STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARQUETTE COUNTY, Complainant

vs.

MARQUETTE COUNTY HIGHWAY EMPLOYEES UNION, LOCAL 1740, AFSCME, AFL-CIO, Respondent

Case 58
No. 64303
MP-4112

Decision No. 31257-A

Appearances:

Mr. Bernard Bult, Marquette County Corporation Counsel, PO Box 129, 77 West Park Street, Montello, Wisconsin, 53949, appearing on behalf of Complainant County.

Mr. Jack Bernfeld, AFSCME Council 40 Assistant Director, 8033 Excelsior Drive (Suite B), Madison, Wisconsin 53717-1903, appearing on behalf of Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 22, 2004, Complainant County filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the Respondent Union had committed prohibited practices within the meaning of Secs. 111.70 (3)(b)3, (3)(c) and (4), Stats., by conduct in relation to a pending interest arbitration proceeding between the parties. Respondent Union filed an answer denying that it had committed the prohibited practices alleged by Complainant.

The Commission appointed a member of its staff, Marshall L. Gratz, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Pursuant to notice, a hearing was held before the Examiner on April 11, 2005, at the Marquette County Courthouse in Montello, Wisconsin. A stenographic transcript was made of the hearing. Post-hearing briefs and reply briefs were exchanged, with briefing completed on August 15, 2005, marking the close of the hearing.

Based on the evidence and arguments of the parties, the Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Marquette County (Complainant or County) is a municipal employer with offices located at 77 West Park Street, Montello, Wisconsin. One of the County's operating departments is its Highway Department. Among the County's officers and agents are the following individuals: James R. Macy, Attorney, Davis & Kuelthau, Oshkosh; William Bracken, Labor Relations Coordinator, Davis & Kuelthau, Oshkosh; Bridget Amraen, Research Paralegal, Davis & Kuelthau, Green Bay; Brent Miller, County Administrative Coordinator, and Kathy McReath, County Payroll/Benefit Specialist.

2. Respondent Marquette County Highway Employees Union, Local 1740, AFSCME, AFL-CIO (Respondent or Union) is a labor organization with principal offices at 8033 Excelsior Drive (Suite B), Madison, Wisconsin. At all material times, the Union has been the exclusive representative of a collective bargaining unit (Highway unit) consisting of "all regular full-time and regular part-time employees of the Marquette County Highway Department, excluding the Highway Commissioner, Patrol Superintendent, office personnel, managerial, supervisory, confidential, part-time, seasonal and temporary employees." At all material times, William Moberly has been the AFSCME Council 40 Staff Representative serving as chief spokesperson for the Highway unit.

3. The County and Union have been parties to a series of Highway Department unit collective bargaining agreements including one with a term of calendar years 2002-03 (Agreement). The Agreement provides, in pertinent part, as follows:

> ARTICLE 2 - DEFINITIONS
>
> . . .
>
> B) Regular Part-Time Employees: . . . Regular part-time employees shall be permitted to enroll in the County's medical insurance program, but shall pay all premiums. Regular part-time employees shall be entitled to all fringe benefits on an actual pro-rata basis for all hours worked, except for medical insurance.
>
> . . .
>
> ARTICLE 15 – INSURANCE
>
> A) The County shall pay 90 percent of the premium of the single or family plan of the existing health insurance plan in effect for all employees eligible for the insurance after completing the required waiting period under the plan. In addition, the plan shall incorporate a hospital pre-admission review and certification program. The health insurance program shall provide a $100

annual single deductible and a $300 annual family deductible. The County may elect to change the present insurance carrier, provided, however, the benefits of the new program are equal to or better than the plan now in effect.

Effective January 1, 2003, the County may replace the current health insurance plans with the Wisconsin Public Employers' Group Health Insurance Program. The County will pay 95% of the cost of the premiums for any of the regular HMO plans in that program, and 90% of the cost for the Standard Plan or the State Maintenance Plan. If this change is made, the County will also offer, and pay 75% of the premium for any employee who elects to enroll in, a dental plan as offered by Delta Dental (Base Plan 02, Option 2) or any dental plan with benefits substantially similar as a whole to that plan.

B) The Employer will pay the percentage of premium then in effect as long as an employee's name remains on the payroll, (sick leave, vacation, actual work, Worker's Compensation). It shall be paid for an employee that is on Worker's Compensation for a maximum of two (2) years.

. . .

ARTICLE 28 - SAVINGS CLAUSE

If any article, section, attached schedule, or appendices hereto shall be held invalid because of law or decision of a court of competent jurisdiction, the remainder of this Agreement and addenda shall not be affected thereby, and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement for such issue affected.

. . .

4. The Agreement was signed by the parties following issuance of a December 11, 2003, interest award by William W. Petrie (Petrie award). The only issue presented in the Petrie award was the size of the deferred wage increase during the second year of the agreement. The parties stipulated to all other issues, including the language in the second paragraph of Art. 15.A., above, and that language took effect by mutual agreement on or before January 1, 2003. Pursuant to that language, the County chose to change to the Wisconsin Public Employers' Group Health Insurance Program (State Plan) effective on January 1, 2003.

5. The State Plan is provided for by s. 40.51(7), Stats., and is administered by the State of Wisconsin Department of Employee Trust Funds (ETF). One essential feature of the State Plan is that the ETF procures and annually offers a set of alternative health plans from which the employees of participating employers choose each year. Administrative regulations promulgated by ETF provide that for an employee of a participating employer to be eligible for State Plan health insurance, "The employer shall pay an employer contribution toward the

gross health insurance premium based on the lowest cost qualified plan in the service area of the employer, as follows: . . . (b) . . . an amount between 50% and . . . 105% of the lowest cost qualified plan." Ss. ETF 40.10(1) and (2)(b), WIS. ADM. CODE. The "lowest cost qualified plan" in the service area is determined annually by ETF.

6. Negotiations between the County and Union concerning a successor to the Agreement commenced sometime after issuance of the Petrie award. That bargain, which remained unresolved as of the date of the instant complaint hearing, became the subject of an interest arbitration petition filed by the Union on March 17, 2004. Macy joined the negotiations as the County's chief spokesperson following the filing of the Union's petition for interest arbitration. Moberly has been the Union's chief union spokesperson throughout the bargain. The WERC's informal investigation in the matter was closed on August 2, 2004, and the WERC issued its Certification of Results of Investigation and Order Requiring Arbitration in the matter on August 6, 2004. When the investigation was closed on August 2, 2004, the right of each party to change its own offer became contingent on the agreement of the other party to allow any further change. The County's offer proposed various changes in the Agreement in addition to general wage increases, whereas the Union's offer proposed only general wage increases. Among other changes proposed in the County's final offer were the following:

. . .

1. Article 2 -- Definitions

Modify the following sentences from Section B -- "Regular part-time employees shall be permitted to enroll in the county's medical insurance program and pay the cost, in accordance with the Plan rules. Regular part-time employees shall be entitled to all other fringe benefits on an actual pro-rata basis for all hours worked."

. . .

4. Article 15 -- Insurance

Revise Paragraph A to read in its entirety as follows:

A) Except for employees hired after January 1, 2004, the county will pay 95% of the cost of premiums for any of the regular HMO Plans in the Wisconsin Public Employer's Group Health Insurance Program and will pay 90% of the cost of premiums for the Standard Plan or State Maintenance Plan.

For employees hired after January 1, 2004, the county will pay 85% of the cost of premiums for any of the regular HMO plans in the Wisconsin Public Employer's Group Health Insurance Program and will pay 80% of the cost of premiums for the Standard Plan or State Maintenance Plan. that

Add Paragraph E to read in its entirety as follows:

> E) The county will pay 75% of the cost of the premium for any employee who elects to enroll in the dental plan offered by Delta Dental -- Base Plan 01, Option 2, or any dental plan with benefits substantially similar as a whole to that plan.

Judge William Eich (Eich) of Madison was selected by the parties and appointed by WERC as the interest arbitrator in the matter.

7. Eich wrote the parties on September 1, 2004, offering four possible dates for a hearing, ranging from October 25-November 29, 2004. When the Union responded that it was unavailable on any of the dates proposed by Eich, the County requested Eich to provide additional dates as soon as possible. Ultimately, Eich wrote the parties on October 8, 2004 confirming that December 20, 2004, had been agreed upon as the date for the interest arbitration hearing.

8. On Tuesday, December 14, 2004, during preparation for the December 20 Highway unit interest arbitration hearing, Moberly reviewed the 2005 "It's Your Choice" booklet (Booklet), which is published annually by ETF to provide premium and plan design information to employees covered by the State Plan. That Booklet identified four plans as being available in the Marquette County service area. Those four plans and their single and family monthly premiums were as follows: Standard Plan administered by Blue Cross Blue Shield of Wisconsin (BCBS) (919.40/2242.90), the State Maintenance Plan (SMP) also administered by BCBS (644.10/1545.10), Dean Health Plan (367.40/900.10), Unity Health Plan - Community Network (459.80/1131.10) and Dean Health Plan (367.40/900.10). The Booklet identified the SMP as a qualified plan and it identified the Dean Health and Unity Health Plans as non-qualified plans. The Booklet also contained a statement that "SMP is available in counties where there is no qualified plan."

