

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WAUKESHA COUNTY EMPLOYEES UNION,
LOCAL 1365, AFSCME, AFL-CIO, Complainant,**

vs.

COUNTY OF WAUKESHA, Respondent.

Case 153
No. 56677
MP-3445

Decision No. 29477-B

Appearances:

Ms. Christine Bishofberger, Staff Representative, and **Mr. Gregory Spring**, Research Analyst, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of Waukesha County Employees Union, Local 1365, AFSCME, AFL-CIO.

Michael, Best & Friedrich, LLP, Attorneys at Law, by **Mr. Marshall R. Berkoff**, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, and **Mr. James H. Richter**, Labor Relations Manager, Waukesha County, Waukesha County Government Center, 1320 Pewaukee Road, Waukesha, Wisconsin 53188, on behalf of Waukesha County.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Waukesha County Employees Union, Local 1365, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on July 17, 1998, alleging that Waukesha County had committed prohibited practices by refusing to bargain with the Union separately from other County bargaining units. Thereafter, the complaint was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful and on September 2, 1998, Waukesha County filed a motion to dismiss the complaint, along with supporting arguments, affidavit and exhibits. On October 1, 1998, the Union filed its response in opposition to the motion to dismiss. The Commission appointed a member of its staff, David E. Shaw, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. The Examiner issued his Order Denying Motion to Dismiss on October 19, 1998,

No. 29477-B

and set the matter for hearing. On November 18, 1998, the County filed its answer denying it had committed any prohibited practices and raising certain affirmative defenses. Hearing was held before the Examiner on November 24, 1998, in Waukesha, Wisconsin. A stenographic transcript was made of the hearing. The post-hearing briefing schedule was completed by January 14, 1999.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following

FINDINGS OF FACT

1. Waukesha County, hereinafter the County, is a municipal employer with its primary offices located at the Waukesha County Government Center, 1320 Pewaukee Road, Waukesha, Wisconsin 53188. James H. Richter has been employed by the County since September 1, 1978 and as the County's Labor Relations Manager he is responsible for collective bargaining, contract administration, employee benefits and risk management on behalf of the County.

2. Waukesha County Employees Union, Local 1365, AFSCME, AFL-CIO, hereinafter Local 1365, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, which has its principal offices at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. At the time the instant dispute arose, Christine Bishofberger was, and continues to be, the Union's District Representative representing Local 1365.

3. By letter of September 1, 1969, the Union's then-District Representative, Walter Klopp, requested that the County voluntarily recognize Local 1365 as the exclusive bargaining representative of certain of its Park and Planning Department employees. Said letter read, in relevant part, as follows:

Gentlemen:

Local 1365, AFSCME, AFL-CIO, in behalf of the Waukesha County Park Employees of the Park and Planning Commission, does hereby respectfully request recognition as the exclusive bargaining representative for all Park employees, excluding professional and technical employees, supervisors and (sic) defined in the Act, and excluding all other Waukesha County employees except as previously recognized by the County in appropriate bargaining units represented by the Union, in all matters relating to wages, hours, & other conditions of employment.

We request recognition for the Park employees in keeping with the intent and spirit of Article II, Section 2 of the agreement between the parties which allows for the amending of the agreement to include employees not currently represented.

Should the County desire proof that a substantial majority of the park employees desire representation by Local 1925 (sic), we shall be happy to present the signed application for membership cards from this group. The Park employees, for purposes of mutual interest, have joined with the Highway Department Employees. Granting recognition in this manner would be similar to the County's recognition of the Health Department Unit.

...

The County subsequently requested that the Union provide it with evidence as to the desire of the majority of eligible Park employees. The Union complied with that request and the County subsequently voluntarily recognized Local 1365 as the exclusive bargaining representative of the Park and Planning Department employees. By letter of September 24, 1969, Klopp requested that for purposes of dues checkoff and other matters the "Park maintenance employees are members of the Waukesha County Highway Department Employees, Local 1365." The Park and Planning Department employees were included in the unit represented by Local 1365.

4. The Union and the County negotiated a 1970 collective bargaining agreement covering the wages, hours and conditions of employment in the various groups of employees represented by the Union's affiliated locals. That Agreement contained "Article II - Recognition and Bargaining Units", which listed the various units that had been certified by the Wisconsin Employment Relations Commission or voluntarily recognized by the County, along with the unit descriptions, including the following:

1. The County of Waukesha recognizes the "Union" referred to herein as Wisconsin Council No. 40, County and Municipal Employees, affiliated with AFSCME AFL-CIO, and its appropriate affiliated local units of local Union No. 1365 as the exclusive collective bargaining agent on behalf of the employees of the County of Waukesha as certified by the Wisconsin Employment Relations Board or as recognized by the County of Waukesha in accordance with the following designations:

- a. All Waukesha County Highway Department employees, but excluding supervisors, office employees, and craft employees as certified by the Wisconsin Employment Relations Board, under date of June 14, 1966, herein referred to as local Union No. 1365.
 - 1) All Waukesha County Park and Planning maintenance employees, but excluding supervisors, office employees, and professional staff, as voluntarily approved at the meeting of September 12, 1969.
 - 2) Waukesha County recognizes AFSCME Council No. 40 and its affiliate No. 1365 as the exclusive bargaining agent for the employees classified as Park Maintenance Men and Greenskeepers.

. . .

Article II also contained the following provisions:

2. Should the “Union” following certification by an appropriate governmental Wisconsin Employment Relations Agency or upon recognition by the County of Waukesha become the collective bargaining agent for other employees of the County of Waukesha not heretofore included in Articles I and II hereof, it is agreed that Article II of this agreement, upon the written consent of the parties hereto may be amended to include the employee unit last certified or recognized.
3. Employees recognized in this agreement, unless otherwise herein specified or as stipulated in an appendix hereto, shall in all matters of County policy or procedure be treated as one (1) party.

The parties’ 1970 Agreement contained provisions that applied to all of the employees in the listed units and also had attached appendices that contained provisions that applied only to the employees in the specified unit. There was such a separate appendix containing provisions covering the employees of the County’s Highway Department and Parks Department, and under the “Classification Compensation Schedule” for the “Parks Department” the following classifications were listed: Park Maintenance Man I, Park Maintenance Man II, Park Maintenance Man III and Greenskeeper I.

5. In 1975, Teamsters General Local Union No. 200, petitioned the Commission for an election among:

All Waukesha County Highway Department employees, excluding supervisors, office employees, and craft employees; and all Waukesha County Park and Planning Department employees in the classifications of Park Maintenance men and greens keepers, but excluding supervisors, office employees, and professional employees.

