STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION, Complainant, vs. TEAMSTERS LOCAL UNION NO. 695 AND COLUMBIA COUNTY, Respondents.	Case 106 No. 44953 MP-2424 Decision No. 26950-A

Appearances:
Mr. Kurt C. Kobelt, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, Suite 202, 1555 North River Center
Mr. Donald Peterson, Corporation Counsel, Columbia County Courthouse, 400 DeWitt Street, Portage, Wisconsin 53901 appearing on behalf of Columbia County.
Mr. Michael R. Bauer, Cullen Weston Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, WI 53703, appearing on behalf of Wiscon

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 17, 1990, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division filed a complaint with the Wisconsin Employment Relations Commission alleging that Teamsters Local Union No. 695 and Columbia County violated Secs. 111.70(3)(a) and (b) of the Municipal Employment Relations Act. The Commission appointed Karen J. Mawhinney to make and issue Findings of Fact, Conclusion of Law and Order as provided in Sec. 111.07(5), Stats. Respondent Teamsters Local No. 695 filed a Motion to Dismiss on August 15, 1991, and the Examiner held the Motion in abeyance pending an evidentiary hearing on the complaint. A hearing was held in Portage, Wisconsin, on October 3, 1991, and the parties completed their briefing schedule by November 25, 1991. The Examiner has considered the evidence and arguments of the parties, and now issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, called the Complainant or the WPPA after this, is a labor organization with its principal office at 7 North Pinckney Street, #220, Madison, Wisconsin 53707.

2. Columbia County, called the County after this, is a municipal employer with its offices located at the Columbia County Courthouse, 400 DeWitt Street, Portage, Wisconsin 53901.

3. Teamsters Local No. 695, called the Teamsters or Local 695 after this, ia a labor organization with its principal office located at 1314 N. Stoughton Road, Madison, Wisconsin 53714-1293.

4. Up to October 1, 1990, the Teamsters were the exclusive collective bargaining representative for sworn employes of the Sheriff's Department. The Teamsters and the County were parties to a series of collective bargaining agreements, the most recent of which started on January 1, 1989 and ended December 31, 1990. On or about July 19, 1990, WPPA petitioned the Wisconsin Employment Relations Commission, herein called the WERC or the Commission, for an election in the bargaining unit represented by the Teamsters. On September 21, 1990, an election was held in Columbia County to determine whether bargaining unit members desired to change their bargaining representative from the Teamsters to the WPPA. On October 1, 1990, the WERC certified the WPPA as the collective bargaining representative of sworn employes of the Sheriff's Department.

5. The collective bargaining agreement between the Teamsters and the County in effect through December 31, 1990, contained among other things the following provisions:

> ARTICLE V. COMPLIANCE AND SEPARABILITY
>
> . . .
>
> Section 2. If any Article or Section of this Agreement or any supplements thereto should be held invalid by operation of law or any tribunal of competent jurisdiction, or it compliance with or enforcement of any article or section be restrained by such tribunal pending a final determination as to validity, the remainder of this Agreement and any supplement thereto, shall not be affected thereby. In the event that any article or section is invalid or enforcement of or compliance with same has been restrained, as above set forth, the Employer and the employees may enter into immediate negotiations, upon request of either, for the purpose of attempting to arrive at a mutually satisfactory replacement.

ARTICLE VI. PROCEDURE FOR GRIEVANCES

Section 1. Definition - A grievance is defined as a dispute between the Union and the Employer or between the employee or group of employees and the Employer with respect to the meaning or interpretation of the terms and provisions of this Agreement.

Section 2. Procedure - Grievances shall be processed in the following manner:

(Steps 1 through 5 omitted)

Section 3. Time Limits - The time limits set forth hereinabove shall include all scheduled work days for the employee involved and any grievance not processed in accordance with the time limits by the employee and/or his representative shall be considered dropped. Any grievance not processed by the Employer in accordance with the time limits shall automatically go the next higher step, if any.

Section 4. Employer and the Union shall each bear their own costs of preparing and presenting the grievance in each step of the grievance procedure. Employees shall not be paid for time spent in grievance meetings.

Section 5. Any time limits set forth in this Article may be extended by the parties in writing.

ARTICLE XIV. GROUP HEALTH AND LIFE INSURANCE

. . .

Section 2. Hospital and Surgical Insurance - Effective January 1, 1989, the Employer shall contribute to the Wisconsin Area Health Fund the sum of One Hundred Ninety-Six Dollars and Two Centers ($196.02) a month for each employee covered by this Agreement who has been on the payroll for thirty (30) days or more, for health and welfare coverage.

