Courthouse unit employes were on it amounted to dictating the composition of the Union's bargaining team and hence a refusal to bargain.

The pendency of the Courthouse unit election petition does not excuse the County's refusal. The County has not shown how its bargaining with a Local 79 Highway unit bargaining team including Courthouse unit members would have destroyed the laboratory conditions necessary to a free and fair Courthouse unit election. Rather, the County's refusal to bargain with Local 79's designated Highway unit bargaining representatives made Local 79 look generally ineffectual at the bargaining table and contributed to Local 79 losing the Courthouse unit election.

For those reasons, in addition to cease and desist and notice posting relief, the Examiner should also order that the Courthouse election results be set aside.

POSITION OF RESPONDENT

On its face the complaint fails to state a violation of MERA. Moreover, the fact that another union was elected as representative by the Courthouse unit employes renders the complaint moot. For those reasons alone, the complaint should be dismissed.

If the merits of the complaint need to be addressed, the Examiner should consider the answer submitted at hearing and the evidence submitted by the parties on the factual issues in dispute. It was surely clear to the Union that the County was contesting the Union's complaint allegations. The Union experienced no prejudice or hardship as a consequence of the County's failure to timely file its answer. The Union had more than the necessary witnesses present. It went forward with proofs on the disputed issues and rested after the County's case without need of rebuttal evidence and without requesting more time to prepare its case.

On the merits of the complaint and answer, the evidence shows that the County did not attempt to dictate which Highway unit employes would represent that unit or to prevent the Union team from including its AFSCME Staff Representative. Rather, the County sought only to maintain strict

neutrality in the pending Courthouse unit election and to hold the Union to the parties' agreement to bargain the Courthouse and Highway contracts separately. Had the County conditioned its willingness to bargain with the Highway unit team on the elimination of Courthouse employes from that team, the County would have risked a complaint of prohibited practice or objections to the conduct of the election on grounds that the County was showing favoritism to Local 79 during the campaign by recognizing and bargaining with members of Local 79 from the Courthouse unit. The County had a right to remain neutral in the election. The Union's inclusion of Courthouse employes in the Highway unit bargaining, after the parties had specifically agreed that the Courthouse and Highway contracts would be separately bargained, served no purpose other than to give the Union an advantage in the election by showing that the Union's Courthouse leadership had an effective and on-going bargaining relationship with the County during the election campaign. The Courthouse and Highway employes were in separate units and had separate and sometimes conflicting interests. Indeed, from the County's point of view, the Union's inclusion of Courthouse employes on the Highway unit bargaining team was a violation of the parties' agreement during the previous round of bargaining that the two units' agreements would be separately negotiated in the future. Moreover, since the Courthouse employes could conceivably have controlled Union caucus decisionmaking regarding Highway unit issues, the bargaining would have at least indirectly focused on Courthouse unit concerns so as to constitute coalition bargaining which the Commission has clearly held cannot be insisted upon by either party over the objections of the other.

For the foregoing reasons, the County requests that the Examiner dismiss the complaint on its merits.

DISCUSSION

County's Failure to Timely File An Answer to the Complaint

While the Examiner agrees with the Complainant that the County has not justified its failure to timely answer the complaint and that parties ought not be permitted to ignore the Commission's rules with impunity, there appears to be no prejudice or disadvantage to the Union for the County's untimely answer submitted on the record to be allowed and for the dispute to be resolved on the basis of the record evidence. For that reason, and to better effectuate the underlying purposes of MERA, the Examiner has waived the requirements of ERB 12.03(6) by the authority granted in ERB 10.01.

Alleged Failure of Complainant to Plead a MERA Violation

The Examiner rejects the County's contention that the complaint does not contain facts that could constitute a violation of MERA. The Examiner agrees with the County that the facts alleged in the complaint would not amount to a domination/assistance prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats., or to a discrimination prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats. However, the complaint does set forth facts sufficient to constitute a Sec. 111.70(3)(a)4, Stats., refusal to bargain prohibited practice and a derivative Sec. 111.70(3)(a)1, Stats., interference prohibited practice. See, Kenosha County, Dec. No. 21130-B (WERC, 2/85)("the composition of a party's negotiating team is . . . a permissive subject of bargaining about which neither party is required to bargain if it chooses not to do so." Id. at 8, citing, Unified School District No. 1 of Racine County, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 138, and Teamsters Local 70, (Kockos Brothers), 183 NLRB 1330, 74 LRRM 1401, aff'd, 459 F. 2d 694, 80 LRRM 2464 (CA 9, 1972). The complaint may also suffice to state a Sec. 111.70(3)(a)5, Stats., violation of contract claim, but the Conclusion of Law 5 outcome makes it unnecessary to address such contract violation claim herein.

