STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY, Complainant, vs. BROWN COUNTY SHERIFF'S NON-SUPERVISORY LABOR ASSOCIATION, Respondent.	Case 554 No. 51978 MP-2971 Decision No. 28289-A

Appearances:

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, 333 Main Street, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of Brown County.

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305-1015, appearing on behalf of Brown County Sheriff's Non-Supervisory Labor Association, Inc.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Brown County filed a complaint with the Wisconsin Employment Relations Commission on December 19, 1994, alleging that Brown County Sheriff's Non-Supervisory Labor Association had committed prohibited practices in violation of Sec. 111.70(3)(b)3, Stats., by refusing to execute a collective bargaining agreement previously agreed upon. On January 23, 1995, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on February 27, 1995, in Green Bay, Wisconsin. The parties filed briefs serially, the last of which was received on June 12, 1995. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Brown County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 201 West Walnut Street, P. O.

Box 23600, Green Bay, Wisconsin 54305-3600.

2. Brown County Sheriff's Non-Supervisory Labor Association, Inc., hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative of non-supervisory sworn employes of the County's Sheriff's Department. Its offices are located at 414 East Walnut Street, Suite 216, P. O. Box 1015, Green Bay, Wisconsin 54305.

3. In 1993, the parties were engaged in negotiations for a 1993-94 collective bargaining agreement. Richard Schadewald, the Chairman of the Public Safety Committee, got the parties to sit down and try to reach an agreement before the end of 1993. On December 6, 1993, Mr. Schadewald met with members of the Association including John Toonen, Association President, Patrick Gilson and Gregory Rabas at the Village of Howard office and communicated by phone and facsimile with the Sheriff, Mike Donart, and Human Resources Director, Wayne Pankratz, and Chief Deputy Gary Pieschek, who were located at the law enforcement center. During the course of discussions that evening the County faxed a proposal to the Association on Article 11. Promotions, which contained a section b) which provided as follows:

> b) All officers who attain or exceed the minimum qualifying score for the combination Sergeant exam stated above, will then proceed to an interview with an Internal Assessment Panel. This Assessment Panel will be composed of three (3) representatives from the Sheriff's Department in management positions, one (1) representative from Human Resources and a Sergeant selected by the Non-Supervisory Association. Should the Non-Supervisory Association choose to not select a representative or should their representative choose not to participate in this process, the process will still continue. The individual candidates for promotion participating in this process will have their qualifications assessed in the general areas of supervision, oral and written communication skills and general decision making capabilities.
>
> The participants will receive a numerical score from 0 to 15 in each area to determine a composite score for each participant. The high score and low score by area will be disregarded and the average of the two (2) or three (3) remaining scores will determine the officer's composite score. A minimum qualifying score of seven (7) must be attained to successfully participate further in this process.
>
> The Specialty Area Sergeant candidates will be interviewed by the Internal Assessment Panel with the names of all

passing candidates being forwarded to the Sheriff. The Sheriff will select up to three (3) candidates from this list for a second interview and may thereafter appoint the successful candidate.

The parties proposed modifications and changes, and it is disputed whether any agreement was reached on December 6, 1993, and if there was, it required ratification by the Association membership.

4. On December 7, 1993, Patrick Gilson met with Sheriff Donart and discussed the subject of advanced deputies and later that day, after a meeting on a disciplinary action, this discussion continued with Mr. Fred Mohr, the Association's attorney, Mr. Gilson and Mr. Rabas present for the Association and the Sheriff and Wayne Pankratz present for the County and a number of issues were discussed including some fine tuning of the promotional procedure.

5. On December 8, 1993, the Association had a general membership meeting. The record is not clear as to what occurred at that meeting, but the contract was presented for discussion including a presentation made as to what the promotional procedure would entail. A vote was taken and again it is not clear if it was for ratification of the contract or a vote in favor of acceptance of a promotional procedure that provided for an oral interview, a written test and then selection based on seniority.

6. On December 10, 1993, Mr. Mohr, for the Association, and Mr. Pankratz, for the County, signed a document entitled TENTATIVE AGREEMENT SHERIFF NON-SUPERVISORY BARGAINING UNIT, which provided in pertinent part as follows:

> 1. The Association accepts the County's proposal on promotional procedure as was modified Monday, December 6, 1993 including the following modifications:
>
> a. Seventy percent (70)% passing rate on written test,
> b. Eligibility list will be maintained for two (2) years,
> c. County will provide the Association with a percentage breakdown by area after the written test is developed, ie. (sic) 8% Wisconsin Statutes, 15% departmental policies.
>
> 2. The County will create eight (8) advanced Patrol Officer positions under the following conditions:

. . .