Section 3. By execution of this Agreement the Employer binds himself and becomes party to the Trust Agreement establishing the Wisconsin Area Health Fund and authorizes the Employer parties thereto to designate the Employer trustees as provided under such agreement hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 4. For covered employees continuation of insurance payment while disabled or sick, will be made by the County as long as the employees accumulated sick leave and vacation benefits are not exhausted plus an additional eleven (11) days.

Section 5. It is agreed further that in the event the Employer becomes delinquent in his contribution that

the Employer shall be liable for the total maximum benefits of the plan then in effect for each employee eligible to be covered under said plan.

Section 6. For the year 1990, the Employer agrees to increase the premium by a maximum of Ten Dollars ($10.00) per month per employee.

. . .

6. The Wisconsin Area Health Fund, called the Fund after this, is a trust fund established pursuant to federal law, specifically the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act. The Fund is established to provide health and welfare benefits for union members covered by collective bargaining agreements. Robert E. Fett is the Administrative Manager of the Fund. The benefits plan is administered by a board of trustees, consisting of two union trustees and two employer trustees. The union trustees are John D. Knoebel and David Shipley, both officers of the Teamsters Local Union No. 695.

7. The County and the Teamsters are signatories to a Standard Participation Agreement with the Fund. The agreement that the parties signed in December of 1973 states, among other things, the following:

. . .

I. - TRUST AGREEMENT, RULES AND REGULATIONS

The Employer and the Union agree to and shall be bound by the Agreement and Declaration of Trust and the Rules and Regulations of the Fund, as amended from time to time, all of the terms of which are incorporated herein by reference, and hereby acknowledge receipt of true and correct copies of said Trust Agreement and Rules and Regulations.

. . .

III. - CONTRIBUTIONS

All contributions to the Fund by the Employer shall be made by the Employer in accordance with its collective bargaining agreement with the Union, the Trust Agreement and the Rules and Regulations of the Fund, as amended from time to time.

IV. - OPTION TO INCLUDE NON-UNION EMPLOYEES

As a convenience to and at the option of the Employer, this Standard Participation Agreement (shall) include and make beneficiaries of the Fund all active full time employees employed by the Employer who are not members of the Union.

. . .

VI. - RIGHT TO CANCEL AND TERMINATE

The Employer and the Fund reserve the right and option to cancel and terminate this Standard Participation Agreement as it applies to all persons employed by the Employer who are not members of the

> Union upon giving thirty (30) days written notice to the other.

8. In the spring of 1990, the Board of Trustees for the Fund made a policy change in the Fund and determined that the Fund would not provide benefits coverage for union members other than Teamster members. The adoption of that policy occurred after the Insurance Commissioner's office for the State of Wisconsin put the Fund on notice that it was not, in effect, a Taft-Hartley trust fund because it was providing insurance coverage to people all over the United States. Although the Insurance Commissioner's office later acknowledged that the Fund was acting in accordance with the terms of its trust documents, the trustees determined that the Fund would be less susceptible to legal challenges if it stopped accepting other union members. The Board of Trustees advised Fett that only Teamster members and participating employers with collective bargaining agreements would be allowed to be in the Fund.

9. In September of 1990, Fett was advised by Joseph Ashworth, business agent for the Teamsters, that an election was going to take place to determine whether the Teamsters would continue to represent the sworn officers of the County. After the election was held, Ashworth notified Fett of the results and provided Fett with a copy of the vote results. Fett then reviewed the collective bargaining agreement in force between the County and the Teamsters, along with the Restated Agreement and Declaration of Trust and the Standard Participation Agreement. Fett concluded that the Fund could not continue to provide coverage, in accordance with its policy that it would not provide coverage for unions other than the Teamsters. On October 1, 1990, Fett sent a letter to the County and to all sworn officers, stating:

> We have been informed that all sworn personnel are no longer represented by Teamsters Union Local #695 effective September 21, 1990.
>
> The standard participation agreement with Wisconsin Area Health Fund is between the County of Columbia and Teamsters Union Local #695.
>
> Since the sworn unit employees are no longer members of the Teamsters Union Local #695, the employer and individual employees of that unit cannot continued to make contributions to Wisconsin Area Health Fund for sworn employees.
>
> Contributions and coverage will be accepted for this unit for the month of October, 1990. This will allow time to obtain other coverage if needed.
>
> Coverage for this unit should terminate September 30, 1990. However, we will extend coverage through October 31, 1990 if needed to obtain other health coverage.

10. On October 12, 1990, WPPA Administrator S. James Kluss sent the following letter to Knoebel:

> This letter is to confirm the previous conversation I had with Robert Fett of Wisconsin Area Health Fund. Mr. Fett explained that the Health Fund was no longer responsible for providing coverage to the Columbia County Deputy Sheriffs effective October 31, 1990. Mr. Fett stated that since the deputies were not members of Teamsters Union Local 695, they may no

longer receive Health Fund benefits.