Alleged Mootness of the Complaint

The Examiner also rejects the County's contention that the election results mooted the complaint. There remains an actual controversy as to whether the County's past conduct violated MERA. Though no longer the Courthouse unit representative, the Union is nonetheless entitled to a determination of whether the Respondent's conduct violated MERA and, if it

did, to a cease and desist order and such other relief as will effectuate the underlying purposes of the statute. Local 150, Service Employees International Union, Dec. No. 16277-C at 14-16 (10/80), aff'd by operation of law, -D (WERC, 11/80) applying Watkins v. ILHR Department, 62 Wis.2d 782, 796 (1975). Also see, Menomonee Falls Schools Dec. No. 20499-A at 7-8 (7/84), aff'd, -B (WERC 10/85); Green County, Dec. No. 20308-B at 18 (WERC 11/84); and Wisconsin Rapids Schools, Dec. No. 19084-C at 19 (WERC, 3/85), applying the general mootness standard established in WERB v. Allis-Chalmers Workers Union, Local 248, 252 Wis 436 (1948).

Merits of the Complaint and Answer

It is clear that the County's representatives unequivocally stated that they were willing to bargain with the Highway unit bargaining team only if the Courthouse unit employes on that team were eliminated. (e.g., tr. 82). As noted above, it is well settled that MERA ordinarily prohibits parties from insisting on modifications in the composition or identity of the other side's bargaining team. Kenosha County, supra, and cases cited therein at Note 8, p.6. Nevertheless, the parties are free, on a permissive subject basis, to agree upon parameters for and limitations on the composition of their respective bargaining teams. During their term, such agreements presumably would be enforceable and would constitute a valid defense for a refusal to bargain with a team that does not conform to the agreed-upon parameters. However, a party's full or partial waiver of its MERA right to unilaterally determine the composition of its bargaining team would need to be proven by clear and unmistakable evidence. See, e.g., City of Brookfield, Dec. No. 11406-A (7/73), aff'd, -B (WERC, 9/73), aff'd, Case No. 31923 (CirCt Waukesha, 9/74).

The instant record does not contain the clear and unmistakable evidence needed to support the County's claim that the Union agreed not to include Courthouse employes on its Highway unit bargaining team for a successor to the 1986-87 agreement, so as to partially waive its MERA right to unilaterally select its Highway unit bargaining representatives.

The evidence shows that the parties had historically negotiated their Courthouse and Highway agreements in one joint set of negotiations between a Union team consisting of Courthouse unit employes, Highway unit employes and the AFSCME Staff Representative representing the Union. That bargaining structure was utilized in the negotiations leading at least to the parties' 1986-87 agreements and their 1985 agreements, and it was expressly provided for in Art. II Sec. 3 of the 1985 Courthouse agreement which provided, "Section 3. Employees covered by this Agreement shall negotiate jointly with employees from the Highway Department unit." No Highway unit agreement contained any such language. The evidence further establishes that the language of Sec. 3 was deleted from the Courthouse unit agreement during the joint negotiations leading to the 1986-87 agreements. The County requested that deletion on the grounds that the language in question was a permissive subject of bargaining, and the Union agreed to the deletion on that basis. (tr.38, 91).

Two County witnesses testified that they participated in those negotiations and that it was their understanding that, as a result of the deletion of Art. II Sec. 3 from the 1986-87 Courthouse agreement there would be two separate sets of negotiations and the Union bargaining team would no longer be a combined group of Courthouse and Highway employes and the AFSCME Staff Representative, but rather would be separate groups of employes each representing their respective unit with the assistance of the AFSCME Staff Representative. (tr.76-77 and 86-87) Specifically, County Board of Supervisors member Howard Lovestead testified that he derived that understanding from discussions with other County representatives and the County Corporation Counsel. (tr.77). When the other County witness, Highway Commissioner Robert Maass, was asked on cross-examination how his understanding came about, he replied that it was based on "Various conversations at personnel committee meetings and with Mr. Heath and with personnel directors," and he admitted that he did not have any conversations with the Union on the subject. Thereafter on re-direct examination of Maass, there was the following exchange:

> Q: Mr. Maass, as part of this understanding that you reached, did that include your presence at the

earlier negotiations that had taken place with respect to the '86-'87 contracts?