(Case XXIX, No. 19222, ME-1203)

At hearing on said petition, the Union intervened as the current representative of the employees in the claimed unit. In the course of the proceeding, the Union alleged that the unit sought by the Teamsters was inappropriate in that it would fragment the existing collective bargaining relationship between the County and the locals affiliated with the Union that represent the various groups of employees and because the employees in the Highway Department and the employees in the Parks Department did not share a sufficient community of interest. The Union also took the position that the two groups of employees had never been considered to constitute one unit and that if units were to be combined, the appropriate unit would consist of all units then covered by the collective bargaining agreement between the Union and the County.

The Commission subsequently issued its decision in WAUKESHA COUNTY, Case XXIX on December 1, 1975, Dec. No. 14157, wherein it directed elections to be held in a unit consisting of "All regular full-time and regular part-time employees of the Waukesha County Highway Department. . ." and in a unit consisting of "All regular full-time and regular part-time employees of the Waukesha County Park and Planning Department in the classifications of Park Maintenance Man and Greenskeeper. . ." The Commission concluded as a factual matter that the existing bargaining relationship between the Union and affiliated locals and the County "developed out of mutual convenience and not as a result of any significant community of interest" among the employees in the nine existing separate units covered by the master contract at the time. Said elections were held in the two separate units. Two employees listed on the eligibility list as eligible to vote in the Park and Planning Department unit, Donald Stickles and John Lahmayer, worked as carpenters in that department at the time. On January 5, 1976, the Commission issued the following Certification of Results of Election in the two units:

Highway Department Unit

. . .

IT IS HEREBY CERTIFIED that Teamsters "General" Local Union No. 200 a/w International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, has been selected by a majority of the eligible employees of the County of Waukesha who voted in said election in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Waukesha County Highway Department, excluding confidential, professional and craft employees, supervisors, and office and clerical employees, as their representative; and that pursuant to the provisions of Section 111.70, Wisconsin Statutes, said Union is the exclusive collective bargaining representative of all such employees for the purposes of collective bargaining with the above named Municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment.

Park and Planning Department Unit

. . .

IT IS HEREBY CERTIFIED that Wisconsin Council of County and Municipal Employees, Wisconsin Council No. 40, Local Union No. 1365, AFSCME, AFL-CIO, has been selected by a majority of the eligible employees of the County of Waukesha who voted at said election in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Waukesha County Park and Planning Department in the classification of Park Maintenance Man and Greenskeeper, excluding confidential, professional and craft employees, supervisors, and office and clerical employees, as their representative; and that pursuant to the provisions of Section 111.70, Wisconsin Statutes, said union is the exclusive collective bargaining representative of all such employees for the purposes of collective bargaining with the above named Municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment.

6. Since 1975, the County and the Union have continued to negotiate the wages, hours and conditions of employment of all of the employees in the units represented by the Union's affiliated locals at the same time, resulting in a "Master Contract" covering all of those employees. The County and the Union have, at times, met to negotiate specific issues unique to a particular unit, and the Master Contract has contained separate appendices containing provisions that apply only to employees in a specific unit.

7. In 1995, the County consolidated a number of its departments, including the Park and Planning Department, to create a Park and Land Use Department. Included in the Park and Land Use Department are employees in the Park Maintenance Worker, Park Foreman and Golf Course Superintendent classifications, which are the current classification titles of

what had previously been the Park Maintenance Man and Greenskeeper classifications. In addition to the 15 Park Maintenance Workers, six Parks Foremen and three Golf Course Superintendents, there are also clerical employes, Sanitarians, an Archivist, a Museum Exhibit Technician, two Carpenters, a Lead Exposition Center Worker and an Exposition Center Worker in that department who are also covered by the Master Contract between the County and the Union. There is a total of 115 employes in the Park and Land Use Department, the Director is the administrative head of that Department and there are six divisions each headed by a manager: Parks Systems, Planning and Zoning, Land Conservation, Environmental Health, Solid Waste and Business. The Park Maintenance Worker, Park Foreman and Golf Course Superintendent classifications are in the Parks System Division.

8. The Union and the County are party to a 1996-1998 Master Contract which contains a number of appendices, each of which apply to a separate group of employes, including the following appendix:

APPENDIX TO MASTER AGREEMENT
BY AND BETWEEN
THE COUNTY OF WAUKESHA
AND
WISCONSIN COUNCIL NO. 40
COUNTY AND MUNICIPAL EMPLOYEES
AND
LOCAL UNION NO. 1365
PARKS DEPARTMENT

Conditions of employment and other matters agreed to between the Employer and Union in this Appendix shall not apply to or be a precedent for serving as a rule of course of action under any other local Union Appendix to the Master Agreement herein referred to.

PARKS DEPARTMENT

1. Hours of Work

- A. County Parks The normal work schedule for regular full-time employees assigned to County parks shall be eight (8) consecutive hours per day, Monday through Friday, scheduled from 8:00 a.m. to Noon and 12:30 p.m. to 4:30 p.m.

- B. Golf Courses The normal work schedule for regular full-time employees assigned to County golf courses shall be eight (8) consecutive hours per day, Monday through Friday, scheduled as follows:

7:00 a.m. to Noon – 12:30 p.m. to 3:30 p.m.

During the months of April through November, the time of the normal shift of the Golf Course Superintendent may be advanced by up to one hour (i.e. up to 6:00 a.m. to 2:30 p.m.) Wherever possible, employees will be notified of shift time changes at least one week in advance.

2. Temporary Foreman – An employee acting as a Park Foreman or Golf Course Superintendent shall receive the Park Foreman or Golf Course Superintendent rate provided that he works at least one (1) full day.
3. Part-time and seasonal employees shall not work in excess of forty (40) hours per week on work normally performed by regular full-time employees who are qualified and available to perform that work unless all such full-time employees are working or are unavailable for work.
4. When overtime is required at the end of the normal workday, the employer shall give as much advance notice as possible, but no less than two (2) hours except in the case of emergencies.
5. Employees assigned to park and golf course maintenance will be provided with three (3) uniform changes per week. A uniform change consists of a shirt and pants.

The wage appendices of the 1996-1998 Master Contract lists the wages for the following classifications under the heading of “Park Department”: Park Maintenance Worker, Exposition Center Worker, Golf Course Superintendent, Park Foreman, Lead Exposition Center Worker. The employees in those classifications, as well as two employees in the Carpenter classification have authorized that their union dues deductions be paid to Local 1365.

The parties’ 1996-1998 Master Contract also contains the following provisions, set forth in relevant part:

AGREEMENT

This Agreement made and entered into at the City of Waukesha, Wisconsin, by and between the County of Waukesha, State of Wisconsin, a municipal body corporate, as municipal employer, hereinafter referred to as the "County" or "Employer" and Wisconsin Council of County and Municipal Employees, Council No. 40, AFSCME, AFL-CIO, and its "Local Unions", Nos. 1365 and 2494, hereinafter referred to as the "Union" for the purpose of maintaining harmonious labor relations, improving employee efficiency and the quality of service rendered to the County and public, maintain a uniform scale of wages, working conditions, and hours among the employees, members of the Union, and to facilitate a peaceful adjustment of all grievances which may arise between the County and the employees represented by the "Union".