4. Effective upon ratification, the County will withdraw its' (sic) declaratory ruling regarding the job bulletin.

5. Effective upon ratification, the Association will withdraw its' (sic) prohibited practices which have been filed against either Brown County or Wayne E. Pankratz.

6. The parties agree to enter into a three (3) year agreement effective upon ratification for calendar years 1994-1995-1996 stating that the County will not request a declaratory ruling during the term of the Agreement on the job bulletin provision of the Agreement and the Association will not attempt to modify, remove nor arbitrate the provisions of the promotional procedure. The parties further agree that this mutual agreement will be extended by one (1) year automatically unless either of the parties informs the other prior to January 1 of the relevant year of its intention to terminate the agreement.

. . .

8. The Company and the Association agree that a hold harmless provision will be added to the dues deduction procedure.

9. The Association agrees to accept the County's 1994 fiscal offer of 2.56% total package which will break down to:

   a. 2.92% wage increase,
   b. No insurance increases (health, dental, life),
   c. Increase the dollar amount from the 1993 Agreement by 2.92% for retirement purposes.

This agreement outlines all of the terms and conditions of this tentative agreement which was ratified by the Sheriff's Non-Supervisory Association on Wednesday, December 8, 1993, by a vote of 55-13-1. The specific language for promotional procedure, advanced Patrol Officers, compensatory time and the letter of agreement referred to in Number 6 above, will be drafted by the parties and submitted to the Brown County Board of Supervisors at its' (sic) December 15, 1993 meeting.

7. Mr. Mohr sent a fax dated December 10, 1993, to Mr. Pankratz which stated, in part, as follows:

> I have reviewed the Tentative Agreement that you have sent over regarding the Sheriff Non-Supervisory Bargaining Unit. There are a couple of clarifications that I would suggest.

No changes were suggested to the promotional procedure language.

Mr. Mohr sent another fax dated December 14, 1993, to Mr. Pankratz which stated, in part, as follows:

> I met with the full committee yesterday to go over the Tentative Agreement in regard to the contract. There were a number of questions regarding implementation of the agreement and one objection to a specific item in the Tentative Agreement. I do not believe we should incur much difficulty in resolving the issues, however. They are:
>
> 1. Compensatory Time. The Tentative Agreement at paragraph 3 indicates that compensatory time balances must be used by the end of 1994. If you recall, in our conversation regarding existing compensatory time grievances we had agreed in Sheriff Donart's office that the 24-hour carryover could be carried over ad infinitum. This item is the only one in the Tentative Agreement which the committee believes is in error.
>
> . . .
>
> 5. Promotional Procedure. Three questions arose regarding the mechanics of the promotional procedure. They are:
>
> a. Development of Oral Test. We believe the language in the agreement is unclear as to who will be responsible for developing the oral test. Presumably, the Wisconsin City/County Testing Service will be doing so but this is not clear from the language of the contract. We would recommend that

the Wisconsin City/County Testing Service prepare the test.

b. Oral Interview Board. A question arose as to what training would be given to members on the Oral Interview Board. Members of our committee feel that it is imperative that members of the Board receive proper training in order to properly assess candidates. I am suggesting that we agree that members of the Board receive training at Fox Valley or Lakeshore Technical College. I believe there is a one or two day seminar that is offered from time to time.

c. Timing of Testing Procedure. The Sheriff has handed out the new policy and procedure manual but officers will not complete training on the manual until sometime in March. The committee feels that it is imperative to delay testing until such time as all officers have had the opportunity to complete their policy and procedure manual training. The Sheriff has intimated that he wants to have a test as soon as possible but given the career impact to individuals we strongly believe that the training should be completed first.

8. On December 15, 1993, Mr. Pankratz responded to Mr. Mohr as follows:

This letter should be a written recitation of our phone conversation this morning with respect to your December 14th letter sent via facsimile. I will use your letter as an outline in responding to these points:

. . .

5) Promotional Procedures -

a) Development of oral tests: the County can assure the employees that the situations being developed for the oral tests will be prepared by an outside firm rather than internal county personnel. However, rather than

locking ourselves into the Wisconsin City/County Testing Service, the County reserves the right to utilize a variety of vendors or institutions.

b) Oral Interview Board: Individuals participating on the oral interview board will receive training prior to their participation, however, the County will probably bring a trainer to Brown County rather than have the trainees travel to an outside county site. It is also the intention of the County to provide refresher training for those serving on the panel prior to the establishment of new lists each subsequent two-year period.

c) Timing of testing procedure: We can agree that we will delay the testing until the officers have completed the training on the new policy and procedure manual which as you state should occur some time in March.

I believe that this resolves or succinctly states all the positions and concerns raised in your above letter. However, I am sure there will be additional questions as we proceed through this new process. As long as we keep the lines of communication open, I believe we will be able to successfully work through this new procedure.