> Enclosed you will find a check in the amount of $1,056.00, dues for twenty-four (24) deputies for the months of October and November. It is our belief that the position of the Fund, as explained by Mr. Fett, is not reasonable in light of the exposure the employees may incur. We believe a change in the bargaining representative by the deputies does not abrogate the terms of the agreement.
>
> Please confirm in writing within five (5) days your receipt of the dues for the deputies.

Knoebel replied to Kluss on October 15, 1990, as follows:

> I am returning your check for Columbia County Sheriff's Department for the months of October and November. We cannot accept the dues for these months as we no longer represent these employees for the purpose of collective bargaining as the bargaining relationship ceased on September 30th.

11. After the change in bargaining representatives took place effective October 1, 1990, and after the County received notice from the Fund that it would not continue coverage for the sworn officers, the County sought interim health insurance coverage for bargaining unit members. Personnel Director James Aiello contacted Ashworth. Ashworth informed him that the Fund was a separate entity from the Teamsters Locals, and that Ashworth had no control over the Fund's action. Aiello applied to Wisconsin Physicians Service, called WPS herein, for coverage. WPS agreed to provide coverage, and Aiello and the County entered into negotiations with Kluss and the WPPA in early October. The County and the WPPA entered into an arrangement whereby WPS provided coverage and the County paid 90 percent of the premiums. An agreement was drafted but not signed by both parties, because Kluss added handwritten language to the bottom of the agreement to which the County objected. The agreement states the following:

> AGREEMENT BETWEEN
> COLUMBIA COUNTY
> AND
> WISCONSIN PROFESSIONAL POLICE ASSOCIATION
> REPRESENTING SWORN OFFICERS
>
> COLUMBIA COUNTY WILL PROVIDE HEALTH INSURANCE COVERAGE TO ALL SWORN OFFICERS REPRESENTED BY WPPA IN THE SHERIFFS DEPARTMENT.
>
> THE BENEFIT LEVEL PROVIDED WILL BE EQUAL TO WHAT IS PRESENTLY OFFERED TO OUR COURTHOUSE EMPLOYEES WITH THE COUNTY MAINTAINING DISCRETION TO CHOOSE THE HEALTH CARE PROVIDER.
>
> COLUMBIA COUNTY WILL PAY NINETY PERCENT (90%) OF THE PREMIUM AND WPPA MEMBERS WILL PAY TEN PERCENT (10%) THROUGH PAYROLL DEDUCTION.
>
> THIS AGREEMENT IS SUBJECT TO CHANGE DURING THE NEGOTIATIONS PROCESS.

The agreement was signed by Kluss by October 12, 1990, and not signed by the County, due to the following note that Kluss wrote on the bottom of the Agreement:

> It should be noted that the Association is agreeing to this solely in order to mitigate damages and the Association does not concede the health and dental benefits plan offered through WISCONSIN AREA HEALTH FUND does not remain in full force and effect through the term of the collective bargaining agreement presently in existence between the County and the sworn non-supervisory deputy sheriffs.

12. Prior to October 1, 1990, the County paid the full contribution to the Fund. The Fund covered bargaining unit members through October 31, 1990. Although the WPS plan covered bargaining unit members for only two months in dispute, November and December of 1990, three months of premiums were paid in order to pay for an administrative fee. Bargaining unit members paid 10 percent of the premiums for WPS coverage. Other potential out-of-pocket expenses incurred by bargaining unit members were not fully documented during the hearing, and the WPPA stated its willingness to provide authentic documentation as to damages, should either the Teamsters or the County be found liable for damages.

13. Bargaining unit members did not file any grievances regarding the change in health insurance coverage, their additional responsibility for premiums, or for any out-of-pocket expenses incurred between October 1 and December 31, 1990. Deputy Russell Manthey, a bargaining unit member and a union steward with the WPPA, was aware that when the unit changed representation from the Teamsters to the WPPA the insurance premiums would go up, because the Teamsters had an attractive insurance plan. Manthey assumed that the bargaining unit members would incur some out-of-pocket insurance expenses once a new contract was reached, but not as a result of the election. Manthey was aware that a requirement of receiving benefits under the Fund was that the beneficiaries had to be Teamsters members. Manthey signed a membership agreement with the WPPA after the election, and he assumed that other sworn officers also signed membership agreements with the WPPA.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent Teamsters Local No. 695 did not coerce or intimidate employes in the bargaining unit of sworn officers of the Sheriff's Department of Columbia County in retaliation for their having exercised their rights pursuant to Sec. 111.70(2), Stats., and Respondent Teamsters Local No. 695 did not violate Sec. 111.70(3)(b)1, Stats.