...

ARTICLE III

RECOGNITION AND BARGAINING UNITS

3.01 The Employer hereby recognizes the Union, referred to herein as the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, and its affiliated Local Unions, as the exclusive collective bargaining agent on matters pertaining to wages, hours, and other conditions of employment for the bargaining units described below:

1. Units Represented by Local 1365
 - a. All Waukesha County Park and Planning Department employees in the classifications of Park Maintenance Men and Golf Course Superintendents, but excluding supervisors, office employees, and professional employees, as certified by the Wisconsin Employment Relations Commission, under date of January 5, 1976, Decision No. 14157.
2. Units Represented by Local 2490 (Formerly Local 97-A and 1365-A)
 - a. All Waukesha County Institutions employees, but excluding the Superintendent, Assistant Superintendent, secretary(s), office personnel, all other employees under

clerical classifications, Registered Nurses, Licensed Practical Nurses, Social Services personnel, Laboratory Technicians, Medical Records personnel, Occupational Therapy personnel, and supervisory personnel, as certified by the Wisconsin Employment Relations Commission, Decision No. 6366.

- b. All clerical employees, Occupational Therapy Aides, Licensed Practical Nurses, and Laboratory Technicians of the Waukesha County Institutions, excluding confidential employees of the Superintendent, and all other County employees, as certified by the Wisconsin Employment Relations Commissions, under date May 21, 1968, Decision No. 8488.

3. Units Represented by Local 2494 (Formerly 1365-B)

- a. All clerical, maintenance, and custodial employees employed in the Waukesha County Courthouse, and all maintenance and custodial employees employed in the University of Wisconsin, Waukesha facility, excluding elected County officials, professional employees, craft employees, confidential employees, supervisory employees, and all other County employees, as certified by the Wisconsin Employment Relations Commission under date of July 3, 1968, Dec. No. 8545.

...

3.02 Should the Union, following certification by the Wisconsin Employment Relations Commission or following recognition by the County of Waukesha, become the collective bargaining agent for other employees of the County of Waukesha not included in Article III hereof, it is agreed that Article III of this Agreement, upon written consent of the parties hereto, may be amended to include the employee unit last certified or recognized.

3.03 Employees recognized in this Agreement, unless otherwise hereinafter specified, shall in all matters of County policy or procedure be treated as one (1) party.

9. By letter of May 19, 1998 from Bishofberger to Richter, Bishofberger notified the County that the employees represented by Local 1365 intended to bargain separately in the upcoming negotiations. Richter sent the following response on May 22, 1998 on behalf of the County:

Dear Ms. Bishofberger:

This letter is in response to your correspondence of May 19, 1998 wherein you have indicated Local 1365's desire to negotiate separately in the upcoming contract negotiations.

The wages, hours, and conditions of employment for the Park and Land Use employees organized under Local 1365 are and have historically been negotiated as a part of and included in the Master contract between Waukesha County and AFSCME. It has always been, and continues to be, the County's position that these employees are properly placed within the Master contract and bargaining with them as a separate unit would unduly fragment the existing unit (Locals 1365 and 2494).

As you are aware, Wisconsin Statutes provides a statutory directive that allows professional employees the right to self-determination elections and separate units if they so desire. This is an exception to the Statute's anti-fragmentation policy and was the reason the Social Workers were allowed to split off from this unit. This statutory right does not apply to the Park and Land Use employees.

While these employees do not have a statutory right to a separate unit for the purposes of collective bargaining, once negotiations have commenced concerning the Master contract, the County would be willing to devote a particular bargaining session or sessions to any issues that you believe are unique to the Parks and Land Use Department employees.

If you would like to discuss this in greater detail, do not hesitate to contact me.

Sincerely,

James H. Richter /s/
James H. Richter
Labor Relations Manager

By the following letter of June 10, 1998, Bishofberger reiterated Local 1365's demand to bargain as a separate bargaining unit:

Re: Local 1365 AFSCME, AFL-CIO

Dear Mr. Richter,

This letter is in response to your May 22, 1998 correspondence wherein you have refused to bargain separately with the members of the aforementioned bargaining unit.

Section 111.70(4)(d)2.d., Stats., does not expressly authorize the Union or the County to insist upon coalition bargaining. Doing so as a precondition to negotiating with the County is a prohibited practice. (WERC Decision No. 21130-B, 2/22/85)

Secondly, with regard to the County's position that bargaining separately by the Park and Land Use employees would "unduly fragment the existing unit", please refer to the Direction of Election (Decision No. 14157, 12/1/75) involving the Teamsters, Council 40 and Waukesha County where your concerns are specifically addressed in the last paragraph of the memorandum.

I suggest and encourage the County rethink its position in order to resolve the issue short of filing a complaint. If I do not hear from the County on or before July 1, 1998, I shall assume there is no change in position and will proceed accordingly.

As always, please call with questions or concerns.

Respectfully,

Christine Bishofberger /s/
Christine Bishofberger
Staff Representative
Waukesha District

Richter sent Bishofberger the following response of June 26, 1998:

RE: Local 1365 AFSCME, AFL-CIO

Dear Ms. Bishofberger:

It is a mischaracterization to say the County is insisting on coalition Collective Bargaining.

The Park and Land Use employees have been part of the County-AFSCME Master Contract for 23 years since they voted for continued AFSCME representation. In all respects their group is merged into the existing Master Contract. These employees have not had their own contract.

The contract they are a part of expressly provides for County recognition of them in the Master Contract and also clearly provides that all employees recognized shall in all matters of County policy or procedure be treated as one party.

We do not believe that employees of any department included in the Master Unit can just walk away from that contract and interrupt a history of collective bargaining for well over two decades. That history has provided stability in labor relations and continuity in the way the parties have dealt with their bargaining responsibilities.

The County continues to believe that separating out this group of employees for separate contract bargaining would be inconsistent with our long standing collective bargaining history, the language of our contract, and the anti-fragmentation policies which have long guided the WERC.

Sincerely,

James H. Richter /s/
James H. Richter
Labor Relations Manager

10. On July 17, 1998, Local 1365 filed the instant complaint of prohibited practices with the Commission wherein it alleged that at all pertinent times, it has been the sole and exclusive bargaining representative “for all employees of the County of Waukesha Park and Planning Department in the classifications of Park Maintenance and Golf Course Superintendents, excluding supervisory, office employees and professional employees”,

pursuant to the Commission's certification issued on January 5, 1976, that it notified the County on May 19, 1998, that it was exercising its right to bargain separately from the other County bargaining units in the upcoming negotiations, and that the County has refused, and continues to refuse, to bargain with Local 1365 separately from those other bargaining units in violation of Sec. 111.70(3)(a)1 and 4, Stats.