9. On December 15, 1993, the County's Board of Supervisors ratified the tentative agreement including the following language on Promotions: Article 11, b):

b) All officers who attain or exceed the minimum qualifying score for the combination Sergeant exam stated above, will then proceed to an interview with an Internal Assessment Panel. This Assessment Panel will be composed of three (3) representatives from the Sheriff's Department in management positions, one (1) representative from Human Resources and a Sergeant selected by the Non-Supervisory Association. Should the Non-Supervisory Association choose to not select a representative or should their representative choose not to participate in this process, the process will still continue. The individual candidates for promotion participating in this

> process will have their qualifications assessed in the general areas of supervision, oral and written communication skills and general decision making capabilities. These questions will all be objective situations.
>
> The participants will receive a numerical score from 0 to 15 in each area to determine a composite score for each participant. The high score and low score by area will be disregarded and the average of the two (2) or three (3) remaining scores will determine the officer's composite score. A minimum qualifying score of seven (7) must be attained to successfully participate further in this process.
>
> The Specialty Area Sergeant candidates will be interviewed by the Internal Assessment Panel with the names of all passing candidates being forwarded to the Sheriff. The Sheriff will select up to three (3) candidates from this list for a second interview and may thereafter appoint the successful candidate.

10. On December 17, 1993, Mr. Pankratz sent Mr. Toonen a letter which stated, in part:

> Now that the contract for 1993-1994 has been ratified, Brown County will start to process the retroactive checks for all affected officers for 1993. As you know the dues deductions that were not withheld between the months of August through December, will be deducted from the retroactive check. In order to process this in an appropriate manner, I would appreciate it if you or another designated official from the Union would please certify to me the names and specific amounts of dues to be deducted from each officers (sic) retroactive check.

By letter dated December 20, 1993, Mr. Mohr withdrew three complaints filed with the Commission in accordance with the Tentative Agreement.

11. On or about April 7, 1994, Mr. Pankratz sent a copy of the 1993-94 agreement to Mr. Mohr for review and signature. On May 12, 1994, Mr. Mohr sent a letter to Mr. Pankratz which stated as follows:

We have reviewed your draft of the 1993-1994 contract and would recommend a few changes in that document.

The first changes we are requesting involve lines 19 and 25 of the draft. In three places the word "contract" was changed to "agreement". Because this was never discussed, we would request that the original language be utilized.

In line 146, our committee would like a clarification contained in the language. We would recommend changing the clause which reads "positions of Court Sergeant" to "positions of Court Sergeant (2)". We believe it is necessary to specify that two Court Sergeant positions were designated to be filled upon straight seniority.

In line 154-156, there is no indication of how long before the testing the Association will be given a breakdown by area. Concern has arisen that the breakdown will not be given until the day of the exam. Consequently, we would request that the language would be changed to:

> "The County will provide the Association as well as individual officers with a percentage breakdown by area after the test has been developed <u>but not less than 30 days prior to the test</u>, i.e. 8% Wisconsin Statutes, 15% Brown County departmental policies."

We would also ask for a clarification in line 193. We would recommend that it be changed to read ". . . they will return to their previous rank and <u>job bulletin</u> position."

We are reiterating our understanding and intention regarding the meaning of lines 109-112. As we had previously indicated to you, it is our belief that an officer may sign a job bulletin position outside of the patrol area and not be required to serve as an Advanced Patrol Officer if assignment is by inverse seniority.

Finally, the contract itself does not make mention of paragraph 6 of our December 10, 1993, Tentative Agreement. We understand that you were reluctant to include that portion of our agreement in the body of the contract and we are agreeable to a sidebar letter. I am enclosing a draft of that proposed sidebar letter for the Sheriff's signature and your own.

Please let me know if the requested changes in your original draft are acceptable and I will have it properly executed.

Mr. Pankratz responded by a letter dated June 13, 1994, as follows:

> I am in receipt of the aforementioned correspondence and will, as per your letter, change the word from "Agreement" back to "contract". You are correct, we did not discuss this change and therefore, the original language should be utilized. However, we will specifically use that same rationale for the changes that you are proposing on line 146, lines 154-156, and line 193. Since we did not discuss these positions and/or changes, they will not be included in the contract.
>
> With respect to the Advance Patrol Officer, I believe we have clarified this in earlier correspondence; thus, there is no need for your reiteration in your first paragraph on page 2.
>
> Finally, the tentative agreement that we signed indicating the provision with respect to the Job Bulletin and Promotion Procedure, did not make any mention of the inclusion of that language in the contract nor did it indicate a side bar letter. If we are to draft a side bar letter, you and the bargaining unit must understand that Brown County and the Non-Supervisory Association would sign off on that letter; however, since there was no mention of the sheriff ever being included in the tentative agreement, the format which you drafted is not acceptable. Consequently, we will not sign any type of letter with respect to this topic which includes the Sheriff. Please let me know how you would like to proceed with this topic. However, I believe with a few minor modifications, your document could be acceptable.
>
> I will make the necessary changes in our original contract document that I have indicated in this correspondence, and a copy of that revised document will be sent to you to be properly executed.
>
> Thank you very much for your consideration of this information.