9. Later on December 14, Moberly sought the opinions and advice of at least three of his Council 40 staff colleagues regarding what appeared to him to be a conflict between the ETF regulations and the language of Agreement Sec. 15.A. in the context of the 2005 ETF Booklet rates for the Marquette County service area.

10. Later on December 14, Moberly contacted the ETF in Madison by phone, spoke with a person in the ETF "Employer's Communications Center," whose name Moberly does not recall, who confirmed that Moberly was correct that the ETF Booklet identifies the SMP as the low cost qualified plan which is to be used in determining the minimum and maximum Employer contributions established by ETF regulations.

11 On Wednesday, December 15, 2004, Moberly left Macy a voice message at his office and sent a 4:39 p.m. e-mail to Macy which read as follows:

> Jim,
>
> I just left you a voice message and thought I'd follow-up with an e-mail. In reviewing the Marquette County insurance language I think we have a problem. It appears to me, based on the new rates for 2005 that the language is illegal. The contract requires an employer payment of 95% of any HMO or 90% of the Standard Plan or State Maintenance Plan. While the ETF allow only 105% of the least costly qualified plan. The SMP is the only qualified plan. With the new rates for 2005 - 105% of the SMP is $1622.36. 90% of the Standard Plan is $2018.61, almost $400 per month the maximum allowable employer contribution. (sic) The figures worked okay the last two years, but with the increases in the Standard Plan we now have an issue.
>
> I would suggest that in light of this and the Savings Clause within the Contract we delay the hearing and meet in bargaining to attempt to bring the Contract into compliance with the ETF.
>
> Bill Moberly
>
> . . .

12 On December 16 at 7:49 a.m., Macy sent Moberly an e-mail reply, with a copy to Miller, as follows:

> Hi Bill,
>
> We are not inclined to cancel the hearing. The issues at hearing are not related to the insurance issue. I am not opposed to discussing an over-all settlement of the contract and that might be in the best interest of both parties. For now, I think the hearing should go forward.
>
> Jim

13. After receiving Macy's December 16 e-mail, Moberly conferred by phone with WERC General Counsel Peter Davis. Moberly described the situation to Davis as it was reflected in the e-mails quoted in Findings of Fact 11 and 12, but Moberly did not provide Davis with the specific language of Agreement Sec. 15.A. or of the final offers then pending in the interest arbitration. Davis responded to Moberly that the Union could request that the WERC reopen the investigation on the basis of which the WERC had certified the final offers and ordered interest arbitration, but that the parties should first attempt to resolve the Union's concern about the legality of the final offers between themselves. Davis also suggested that Moberly could contact Eich and ask for a postponement of the December 20 hearing to permit the parties to attempt to resolve the Union's concern. Moberly's telephone communication with Peter Davis occurred without the knowledge or participation of Macy or any other County representative. Macy first learned of it at the instant complaint hearing.

14. On December 16, at 3:29 p.m., Moberly e-mailed Eich (with copies to Macy and Edward VanderBloomen, the chief spokesperson for two other County bargaining units represented by the Wisconsin Professional Police Association with pending bargains with the County), requesting postponement of the December 20 interest arbitration hearing. Moberly's message to Eich read, in pertinent part, as follows:

> This request is based on the fact that since the certification of Final Offers, changes in the monthly premiums for the State Health Plan for 2005 have created a situation where both final offers are illegal. Current contract language requires the employer to pay 95% of any HMO Plan and 90% of the Standard Plan or State Maintenance Plan. ETF regulations require the Employer to pay no less than 50% and no more than 105 % of the least costly qualified plan. In Marquette County the SMP is the only qualified plan. Simply put 105% of the SMP is less than 90% of the 2005 rates for the Standard Plan, consequently, the language would require the Employer to pay in excess of the allowable 105%. This language is not in dispute. The Union's Final Offer calls for status quo on health insurance. The Employer's Final Offer maintains this funding mechanism and calls for a second tier with a smaller Employer contribution for employees hired after January 1, 2004. I am not currently in my office, but I believe the second tier as it relates to the Standard Plan would still be illegal. Unfortunately, if we were to continue to hold the hearing on Monday, you would have two Final Offers which are illegal, making it impossible for you to rule on either.
>
> I am proposing that the parties voluntarily agree to meet for the purpose of negotiating specifically on this issue, reserving the right to return to interest arbitration should we be unable to reach a voluntary settlement. I proposed this yesterday to Mr. Macy, but he unfortunately rejected my proposal and has requested that we proceed with the hearing.
>
> Should you agree to the postponement, and Mr. Macy refuses to voluntarily return to the bargaining table, I will apprise the WERC of the situation and ask them to reopen the investigation. Your timely response to this will be greatly appreciated. My e-mail address is . . . my office telephone . . . I [can] best [be] reached by cell at . . . .

15. In addition to sending a copy of his 3:29 p.m. December 16 e-mail to VanderBloomen, Moberly provided the same information by phone to Dan Campbell, the Teamsters business agent representing two of the County's bargaining units with each of which the County was then close to resolving on-going contract negotiations.

16. Shortly after sending the 3:29 p.m. December 16 e-mail to Eich, Macy and Moberly met in person for negotiations involving another employer, and they had occasion to discuss the status of the December 20 Marquette County interest arbitration hearing. Macy

asserted that the contract language is not illegal and that the hearing should not be postponed. Moberly asserted the contrary in both respects. The record does not establish whether Moberly advised Macy during that conversation that Moberly had requested that Eich postpone the hearing.

17. Later on December 16, Eich responded to an e-mail sent to him by Amraen of Macy's firm asking whether Moberly's earlier e-mail message to Macy "discussing possibility of an illegal proposal based on the 2005 health insurance rates" was related to a provision "in the local health insurance administration manual [stating] 'The employer contribution toward the premium for any eligible employee must be between 50% and 105% of the least costly qualified health insurance plan within the service area of the employer (but will not exceed the total premium for the selected plan.)'" Moberly's 9:22 p.m. December 16 response to Amraen, with copies to Eich, Macy, Miller and McReath, read as follows:

> Ms. Amraen,
> Yes, you are correct. The County is restricted to paying no more than 105% of the least costly qualified plan. For Marquette County the only qualified plan is the SMP which for 2005 has a rate of $1545.10.
> 105% of that figure is $16.22.25. The contract (sic) Marquette County Collective Bargaining Agreements require the County to pay 95% of any HMO and 90% of the Standard Plan or State Maintenance Plan (SMP). The rates for the Standard Plan for 2005 are $2242.90; 90% of that equals $2018.61, clearly almost $400.00 per month more than is allowed by ETF. The County and the Union's Final Offers would maintain that language and consequently would constitute illegal final offers.
> Additionally, the County has proposed a second tier that would require an employer contribution of 80% toward the Standard Plan for employees hired after 1/1/04. The 80% contribution figure is equal to $1794.32, again an amount greater than the $1545.10 allowed by ETF.
> It is for this reason that I believe that both the certified Final Offers are illegal, and why I have suggested we mutually agree to postpone the interest arbitration hearing and reconvene bargaining in order to attempt a voluntary settlement that will be legal. After Jim['s] initial response and unwillingness to postpone the hearing, I have written to Arbitrator Eich and requested a postponement predicated on the basis that both final offers are illegal.

18. On the morning of Friday, December 17, 2004, Eich called Macy to obtain the County's position regarding the Union's request for postponement of the December 20 hearing. Eich then faxed Moberly and Macy as follows:

> I was out of my office most of yesterday and, on my return late in the day, I received an e-mail from Mr. Moberly asking for a postponement of Monday's hearing on grounds that, in the Union's view, both parties' final offers have become "illegal" as a result of changes in the State Health Care premiums.

> Because of computer problems, I could not immediately respond by e-mail, so I telephoned Mr. Macy this morning and he said the County's position is that Mr. Moberly's concerns are not related to the matter or matters in dispute in arbitration.
>
> A reading of the parties' final offers suggests to me that it remains debatable whether either is illegal, as the Union contends, or might at some future date be subject to legal challenge. It thus seems to me that the most efficient and practical way to proceed is to cancel the scheduled hearing, with a request that the parties attempt either to resolve the underlying issues in the dispute, or, at least the controversy over the content of the final offer(s). I urge you to do so. If either the procedural or substantive issues remain unsettled by February 1, [2005], I will consider referring the matter to the Commission for resolution.