2. Respondent Teamsters Local No. 695 did not violate the collective bargaining agreement in effect or otherwise engage in conduct violative of Sec. 111.70(3)(b)4 or 111.70(3)(b)1, Stats.

3. Respondent Columbia County did not make unilateral changes in the collective bargaining agreement in effect or engage in any conduct that violated the collective bargaining agreement, and Respondent County did not

violate Secs. 111.70(3)(a)1, 4 or 5, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the Complaint filed in the matter be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 23rd day of January, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

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

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

The essential facts are not in dispute. Teamsters represented sworn officers of the County until October 1, 1990, when WPPA was certified as the bargaining representative, following an election. The collective bargaining between the Teamsters and the County had three months left to run when WPPA became certified as the bargaining representative. The bargaining agreement called for employer contributions to the Wisconsin Area Health Fund, and the Fund refused to continue to accept contributions or provide coverage to employes no longer represented by Teamsters. The County and WPPA negotiated for interim insurance coverage which was provided by WPS.

POSITIONS OF THE PARTIES:

WPPA:

The WPPA, as the Complainant, alleges that the Teamsters' actions violate Secs. 111.70(3)(b)1 and 4, Stats., as their conduct constitutes retaliation against bargaining unit employes for their decision to change their collective bargaining representative from the Teamsters to the WPPA. The WPPA alleges that the County's actions violate Sec. 111.70(3)(a)4, 5, and derivatively 111.70(3)(a)1, Stats., by unilaterally changing the parties' collective bargaining agreement and by violating that agreement between the County and sworn officers of the Sheriff's Department.

WPPA recognized its responsibility to fulfill the provisions of the existing collective bargaining agreement, under the obligations imposed by law such as WEAC and Gateway Technical Education Association vs. Gateway Vocational, et al., Dec. No. 20209-A (Crowley, 7/83). A collective bargaining provision pertaining to health insurance benefits is a substantive part of the agreement and a provision that runs to the benefit of the bargaining unit employes. In order to protect the employes, the WPPA tendered the appropriate amount of dues to the Teamsters, but the Teamsters rebuffed that offer and made it clear that the Fund would not provide health insurance. Through October of 1990, the WPPA was prevented from fulfilling the existing collective bargaining agreement by the retaliatory actions of the Teamsters who attempted to penalize the bargaining unit employes for the results of the election. Such actions are contrary to Sec. 111.70(3)(b)1, Stats., which forbids actions that coerce or intimidate a municipal employe in the enjoyment of his legal rights, and violates Sec. 111.70(3)(b)4 which forbids the violation of the collective bargaining agreement.

WPPA asserts that the Wisconsin Area Health Fund is controlled and dominated by Teamsters Local 695. The sole two union trustees of the Fund are members of Local 695. The administrator who made the decision to terminate the contract between the Teamsters and the County serves at the pleasure of the Board of Trustees. The Commission must not allow the Teamsters to avoid responsibility for their actions by hiding behind the Fund, an organization which it dominates and controls.

WPPA contends that the County violated the collective bargaining agreement by not providing the stated health benefits. The County made no efforts upon being informed by the Fund that it would terminate coverage of sworn employes, while the County admits that those employes received health benefits for the last three months of 1990 that cost more and had less comprehensive coverage than that contained in the existing bargaining

agreement. WPPA rejects the County's contention that it is the innocent victim of an inter-union battle. If the County had acted immediately and vigorously, the bargaining agreement would not have been violated. Short of that, the County was obligated to provide health benefits equal to those provided in the bargaining agreement, which it failed to do. Because the County failed to abide by the terms of the collective bargaining agreement and as a result the employes suffered damages via higher premiums and out-of-pocket expenses, the County violated Secs. 111.70(3)(a)4 and 5, Stats., and should be liable for the damages suffered.

The County:

The County asserts that it did not violate Secs. 111.70(3)(a)4 and 5, Stats., because it did not fail to execute the health insurance provisions of the collective bargaining agreement between it and the Teamsters. The County could not execute that portion of the bargaining agreement where the County and the employes entered into a corollary Standard Participation Agreement with the Fund which was terminated by the Fund due to the employes' unilateral action via an election to cease the representation by the Teamsters as required under the Standard Participation Agreement. The County was not able to dispute the Fund's decision, where in accordance with Article XIV, Section 3 of the bargaining agreement, the County was bound to abide by the provisions of the Fund's Trust Agreement. The Trust Agreement provides that disputes concerning insurance coverage are to be decided by the Fund's trustees.

Therefore, the County contends that the decision by Fett to terminate non-Teamsters from health insurance coverage was a matter outside the control of the County. The Fund's action cannot be characterized as a failure on the part of the County to execute its responsibility under the bargaining agreement. Section 6 of the Standard Participation Agreement allows the Fund to terminate the agreement as it applies to non-union members. The Fund provided the appropriate 30 day notice as required by the Standard Participation Agreement.