Mr. Mohr responded by letter dated June 29, 1994, which stated as follows:

> I am in receipt of your letter of June 13, 1994. Please go ahead and

prepare the contract as indicated in your letter. I merely was attempting to suggest clarification revisions and did not intend to suggest any substantive changes in our agreement.

I must again reiterate, regarding the Advanced Patrol Officer position, we retain our belief that an officer may sign a job bulletin position outside of the patrol area and not be required to serve as an APO if assigned to the position by inverse seniority. I understand that the County may take a contrary position and that question will need to be resolved if it arises in the future.

Regarding the sidebar letter I had suggested, I have revised the same and have included a copy for your signature. You will note on the agreement I have deleted reference to the Sheriff.

You should also note that I have written directly to Sheriff Mike Donart regarding this sidebar letter. It would appear that you are asserting that the Sheriff has some constitutional powers which the County can not (sic) curtail through the negotiation process. Certainly I am not in disagreement on this point and consequently, I have provided Sheriff Donart with a facsimile of the enclosed agreement for his signature directly. The sidebar letter memorializes a verbal agreement I had reached with the Sheriff and the County need not be a party to that agreement.

I assume in the future if matters infringe upon a professed constitutional power with the Sheriff, that I should deal directly with the Sheriff in negotiating accommodations in regard to that power.

12. On July 25, 1994, the parties signed the following sidebar agreement:

AGREEMENT

WHEREAS, Brown County, and the Brown County Non-Supervisory Labor Association having reached an agreement in regard to a labor contract for the years 1993-1994; and

WHEREAS, in conjunction with these parties reaching said agreement it is their desire to set forth herein a further agreement regarding the job bulletin provision and the promotional procedure of the labor contract.

NOW, THEREFORE, IT IS AGREED by the parties hereto:

1. That Brown County shall not request a declaratory ruling of any commission or court of competent jurisdiction regarding the job bulletin provision of the labor agreement. It is further agreed that Brown County shall abide by the contractual requirements of the said job bulletin provision during the term of this agreement.

2. The Association agrees that it shall make no attempt to modify, remove or arbitrate any provisions of the promotional procedure contained in the labor agreement during the term of this agreement.

3. The parties agree that the term of this agreement shall be January 1, 1994 to December 31, 1996. The parties further agree that this agreement shall automatically extend itself for one (1) year periods unless either of the parties informs the other of its intention to terminate the agreement at least 365 days prior to the relevant termination date or extension thereof.

Dated this 25 day of July, 1994.

13. Sometime during the week of September 26, 1994, Mr. Pankratz's secretary checked on the status of the contract as the Association had not returned a signed copy. On or after October 3, 1994, the Association informed Mr. Pankratz they would not execute the collective bargaining agreement because of the language in Article 11, b). On October 11, 1994, Mr. Mohr sent Mr. Pankratz a letter which stated, in part, as follows:

> At this time my committee is unwilling to execute the 1993-1994 labor agreement. During the course of the past several months, the internal assessment panel as cited in your proposed language has taken form. This panel and the procedure used by it is not in conformity with our understanding of the agreement. We believe that the agreement reached involved an oral interview board in the traditional sense. It appears that any discussions which occurred regarding an oral interview board and/or an internal assessment panel primarily occurred on December 6, 1994. Unfortunately, the parties did not meet face to face at that time but instead relied on an

> intermediary to shuffle proposals back and forth. The intermediary's recollection is that the discussion involved the use of an oral interview board and not the internal assessment panel involved in your proposal. Specifically, the contract language you suggest would require a candidate at the oral interview stage to submit to further written examination. It was not contemplated by our committee when the general concepts were discussed that the oral interview board would require anything other than an oral response to oral questions asked. The assessment center essentially was not discussed by Schadewald, nor was it agreed to by the committee, nor was it authorized by our general membership vote.

By letter dated October 12, 1994, Mr. Pankratz responded as follows:

> With respect to the issue of the 1993-94 labor agreement, please be advised that Brown County has no intention at this point of now negotiating the subject of a tentative agreement which was subsequently ratified by both parties. I cannot state how you nor other union members sold the 1993-94 labor agreement to the membership, but I clearly know what was the subject of our proposal, what was stated in our proposals, and how our proposals were modified. Your concerns about an oral interview board were raised after the tentative agreement was reached and executed.