A: Yes, because I believe that was discussed at length during the '80 -- or the one prior to '88. Yeah, that would have -- '86, two-year contract, yeah, that was discussed at length as I recall to separate the two sessions.

(tr.90). The County presented no other evidence concerning the bargaining history relating to the deletion of Art. II Section 3 of the Courthouse agreement.

In analyzing the abovenoted evidence, it can first be noted that there is no language in either 1986-87 agreement specifying that Courthouse unit employes can or cannot be a part of the Union's Highway unit bargaining team. Rather, the Highway agreement states that the Highway unit shall be represented in contract bargaining by "the Negotiating Committee and/or representatives appointed by the highway employees to represent them." 2/ The unqualified nature of that language at least suggests that no limitations were intended on the universe of individuals from which the highway employes would select their appointees. By all accounts, the parties' deletion of Art. II Sec. 3 from the Courthouse agreement was intended to remove a permissive subject provision from the agreement. It would seem inconsistent with that general purpose to find that the parties intended to simultaneously create a limitation on the composition of the Union's bargaining team, which, itself, would constitute a permissive subject of bargaining. The evidence strongly suggests that County witnesses Lovestead and Maass' derived their understanding that the parties were agreeing to such a limitation solely from discussions with other County representatives and not with Union representatives, thereby rendering those understandings of little significance in determining the parties' mutual intent. Even if Maass' abovequoted testimony on re-direct were taken to mean that his understanding was based in part on unspecified bargaining table conversations with Union representatives, in the absence of details as to what was said in the presence of Union representatives and what the Union representatives' responses were, if any, that testimony is not sufficient to overcome the contrary indications noted above. In any event, it is surely not enough to constitute clear and unmistakable evidence of a Union agreement to waive its MERA right to include Courthouse unit employes on its Highway unit bargaining team.

Thus, while the agreed-upon deletion of Art. II Sec. 3 from the Courthouse agreement clearly and unmistakably establishes that the two units' would be negotiated separately rather than in one common set of negotiations, neither that agreed-upon change nor the balance of the record evidence establishes by the requisite clear and unmistakable evidence that the Union agreed during the 1986-87 agreement negotiations not to include Courthouse unit employes on its Highway unit bargaining team in the succeeding round of bargaining.

Attention is now turned to the question of whether the pendency of a Courthouse unit election petition justified the County's insistence that

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2/ The record evidence would not support a finding that the individuals who presented themselves to the County on November 19, 1987 were not duly appointed by the highway employees to represent them in contract negotiations. Local 79 president Thomas Kutz testified that the combined team had been duly elected as the negotiation committee for both units circa April of 1987 (tr.22). Moreover, the Union team specifically informed the County that the combined team members were the duly designated bargaining representatives for the Highway unit agreement both at the November 19, 1987 meeting (tr. 28, 84) and during earlier meetings in the 1988 round of bargaining, each time the County objected to the presence of employes from the unit that was not the subject of the negotiation. (tr. 49-50).

Courthouse unit employes be excluded from the Union's Highway unit bargaining team. The County correctly asserts that it had a right to remain neutral in the pending Courthouse unit election proceeding. In the Examiner's opinion, however, the County could have maintained neutrality in that election without insisting that the Union exclude Courthouse unit employes from its Highway unit bargaining team. The Examiner is not persuaded that the County's continued bargaining about Highway unit issues with the combined Union committee would have constituted illegal conduct on the County's part or conduct which would have jeopardized the finality of the election results. In any event, however, if the County felt that it would have given the eligible voters in the Courthouse election a mistaken impression by bargaining with the a Highway unit bargaining team that included Courthouse employes, it could have posted a notice or sent individual written communications to the Courthouse unit employes to set the record straight and avoid any such misunderstanding. It could thereby have informed those employes that the County had suspended negotiations with Local 79 about a Courthouse unit agreement and that the County was continuing to deal with a Union Highway unit bargaining team that included Courthouse unit employes because the law gives the Local 79 the right to designate whomever it chooses as its Highway unit bargaining representatives. Thus, the pendency of the election petition did not mean that the County would have destroyed the laboratory conditions for a free and fair Courthouse election unless it refused to with a Union Highway bargaining team that included Courthouse unit employes. The pendency of the election therefore does not excuse the County's conditioning its willingness to bargain on the exclusion of Courthouse unit employes from the Union's Highway unit bargaining team.