19. Also on December 17, 2004, at Macy's request, Bracken contacted the ETF for information regarding Moberly's contention that the 2005 rates put the 2002-03 agreement's insurance language into conflict with ETF legal requirements. Bracken initially wrote the following to the general ETF website e-mail contact address:

> . . .
>
> Employer Name: Marquette County
>
> . . .
>
> What is ETF's position if the employer has a provision in a labor contract that may cause it to exceed the 105% of the lowest qualified plan? Our contract requires the County to pay 90% of the Standard plan or State Maintenance Plan. 90% of the Standard Plan exceeds 105% of the State Maintenance Plan. No one is taking the Standard Plan. Can we pay 90% of the Standard Plan if an employee selects it? Please respond ASAP.

Bracken received a telephone call back from ETF's Jerry Young. Young told Bracken that he would discuss Bracken's question with Joan Steele. Steele and Bracken then spoke by phone during which Steele assured Bracken that the Marquette County insurance language complied with ETF legal requirements. Steele then e-mailed Bracken as follows:

> Bill,
>
> This is in follow-up to our discussion earlier today. As I indicated, when there is not an alternative plan (HMO) in a county that meets the minimum provider availability requirements (based on primary care providers, hospital, chiropractor, and dentist if dental is offered by the plan), the State Maintenance Plan (SMP) is available. The SMP, which is a self-insured plan, is not considered an alternate plan and thus, not used for determining the employer's maximum allowable premium contribution in that county.

> Please feel free to contact me directly should you have further questions on this topic.
>
> Joan Steele
> Manager, Alternate Health Plans
> Health benefits & Insurance Plans Bureau
> Division of Insurance Services

Steele's December 17 e-mail message above was not sent to or received by Moberly, directly or indirectly.

20. Later on December 17, 2004, County representatives arranged a telephone conference call among Bracken, Macy, Steele and Moberly. During that call, Steele provided the information noted in her message above, Moberly stated that he had received information to the contrary from another ETF employee, and Moberly asked whether Steele could refer to any ETF publication in support of the information Steele was providing. Steele replied that she was the head of the ETF subunit responsible for determining the low cost qualified plan for each service area. Steele also acknowledged that she was providing an interpretation that was not contained in any ETF publication. Moberly asked that Steele provide him with her precise interpretation of the ETF rules and regulations in writing. Steele replied that she considered her role to be to serve as a resource to employers, so that she could only provide information to the County's representatives and they could forward it, in turn, to whomever they chose.

21. Later on December 17, Macy faxed Eich with copies to Moberly and Miller, as follows:

> This letter is in response to your letter of December 17, 2004, regarding the status of the hearing in the above-noted matter. Please note that in a phone conference between Mr. Moberly, the Union's Representative, myself and one of my colleagues, Bill Bracken, a representative of the Wisconsin Employee Trust Fund, Joan Steele, confirmed to the three of us that the insurance language at Marquette County is legal and appropriate under the Fund's rules and regulations. She will be confirming this in writing to the parties.
>
> As I noted earlier, this simply confirms the understanding that the County has had all along.
>
> In this regard, recognizing that this matter has been pending for a long time, we respectfully request that we continue with the hearing on Monday, December 20, 2004. Thank you for your assistance.

22. Also on December 17, 2004, sometime after the completion of the conference call with Steele noted in Finding of Fact 18, Moberly spoke with another ETF representative who stated that ETF personnel were having a meeting at that time to discuss the question of whether the SMP or the Standard Plan was to be used low cost qualified plan in areas in which the SMP is the only qualified plan available.

23. At 2:15 p.m. on December 17, 2004, Moberly e-mailed Eich as follows:

> From: Bill Moberly
> To: William Eich
> Date: 12/17/04 2:15P.M.
> Subject: Re: Marquette County Arbitration
>
> Judge Eich,
>
> I have received your e-mail and interpret it to mean that the hearing scheduled for Monday is canceled and that you are urging the parties to attempt to resolve the underlying issues. If we are unable to do so by Feb. 1, 2005 you will refer the matter back to the Commission for resolution.
>
> As of 2:00 P.M., the parties still have not adequately resolved the dispute over the legality of the final offers. Two separate representatives from ETF have given two separate answers, one the Manager of Alternative Health Plans, believes the current language is legal and a second from the Employer's Communication Center believes the language requires an Employer contribution beyond the rules and regs of ETF.
>
> Thank you for your attention to this matter.
>
> Sincerely,
> Bill Moberly
>
> . . .
>
> cc: jm@dkattorneys.com

The Examiner infers from the absence of any name besides Eich's in the "To: " line of that message that Moberly did not, in fact, send that message to anyone besides Eich. The Examiner infers from the reference to "cc: jm@dkattorneys.com" that Moberly may have contemplated sending a copy of that message to Macy at the "jm@dkattorneys.com" e-mail address. However, that is an erroneous address which would not have resulted in Macy receiving that message had it been sent to him there.

24. On December 17, 2004, at 3:10 p.m., Macy faxed Eich (with copies to Moberly and Miller) as follows:

> This letter is in response to your letter of December 17, 2004, regarding the status of the hearing in the above-noted matter. Please note that in a phone conference between Mr. Moberly, the Union's Representative, myself and one of my colleagues, Bill Bracken, a representative of the Wisconsin Employee Trust Fund, Joan Steele, confirmed to the three of us that the insurance language at Marquette County is legal and appropriate under the Fund's rules and regulations. She will be confirming this in writing to the parties.
>
> As I noted earlier, this simply confirms the understanding that the County has had all along.
>
> In this regard, recognizing that the matter has been pending for a long time, we respectfully request that we continue with the hearing on Monday, December 20, 2004. Thank you for your assistance.

25. On December 17, 2004, at 3:27 p.m., Eich attempted to send the following message to Moberly (at bmoberly@afscmecouncil40.Org) and to Macy (at the incorrect jm@dkattorneys.com appearing on Moberly's 2:15 p.m. message noted in Finding of Fact 21) with a copy to WERC General Counsel Peter Davis. Eich resent that message to Moberly at bmoberly@afscmecouncil40.org at 3:36 p.m., and Eich resent it to Macy at the correct jmacy@dkattorneys.com at 4:34 p.m. The text of the original 3:27 p.m. message from Eich read as follows:

> I was away from my office for several hours. You have my faxed letter indicating that, given the question raised by the Union concerning the legality of the County's offer regarding the employee health plan, I felt it best to avoid any future challenges based on that claim by canceling Monday's hearing. I have since received a telephone message from Mr. Macy indicating that someone at ETF has advised him there is no problem with the County's offer on that subject. I have also received an e-mail from Mr. Moberly indicating that another ETF representative has advised him there is a problem.
>
> My own problem is this. I am, and have been, ready to proceed with the hearing on Monday. But I would hate to have the case heard and decided, and an award issued that might later be subject to challenge on grounds of the illegality of the offer. And from the information I have at this point, that remains very much in dispute.
>
> I have discussed the matter with Peter Davis at the Commission; and in light of all these considerations, I continue to feel that the most prudent course to take in light of this eleventh-hour procedural/legal dispute is to cancel Monday's

> hearing. While it appears quite unlikely from what each of you has communicated to me, if the parties can resolve this preliminary question, we could proceed with the scheduled hearing. If, however--as appears to be the case--the parties remain in disagreement with respect to the legality of the offer(s), I believe that issue should be referred to the WERC for determination.
>
> So unless I am advised by 4:30 p.m. today that both sides agree to proceed with the scheduled hearing without any challenges to the legality of the offer(s), I consider Monday's hearing as canceled.

26. At 5:01 p.m. on December 17, 2004, Eich e-mailed Macy and Moberly as follows:

> Should you be able to get together on the ETF/offer problem, I could hear the merits of the case on January 12, 13, 19, 20, 26, 27; or February 2, 3, 9 or 10. Thank you both for your assistance and cooperation.

27. On Sunday, December 19, 2004, at 2:15 p.m., Moberly e-mailed Eich and Macy as follows:

> Contrary to Mr. Macy's fax, the Union did not leave the telephone conversation with Ms. Steele convinced that the final offers are legal. I'm surprised that Mr. Macy would convey to you such a self-serving and untrue statement. I have spoken with another representative of ETF who tells me that Ms. Steele is incorrect, and Ms. Steele herself admitted that her interpretation of the rules and regulations is just that, an interpretation, that is not in print and has not been publicize[d] in any ETF document. I have asked Ms. Steele to confirm in writing for me her precise interpretation of the rules and regulations.
>
> I have numerous bargains beginning in January and would be available for hearing February 9 or 10. Of course this is predicated on the parties being able to reach an agreement on the status of their final offers by that date.
>
> I would suggest that we all communicate by mid-January on the status, in order to tie down the Feb. 9 or 10 hearing date.

28. On December 19 at 5:39 p.m., Eich e-mailed Moberly and Macy as follows:

> I have tentatively set aside February 2 and 3, 2004, as new hearing dates in the above arbitration. I assume the location and starting time will remain as before. If you could let me know which of the dates is mutually agreeable, we can confirm it.

> Finally, this assumes that the parties can reach an agreement on the legality of the final offers as they presently exist. As indicated, if this is not possible, and the parties' positions remain unalterably opposed on this issue, my intention would be to refer the matter to the Commission for determination as to the status of the offers.