11. By notice of July 27, 1998, the Union's Staff Representative assigned to represent Local 2494 in negotiations with the County for a successor Master Contract, Michael Wilson, notified the County that Local 2494 wished to reopen negotiations for a successor agreement and that it would be bargaining with the County separately from Local 1365. Richter sent Wilson the following response of July 30, 1998:

RE: Your Notice to Re-Open Collective Bargaining
Waukesha County Employees

Dear Mr. Wilson:

The County is in receipt of your notice dated July 27, 1998 to open collective bargaining and your statement that "Local 2494 will be exercising its rights to bargain separately from Local 1365." As you know, Waukesha County does not believe that the Union is free, unilaterally, to break off from the Master Agreement the Park and Land Use employees which have been part of the County - AFSCME Master Contract for 23 years.

The County continues to believe that separating out that group from the employees remaining in the Master Contract would be inconsistent with the long-standing collective bargaining history, the language of the labor contract and anti-fragmentation policies which have long guided the WERC. We enclosed a copy of the letter which was previously sent to Ms. Christine Bishofberger on the same issue.

It would be the County's suggestion that until this matter is resolved, the parties move forward in their bargaining as we have in the past. The County would agree that bargaining which includes the Park and Land Use employees as well as the other employees in the master agreement for the current bargaining for a new contract will be without prejudice and will not be utilized as evidence in any WERC proceeding.

Until this matter is agreed upon or resolved by decision, however, the County does not agree to separate bargaining which is unilaterally proposed here.

Sincerely,

James H. Richter /s/
James H. Richter
Labor Relations Manager

12. Local 1365 has been, and continues to be, the exclusive bargaining representative of the bargaining unit consisting of the employees in the classifications of Park Maintenance Worker, Park Foreman and Golf Course Superintendent. Said bargaining unit constitutes a separate appropriate bargaining unit.

13. For their mutual convenience, the County and the Union, through its affiliated Locals, have engaged in coalition bargaining by meeting and negotiating with regard to the wages, hours and conditions of employment for all of the employees in the various bargaining units represented by those locals and entering into a "master contract" covering those employees, including the employees in the bargaining unit set forth in Finding of Fact 12.

14. The employees in the bargaining unit set forth in Finding of Fact 12 do not share a significant community of interest with the employees in the other bargaining units set forth in the 1996-1998 Master Contract.

15. The County has refused to bargain with Local 1365 separately regarding the wages, hours and conditions of employment of the employees in the bargaining unit set forth in Finding of Fact 12 for the purpose of arriving at a separate collective bargaining agreement covering only those employees, and has conditioned bargaining with that bargaining unit as to unit specific issues on its engaging in coalition bargaining with the other units covered by the Master Contract as to issues common to those units.

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

CONCLUSIONS OF LAW

1. The bargaining unit represented by Local 1365, AFSCME, AFL-CIO and certified by the Commission January 5, 1976, remains an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2, Stats.

2. Waukesha County, its officers and agents, by refusing to meet with Local 1365 for the purpose of bargaining a separate collective bargaining agreement covering the employees in the bargaining unit set forth in Finding of Fact 12, and by conditioning its willingness to meet and bargain separately with Local 1365 as to issues unique to that bargaining unit on the Local's willingness to engage in coalition bargaining with the other Locals representing the other bargaining units covered by the 1996-1998 Master Contract as to issues common to the bargaining units, has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, and derivatively, 1, Stats.

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

ORDER

That Waukesha County, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain separately with Local 1365, AFSCME, AFL-CIO as the representative of a separate collective bargaining unit of employees in the classifications of Park Maintenance Worker, Park Foreman and Golf Course Superintendent in the Waukesha County Park and Land Use Department, for a separate collective bargaining agreement setting forth the wages, hours and conditions of employment for those employees.

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

- (a) Post the Notice attached hereto as Appendix "A" in conspicuous places in the County's buildings where notices to employees are posted. The Notice shall be signed by the representative for the County and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

- (b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the District has taken to comply with this Order.

Dated at Madison, Wisconsin this 22nd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to bargain with Local 1365, AFSCME, AFL-CIO, as the exclusive bargaining representative of a separate bargaining unit consisting of the employees of the Waukesha Park and Land Use Department in the classifications of Park Maintenance Worker, Park Foreman and Golf Course Superintendent for a separate collective bargaining agreement setting forth the wages, hours and conditions of those employees.

Dated this 22nd day of March, 1999.

WAUKESHA COUNTY

By

Labor Relations Manager

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

WAUKESHA COUNTY

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

The Union has filed a complaint of prohibited practices wherein it alleges that the County has violated Sec. 111.70(3)(a)4, and derivatively 1, Stats., by refusing to bargain with Local 1365 for a separate collective bargaining agreement covering the employees of the “Park and Planning Department” in the classifications of Park Maintenance and Golf Course Superintendent, a bargaining unit certified by the Commission in 1975.

The County has filed an answer wherein it denies that the Union is, or has been, a bargaining representative for those employees as a separate bargaining unit, denies that those employees have a right to bargain separately and denies it has committed a prohibited practice. The County also asserts a number of affirmative defenses. The County alleges that (1) the group of employees claimed by the Union is not a legally appropriate unit and the County does not have a duty to bargain a separate contract with those employees, (2) those employees have been merged for collective bargaining purposes into the Master Unit and cannot unilaterally demand to bargain separately, (3) the remedy sought of an order to bargain with those employees separately would cause fragmentation of the Master Unit, inconsistent with the statutes, (4) the County has been willing to negotiate with the Union regarding the wages, hours and conditions of employment of these employees as part of the bargaining with the Master Unit, and (5) the parties’ Master Contract includes this group of employees, along with others, and they are referenced in the recognition clause as part of the Master Unit. Since a change in a bargaining unit is a permissive subject of bargaining, it cannot be accomplished by the unilateral demand of one party.

Union

The Union first asserts that the County’s insistence upon multi-unit bargaining as a precondition to negotiations violates the duty to bargain in good faith. Section 111.70(1)(b), Stats., states “collective bargaining unit means the unit determined by the Commission to be appropriate for the purposes of collective bargaining.” The scope of the appropriate unit is a matter left to the discretion of the Commission pursuant to Section 111.70(4)(d)2.a., Stats., and in the case of a voluntarily-recognized bargaining unit, to the parties themselves. In 1975, the Commission established the appropriate unit in this case as follows:

“All regular full-time and part-time employees of the Waukesha County Park and Planning Department in the classifications of Park Maintenance Man and Greenskeeper who were employed by the municipal employer on December 1, 1975, excluding confidential, professional, and craft employees, supervisors, and

office and clerical employes, except employes as may prior to the election quit their employment or be discharged for cause.”

In doing so, the Commission weighed and balanced the need for stability and addressed the anti-fragmentation proscription of the statute, as well as insured that the unique interests in this group of employes would not be subordinate to the overall group. Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer to “to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit.” (Emphasis added). The statutory duty to bargain is specifically premised upon bargaining at an appropriate unit level.