The County notes that this result should have been anticipated, unless past or present representatives of the affected employes failed to inform their members that a loss of benefits under the Fund would be triggered should the election result in non-Teamster representation. Manthey's testimony reveals that employes were under the misunderstanding that their representation by the Teamsters ran for the life of the collective bargaining agreement.

The County argues that the Complainants should be required to exercise and exhaust their remedies under the procedure for grievances, Article VI of the bargaining agreement. The County concludes by noting that it did not commit a prohibited practice in failing to enforce the bargaining agreement where it had no legal right to enforce an agreement where the actions creating the loss of benefits to the affected employes came at their own hands due to their own unilateral actions to change representation via election and thus breach their health care contract with the provider.

Teamsters:

The Teamsters filed a motion to dismiss along with a supporting brief. The motion was not ruled on before hearing, and the arguments raised by the motion and its supporting brief will be noted here, as well as arguments raised in the post-hearing brief by the Teamsters.

Teamsters moved to dismiss the complaint for the following reasons: (1) Local 695 is not a proper respondent to the claim because it is not a municipal employe and it is not Complainant's exclusive bargaining representative during

the time material to the present claim; (2) the Complaint fails to state a claim upon which relief can be granted; (3) the action which WPPA contests was not taken by Local 695 but rather by a jointly trusteed health and welfare plan which is a separate entity; (4) the conduct of Local 695 was dictated by the Municipal Employment Relations Act; and (5) WPPA failed to exhaust its contractual remedies.

While WPPA alleges that the Teamsters violated Sec. 111.70, Stats., by conduct occurring on or after October 1, 1990, the Teamsters was not the exclusive bargaining representative of employes at that time, and was not either a municipal employe individually or in concern within the meaning of Sec. 111.70(3)(b). The only claim against labor organizations which can arise under Sec. 111.70(3)(b) are those against the exclusive bargaining representative of the potential complainants. If any claim exists on behalf of the employes of the County on or after October 1, 1990, under Sec. 111.70(3)(b), it arises against WPPA, the employes' exclusive bargaining representative.

Teamsters also asserts that WPPA has failed to state a claim against it. Claims against labor organizations cognizable under Sec. 111.70(3)(b)1 have involved allegations of breach of the duty of fair representation. Before a claim for the breach of the duty of fair representation can be made against a labor organization, the labor organization must act as the exclusive bargaining representative. Since the Teamsters was not the exclusive bargaining representative of the employes at issue, no claim under Sec. 111.70(3)(b)1 can be asserted against it.

WPPA also alleges a claim under Sec. 111.70(3)(b)4, which states that it is a prohibited practice for employes, individually or in concert, to violate a collective bargaining agreement. Teamsters was a party to a bargaining agreement with the County only until October 1, 1990, and it was not a party when it ceased to be the collective bargaining representative of sworn employes. When a labor organization loses a representation election and ceases to be the certified representative of covered employes, it ceases to have any enforceable rights under the labor agreement. The representative selected is obligated to enforce and administer the substantive provisions therein, per City of Green Bay, Dec. No. 9183 (1963), and Merton Joint School District #9, Dec. No. 12828 (1974). Any claim for either breach of duty of fair representation or for violation of a labor agreement arises against WPPA, not Local 695. In reviewing the insurance language of the bargaining agreement, Teamsters asserts that promises made therein are made by the County, and if any party violated the labor agreement, it is the County and not the Teamsters. If any labor organization is responsible for failing to enforce that language, it is the WPPA as the exclusive bargaining representative and party to the contract effective October 1, 1990.

Teamsters contends that the conduct to which the Complaint refers was taken by the Fund, not Local 695. The Fund is a legally separate entity from Local 695 administered by a board of trustees consisting of two employer representatives and two union representatives in accordance with Section 302 of the Labor Management Relations Act of 1947. As the Administrative Manager of the Fund, Fett has discretion to enforce the terms of the trust subject to the approval of the board of trustees. After the Wisconsin Insurance Commissioner raised questions concerning the Fund's practice of entering into participation agreements with employers whose employes were not represented by unions affiliated with the Teamsters, the trustees adopted a policy forbidding the Fund from entering into participation agreements or providing benefits to employes who were not represented by the Teamsters. When Fett determined that coverage could not be extended to sworn officers of the County, the County was bound by Fett's determination in accordance with both Article 14, Section 3 of

the contract, as well are the terms of the participation agreement. The purpose of the change of policy was to avoid legal questions such as those raised by the Insurance Commissioner and had nothing to do with the decertification of Local 695. Local 695 had nothing to do with Fett's decision and it cannot be held responsible for its consequences.