29. No interest arbitration hearing occurred on December 20, 2004. However, at 2:03 p.m. on that day, ETF's Jerry Young e-mailed to Bracken and Miller the following reply to Bracken's initial December 17 e-mail to the general ETF website e-mail box:

> In response to your question, employer contribution share is defined by WI Adm. Code ETF 40.10 (2) and has the force of State law; collective bargaining agreements cannot be written to supersede State law.
>
> In the case of Marquette County, the plan that is used in the contribution formula is the Standard Plan, not the State Maintenance Plan (SMP). Therefore, there is no conflict between the payment of 90% of the Standard Plan in your collective bargaining agreement and our contribution formula. It appears that this confusion may have arisen due to the low cost plan letter of September 20, 2004.
>
> Last year, the annual employer contribution letter to Marquette County correctly noted that the SMP plan was available but was not used in the calculation of the employer contribution. Unfortunately, the low cost plan letter this year for 2005 cited above contained conflicting information. While it correctly noted that the "SMP premium is not used in any county 'Employer Pays' calculation", it also incorrectly identified the State Maintenance Plan as the Low Cost plan. SMP has never been considered a low cost plan for the purpose of determining employer contributions since it is a plan that is only offered in areas where there is no qualifying HMO or alternate health plan.
>
> A new low cost plan letter correcting this letter will be sent to Marquette County shortly after the beginning of the new year. In the meantime, please accept this as notification of the error. We sincerely regret any inconvenience. Please note that Bill Moberle (sic) and Jim Masey (sic) had asked to be informed of this information and we are relying on you to do that.

Young's December 20 e-mail quoted above letter was not sent to or received by Moberly, directly or indirectly.

30. On December 21, 2004, ETF faxed Miller the corrected 2005 employer contribution letter referred to in Young's December 20 e-mail, again expressing "We sincerely regret the error" that had been made in the September 20, 2004, version of that letter that ETF had sent to the County. The ETF's corrected 2005 employer contribution letter contained another ETF error in that it misstated the Total Premium for family coverage under Unity-Community as "1,331.10" rather than the unquestioned "1,131.10" figure published in the 2005 Booklet. ETF's December 21, 2004 correcting letter was not sent to or received by Moberly, directly or indirectly.

31. As noted in Young's December 20 e-mail, the ETF's September 20, 2004 low cost plan letter had contained conflicting information as to whether the SMP or the Standard Plan was the low cost qualified plan upon which the County was to base its calculations of the minimum and maximum employer contributions under the ETF regulations for 2005. After the County received that letter, Miller called the ETF and requested clarification of the conflict. Miller was told by the ETF representative to whom he spoke at that time that the SMP was the low cost plan to be used to determine the County's minimum and maximum contributions. On the basis of that information, the County prepared and distributed to its employees a listing of employer and employee premium contributions for the four plans available for them to choose for 2005. After receiving the corrected low cost plan letter on December 21, 2004, the County prepared and distributed revised information to its employees correcting the employer and employee premium contributions previously distributed on the basis of the earlier erroneous information provided by ETF.

32. On December 21 or 22, 2004, Moberly initiated another telephone call to ETF in Madison. The ETF representative that he spoke with on that occasion acknowledged that the 2005 Booklet was in error when it identified SMP as the plan to be used in determining the employer's maximum allowable premium contribution plan, because in counties (including Marquette County in 2005) where the SMP is the only qualified plan, ETF uses the Standard Plan rather than the SMP as the low cost plan when determining the employer's maximum allowable premium contribution plan. After receiving that information, Moberly did not object further to an unconditional rescheduling of the interest arbitration hearing.

33. The hearing was ultimately rescheduled for and conducted on February 2, 2005. At the time the parties and Eich were communicating about dates for rescheduling the hearing, Moberly offered Macy dates in January 2005 for a bargaining session in Adams County after having asserted to Eich and Macy (as noted in Finding of Fact 25) that the Union was not available to reschedule the Highway unit interest arbitration hearing on any date in January.

34. Because the ETF uses the Standard Plan rather than the SMP as the low cost plan when determining a participating employer's maximum allowable State Plan premium contribution in counties (including Marquette County in 2005) where the SMP is the only qualified plan, the 2005 health plan rates announced by ETF for State Plan health plans available in Marquette County did not create a situation in which a County payment of 90% of the Standard Plan would exceed 105% of the lowest cost qualified plan. The Union's contrary assertions to Eich and others were factually and legally incorrect.

35. While the Union's assertions -- to the County, to Eich, to Campbell and VanderBloomen and to Peter Davis -- that the parties' final offers would require the County to make a payment for Standard Plan insurance that would exceed 105% of the lowest cost qualified plan were factually and legally incorrect, those assertions, both before and after the conference call with Steele, were made by the Union in good faith based on: the requirements of ETF 40.10 (1) and (2) (b), WIS. ADM. CODE that for an employee of a participating employer to be eligible for State Plan health insurance "The employer shall pay an employer contribution toward the gross health insurance premium based on the lowest cost qualified plan in the service area of the employer, as follows: . . . (b) . . . an amount between 50% and . . . 105% of the lowest cost qualified plan;" the unconditional provisions in the 2005 Booklet that the SMP was the lowest cost qualified plan for the Marquette County service area; the fact that Moberly received information from an ETF representative before the conference call with Steele that was consistent with the Booklet and inconsistent with the interpretation provided by Steele during the conference call; the fact that after the conference call another ETF representative informed Moberly that the question of whether the SMP or the Standard Plan was the plan to be used for calculating an employer's minimum and maximum where the SMP was the only qualified plan available, was then being discussed in a meeting; and the fact that, following the conference call, Moberly received nothing in writing from Steele or from anyone at ETF directly or indirectly.

36. No members of the Highway bargaining unit selected the Standard Plan as their health plan for 2005.

37. The State Plan has been in effect for all five of the County's bargaining units since January 1, 2003. Prior to Moberly's December 15, 2004, communications, no individual or organization had expressed to the County any concern that there was a conflict between the language of Agreement 15.A. and the requirements of the ETF regulations.

38. Beginning in January of 2005, the County paid more than 95% of the health insurance premiums for Highway bargaining unit employees who chose either the Dean Health Plan or Unity-Community. The County did so despite the fact that both Dean Health Plan and Unit-Community are "regular HMO plans" within the meaning of Agreement Sec. 15.A., and despite the Agreement Sec. 15.A. provision stating that "The County will pay 95% of the cost of the premiums for any of the regular HMO plans in [the State Plan] . . .". The County did so because the County's minimum 2005 employer contributions required by ETF regulations (50% of the 2005 Standard Plan premiums) exceeded 95% of the 2005 premiums for each of those two plans.

39. Except for the conference call with Steele arranged by County representatives, Moberly's various telephone communications with ETF personnel occurred without advance notice to or participation of Macy or any other County representative.

40. At times not specified in the record, Moberly has made requests to the County's Administrative Coordinator to obtain information concerning the fees that the County has paid to Macy and his firm. At least one such request related to a time period that included December of 2004, without asking for any differentiation between the time spent in response to the Union's request for a postponement of the December 20, 2004, hearing and bills for other time spent by the firm on Marquette County work. Moberly has made similar requests to other counties, as well. In ways not specified in the record, the Union has criticized the County for spending $6,500 on legal fees to defend itself against a Highway unit grievance that Moberly asserts would have cost the County $1,500 had it been granted.

41. The Union did not refuse to participate in the December 20 interest arbitration hearing. Rather, that hearing was postponed by Eich at the request of the Union and over the objections of the County. The Union's conduct regarding its request for postponement of the December 20 hearing did not constitute and was not tantamount to an outright refusal to bargain with the County.

42. The Union's conduct regarding the scheduling, postponement and rescheduling of the December 20, 2004, Highway unit interest arbitration hearing did not constitute a failure or refusal by the Union to meet with the County at reasonable times for the purpose of an interest arbitration hearing.

43. Even if Moberly's failure to send to Macy a copy of his 2:15 p.m. December 17 e-mail message to Eich were found to be intentional, the record would not establish a lack of good faith as regards the totality of the Union's conduct regarding the scheduling, postponement and rescheduling of the Highway unit interest arbitration hearing.

CONCLUSION OF LAW

Respondent Union has not been shown to have committed prohibited practices within the meaning of Secs. 111.70(3)(b)3, (3)(c) or 4, Stats., by any or all of the conduct alleged in the complaint or by any or all of the conduct described in the Findings of Fact, above.

ORDER

1. The Complaint is dismissed in all respects.

2. The Respondent Union's request that Complainant County be ordered to pay Respondent Union's litigation costs and fees is denied.