The Association did not execute the agreement and the County filed the instant complaint on December 19, 1994.

14. The parties reached a tentative agreement on or about December 8, 1993, and this agreement was ratified by the Association on December 8, 1993, and by the County on December 15, 1993. The Association refused and continues to refuse to execute the agreement.

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

CONCLUSION OF LAW

The Association by refusing, and continuing to refuse to execute a previously agreed-upon and ratified collective bargaining agreement, has violated and continues to violate Sec. 111.70(3)(b)3 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Brown County Sheriff's Non-Supervisory Labor Association, Inc., its officers and agents, shall immediately:

1. Cease and desist from refusing to execute the collective bargaining agreement it agreed to and ratified in December, 1993.

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

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

(a) Immediately sign and execute the collective bargaining agreement which it agreed to and ratified in December, 1993.

(b) Post in its offices, meeting halls and all places where notices to its members are customarily posted, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by an official of the Association, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Association to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin, this 8th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

APPENDIX "A"

Notice to All Members

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

1. WE WILL immediately sign and execute the collective bargaining agreement which we agreed to in December, 1993.

2. WE WILL NOT in any other or related manner violate the provisions of the Municipal Employment Relations Act.

Dated this _____ day of _____, 1995.

By _____
Brown County Sheriff's Non-Supervisory Labor Association, Inc.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF

AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

BROWN COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the County alleged that the Association violated Sec. 111.70(3)(b)3, Stats., by its refusal to execute a tentative agreement which had been ratified by both parties. The Association answered denying that it refused to execute a collective bargaining agreement previously agreed upon.

COUNTY'S POSITION

The County contends that the Association violated Sec. 111.70(3)(b)3, Stats., because the parties reached a tentative agreement and the Association refused to execute it. The County argues that the parties reached a tentative agreement reflecting their agreement on Article 11, b). It points out that the parties executed a tentative agreement on December 10, 1993, and the text of Article 11, b) was the same as faxed to the Association on December 6, 1993, with the addition of the final sentence, "These questions will all be objective situations." It submits that the promotional procedure language was presented to Mr. Mohr by Mr. Pankratz on December 10, 1993, and is referred to by Mr. Mohr in his letter of December 14, 1993. It notes that Article 11, Section b) always referred to an Internal Assessment Panel. It claims that any allegation by the Association that the parties agreed to some sort of "oral interview board" rather than the Internal Assessment Panel must be discounted as there is no document in the record referencing anything other than the Internal Assessment Panel. Additionally, according to the County, Pankratz's December 15, 1993 letter which refers to an "oral interview board" was merely a response to Mohr's December 14, 1993 letter and cannot be found to alter the language of the tentative agreement and "oral interview board" would not be consistent with the other language of Article 11, Section b).

The County asserts that the facts establish that there was an agreement in that Mohr executed the Tentative Agreement which incorporated the promotional procedure language from the County's December 6, 1993 proposal and the Association ratified the Tentative Agreement on December 8, 1993.

The County observes that it ratified the contract with the text of Article 11 as reflected in the Tentative Agreement. It submits that the Association's contention that the County's Board did not have the change in Article 11 before it ratified it is erroneous. It points out that the language was attached to the labor agreement resolution when the County Board ratified it on December 15, 1993.

The County contends that the Association had ample opportunity to object to Article 11, b) and it never brought up any problem even after receiving the entire agreement on April 7, 1994. It observes that the Association's legal representative, Mr. Mohr, executed the Tentative Agreement on December 10, 1993, and never wrote to the County from that date through September, 1994, with respect to any objections to Article 11, b).

The County urges that the Association's arguments based on the sidebar agreement should be disregarded. The County seeks rejection of the Association argument that the County did not execute the sidebar as an excuse for not executing the agreement because the County did execute the sidebar. It maintains that the Association's claim that it did not receive the executed sidebar is not credible. It notes that there was no request for it and it seems logical that if the Association did not receive it, it would have asked for it. Additionally, it points out that Mr. Mohr's October 11, 1994 letter makes no mention of the sidebar agreement. It argues that the sidebar had nothing to do with the Association's failure to execute the agreement. The County concludes that the Association should be found to have failed to bargain in good faith and an order be issued compelling the Association to execute the 1993-94 contract.

ASSOCIATION'S POSITION

The Association contends that the general legal principles applicable to this case include the duty to execute an agreement once it is found that an agreement was reached, that it is bad faith to refuse to execute an agreement premised on draftsmanship versus substantive issues and the agreement must be final and not contingent upon reaching agreement in other areas.