Teamsters also asserts that the WPPA has failed to exhaust contractual remedies available to it. WPPA union steward Manthey was aware that the County reduced the level of benefits and charged employes for a portion of the premium, but no WPPA official grieved the violation of Article 14 of the contract which WPPA was legally obligated to enforce until it expired on December 31, 1990. Thus, the Complaint should be barred, under Fennimore Joint School District, Dec. No. 12790-A. WPPA attempted to shift the blame for its own failure to represent its members onto Teamsters, which was out of the picture. WPPA's ineptitude was further evidenced by its attempt to tender dues to Teamsters on behalf of the employes, which created the absurd scenario of one union paying dues to a decertified union for the purpose of receiving contractual benefits which a third party, the County, was required to provide. Teamsters had no authority or right to claim dues on behalf of employes it no longer represented, and Knoebel's refusal of the dues tendered by Kluss was dictated by MERA.

Teamsters asks that the Complaint be dismissed and requests attorneys fees for this frivolous action.

DISCUSSION:

Where the Commission conducts an election during the term of a collective bargaining agreement, and the employes select a bargaining representative other than the one recognized in the agreement, the Commission's policy is that the new representative will be obligated to enforce and administer the substantive provisions in that agreement which inure to the benefit of employes covered by that agreement, and any provision that runs to the benefit of the former bargaining agent will be considered extinguished and unenforceable. 2/

Upon review of Gateway, the Commission stated that the principles developed in Green Bay continue to represent the Commission's views of the appropriate approach to questions of enforceability of an existing collective bargaining agreement where a rival organization is certified as exclusive representative. The Commission stated that those principles properly:

> - maintain a measure of predictability -- of labor costs for the municipal employer and of rights and benefits for the employes -- through the previously established expiration date of the existing agreement;
>
> - free the employes and the municipal employer from labor contract obligations to the previous representative which were established under circumstances that have been materially changed by the ouster of that organization;
>
> - remove any incentive for changing representatives that might derive from a desire to "get out from under"

2/ City of Green Bay, Dec. No. 6558 (WERC, 11/63); Merton Joint School District No. 9, Dec. 12828 (WERC, 6/74); Gateway Vocational, Technical and Adult Education District, Dec. No. 20209-A (Examiner Crowley, 7/83).

> what may be viewed as an unfavorable contract, before it has run its course; and
>
> - neither reestablish the relatively few labor contract provisions inuring to the benefit of the ousted organization nor transfer same to the benefit of the insurgent organization without an agreement being reached to those effects between the new representative and the municipal employer. 3/

Article XIV, the insurance section of the collective bargaining agreement, is a substantive provision in the agreement that inures to the benefit of the employes covered and does not run to the benefit of the former bargaining agent. Thus, nothing in Article XIV was extinguished and unenforceable by the election of the new bargaining representative, and as the new representative, WPPA sought enforcement of this provision. WPPA tendered dues to the Teamsters in order to maintain the benefits of the Fund. However, it was the Fund that determined that it would no longer cover employes who were no longer Teamsters, and that it would not continue to accept contributions from the County.

Section 3 of Article XIV states:

> By execution of this Agreement the Employer binds himself and becomes party to the Trust Agreement establishing the Wisconsin Area Health Fund and authorizes the Employer parties thereto to designate the Employer trustees as provided under such agreement hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

The County was bound to comply with the Fund's policies under its collective bargaining agreement, as well as the Standard Participation Agreement it signed. Under that Participation Agreement with the Fund, signed by both the County and the Teamsters, the parties agreed to the following:

> The Employer and the Fund reserve the right and option to cancel and terminate this Standard Participation Agreement as it applies to all persons employed by the Employer who are not members of the Union upon giving thirty (30) days written notice to the other.

It was the trustees of the Fund who determined, that as a matter of policy, the Fund would not provide benefits to employes who were not members of the Teamsters. The trustees took such action well before the election in Columbia County, and they took such action in response to perceived threats of state regulation. Therefore, Article XIV became null and void due to the actions of the Fund, and its administrative manager, Fett.

WPPA cannot complain that the County made unilateral changes in the collective bargaining agreement where WPPA entered into contract negotiations once the specific provision of the bargaining agreement became null and void due to actions by the Fund. Article V, Section 2, of the bargaining agreement spells out the obligations of the parties in cases where a section of the contract becomes invalid:

3/ Gateway Vocational, Technical and Adult Education District, Dec. No. 20209-B (WERC, 8/84), aff'd Cir.Ct.