Insistence upon multi-unit bargaining is analogous to an employer’s insistence upon bargaining taking place in open session or upon the union’s conditioning its willingness to meet upon the employer accepting the union’s proposal on who will represent the employer at the bargaining table. Those examples relate solely to the manner in which negotiations will be conducted and are similar to this case in that the County’s demands deal solely with the bargaining process itself. In both examples cited above, the Commission ruled that such posturing is a permissive subject of bargaining and that it is a refusal to bargain to insist upon such proposals as a condition to negotiations. Citing, CITY OF SPARTA, DEC. NO. 14520 (WERC, 4/76); WALWORTH COUNTY, DEC. NO. 12690 (WERC, 5/74); CITY OF LAKE GENEVA, DEC. NO. 12208-B (WERC, 5/74); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 13696-C, 13876-B (WERC, 4/78). To some extent, insistence upon multi-unit bargaining is more serious than those cases in that individual employes would relinquish their statutory rights to choose their own representative. Thus, the will of the coalition would or could override the individual bargaining units involved and the individuals within the unit, thereby hindering the statutory intent. Further, the intent of Section 111.70(4)(d), Stats., is that the representative be chosen by the majority of the employes in the appropriate bargaining unit. The existence of a coalition seriously jeopardizes employe rights in three ways:

- 1) A coalition is not an appropriate unit for collective bargaining, nor is it a certified bargaining unit;
- 2) The coalition may not represent the majority of all employes in all the individual units;
- 3) Since a coalition is not certified as the exclusive bargaining representative of the individual units, said bargaining is then contrary to the established rule of majority.

The Union cites KENOSHA COUNTY, DEC. NO. 21130-A (Crowley, 7/84), where it was found that the union's insistence upon multi-unit bargaining was incompatible with the requirements of Section 111.70(4)(d)2.a., Stats., in that the unique interests of each separate bargaining unit could be subordinated to the interests of the coalition and that the establishment of separate units on the basis of statutory mandates could be completely undone by the requirements of coalition bargaining contrary to the intent of MERA.

The County's legal obligation as a municipal employer is to bargain collectively with a representative of a majority of its employes in an appropriate unit as contemplated by the statute. Multi-unit bargaining as demanded by the County denigrates the statutory process. In multi-unit bargaining, the individual unit concerns and specific issues are inevitably overridden by multi-unit issues. Under such circumstances, the municipal employer is not bargaining with an appropriate unit of its employes, but rather with various separate units combining together which cannot, by virtue of its composition, represent the interests of the employes in the manner contemplated by the statute.

Next, the Union asserts that multi-unit bargaining is not required by Wisconsin law, and therefore cannot be demanded by a party. When the proposed structure of bargaining goes beyond the specific appropriate unit determined by the Commission, it is a permissive subject of bargaining. The composition of a party's bargaining team is a permissive subject of bargaining, and absent unusual circumstances, a refusal to meet with a party's bargaining team is a prohibited practice. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, supra., The Union also cites federal case law in support of its position, citing NLRB V. INDIANA AND MICHIGAN ELECTRIC COMPANY, 101 LRRM at 2474, where it was held that an employer retains the right to resist union efforts aimed at expanding the scope of the employer's collective bargaining obligations, where the union attempted to use coordinated bargaining to force company-wide negotiations. Though Section 111.70(4)(d)2.d., Stats., does not prohibit multi-unit bargaining, it does not compel it. While parties may discuss the format for bargaining as a permissive subject of bargaining, to insist upon such a permissive subject to the point of impasse is a clear refusal to bargain in good faith.

While the County argues that multi-unit bargaining is appropriate because the wages, hours and conditions of employment of the Park and Land Use employes have been negotiated as part of, and included in, the Master Contract for the 23 years since they voted for union representation, that bargaining history is immaterial as multi-unit bargaining is not required for subsequent negotiations. The mere agreement to multi-unit bargaining in the past does not prohibit a party from withdrawing from such a voluntary agreement in the future. Although the parties may discuss, and even agree, on a specific bargaining structure, that arrangement does not obligate those parties forever.

Finally, the Union asserts that the County's refusal to bargain is a blatant disregard of the law, thereby rendering it liable for costs. The County raised a frivolous defense in this case under Section 814.05(3)(b), Stats., which provides that it is frivolous where,

"The party or the party's attorney know or should have known, that the action, special proceeding, counter claim, defense or cross complaint was without a reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law".

The Union further notes that in its June 10, 1998 correspondence it supplied the County with the relevant statutes and case law which clearly and unequivocally supports the Union's position. Despite this, the County continued to flagrantly ignore the evidence, compelling the Union to proceed. Given the County's blatant disregard of the law, an order to cease and desist is insufficient to adequately address the violation. Thus, the Union seeks costs and attorney's fees.

County

The County notes that it negotiated a Master Contract covering the period from 1996 through 1998. Article 3 of that Agreement, the recognition clause, refers to ten groups or units, one of which under 3.01(1) is represented by Local 1365. The group referenced is "all Waukesha County Park and Planning Department employees in the classifications of Park Maintenance Man and Golf Course Superintendents, but excluding . . . as certified by the Wisconsin Employment Relations Commission under date of January 5, 1976, Decision No. 14157." The Park and Planning Department no longer exists and park work is now performed by the Parks and Land Use Department, and partially performed by employees in classifications of Park Maintenance Worker, Park Foreman, and Golf Course Superintendent, all in the Parks and Land Use Department. There were 24 employees in those three classifications at time of hearing. Those classifications are not only specifically referenced in the recognition clause, but also in the specific appendix integrated in the Master Contract referencing their hours of work and certain other matters. Additionally, these "successor" job classifications are specifically referenced in the Master Contract's wage appendix. Neither party has proposed in bargaining to delete these classifications from the Master Contract, to change the recognition clause, or to bargain a separate contract for them. Rather, on May 19, 1998, the staff representative for Local 1365 notified the County that "Those employees represented by AFSCME Local 1365 will be exercising their right to bargain separately in the upcoming negotiations." In a letter of May 22, 1998, the County's Labor Relations Manager, James Richter, noted that the employees in the classifications in question had historically been negotiated as a part of, and included in, the Master Contract between the County and the Union, and indicated that to remove them from the Master Unit and negotiate a separate contract for them would "unduly fragment the existing unit." Richter also stated that the

County was willing to commence negotiations with the Master Unit, and that if there were particular issues which the Union felt were unique to these employees represented by Local 1365, the County was willing to devote particular bargaining sessions or times to such issues. In its communication with the Union's Staff Representative for Local 2494, Michael Wilson, the County reiterated that it did not believe the Union was free to unilaterally break off a group of employees from the Master Contract who had been part of that contract for over 29 years. The County also suggested that in order to move forward in bargaining, the parties meet and negotiate as in the past pending a decision by the Commission, and that such bargaining would be without prejudice and not utilized as evidence in any Commission proceeding. The Union declined the suggestion and has refused to bargain on that basis.