The Association believes that agreement was never reached with regard to the promotional procedure. It claims that it believed that the final language would include an oral interview board which would administer an oral interview. It insists that the language of the proposed draft includes an internal assessment panel which would administer a test far exceeding the parameters of an oral interview. It argues that the basic issue was never resolved by the parties and no final agreement was reached. The Association believes that its refusal to sign is justified where the language is substantively different than its understanding of the agreement. The Association also argues that the full membership did not ratify the Tentative Agreement because the membership meeting was two days before the Tentative Agreement was drafted.

The Association maintains that no agreement was reached on the promotional procedure. It alleges that no agreement was reached on the language on December 6, 1993, citing the testimony of Richard Schadewald, and no agreement was reached on December 7, 1993, citing the testimony by Mr. Pankratz. The Association asserts that at the December 8, 1993 membership meeting, no specific language on the promotional procedure was presented but left for further negotiation. The Association also relies on Mr. Pankratz's letter of December 15, 1993, wherein he referred to an "oral interview board" and "development of oral test" as supporting the Association's position that

there was no meeting of the minds. It claims that it

never received the comparative language submitted to the County Board. It argues that the membership authorized a procedure of a written test, oral test and selection by seniority and the language provides for more than an oral test and does not comport with the parties' agreement, and it concludes that it is not obligated to sign a contract which contains a substantial variance from the agreement reached.

The Association maintains that its refusal to execute is not based on mere draftsmanship but rather on a dispute over the substantive issues. The Association notes that the language of the contract is substantially identical to that offered by the County on December 6, 1993, and it claims that that language was clearly rejected by the Association. It insists that no agreement was reached on December 7, 1993, and although a tentative agreement was reached on December 10, 1993, the parties deferred the actual language to be contained in the promotional procedure and the County ratified language never agreed to by the Association. It alleges that the Association's committee members believed an oral interview would be limited to oral questions asked and answered and not the internal assessment panel contemplated by the County. This difference, the Association urges, is not merely a dispute over draftsmanship but over a substantive issue and its refusal to sign language which it does not believe it agreed to is appropriate.

The Association claims the agreement is not final because the December 10, 1993 Tentative Agreement was never ratified. The Association claims that Mr. Pankratz provided the draft of the language to the County Board but failed to provide it to the Association and when queried about the "oral test and oral interview board," he responded in kind using the identical language. It argues that a reasonable man would have alerted the other side of his intention concerning an internal assessment panel rather than calling it an oral interview board. It asserts that as the specific language on this issue was never hammered out, the agreement cannot be considered final.

The Association insists that the County's claim that it had the text of Article 11 on December 10, 1993, is not credible. It points out that the text of Article 11 was typed on December 10, 1993, at 9:34 a.m. It claims that it would be impossible for Mr. Pankratz to proof this language, deliver it to Mr. Mohr's office, for Mr. Mohr to review it and to suggest changes in a letter drafted and faxed that makes reference to being contacted between 10:00 a.m. and 11:00 a.m. It states that the only conclusion that can be reached is that Mr. Pankratz did not provide the promotional language that day or at any other time in person or by fax or mail. It points out that the Tentative Agreement states that the promotional language will be drafted by the parties and submitted to the County Board. It submits that no agreement was reached and, at best, the parties misunderstood what the other party believed the agreement was, i.e., there was no meeting of the minds.

The Association does not deny that Mr. Mohr executed the Tentative Agreement on December 10, 1993; however, the Tentative Agreement did not incorporate the promotional procedure language from the County's December 6, 1993 proposal. No agreement was reached

on December 6, 1993, and it was physically impossible for Mr. Pankratz to deliver the language of Article 11 together with the Tentative Agreement on December 10, 1993. It submits that it could not approve language it did not receive. The Association maintains that it did not receive the language of Article 11 until March, 1994, and the language was objected to time and again during the course of the next several months until the matter came to a head.

The Association rejects the County's assertion that the Association had the opportunity to object to Article 11 after April, 1994, but did not do so. It states that Mr. Mohr objected on May 12, 1994, and the County refused to make the suggested changes in whole and Mr. Mohr again made a request for clarification on June 29, 1994, and became more emphatic about his objections in a letter of July 20, 1994. It claims that the correspondence passing during this time shows that the parties did not have a meeting of the minds on what constituted an oral interview and without a mutual understanding, no agreement could have been reached.

The Association argues that a finding that it committed a prohibited practice by refusing to sign this contract would unjustly reward the surreptitious conduct of the County's negotiator and impose on the Association members a promotional procedure which was specifically rejected by the bargaining committee and would encourage future misconduct on the part of the County. It concludes that the County is attempting to use the prohibited practice procedure as a substitute for interest arbitration and it should not be allowed to do so. It urges dismissal of the County's complaint.