Dated at Shorewood, Wisconsin, this 3rd day of October, 2005.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

MARQUETTE COUNTY

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

In its complaint, the County asserted that the Union committed refusals to bargain collectively in violation of Secs. 111.70(3)(b)(3), (3)(c) and 4, Stats., by unilaterally: delaying the initial scheduling of an interest arbitration hearing; causing the interest arbitrator to cancel the scheduled hearing based on factually- and legally-incorrect Union assertions that the parties' final offers were illegal, by continuing to advance those incorrect assertions even after the County arranged a conference call in which the parties were assured by an authoritative ETF source that the offers were not illegal; and by delaying the rescheduling of the hearing until February 2, 2005 by falsely asserting that the Union was not available on earlier dates. By way of remedy, the County requests declarative, cease-and-desist, and notice posting relief as well as an order that the Union reimburse the County for fees and other costs incurred as a result of the Union's unjustified delays of the interest arbitration hearing and incurred in pursuing the instant complaint case.

In its answer, the Union denies that it committed any prohibited practices, admits that it caused the interest arbitrator to cancel the hearing based on what turned out to be incorrect information, but asserts that the Union acted in all respects in good faith, and that, in any event, the complaint fails to allege conduct that would, if proven, amount to a prohibited practice. The Union requests an order that the County be required to pay the Union's fees and costs incurred in defense of the instant complaint case.

In its post-hearing arguments, the County asserts that the Union violated Secs. 111.70(3)(b)(3), (3)(c) and 4, Stats., by: delaying the scheduling of the interest arbitration hearing; improperly and unilaterally causing the cancellation of the scheduled hearing in the interest arbitration; engaging in dilatory tactics regarding the rescheduling of the interest arbitration hearing; improperly communicating with representatives of other County bargaining units in an attempt to influence and disrupt the County's negotiations with those organizations; improperly unilaterally communicating incorrect information to the arbitrator, the ETF and the WERC General Counsel in order to cause cancellation of the interest arbitration hearing; and improperly causing the County to incur significant costs and other adverse impacts. By way of remedy, the County requests an order that the Union reimburse the County for the costs the County incurred due to the Union's canceling of the interest arbitration hearing and for the costs of pursuing the instant complaint proceeding.

In its post-hearing arguments, the Union asserts that the complaint is frivolous; that the Union acted in good faith in all respects; that it did not refuse to participate in the interest arbitration, but rather submitted a motion to postpone which was granted by the interest arbitrator; that it did not inappropriately or illegally cause delay of the interest arbitration hearing; that it did not provide false information to anyone; and that it did not inappropriately or illegally communicate with others. The Union asks that the complaint be entirely dismissed;

that the County be ordered to post a notice at its work sites stating that it has been found to have filed a frivolous and baseless complaint; and that the County be ordered to reimburse the Union for its complaint case costs and expenses.

I. Applicable Legal Standards

Section 111.70(3)(b)3, Stats., makes it a prohibited practice for a labor organization (i.e., municipal employees acting in concert with one another) to "refuse to bargain collectively with the duly authorized officer or agent of a municipal employer. . . ." Section 111.70(1)(a), Stats., defines "collective bargaining" as "the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment . . . . The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession." Section 111.70(3)(c), Stats., makes it a prohibited practice for any person to do or cause to be done on behalf of or in the interest of . . . municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by, among others, Sec. 111.70(3)(b)3, Stats. Section 111.70(4), Stats., sets forth the hearing and other procedures for binding resolution of certain contract negotiation disputes affecting municipal bargaining units including the Highway unit involved in this case.

To prove that the Union violated its statutory duty to bargain in violation of those provisions, the County bears the burden of proving by a clear and satisfactory preponderance of the evidence, either that the totality of the conduct of the Union amounted to subjective bad faith, E.G., ADAMS COUNTY, DEC. NO. 11307-A (Schurke, 4/73), AFF'D BY OPERATION OF LAW, -B (WERC, 5/73) or that the Union engaged in specific conduct which constitutes or is tantamount to an outright refusal to bargain. See generally, Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining*, 399-401 (BNA, 1976) and see, E.G., NLRB V. KATZ, 369 US 736 (1962) (unilateral change in mandatory subject of bargaining held to be tantamount to outright refusal to bargain and therefore per se violation of duty to bargain imposed by federal private sector law). Dilatory tactics can violate the statutory requirement to meet and confer at reasonable times, but must be assessed as part of the overall conduct of the respondent. CITY OF JANESVILLE, DEC. NO. 22981-A (Honeyman, 3/86) AFF'D BY OPERATION OF LAW, -B (WERC, 4/86). On the other hand, refusing to complete an on-going grievance arbitration proceeding was held to constitute a per se refusal to bargain in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 30590-B (WERC, 5/04).

II. Alleged Union Per Se Refusal to Bargain

The County argues, in effect, the Union committed a per se refusal to bargain by causing the hearing to be canceled based on incorrect facts and an incorrect legal theory.

It is undisputed that the Union caused the hearing to be canceled on the basis of its assertion that the final offers were illegal because ETF's 2005 health plan rates for Marquette County created a situation in which a County payment of 90% of the Standard Plan would exceed 105% of the lowest cost qualified plan. That theory turned out to be to be incorrect both factually and legally.

The County argues that it is irrelevant whether the Union advanced that incorrect theory in good faith or otherwise. In other words, the County would have the Examiner conclude that the Union committed a per se refusal to bargain by causing the hearing to be canceled on the basis of a theory that turned out to be incorrect. In support of that contention, the County cites BROWN COUNTY, DEC. NO. 28289-A (Crowley, 8/95) AFF'D BY OPERATION OF LAW -B (WERC, 8/95) in which Examiner Crowley held that a party's good faith but incorrect understanding as to the meaning of certain mutually agreed-upon language is not a valid defense to a claim that the party violated the duty to bargain by refusing to execute the agreed-upon language. The County also cites NORTHEAST WISCONSIN TECHNICAL COLLEGE (NWTC), DEC. NOS. 28954-C, 28909-D AT 7 (WERC, 3/99) in which the Commission held that a party's good faith misunderstanding of the applicable law was no defense to a claim that the party's refusal to bargain about certain subjects constituted a violation of the statutory duty to bargain.

In the Examiner's opinion, those cases are materially distinguishable from the instant circumstances. On a superficial level, the Union in this case has, of course, neither refused to sign language that was previously agreed upon nor refused to bargain about particular subjects. More importantly, the Union in this case did not refuse to participate in the interest arbitration hearing in a manner paralleling the refusals of the respondents in BROWN COUNTY and NWTC to execute agreed upon language and to bargain about certain subjects. In addition, the Union here did not refuse to participate in the arbitration hearing the way the respondent in the MILWAUKEE SCHOOLS decision, *supra*, did. Rather, in this case, the Union requested that interest arbitrator Eich grant a postponement of a scheduled hearing to permit the parties to attempt to resolve the Union's stated concern about the legality of the parties' respective final offers. While the Union was the moving party regarding the postponement request, it was the interest arbitrator who ultimately determined whether the Union's postponement request would be granted.

Accordingly, the Examiner concludes that, as in CITY OF JANESVILLE, *supra*, the question of whether the Union engaged in dilatory delaying tactics constituting a refusal to meet at reasonable times is a matter that must be assessed as a part of the overall conduct of the Union.

III. Alleged Totality of Union Conduct as Bad Faith Bargaining

Upon consideration of the totality of the Union's conduct cited by the County in this case, the Examiner has concluded that the County has failed to prove by the requisite clear and satisfactory preponderance of the evidence that the Union violated its statutory duty to bargain in good faith.

The County contentions that the totality of the Union conduct constitutes bad faith fall into the following three basic categories: (A) the Union knew that there was no valid basis for postponing the hearing; (B) the Union's true purposes for delaying the hearing were improper; and (C) the Union's methods of delaying the hearing were improper. Those three categories are discussed, in turn, below.

A. Claimed invalidity of Union's stated basis for hearing postponement

The Union's stated reason for postponing the hearing was that both parties' final offers were illegal because 90% of the 2005 Standard Plan rates exceeded 105% of the 2005 SMP rates, such compliance with the contractual 90% employer contribution toward the Standard Plan would exceed the maximum employer contribution permitted by the ETF regulations. That argument, in turn, was premised on the notions that the Agreement required the County to pay no more and no less than 90% of the Standard Plan, that the SMP was the low cost qualified plan to be used in calculating the maximum 2005 County contribution permitted by the ETF regulations, and that proceeding with the interest arbitration hearing without a resolution of the claimed conflict between the contract and the ETF regulations would result in the arbitrator being presented with arguments about offer legality that would preclude him from selecting either of the parties' offers.

Agreement Sec. 15.A. provides that ". . . the County may replace the current health insurance plans with the Wisconsin Public Employer's Group Health Insurance Program. The County will pay 95% of the cost of the premiums for any of the regular HMO plans in that program, and 90% of the cost of the Standard Plan or the State Maintenance Plan." The County asserts that, properly interpreted, that language means that the County is contractually required to pay 90% of the cost of the Standard Plan unless the ETF's State Plan regulations require that the County pay some other percentage. In support of that contention, the County presented testimony to the effect that the County's agreements covering all five of its units have been administered based on that interpretation since January of 2003 and that no other union or employee had ever before argued that the Agreement conflicted with the ETF regulations. The County also offered testimony by Macy that the County is interpreting the Agreement language the same way other State Plan participating employers do and that the County told the Union that is how the language would be applied when the parties were bargaining about it in the 2002-03 negotiations. (tr.151-154).