Finally, the Examiner rejects the County's contention that the Union's insistence on including a substantial number of Courthouse unit employes on its Highway unit bargaining team constituted insistence on coalition bargaining which has been held by the Commission to be unlawful. The County relies in that regard on testimony (tr.61-62) to the effect that it is theoretically possible that enough of the Highway unit employes on the Union's Highway unit bargaining team could on some other occasion have been absent so as to give the Courthouse unit employes on that team majority control of decisionmaking in the Union caucus. In Kenosha County, supra, the Commission squarely held that MERA permits but does not compel parties to bargain on a coalition basis, that is, on a basis whereby representatives of more than one unit bargain as one with the resultant terms binding on all of the units involved. The Commission further stated, however, that unilateral imposition of "coordinated bargaining" is not prohibited by MERA. Thus, the Commission stated at Dec. No. 21130-B, p.6,

> . . . MERA would not prohibit the majority representative of a given unit from including on its bargaining team individuals drawn from various other bargaining units. In that way, the respective Unions involved herein could designate the same team as the bargaining representatives for each of the units involved. For, the composition of a party's negotiating team is also a permissive subject of bargaining about which neither party is required to bargain if it chooses not to do so. (footnote omitted).

The Union's conduct herein appears to fall squarely within the Commission's dictum, above, permitting coordinated bargaining. By all accounts the Highway unit negotiations were dealing only with Highway unit issues, and not at all with Courthouse unit issues. The County had insisted on that arrangement from the beginning of the 1988 negotiations and the Union had complied. Even if the hypothetical situation posited by the County were to occur and the Union bargaining team complement were dominated by Courthouse unit employes due to absences among the Highway unit employes at a particular meeting, the bargaining would not become coalition in nature if the focus remained (as it did throughout the meeting on November 19, 1987) exclusively on Highway unit agreement issues.

For the foregoing reasons, the Examiner concludes that the County's November 19 refusal to bargain with the Union's Highway unit bargaining team because it included Courthouse unit employes constituted a refusal to

bargain within the meaning of Sec. 111.70(3)8a)4, Stats., and a derivative Sec. 111.70(3)(a)4, Stats., interference with employe rights. The Union has not seriously contended that the County's conduct also constituted a Sec. 111.70(3)(a)2, 3 or 5, violation. The evidence does not support the (3)(a)2 or 3 allegations, and it is unnecessary to address (3)(a)5 because the remedy would be parallel to that ordered herein for the violation cited in Conclusion of Law 5.

Remedy

By way of remedy, the Examiner has ordered cease and desist and notice posting relief. The Union's requests for additional relief in the form of back pay, interest and litigation costs were not advanced at the hearing and in any event, such relief is not warranted in the instant circumstances. The Union's request for relief in the form of an order setting aside the results of the Courthouse election was specifically urged by the Union at the hearing. That request is rejected for the following reasons. First, the Examiner is not persuaded that the election needs to be set aside in order to prevent future occurrences of the County's conduct found unlawful herein. And second, while the County's conduct has been found herein to have violated MERA, that conduct related to the Complainant as exclusive representative of the Highway unit, rather than as representative of the Courthouse unit. For that reason, the County's violation does not appear to have been such as would meet the standard for setting aside an election, to wit, that the County's conduct rendered it improbable that the Courthouse unit voters would have been able to freely cast a ballot for or against the Union. See generally, Town of Weston, Dec. No. 16499-B (WERC, 2/79) and Fond du Lac County, Dec. No 16096-B (WERC, 9/78). 3/

Dated at Madison, Wisconsin, this 15th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

3/ While the Examiner rests his scope of remedy determination solely on the factors noted in the text above, it can also be noted that the Union did not file an objection to the conduct of the election, such that its rival was certified as representative on January 5, 1988 (Dec. No. 24844); and that the Union opted to have the election conducted rather than to have the election held up while the complaint was being adjudicated. (See WERC pre-hearing correspondence to the parties dated December 14, 1987 and see generally, Plateville Schools, Dec. No. 21645-A (WERC, 6/84)).