COUNTY'S REPLY

The County insists that the Association's arguments are without merit. It submits that the main focus of the Association's arguments is that there was no meeting of the minds, and thus, no contract. It notes the Association makes four arguments in support of its position: 1) The promotional procedure language was not attached to the Tentative Agreement; 2) The Internal Assessment Panel was objected to by Mr. Mohr as early as December 14, 1993; 3) The Association never ratified the agreement, only agreeing to continue negotiations over the promotional procedure; and 4) The Association objected to the Internal Assessment Panel all along.

The County claims the Association was aware of the text of Article 11 in December, 1993. It insists that the promotional procedure language was attached to the Tentative Agreement delivered to Mr. Mohr by Mr. Pankratz on December 10, 1993. It argues that while the Association argued that it was physically impossible to have the procedure typed and responded to by Mr. Mohr by 10:00 a.m., that probably did not occur and Mr. Mohr in his testimony admitted he had Article 11 when he wrote the December 10, 1993 letter.

The County maintains that Mr. Mohr received the promotional procedure language which was submitted to the County Board. It contends that the Association presented no evidence that it

did not receive the comparison language and no objection was made until the hearing in this matter. It notes that if Mr. Mohr had not received the language until March and found it different from the December 15, 1993 language, he would have been upset, yet there was no objection until October, 1994.

The County points out that there was no change in the language from the December 6, 1993 language presented to the Association and no counterproposals were ever made on this language, although other portions were "clarified." It notes that the Association made much of the exchange of correspondence on December 14 and 15, 1993, referring to an "oral test" and an "oral interview board" and claiming these constituted an objection; however, neither an objection nor an acknowledgement ever occurred. It alleges that the parties were merely discussing development and training issues and nothing more and there was no express or implied objection to the Internal Assessment Panel.

The County states that the Association ratified the Tentative Agreement. The County bases this on the language of the Tentative Agreement which provides that it was ratified by a vote of 55-13-1. It further notes that if the Association merely voted to continue negotiations, there was never any request to continue negotiating and further negotiations never occurred.

The County points out that the Association made no objection to the Internal Assessment Panel until October, 1994. It asserts that not only were there no objections to this language but there were affirmative written statements that an agreement was reached. It urges a conclusion that the Association's contention that no agreement was reached simply does stand up to scrutiny. It claims that because the sidebar agreement prevents the Association from grieving the promotional procedure, the Association has attacked the existence of the contract itself, but to do so, it must rewrite history and the evidence of history precludes such a rewrite. It asks that the Association be found to have failed to bargain in good faith and be ordered to execute the 1993-94 contract.

DISCUSSION

Section 111.70(3)(b)3, Stats., provides that it is a prohibited practice for a municipal employe, individually or in concert with others:

> **3.** To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

It is undisputed that the Association has refused to execute the County's draft of the 1993-94 collective bargaining agreement. The Association's refusal to sign is based on a number of defenses. The first is that it never reached an agreement regarding the promotional procedure language in the contract. The language in dispute appears in Article 11, b) of the contract. This language was presented to the Association on December 6, 1993. 2/ The parties signed a tentative agreement on December 10, 1993, and paragraph 1 states as follows:

> 1. The Association accepts the County's proposal on promotional procedure as was modified Monday, December 6, 1993 including the following modifications:
>
> a. Seventy percent (70)% passing rate on written test,
> b. Eligibility list will be maintained for two (2) years,
> c. County will provide the Association with a percentage breakdown by area after the written test is developed, ie. (sic) 8% Wisconsin Statutes, 15% departmental policies. 3/

A review of the 1993-94 agreement proposed by the County reveals that all these were incorporated into the agreement. 4/ The Association states that it never received the comparative language; however, the objection to signing the contract is based on paragraph b) and the Association had this language with respect to the internal assessment panel since December 6, 1993. The Association's and the County's reference to an "oral test" and "oral interview board" in their exchange of letters on December 14 and 15, 1993, relates to who develops the test and the training given to those doing the testing and does not constitute an objection to the express language of the contract. 5/ No objection was made until October 11, 1994, that the internal assessment panel language had not been agreed to. 6/ The Association claims there was no meeting of the minds on this language and that this was a mutual misunderstanding. The evidence does not support this argument. If the

---

2/ Ex. 1.

3/ Ex. 3.

4/ Ex. 5.

5/ Exs. 2 and 16.

6/ Ex. 6.