The Union's bargaining history evidence consisted of Moberly's testimony denying that the County made any such 2002-03 bargaining table statements, and that, on the contrary, the County had told the Union that the County would contribute the percentages specified in the language for the various plans and that when Union bargainers pointed out that future rate relationships could create a conflict between the ETF regulations, the County responded that the then-existing rates created no such problem and that the parties would deal with that problem if and when it arose in the future. (tr.140-41, 161-62).

Given the absence from the record of bargaining notes or any other bargaining history evidence, the Examiner does not find either party's bargaining history evidence to be a reliable basis on which to determine whether Moberly and the Union knew that Sec. 15.A. would not require the County to pay 90% of the Standard Plan if doing so would exceed the applicable maximum employer contribution permitted by the regulations governing the State Plan. Macy's testimony about how other employers are administering the State Plan provided no specifics regarding the contract language in effect in those relationships or the extent to which the Union is chargeable with knowledge of those practices. The County's evidence that no other County union or employee had ever expressed the concern raised by the Union about a conflict between the contract and the ETF-regulations is not conclusive both because the evidence does not establish that the rate relationships in 2003 or 2004 were such as would present the question raised by the Union regarding the 2005 relationship, and because the Union is not bound by the acquiescence of other organizations.

In light of the specific language of Sec. 15.A. regarding employer percentage contributions, the Examiner is not persuaded that the Union knew that Sec. 15.A. would not require the County to pay 90% of the Standard Plan if doing so would exceed the applicable maximum employer contribution permitted by the regulations governing the State Plan.[1]

It is undisputed that no Highway unit employee had selected the Standard Plan for 2005. Moberly admitted (tr.142) that he was aware of that fact as of the date of the complaint hearing, and the Examiner finds it plausible that Moberly was also aware in December 2004 that no Highway employee had signed up for the Standard Plan for 2005 given that Moberly was at that time preparing for the December 20 interest arbitration hearing. The record also establishes, however, that one or more Highway unit employees could have chosen the Standard Plan for 2006 during the open enrollment conducted in the closing months of the 2004-05 agreement that was at issue in the interest arbitration. Had that occurred, and had the 2006 rate relationship between the Standard Plan and the SMP remained as it was in 2005, the Union's stated December concern about a contractual 90% Standard Plan contribution in excess of the ETF maximum employer contribution would have ripened into a non-hypothetical situation, albeit only as regards premium payments beginning in 2006 after the nominal termination of the 2004-05 agreement. Thus, the County makes a good point that the concern the Union was raising in December was largely hypothetical. However, the fact that the County's communications in December did not point that out to either Moberly or Eich, coupled with the limited potential for a non-hypothetical issue arising during the term of the 2004-05 agreement noted above, lead the Examiner not to find that the Union knew that no Highway unit employee could possibly be affected at any time during the 2004-05 agreement by the concern the Union was raising in December 2004.

The County argues that at least by the end of the conference call with Steele the Union knew that the SMP was not the low cost qualified plan to be used in calculating the maximum

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[1] The Examiner's conclusion in that regard is not intended to be a binding determination of what the parties' Agreement means or how it applies in any given circumstances.

2005 County contribution permitted by the ETF regulations and that the Union therefore also knew that its stated basis for requesting a postponement was invalid. The Union's stated concern was based on the fact that the 2005 ETF Booklet identified the SMP as low cost qualified plan for the Marquette County service area. Moberly's initial call to the ETF Communications Center confirmed that Moberly's understanding from the Booklet was correct that the SMP was the plan on the basis of which the County's 2005 minimum and maximum State Plan contributions were to be calculated. In the conference call arranged by the County, Steele made it clear that she was in a position of authority within ETF to address the issue and she unequivocally assured Moberly and the County's representatives that, notwithstanding what the ETF Booklet stated, the Standard Plan rather than the SMP was to be used to determine the minimum and maximum County State Plan contributions in 2005. Steele acknowledged during the conference that she was providing what amounted to her interpretation of the ETF regulations and that she could not point to any ETF publication which supported that interpretation. The record also establishes that despite Moberly's request during the conference call that he be provided with Steele's interpretation in writing, Moberly was not provided, directly or indirectly, with any of the correspondence that the County received from ETF before or after the conference call.

In that context, it is understandable that Moberly would contact ETF after the conference call to try to resolve the conflict between the ETF Booklet and Communications Center representative on the one hand, and Steele on the other. That conflict was not resolved when Moberly was ultimately informed that the question Moberly was asking was then being discussed in a meeting of other ETF representatives. In the context of the latter telephone call to ETF and the absence of anything in writing from ETF contradicting the ETF Booklet, the Examiner is not persuaded that the Union knew by the end of the conference call that the Standard Plan was the plan to be used to calculate the County's State Plan minimum and maximum contributions for 2005.

While Moberly's testimony was not specific as to the name of any of the ETF personnel with whom he unilaterally spoke on three separate occasions regarding this matter (one before and two after the conference call with Steele), the Examiner nonetheless credits Moberly's testimony regarding all three of those conversations. Because the record shows that ETF's written and telephonic communications on the subject had been fraught with errors and inconsistencies, it is not at all surprising that Moberly would have been assured by an ETF representative before the conference call that the Booklet was authoritative or that he would have been informed after the conference call that the matter remained under active discussion in a meeting at the time of Moberly's call. In that regard, Young's e-mail quoted in Finding of Fact 27 frankly acknowledged that another of ETF's written communications to the County regarding the State Plan for 2005 had contained internally-contradictory information regarding whether the SMP plan was or was not to be considered the low cost qualified plan to be used for determining the employer's maximum allowable premium contribution. In addition, Miller testified that when he spoke with a person at ETF on October 8, 2004, that ETF person had informed him (erroneously as Miller learned in December) that the SMP plan was the low cost qualified plan to be used for that determination. (tr.75). Once Miller later learned that he had

been erroneously informed by ETF in that regard, the County corrected and reissued health plan premium contribution information to its employees. Indeed, even the when the ETF issued its corrected low cost qualified plan letter of December 21, 2004, that letter included for the first time what appears to be an erroneous Total Premium amount (of "1,331.10" rather than "1, 131.10") for Unity-Community Family coverage. (ex.18).

For those reasons, the Examiner is not persuaded that the Union knew that the Standard Plan rather than the SMP was the plan to be used for calculating the County's minimum and maximum State Plan contributions at any time prior to Moberly's final phone conversation with an ETF representative on December 21 or 22 noted in Finding of Fact 30.

There remains the question of whether the Union knew that proceeding with the interest arbitration hearing without a resolution of the claimed conflict between the contract and the ETF regulations would not result in the arbitrator being presented with arguments about offer legality that would preclude him from selecting either of the parties' offers.

In all of the circumstances of this case, the Examiner is not persuaded that the Union can be charged with such knowledge. Moberly did not communicate a postponement request to Eich until after he had conferred with several of his AFSCME Council 40 colleagues, with the ETF, with Macy and with Peter Davis of the WERC. According to Moberly, Davis informed him that a possible method for resolving the Union's concern regarding the legality of the parties' final offers was a reopening of the WERC investigation for that purpose if the parties were not able to resolve that matter between themselves. While Macy's reply to Moberly's initial e-mail suggesting postponement of the hearing asserted that "The issues at hearing are not related to the insurance issue," the Examiner is not persuaded that in the context of the language of Sec. 15.A., and the information Moberly derived from the ETF Booklet and various ETF personnel and Peter Davis of WERC, that the Union had reason to know that proceeding with the interest arbitration hearing without a resolution of the claimed conflict between the contract and the ETF regulations would not have resulted in the arbitrator being presented with arguments about offer legality that would preclude him from selecting either of the parties' offers.

On that point, Eich's December 17 communications December 17 fax to the parties' stated that "a reading of the parties' final offers suggests to me that it remains debatable whether either is illegal, as the Union contends, or might at some future date be subject to legal challenge." Eich went on to state in that fax that if the parties were unable to resolve the issues raised by the Union regarding the legality of the final offers by February 1, Eich would "consider referring the matter to the Commission for resolution." Eich's e-mail to the parties later that day further stated that "I have discussed the matter with Peter Davis at the Commission; and . . . I continue to feel that the most prudent course to take in light of this eleventh-hour procedural/legal dispute is to cancel Monday's hearing. . . . If . . . the parties remain in disagreement with respect to the legality of the offer(s), I believe that issue should be referred to the WERC for determination."

While the County is correct that that the differences between the parties' final offers did not involve the Union's stated concern about offer illegality arising out of a claimed conflict between ETF regulations and the existing contract language, the record establishes that despite having given careful consideration to the County's specific contentions to that effect, Eich nonetheless concluded that the best course in the circumstances was to cancel the hearing.