> Section 2. If any Article or Section of this Agreement or any supplements thereto should be held invalid by operation of law or any tribunal of competent jurisdiction, or it compliance with or enforcement of any article or section be restrained by such tribunal pending a final determination as to validity, the remainder of this Agreement and any supplement thereto, shall not be affected thereby. In the event that any article or section is invalid or enforcement of or compliance with same has been restrained, as above set forth, the Employer and the employees may enter into immediate negotiations, upon request of either, for the purpose of attempting to arrive at a mutually satisfactory replacement.

The County and WPPA quickly entered into negotiations for insurance coverage, and reached what appears to have been a mutually satisfactory agreement, but for the fact that WPPA added an addendum to the bottom of the agreement regarding insurance, stating in effect, that WPPA was not waiving its position that the Fund was in effect through December of 1990. WPPA signed the agreement, and the County actually complied with the terms of the interim agreement on insurance, and only refused to sign the agreement due to the handwritten addendum. The County was not acting unilaterally in providing insurance where it entered into negotiations with WPPA once the parties realized that the Fund would not continue to cover sworn officers for the last two months of 1990. Therefore, the County did not violate Sec. 111.70(3)(a)4, Stats.

Also, the County did not violate the collective bargaining agreement or otherwise engage in conduct which would be a violation of Sec. 111.70(3)(a)5, Stats. WPPA suggests that if the County had tried more vigorously to intercede with the Fund's decision to stop accepting contributions on behalf of employes who were no longer Teamsters members, the Fund would have allowed the employes to maintain the insurance through the duration of the contract. Not only is this speculative, it is contrary to the terms of the collective bargaining agreement itself, particularly Article XIV, Section 3, which states, as noted earlier, that the County became a party to the Trust Agreement establishing the Fund, and waived notice of and ratified all actions already taken or to be taken by the trustees. The County was therefore obligated by the terms of the collective bargaining agreement to accept the actions of the Fund. Accordingly, the County did not violate the contract by its conduct in not vigorously protesting the Fund's decision to stop providing coverage for sworn officers who became WPPA members.

While WPPA also contends that the County was obligated by the contract for provide the level of benefits equal to those provided in the bargaining agreement, the bargaining agreement only states that the County shall contribute to the Fund a certain dollar amount for health and welfare coverage. There is nothing in the contract about a level of benefits which must be maintained, or how a change in insurance carriers could occur under the terms of the contract. WPPA does not claim that the County has provided less than the stated dollar amount of the contract.

The labor contract only obligated the County to make contributions to the Fund, nothing more. The contract did not provide that the County would pay the full premium to any insurance carrier for any and all coverage; it provided that the County would pay $196.02 a month to the Fund for each employe covered by the agreement. The County was unable to fulfill this obligation, because an intervening event caused the impossibility of fulfillment of this section of the contract. That intervening event was the decertification of the Teamsters

as the bargaining representative. The County did nothing to cause the impossibility of fulfillment of the contract; WPPA's raid of the bargaining unit caused it, along with the Fund's policy of not covering union members other than Teamsters members. Thus, the County fulfilled its obligations under the contract, and when a section of the contract became unenforceable and void, it entered into negotiations for interim insurance coverage for bargaining unit members. The bargaining agreement does not make the County liable for any and all expenses incurred by bargaining unit members following the extinction of the contract section providing for employer contributions to the Fund.

The Examiner has dismissed all allegations against the County and has found that the County neither made unilateral changes in the existing collective bargaining agreement nor violated the bargaining agreement.

Turning to the allegations against the Teamsters, the Examiner also finds no violation of Secs. 111.70(3)(b)1 and 4, Stats., as alleged by WPPA. WPPA is contending that the Fund is controlled and dominated by Teamsters Local 695, and that Local 695 retaliated against bargaining unit employes for the results of the election by terminating the Fund's coverage of them. The record does not bear this out.

First of all, the record shows that the Fund's trustees include two employer trustees as well as two trustees from Local 695. The Fund operates as a trust set up under Section 302 of the Labor Management Relations Act, and is administered by Fett. The Restated Agreement and Declaration of Trust of the Fund (Exhibit #10) show that the Fund is set up for Teamsters Local 695 and employers, and under Article 1, Section 1.2(b), other labor organizations may participate in the fund "only upon prior approval of the Trustees." 4/ If the two Teamsters trustees on the Fund would have given approval for WPPA members to participate in the benefits of the Fund, the two employer trustees would also have to agree. There is no evidence that the two employer trustees would have agreed to continue coverage for WPPA members, and indeed, the record shows that the Fund had already determined that as a matter of policy that it would exclude other unions from participating in the Fund.