Association wanted only an oral interview, it could have clearly communicated this to the County, yet there was no counterproposal to this effect and the Association's alleged desire was never made clear to the County. The Association may have read Article 11, b) as merely providing an oral interview but this is not a mutual mistake; rather, at most, it is a unilateral mistake. Merely because the full implications of the language were not realized by the Association or the language did not square with the unilateral expectations of the Association is not justification to refuse to execute the agreement after it had indicated that it accepted this language. 7/ If the Association did not understand all the implications or felt that the County was interpreting the language in a manner that exceeded the parties' agreement, the remedy is not to refuse to execute the agreement, rather, the matter must be taken to a grievance arbitrator pursuant to the contractual grievance procedure. The Association's assertion that it agreed only to an oral test is not supported by the evidence. In his December 14, 1993 letter, Mr. Mohr stated that there was one objection to a specific item in the Tentative Agreement and that was on compensatory time, and that was the only one in the Tentative Agreement "which the committee believes is in error." 8/ There was no objection to the internal assessment panel in Mr. Mohr's letter of May 12, 1994. 9/ In his June 29, 1994 letter, Mr. Mohr stated as follows:

> Please go ahead and prepare the contract as indicated in your letter. I merely was attempting to suggest clarification revisions and did not intent to suggest any substantive changes in our agreement. 10/

In the sidebar agreement dated July 25, 1994, the parties agreed that they have reached an agreement. 11/ The internal assessment panel language first became an issue in July, 1994, when its interpretation came in question, but only because a large number of grievances might be filed. 12/ The language was first cited as a reason not to execute the agreement when its full implications were realized as noted in Mr. Mohr's letter of October 11, 1994, wherein he states:

7/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 397.

8/ Ex. 2.

9/ Ex. 10.

10/ Ex. 12.

11/ Id.

12/ Ex. 14.

. . . This article involves the second step of the promotional procedure and refers to an internal assessment panel. The

> committee believes that an internal assessment panel was not agreed to but instead that an oral interview panel was discussed and agreed to. 13/

The December 6, 1993 language was never changed and it is clear that the Association accepted this language and raised no objection to it for many months. No counterproposals were made and any objections or suggestions had to do with other matters. No objections were to this specific language. The objections involved interpretation of the language and not the language per se. The Association's claim that it did not receive Article 11 on December 10, 1993, is not material and is not a basis to change the result herein because the Association had knowledge of it and probably had it. 14/ There is no evidence that the Association asked for it within a few days of December 10, 1993, and, in fact, it responded to it on December 14, 1993. 15/ Thus, this argument is not persuasive. The Association's reference to the last sentence of the Tentative Agreement in support of its argument that it agreed in concept to the promotional procedure but not to language is misplaced in that the language in question was already drafted and it was modifications that would be drafted and, in fact, they were pursuant to Mr. Mohr's letters of December 10 and 14, 1993, and Mr. Pankratz's letter of December 15, 1993. 16/

It is concluded that an agreement was reached on this language as well as to all the other terms of a new collective bargaining agreement.

The Association asserts that the agreement was not final because it never ratified it. This argument is directly contradicted by the December 10, 1993 agreement signed by the parties which states:

13/ Ex. 6.

14/ Tr. 13.

15/ Ex. 2.

16/ Exs. 2, 4 and 16.

This agreement outlines all of the terms and conditions of this tentative agreement which was ratified by the Sheriff's Non-Supervisory Association on Wednesday, December 8, 1993, by a vote of 55-13-1. 17/

17/ Ex. 3.

Additionally, the Association withdrew prohibited practices complaints in accordance with the Tentative Agreement. 18/ These actions establish that ratification occurred. Thereafter, the County processed retroactive checks and started dues deduction. 19/ It wasn't until some nine to ten months later that the Association asserted that it never ratified any contract. It would not constitute good faith bargaining to accept the benefits under an agreement with knowledge that no agreement had been reached and to delay making this known to the other side while reaping the benefits of the agreement and later assert that no agreement was reached due to a lack of ratification. In City of Greenfield, Dec. No. 13051-A (Greco, 4/25), where it was alleged that there was a deliberate delay in clearing up a misunderstanding as to what the parties agreed to in order to get the benefits under the new agreement, the Examiner stated:

> . . . If that were the case, Respondent's deliberate delay in clearing up the alleged misunderstanding, until such time as it first reaped the benefits of the new contract, was the very antithesis of good faith bargaining and in fact could well constitute an unlawful refusal to bargain. (footnote omitted)

Here, the Association said it ratified the agreement, acted as if it ratified it and reaped the benefits. To later deny ratification is bad faith bargaining.

Upon the basis of the facts presented, it is concluded that the parties' reached a tentative agreement which was ratified by both parties and the agreement drafted by the County incorporates all the terms of the Tentative Agreement and the Association's failure and refusal to execute it constitutes a violation of Sec. 111.70(3)(b)3, Stats. The Association is therefore directed to execute the agreement and to post the appropriate notice and to notify the Commission of its actions taken to comply with the Order.

Dated at Madison, Wisconsin, this 8th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

18/ Exs. 18, 19 and 20.

19/ Ex. 17.