For the foregoing reasons, the Examiner is not persuaded that the Union knew when it was requesting the postponement that there was no valid basis for postponing the hearing.

B. Claimed improper Union purposes for delaying the hearing

1. Claim that the Union was concerned only about the County paying less than 90% for the Standard Plan, not about illegality

The County argues that the Union showed it had no good faith concern about final offer illegality by ending its illegality contentions once the corrected 2005 ETF rate comparisons eliminated the possibility that the County would be paying less than the contractually-specified 90% for the Standard Plan, even though the correction also resulted in the County paying more than the contractually-specified 95% for the Dean and Unity-Community plans.

The Examiner finds this contention unpersuasive. The sole stated basis for Moberly's contention that the final offers were illegal was that the Agreement would require a 90% employer contribution toward the Standard Plan but that based on the Booklet's specification of the SMP as the low cost qualified plan, the ETF regulations would limit the Employer's contribution toward the Standard Plan to less than 90% of the premium. Once the ETF authoritatively corrected the erroneous Booklet reference to the SMP as the plan to be used in calculating the County's contribution minimum and maximum for 2005 under the ETF regulations, that resolved the sole stated basis for the Union's claim that the final offers were illegal and its associated request for a postponement of the hearing.

The record does not persuasively establish whether Moberly was aware that the ETF's correction of the Booklet also resulted in a conflict between the contractually-specified 95% for the Dean and Unity-Community plans and the 50% of Standard Plan minimum imposed by the ETF regulations.[2] Nor does the record persuasively establish whether and when Moberly became aware that the County would be paying more than 95% of the premiums for the Dean Health and Unity-Community plans beginning in January of 2005. Notably, none of County's communications with Moberly or Eich regarding postponement of the interest arbitration

[2] In his testimony, Macy asserted that Moberly revealed that he was aware that the County would be paying more than 95% for Dean and Unity-Community by expressing surprise and commenting,"Well, let me see how the formual might work then," in response to Steele's conference call assertion that the Standard Plan rather than SMP was the low cost qualified plan to be used in determining the County's 2005 ETF minimum and maximum State Plan contributions. (tr151). The Examiner finds Moberly's comment in that regard to be ambiguous at best, since it might just as well have referred solely to the County's Standard Plan contribution which was the sole focus of the Union's request for a postponement.

hearing called attention to that fact or otherwise asserted that the Agreement, properly interpreted, provides that the ETF regulations trump the contractual employer contribution percentages in the event of a conflict between the two.

As a result, it is plausible that Moberly was not aware that the ETF's correction resulted in an ETF-regulation employer minimum contribution toward Dean and Unit-Community that exceeded the contractually-specified 95% employer contribution for those plans. It is also plausible that Moberly was aware of that situation and chose not to base a request for a further postponement of the hearing on it.

Given that state of the record, the County has not met its burden of proving by a clear and satisfactory preponderance of the evidence that Moberly was being consciously disingenuous by ultimately acquiescing in the unconditional rescheduling of the hearing as he did.

2. Claim that the Union was attempting to increase the County's legal bills

The County contends that the Union's incorrect assertion, that the final offers were illegal, foreseeably caused the Employer to experience unnecessary additional legal costs. The County argues that the Union's unsuccessful previous pursuit of frivolous issues in a grievance case, coupled with the Union's requests for and criticism of the amounts of money paid by the County in legal fees and the timing of the Union's request for postponement, show that one of the Union's true purposes for causing postponement of the hearing was to further increase the amounts of money paid by the County for legal fees.

The County's attachment to its initial brief of a copy of the award in the grievance case to which its argument above refers was not sufficient to make that award part of the record evidence in this case, so the nature of the grievance case referred to by the County is not a part of the record on which the Examiner can base the instant decision. The record also provides no detail regarding the manner in which and extent to which the Union has criticized the amounts of money paid by the County in legal fees. (tr.145, 168) The very limited evidence regarding the grievance arbitration and the Union's criticisms of the legal fees paid by the County does not constitute a basis on which the Examiner can find that one of the Union's purposes for seeking postponement of the hearing was to cause the County to incur additional legal fees.

The County also argues that the timing of the Union's postponement request shows that the Union was trying to cause the County to incur additional and unnecessary legal costs. It is true that the Union did not request a postponement of the hearing until December 15. However, Moberly's undisputed testimony establishes that under the State Plan rates in effect in 2003 and 2004 50% of the Standard Plan did not exceed 105% of the lowest cost qualified plan available in Marquette County under the State Plan, and the record otherwise establishes that the 2005 State Plan rates were issued by ETF after the August 2, 2004, close of the WERC investigation precluded either party from unilaterally amending its offer without the

agreement of the other party. In those circumstances, the Union's concern, that the Agreement required a greater employer Standard Plan contribution than 105% of the low cost qualified plan identified in the ETF Booklet, did not arise until the 2005 rates were published in the ETF Booklet. The Examiner finds plausible and credible Moberly's explanation that he discovered that situation on December 14 during the course of his preparations for the December 20 hearing. The record establishes that Moberly very promptly thereafter raised that concern with the County and subsequently with Eich.

For those reasons, the Examiner is not persuaded that either the Union's information requests and criticism concerning the County's legal fee spending or the timing of the Union's request for hearing postponement shows that a Union's purpose for seeking postponement of the hearing was to cause the County to incur additional and unnecessary legal expenses.

3. Claim that the Union was coercing the County in the selection of its bargaining table representative

The County also contends that the Union's requests for and criticism of the amounts of money paid by the County in legal fees constitute an improper attempt to coerce the County in the selection of its bargaining table representative. In that regard, the County cites dicta in CITY OF BURLINGTON, DEC. NO. 13256-B (Schurke, 8/75) to the effect that a pattern of conduct on the part of a labor organization against a municipal employer would violate a Union's duty to bargain if any part of the labor organization's motivation is coercion of the employer in the selection of its bargaining table representative. The examples of unlawful coercion cited by Examiner Schurke involved patterns of conduct tantamount to a refusal to meet with the employer's designated representative, as evidenced by strikes, threats of strikes, picketing, direct demands for the removal of the negotiator and unspecified threats of trouble on the employer's job site. On the facts of that case, however, Examiner Schurke concluded that the Union's numerous and strident public criticisms of a member of the employer's bargaining team did not rise to the level of unlawful coercion, "based largely on the complete absence in this record of any evidence of action threatened or taken by the Association or its members to disrupt the work of the police department during the long hiatus in bargaining . . .". Id. at 8.

The Examiner agrees with the County that it has a statutory right to be free of unlawful coercion as regards the selection of its bargaining representative. However, as in CITY OF BURLINGTON, the Examiner in this case concludes, based largely on the complete absence in this record of any evidence of action threatened or taken by the Union or its members to disrupt the work of the Highway department, that the Union conduct cited by the County in this case does not rise to the level of unlawful coercion of the County as regards the selection of its bargaining representative violative of the Union's statutory duty to bargain.

4. Claim that the Union was attempting to disrupt County bargains with other unions

The County also argues that the only reason Moberly had for informing VanderBloomen and Campbell about the Union's request for a postponement of the hearing as he did was an improper and bad faith purpose to disrupt and interfere with the County's on-going negotiations with its other unions. The Examiner agrees with the County that, had Moberly's communications with VanderBloomen and Campbell prevented those representatives' organizations from promptly settling their pending contract negotiations on terms paralleling the County's Highway unit offer, the Union stood to avoid what would otherwise have become an internal pattern of settlements supportive of the County's Highway unit offer.

However, the County has cited no authority for the proposition that a party evidences a lack of good faith or otherwise violates its statutory duty to bargain when it communicates information and opinion to a party involved in another collective bargaining relationship in an effort to influence the outcome of that other organization's pending contract negotiation. A more persuasive argument could be made that the Union's efforts to inform VanderBloomen and Campbell of the existence of a possible issue regarding legality of the contract language that was apparently a part of those organizations' agreements with the County and to inform them about the possible postponement of the Highway unit interest arbitration hearing were, instead, lawful concerted activities within the meaning of Sec. 111.70(2), Stats.

5. Claim that the Union was attempting to delay implementation of County proposals

The County's final offer proposed increases in health insurance contributions for employees hired after January 1, 2004. The Union's offer proposed to maintain the status quo. During the pendency of the interest arbitration, the status quo contribution levels would have been applicable to Highway unit employees hired after January 1, 2004, if there were any. However, if the County prevailed in the arbitration, the contribution increases proposed by the County for those employees would take effect retroactively as a set off against the County's payments to those employees of retroactive wage increases. In those circumstances, the Union and any affected employees do not appear to have very much to gain from a delay in the time when the higher contribution levels for new employees proposed by the County would be implemented if the County offer were selected. The Examiner is not persuaded that the Union's conduct in relation to the arbitration hearing constituted an attempt to delay the date of possible implementation of those changes.