The group of employees in the original classifications was voluntarily recognized by the County in 1969, and the current Master Contract contains essentially the same language in Sections 3.02 and 3.03 that was then found in Article 2 of the 1969 agreement. While the County took no position in the Commission proceedings in 1975 pursuant to a petition filed by the Teamsters Local 200, there were only two other bargaining units in existence in the County at the time, law enforcement and public health nurse units. By contrast, in 1998 there are five separate bargaining units besides the Master Unit. The Commission certification resulting from the election amongst these employees in 1975 was a certification that Local 1365 was selected by a majority of eligible employees as their collective bargaining representative. After that election, those employees have remained in the Master Contract to the present time without any change whatsoever. That spans 14 contracts negotiated by the Union for the employees in the Master Unit, and during that time all those groups or units have been treated as one party under the terms of the contract.

The County also asserts that the organization and community of interest of employees has changed substantially since 1975. The Park and Planning Department has been totally reorganized and a much larger Park and Land Use Department created. This has included changes in duties and work locations of the employees in issue, as well as a change to joint supervision and management and an increase in the other employees they work with. The employees at issue work with other AFSCME represented employees in the Department in the clerical, Exposition Center Worker and Carpenter classifications, all of which are in the Master Contract. In contrast, in 1975, the park employees had little, if any, work contact with employees represented by Local 2494, there was no common supervision, and the Exposition Center and the Museum were separate departments and the ice arenas were not in existence. Richter testified that the employees in the Master Unit share common fringe benefits, and that the employees in issue are covered by the same budget and management policies and procedures as other AFSCME-represented employees in the Park and Land Use Department who are covered by the Master Contract.

The County asserts that if these employees are permitted to split into a new unit with a new contract, there would be no particular reason why any of the nine other groups or units of employees listed in the Master Contract could not claim the same right. Richter testified that under the language in Sections 3.02 and 3.03 of the Master Contract and over the many years of bargaining, there has been in effect a merger of the separate groups or units into the Master Contract. Also, having separate units involves the possibility of multiple cases going to mediation and arbitration.

The County asserts that to prove the alleged violation of MERA, the Union must prove that the "unit" for which it demands separate bargaining is appropriate under the law, and that the employer has refused to bargain. The County has not refused to bargain with the Union for the employees in issue, rather, it has at all times been willing to bargain with those employees as part of the Master Contract, as it has since 1969. In a letter to Wilson, the County indicated that it was willing to bargain with the Master Unit as constituted, including these employees, and that it would do so without prejudice to the Union's position in this case. The County also indicated that if those employees had any proposals unique to them, the County would, as it had in the past, agree to meet in a separate session or sessions to discuss such issues.

As to an appropriate unit, the Union presented no evidence as to what, if any, identifiable unit remains from that certified for the 1975 election. There is no longer a Park and Planning Department, as it has been eliminated through reorganization, with its functions and organizations merged into a much larger Park and Land Use Department, and there are no longer classifications of Park Maintenance Man or Greenskeeper. While the 1996-1998 Master Contract still references the old terms of "Park and Planning Department employees" and "Park Maintenance Men" and "Golf Course Superintendents", the recognition clause does not reference Greenskeeper, and the wage appendix under "Parks Department" lists Park Maintenance Worker, Exposition Center Worker, Golf Course Superintendent, Park Foreman and Lead Exposition Center Worker. The Union presented no evidence as to which jobs, if any, were traceable to the former classifications referenced in the Commission's certification, nor evidence as to why the Exposition Center Workers should be excluded, nor certain Carpenters included in the claimed unit. It is clear from the evidence that the Union's demand to carve out 24 employees represented by Local 1365 would leave at least 75 other AFSCME represented employees behind who work with those 24 employees, are in the same department, and are represented by Local 2494 as part of the same Master Unit. The claimed employees work with and interchange with those other represented employees in their department, and now share the same budget, same management, and the same wage system and benefits as the other employees in the new department. As to the old Park and Planning Department unit, those classifications and the unit has been merged into the Master Unit and are no longer a separate unit for purposes of collective bargaining. Under Klopp's 1969 request for voluntary recognition and the County's 1969 agreement, the parties agreed to amend the Master Unit to

include the “unit” in the Master Contract. After the 1975 election, by staying in the Master Unit, those classifications continued to be an integral part of the Master Unit. The language of Section 3.01 of the Master Contract continued in effect in 1975:

“Should the Union, following certification by the WERC become the collective bargaining agent. . .it is agreed that Article III, upon written consent of the parties. . .may be amended to include the employe unit last certified. . .”

That agreement is ample evidence of the consent to that unit’s inclusion. That group of employes has participated in bargaining the Master Contract since 1969 without interruption and it is uncontroverted that the “groups” or “units” listed in the Master Contract have been treated as one party thereunder, as contemplated by the parties in Sections 3.02 and 3.03. Thus, the group of employes at issue have been merged into the Master Unit at least since 1975.

The legal doctrine of “merger” has been specifically articulated by the National Labor Relations Board, hereinafter “Board”. In *WISCONSIN BELL, INC. V. COMMUNICATION WORKERS LOCAL 4063*, 283 NLRB No. 179, 125 LRRM 1108 (1987), the Board held that when the union and the employer agreed to amend their then-current labor agreement to merge a newly-certified separate unit into a larger unit, the larger unit became the “unit for collective bargaining purposes.” When the same group which had been separately certified sought a decertification election, the Board denied the petition, indicating the only appropriate unit then existing was the larger merged unit. The Board stated, “The Board has long recognized the ‘merger doctrine’ under which an employer and union can agree to merge separately-certified or recognized units into one overall unit.” That doctrine had been recently affirmed in the decision of *GIBBS AND COX, INC.*, 280 NLRB 110, 123 LRRM 1034 (1986). In *GIBBS*, the Board noted that the bargaining history as a merged unit is more important than other factors, such as community of interest, stating “a shared community of interest. . .are, however, of lesser cogency where a history of meaningful bargaining has developed.” The Board has reached this “merged unit” principle even without a specific statutory anti-fragmentation directive. While the Commission is not bound to follow Board decisions, where such doctrines make sense and are consistent with the Commission’s own caselaw and guiding statutes, they should be considered. In that regard, the merger doctrine is consistent with, and in furtherance of, the anti-fragmentation policy under MERA. The Union’s business agent acknowledged that if this group is permitted to split off as a separate unit, she knows of no prohibition on the other groups or units to also demand separate bargaining and separate contracts. If the Commission orders separate bargaining for this group, it will

lead to the disintegration of the Master Unit and the potential creation of nine additional units. This is the very kind of destabilization of labor relations and bargaining that the statute and the Commission have long opposed.