The Fund determined well before any rival union activity by WPPA in Columbia County that it was vulnerable to legal challenges or state regulation by providing insurance to anyone, and that to avoid to challenges to its operations as a Taft-Hartley trust fund, it would limit its coverage to Teamsters members only. Thus, the record shows that the Fund's decision to terminate coverage to sworn officers of the County was not in retaliation for those employes having selected a rival union. The Fund acted in accordance with a predetermined policy adopted in the spring of 1990 which was a response to the threat of regulation. Therefore, there is no evidence that Local 695 retaliated against bargaining unit members for their choice of WPPA in the election. WPPA has failed to demonstrate that the Teamsters have violated Sec. 111.70(3)(b)1, Stats.

When WPPA tendered union dues to Teamsters and those dues were returned, Teamsters was acting properly under the principles of Gateway, where Teamsters would not be entitled to receive money for union dues, as a contract provision running to the benefit of the former bargaining agent would be considered extinguished and unenforceable upon the selection of the new bargaining agent. Thus, it was proper for Teamsters to refuse the offer to the dues from WPPA, and in doing so, Teamsters may not be held to have acted in a manner which coerced or intimidated municipal employes in their rights.

WPPA suggests that the Teamsters may have acted improperly by inaction,

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4/ Exhibit #10, page 3.

as it suggested that the County's inaction and acquiescence in the Fund's determinations was improper. WPPA noted that the Teamsters did not challenge the Fund's decision to discontinue coverage for the sworn officers. Sec. 111.70(3)(b)1 makes it a prohibited practice for a municipal employe, individually or in concert with others, to coerce or intimidate a municipal employe in the enjoyment of his legal rights. Inaction is not coercion where there is no duty to act affirmatively on behalf of a party. A decertified union has no duty to take affirmative action to obtain benefits which it offered to employes as their representative where the employes voted to decertify that union, and the decertified union has not otherwise acted in any intimidating or coercive manner.

WPPA also alleges that the Teamsters violated Sec. 111.70(3)(b)4, which makes it a prohibited practice for a municipal employe, individually or in concert with others, to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hour and conditions of employment affecting municipal employes. At the point in time of the alleged violation, after the election, Teamsters was no longer a party to the collective bargaining agreement, and WPPA was the successor and the party obligated to enforce and administer the substantive provisions in that agreement which inured to the benefit of covered employes, under the principles of Gateway. Therefore, Teamsters cannot be charged with violating a collective bargaining agreement to which it was not a party.

Teamsters has raised the question of whether a claim of a violation of Sec. 111.70(3)(b) can be made against a union who is not the representative of the potential complainants. Although Sec. 111.70(3)(b)1 refers to a "municipal employe," it is acknowledged that this section has been repeatedly interpreted as applying to labor organizations. 5/ Teamsters claims that as in the Burdick case, Local 695 did not represent the Complainant or Columbia County employes following October 1, 1990, and therefore was not a municipal employe within the meaning of Sec. 111.70(3)(b), and that the only claim against labor organizations which can arise under that section of the statute are those against the exclusive bargaining representative of the potential complaints. The only similarity between this case and Burdick is the fact that a respondent labor organization represents both public and private employes. However, in Burdick, the connection between the complainant and the labor organization arose where the labor organization represented the complainant in his private sector employment. In the instant case, the basis for the complaint is the relationship between the municipal employes and the labor organization that represented them in their municipal employment relationship. The Examiner finds no reason to dismiss the complaint solely on the basis that Teamster were decertified and no longer represented the municipal employes at the time of the events giving rise to the complaint.

Both the County and Teamsters have argued that the WPPA failed to exhaust the grievance procedure, and that the contractual claim should therefore be dismissed. The grievance procedure remained in full effect and force after the election, and it is possible that WPPA could have resorted to the grievance procedure. However, WPPA would have had to grieve over a section of the contract which became extinguished by the election of WPPA as the bargaining representative of employes, and WPPA had to quickly enter into negotiations over replacement of insurance benefits in order to protect the employes it represented. WPPA could not grieve a contractual provision which it just negotiated and signed, but it could attempt to preserve its position that the

5/ Burdick v. Beatty et al., Dec. No. 16277-C (Examiner Henningsen, 10/80).

Fund remained in effect during the full term of the bargaining agreement by raising the instant complaint.

Teamsters asks for an award of attorney fees, calling the complaint a frivolous action. The test for the availability of attorney fees is strict, and this extraordinary remedy warranted only in exceptional cases, where defenses raised are frivolous as opposed to debatable. 6/ In this case, as the Respondent is asking for attorney fees, the allegations of the complaint would have to be deemed frivolous as opposed to debatable. This is a unique case. Fett had never seen a situation like this one in his 18 years as administrative manager to the Fund, as normally a rival union comes in when a bargaining agreement has concluded, although he had seen an overlap once or twice. The Complainant has raised unique questions about the nature of the rights and respective responsibilities of the parties, and the Examiner does not find the Complaint to be frivolous and has denied the request for attorney fees.

Dated at Madison, Wisconsin this 23rd day of January, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

6/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).