C. Claim that the Union used improper methods to delay the hearing

1. Claimed unnecessary delay in initial hearing scheduling

As noted in Finding of Fact 5, Eich wrote the parties on September 1, 2004, offering four available dates for the hearing ranging from October 25-November 29, 2004. When the Union responded that it was unavailable on any of the dates proposed by Eich, the County requested Eich to provide additional dates as soon as possible. Ultimately, Eich wrote the parties on October 8, 2004 confirming that December 20, 2004, had been agreed upon as the date for the interest arbitration hearing. On those facts, the Examiner is not persuaded that the Union engaged in dilatory or otherwise improper delaying tactics as regards the initial scheduling of the interest arbitration hearing.

The County cites the fact that the Union never proposed any specific contract revisions or meeting dates for the County's consideration as another indication that the Union's stated concern about Agreement illegality was not the true reason behind the Union's efforts to postpone the hearing. The Examiner finds no merit in this contention. The record reflects that Union did not know whether the hearing would be postponed, and, if so, whether the County would agree to discuss the Union's illegality of Agreement concern. In that context, it is not surprising or indicative of a lack of good faith on the Union's part for the Union not to have proposed specific solutions or specific dates for meetings about that subject.

2. Claimed unilateral and misleading communications with Eich, ETF and Davis

It is true that the Union variously asserted in its communications with Eich, ETF and WERC's Davis that the parties' final offers were illegal. It is also true that the Union's stated basis for that assertion turned out to be factually and legally incorrect. Specifically, contrary to the Union's assertions, there is no conflict in 2005 between a 90% County contribution toward the Standard Plan and an employer ETF contribution maximum of 105% of the Standard Plan (because ETF ultimately made it clear that the SMP was not the proper plan to be used in calculating the County's ETF minimum and maximum contributions.)

However, for the reasons noted earlier in this DISCUSSION, the Examiner has concluded that the Union's assertions, as to final offer illegality and as to the existence of a conflict between the Agreement and the ETF regulations regarding employer contributions for the Standard Plan, were mistakes that were made in good faith. The Examiner concludes that the Union's good faith in those regards is a valid defense in the circumstances.

The record establishes that Moberly sent numerous communications to Arbitrator Eich, all by e-mail, and that Moberly successfully caused a copy of all but one of them to be delivered to Macy's e-mail account at jmacy@dkattorneys.com.[3] The one message that

[3] Macy testified (tr. 20) that he did not learn that the Union had sent Eich a request for postponement until sometime on December 17, because Moberly did not disclose to Macy during their in person conversation on

Moberly sent to Eich that Macy did not receive was his 2:15 p.m. December 17 message noted in Finding of Fact 25. That message contains "CC: jm@dkattorneys.com" as the last line of text in the message, with only Eich shown as an addressee in the "To: " line of the e-mail. On that basis, the Examiner has found that Moberly did not send a copy of that e-mail to Macy, either at his correct e-mail address or at the incorrect "jm@dkattorneys.com" address noted in the text of the message. Macy eventually received Eich's 4:34 p.m. resend of Eich's 3:27 p.m. message which informed Macy that Eich had "also received an e-mail from Mr. Moberly indicating that another ETF representative had advised him there is a problem." However, even Macy's receipt of that message was delayed because Eich had used the incorrect "jm@dkattorneys.com" that Eich apparently copied from the text of Moberly's 2:15 p.m. message.

As a result, Macy was deprived of any opportunity to respond further until sometime after 4:34 p.m. However, because Eich's 3:27 p.m. message made it clear that Eich considered the December 20 hearing canceled unless the parties agreed to proceed with the hearing without any challenges to the legality of the offers, and because it was also clear that Moberly was not willing to waive his challenge to the legality of the offers, Macy's non-receipt of Moberly's 2:15 p.m. message and delayed receipt of Eich's 3:27 p.m. message do not appear to have materially affected the outcome of the parties' communications as regards the Union's request for a postponement of the hearing. However, even if the Examiner had found that Moberly intentionally failed to copy Macy with his 2:15 p.m. message, a finding to that effect would not render the totality of the Union's conduct violative of the statutory duty to bargain in good faith.

The County also asserts that the Union failed to provide Eich with complete information regarding the specific language of Agreement 15.A., the history of administration of that Agreement provision, and the fact that no Highway unit employee had opted for the Standard Plan. The Examiner finds the County's assertions in those respects unpersuasive because the County could have provided such information to Eich if it wanted it considered as a part of Eich's disposition of the Union's postponement request. The Union's various communications have not been shown to have been intentionally misleading to Eich. While some of the information and argument communicated by the Union to Eich turned out to be factually and legally incorrect, for reasons noted above, the Examiner finds that the Union's communications were made in good faith.

The record also establishes that Moberly initiated various ex parte communications with the ETF. The County had, of course, also done that in Bracken's communications with ETF prior to the conference call with Steele, and in Miller's communications with ETF regarding

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December 16 that Moberly had sent that e-mail to Eich. In contrast, Moberly testified that he made it a point to let Macy know that he had e-mailed a postponement request to Eich earlier that day. (tr.106). The record does not establish that one of those competing versions is more persuasive than the other. In any event, Moberly did, in fact, copy Macy with his December 15 e-mail asking Eich for a postponement, and Moberly copied Macy with his 9:22 p.m. December 16 e-mail reply to Amraen noted in Finding of Fact 17, in which Moberly again noted that he had written to Eich requesting a postponement.

lack of good faith to either of the parties on account of the ex parte nature of those communications with ETF. The County also asserts that the Union demonstrated bad faith by failing to provide complete information to the ETF personnel with whom Moberly claims to have spoken unilaterally. The Examiner finds those County contentions unpersuasive because there is no basis for concluding that Moberly would have received different answers from ETF had he given ETF specific information regarding the language of Agreement 15.A., the history of administration of that Agreement provision, and the fact that no Highway unit employee had opted for the Standard Plan.

The record also indicates that Moberly communicated with WERC General Counsel Peter Davis regarding the Union's concerns that the parties' offers were illegal. Moberly described the situation to Davis as it was reflected in the e-mails quoted in Findings of Fact 11 and 12, but Moberly did not provide Davis with the specific language of Agreement Sec. 15.A. or of the final offers then pending in the interest arbitration. The Examiner finds no basis in the record for attributing a lack of good faith to the Union on account of the content of or the ex parte nature of the Union's communications with Davis.

3. Claim that the Union engaged in unnecessary delay in rescheduling hearing

The evidence regarding rescheduling of the interest arbitration hearing establishes that the Eich initially proposed dates for rescheduling in his 5:01 p.m. December 17 e-mail, albeit on condition that the parties are able to resolve "the ETF/offer problem." Moberly's Sunday December 19 response stated, among other things, "I have numerous bargains beginning in January and would be available for hearing February 9 or 10. Of course this is predicated on the parties being able to reach an agreement on the status of their final offers by that date." The record does not clearly establish what happened next, but whatever it was resulted in Eich e-mailing the parties late in the day on December 19 that he had tentatively set aside February 2 and 3, 2004, and asked the parties to let him know which of those dates is mutually agreeable. The hearing was ultimately rescheduled for and conducted on February 2, 2004.

Macy testified that in the same time frame when rescheduling of the interest arbitration hearing was being addressed by the parties, Moberly offered January dates for a bargaining meeting involving Adams County. Moberly admitted that Macy's recollection on that point might well be correct. On that basis, the County asserts that the Union improperly delayed the rescheduling of the hearing. The Examiner disagrees. Moberly's December 19 message noted that he had "numerous bargains beginning in January," which is quite consistent with his holding some January dates for scheduling of January bargaining meetings like the one in Adams County for which Macy recalled that Moberly offered January dates. Moberly also persuasively testified that bargaining meetings can often be scheduled more easily than interest arbitrations because bargaining meetings are often scheduled for less than a full day, whereas he ordinarily schedules an interest arbitration hearing for a full day.

For those reasons, the Examiner does not find it indicative of a lack of good faith on

the Union's part for the Union not to have offered to reschedule the hearing on any date in

January, and the Examiner is not persuaded that the Union engaged in dilatory or otherwise improper delaying tactics as regards the rescheduling of the interest arbitration hearing.

IV. Union's requests for notice posting and reimbursement of costs and fees

The Examiner has denied the Respondent Union's request for an order requiring Complainant County to post a notice admitting that the complaint has been determined to be frivolous. The instant complaint was not filed by the Union, so the Examiner and Commission lack the jurisdiction or authority to issue such an order.

Similarly, the Examiner has denied the Union's request for an order that the County pay the Union's defense costs and fees because the Commission has held repeatedly in recent years that it is without statutory authority to grant such relief to a respondent. E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 30254 (WERC, 1/4/02) AT 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99).")

V. Conclusion

For the foregoing reasons, the Examiner's order dismisses the complaint in its entirety and denies the Respondent Union's requests for notice posting and reimbursement of litigation costs and fees.

Dated at Shorewood, Wisconsin, this 3rd day of October, 2005.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

MLG/gjc