While the Union asserts that the County is in effect demanding coalition bargaining, the contention that this “unit” has been in coalition bargaining for 30 years is ludicrous. The parties have never used the term “coalition bargaining” and it would be in direct contravention of their intent and actions as relates to the circumstances of recognition and the integration of employes into the Master Unit, and the specific language of the contract integrating them as part of the Union’s treatment as “one party”. In the decision in KENOSHA COUNTY, it is clear that the Commission considered that coalition bargaining was the coming-together for bargaining purposes of separate units (with separate contracts) for the purpose of bargaining certain issues of common concern. Here, there was no “coalition”; rather, there was by agreement and history, a total functional merger of the Parks group into the Master Unit. The County is only seeking to maintain the “*status quo*”, and is not insisting on coalition bargaining. It is the Union that seeks a unilateral change to the Master Contract’s recognition clause.

Finally, the County asserts that it is uncontroverted that the 1975 unit description is no longer valid, as there is no longer a Park and Planning Department. The Union also seeks to include two Carpenters into this “unit” who are apparently not in the classifications specifically referenced in the 1975 certification. The Union’s business agent admits this, and also that the contract contains Carpenters who may work to some degree in the Park and Land Use Department, but who may not be the Carpenters sought to be included in the unit. Although Local 1365’s president testified that two Carpenters paid dues to Local 1365, Richter also testified that other classifications in the Master Unit also have dues paid to Local 1365, such as the Exposition Center Worker and the Lead Exposition Center Worker represented by Local 2494. The Union seeks an order that the County “recognize the separate certification and identity of Local 1365” and Bishofberger’s demand letter of May 19 states that “Local 1365 will be exercising their right to bargain separately.” Locals do not equal bargaining units. The Union takes the position that Local 1365 includes at least two employes who do carpenter work, but whose classifications are not referenced in the old certification. When asked if that position did not concede that the unit for which they claim separate bargaining was not appropriate, the Union responded that it was “laying groundwork” so that it would not have to go through “some rigamaroll as to who we are bargaining for.” That “rigamaroll” would be a Commission proceeding to determine whether a unit description should be modified.

DISCUSSION

Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . .

As both parties have recognized, a finding of a violation of the duty to bargain requires that the employes demanding the right to bargain constitute “an appropriate collective bargaining unit.” In that regard, the Union relies upon the Commission’s certification in 1975 of a bargaining unit of “all regular full-time and regular part-time employes of the Waukesha County Park and Planning Department in the classifications of Park Maintenance Man and Greenskeeper. . .” Conversely, the County asserts that the unit certified in 1975 no longer exists because it was merged by the agreement of the parties into the Master Unit consisting of nine other units that had been certified or voluntarily recognized and also represented by AFSCME. The County also asserts that the claimed unit would no longer be appropriate due to the reorganization and merger of departments.

Considering first the County’s reliance on the “merger” doctrine, as the County concedes, the Commission is not bound by Board interpretation of the federal law, although it may take guidance from Board decisions. A review of Commission case law indicates that the Board’s merger doctrine, as described in its decision in *WISCONSIN BELL, INC.*, supra, and *GIBBS & COX*, supra, has been rejected by the Commission. In the 1975 case involving these parties, the Teamsters Union petitioned for an election in a bargaining unit consisting of Highway Department employes and the employes in the Park and Planning Department in the Park Maintenance Man and Greenskeeper classifications. Both of these units were represented by the Union in this case and covered by the Master Contract between the County and the Union. The Highway Department unit had been certified by the then-Wisconsin Employment Relations Board in 1966 and the Park and Planning Department unit had been voluntarily recognized by the County in 1969. The Master Contract contained the same provisions in 1975 as are contained in the 1996-98 Master Contract and relied upon by the County (now Secs. 3.01, 3.02 and 3.03). While the Union argued in 1975 that the Teamsters were seeking to combine two units that lacked a community of interest, it also relied on the same facts as the County and made essentially the same argument to the Commission as the County now makes in this case regarding merger. In rejecting that argument, and finding the lack of a community of interest and the right of self-determination in existing units to be the predominant factors, the Commission implicitly rejected the doctrine of “merger”. In ordering that elections be held in separate units of the Highway employes and the Parks and Planning employes, the Commission explained:

It should be noted that the Commission's decision in no way conflicts with the statutory mandate against unnecessary fragmentation of bargaining units. Although it is possible that the direction of election could lead to a disruption of the existing bargaining relationship between the three AFSCME locals and the Municipal Employer, said relationship developed out of mutual convenience and not as a result of any significant community of interest among the employees in the nine units covered by the master contract. The direction of election in this case merely allows employees in existing separate units to determine whether they wish to continue to be represented by the Intervenor.

Dec. No. 14157 (at p. 4).

Later, in KENOSHA COUNTY, DEC. NO. 21130-A (Crowley, 7/84), an examiner found a refusal to bargain violation on the part of the union based upon the union's refusal to bargain with the county unless it engaged in "coalition bargaining" as to the issues of common concern to all of the county units represented by the union. In finding the violation, the examiner reasoned:

Inasmuch as coalition bargaining is not prohibited, a request for coalition bargaining is not violative of MERA. However, because the effect of coalition bargaining is to merge all units into one unit to create a new unit, and since unit questions are not mandatory subjects of bargaining, coalition bargaining is also permissive and not a mandatory subject, i.e. primarily related to wages, hours and conditions of employment, and the Locals could not insist on coalition bargaining to the point of causing a deadlock in negotiations. The evidence established that the Locals would only negotiate with the County on a modified coalition bargaining basis, thereby refusing to bargain collectively with the County. Therefore, it is concluded that the Locals have committed a prohibited practice in violation of Sec. 111.70(3)(b)3, Stats.

It follows that, inasmuch as the Locals' demand for coalition bargaining was violatively maintained, the County's resistance to same was not a prohibited practice. Section 111.70(3)(a)4, Stats., makes it a prohibited practice "To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." As coalition bargaining is not required by MERA, the County could lawfully insist that bargaining be confined to the established appropriate bargaining units. The evidence failed to prove that the County refused to negotiate within the appropriate collective bargaining

unit scheme. The Locals argued that the County refused to meet on the issues of local concern for each unit. The Locals expressed willingness to meet on unit specific proposals while insisting common issues be discussed with the coalition.

(At 11; citations omitted)

In affirming the examiner's decision, the Commission stated:

We entirely agree with the Examiner as regards both his outcome and rationale.

...

We also agree with the Examiner that to compel the County, over its objection, to bargain on a coalition basis as regards an agreement on common-concern issues binding on more than one unit, would undercut the significance of our prior certification of the five separate units involved herein as appropriate units for collective bargaining purposes. It might be possible, through a timely and successful representation petition proceeding, for the Unions to remove the legal barriers to Union insistence on bargaining for broader grouping(s) of the County employees involved herein. However, at present, the existence of the five separate units renders unlawful the Unions insistence on coalition or modified bargaining in the face of County objections.

The fact that in the past the County has voluntarily bargained with a coalition of the instant locals does not alter our conclusion in that regard. Establishment of a multi-unit coalition or modified bargaining structure, like the contours of the bargaining unit itself, is a permissive subject of bargaining. The Unions may request that bargaining be so structured and the County may agree upon such an arrangement. However, after the term of any such agreement, the County is free to refuse to continue to bargain in the coalition or modified coalition structure that it had agreed to operate under to various degrees in the past.

DEC. NO. 21130-B (WERC, 2/85 at pp. 5-6. (Citations omitted)).

While the facts in KENOSHA COUNTY were not as supportive of the application of the merger doctrine as in this case, the Commission's reasoning is again instructive as to the significance it places on its having certified a bargaining unit as appropriate. In that regard, see also MANITOWOC MEMORIAL HOSPITAL, DEC. NO. 11952 (WERC, 6/73) cited by both the examiner and the Commission in KENOSHA COUNTY.

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The County has also alleged that the unit of Park Maintenance Men and Greenskeepers

certified in 1975 is no longer an appropriate unit due to the merger of the Park and Planning Department with other county departments to form the Park and Land Use Department in 1995. The record indicates that the Park Maintenance Man classification was subsequently changed to the Park Foreman and Park Maintenance Worker classifications and the Greenskeepers were retitled Golf Course Superintendents. It also appears that the Park Maintenance Workers and Park Foremen perform the same or similar functions as employees in the Park Maintenance Man classification performed in 1975, albeit at more locations. There are presently six Park Foremen, 15 Park Maintenance Workers and three Golf Course Superintendents, and all of them report to the Parks Supervisor. Of the other employees cited by the County, i.e., the clerical employees, the Lead Exposition Center Worker, the Exposition Center Worker, Sanitarians, Archivist, Museum Exhibit Technician and the Carpenters, it appears that only a few of the clerical employees, the Lead Exposition Center Worker, the Exposition Center Worker, and the Carpenters have any interaction with these employees. As the clerical employees, the Lead Exposition Center Worker and the Exposition Center Worker work indoors, while these employees primarily work outdoors, the amount of interaction between them appears questionable. More importantly, the Commission has consistently held that Sec. 111.70(4)(d)2.a., Stats., requires that the unit sought is an appropriate unit, not that the unit sought is the most appropriate unit. OCONTO SCHOOL DISTRICT, DEC. NO. 29295 (WERC, 1/98); MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91); CITY OF GREEN BAY (CITY HALL), DEC. NO. 21210-A (WERC, 3/84). In MARINETTE SCHOOL DISTRICT, the Commission explained:

Although the statute directs that the Commission “whenever possible” avoid fragmentation of units, it does not specify that there be only one potentially appropriate unit in a given situation. Accordingly, the Commission is not precluded from finding that the Union’s proposed bargaining unit, which is of more limited composition than the overall residual unit proposed by the District, is consistent with the statute. Our role is to determine whether the unit sought is an appropriate unit, not whether the unit sought is the most appropriate unit.

The Commission has interpreted Sec. 111.70(4)(d)2.a., Stats. to mean that at times there is a need for a mix of bargaining units which afford employees the opportunity to be represented in workable units by organizations of their own choosing, which may reasonably be expected to be concerned with the unique interests and aspirations of the employees in said unit. Therefore, the Commission has the obligation to strike a balance between the antifragmentation proscription of the statute and the need for ensuring that the unique interests of a

given group of employees will not be subordinated to the interest of others in a bargaining group. However, units cannot be so fragmented so as to be

inadequate for bargaining. . .

(At pp. 11-12; citations omitted)

Thus, even if a more appropriate unit could be fashioned, that does not necessarily affect the appropriateness of the unit certified in 1975. If the County feels that a unit of Park Foremen, Park Maintenance Workers and Golf Course Superintendents no longer constitutes an appropriate unit, as the Commission noted in its decision in KENOSHA COUNTY, it might be possible through a timely and successful representation petition proceeding to remove the legal barriers to insistence on bargaining for a broader group of County employees than just those employees. Given the Commission's prior certification of this unit, the burden in that regard is on the County. It is noted, however, that the County's assertion that a broad unit consisting of all the employees in the units covered by the Master Contract constitutes an appropriate unit was previously made by the Union in the 1975 proceedings and rejected by the Commission based upon a lack of community of interest among those groups.

It is also noted that although two employees listed as eligible to vote in the 1975 election in this unit were identified as "carpenters" by Local 1365's President, it is not clear whether they held such a classification at the time or were Park Maintenance Men performing primarily carpentry work. As the Carpenter classification was not included in the unit description in 1975 and there is such a classification listed in the Master Contract as part of "Maintenance", the evidence is not sufficient to determine whether or not to include them at this point.

Finally, with regard to the County's assertion that it has not in fact refused to bargain with Local 1365 regarding these employees, the record establishes otherwise. As the union in KENOSHA COUNTY conditioned bargaining with the county separately regarding the unique issues of the separate units upon agreeing to coalition bargaining on the issues of common concern to all of the units, the County has made essentially the same offer to Local 1365. In his letter of May 22, 1998 to Bishofberger, Richter made the following offer:

While these employees do not have a statutory right to a separate unit for the purposes of collective bargaining, once negotiations have commenced concerning the Master contract, the County would be willing to devote a particular bargaining session or sessions to any issues that you believe are unique to the Parks and Land Use Department employees.

In his June 30, 1998 letter to Wilson, Richter stated:

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It would be the County's suggestion that until this matter is resolved, the parties move forward in their bargaining as we have in the past. The County would

agree that bargaining which includes the Park and Land Use employees as well as the other employees in the master agreement for the current bargaining for a new contract will be without prejudice and will not be utilized as evidence in any WERC proceeding.

Until this matter is agreed upon or resolved by decision, however, the County does not agree to separate bargaining which is unilaterally proposed here.

Just as the Commission found in KENOSHA COUNTY, that conduct constitutes a refusal to bargain under MERA. Further, the County's offer contained an express refusal to bargain a separate contract with Local 1365 covering only these employees.

Based upon the foregoing, the Examiner has concluded that the County has refused to bargain with Local 1365 in violation of Sec. 111.70(3)(a)4, and derivatively, 1, Stats., and ordered that it cease and desist in that regard. The Examiner has not awarded the Union costs and attorney's fees as requested. The County's position in this case is not without some legal basis. The County has relied in part upon the doctrine of "merger" which has been applied by the Board under federal law. While the Commission has at least implicitly rejected that doctrine, it has not done so expressly. Further, twenty-three years have passed since the Commission's earlier ruling certifying this bargaining unit and the factual circumstances have changed over that time. While the Examiner has rejected the County's various legal arguments in this case, he cannot conclude that the County's position was so without a basis in fact or law as to be "frivolous" or constitute "bad faith" as is required to award such relief. CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98); WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90).

Dated at Madison, Wisconsin this 22nd day of March, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw, Examiner

DES/gjc
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