STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA COUNTY HIGHWAY EMPLOYEES, LOCAL 70, COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

KENOSHA COUNTY, Respondent.

Case 309
No. 71382
MP-4703

Decision No. 34085-A

Appearances:

Bruce Ehlke, Attorney, Ehlke, Bero-Lehmann and Lounsbury, S.C., 6502 Grand Teton Plaza, Suite 202, Madison, Wisconsin 53719, appearing on behalf of the Complainant Union.

Joseph Cardamone III, First Assistant Corporation Counsel, Kenosha County Corporation Counsel's Office, 912 – 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On January 13, 2012, Kenosha County Highway Employees, Local 70, Council 40, AFSCME, AFL-CIO (thereinafter the Union), filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Kenosha County (hereinafter the County or the Employer). The complaint alleged that after the County filed for interest arbitration with the highway bargaining unit in December 2010, the County initially put forth a final offer, but subsequently withdrew it (i.e. the final offer). The complaint further alleged that thereafter the County repeatedly refused to put forth a final offer. The complaint further alleged that the County's repeated refusal to submit a final offer and continue forward with the interest arbitration process was in violation of Sections 111.70(3)(a)4 and 1, Stats. After the complaint was filed, it was held in abeyance at the parties' request. In March 2013, the Union asked that the complaint be reactivated and assigned to an examiner. On March 26, 2013, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sections 111.07(5) and 111.70(4)(a). On May 22, 2013, the County filed an answer denying the allegations. Hearing on the complaint was held on June 5, 2013 in Kenosha, Wisconsin. On

June 18, 2013, the Complainant asked the Examiner to recuse himself from the case because of statements the Examiner made before the hearing started when settlement discussions were occurring. The Examiner denied the Union's request on June 20, 2013. The parties then filed briefs and reply briefs, whereupon the record was closed on August 30, 2013. Based on the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant Kenosha County Highway Employees, Local 70, Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its offices in care of AFSCME Council 40 Staff Representative Nick Kasmer. His mailing address is P.O. Box 580734, Pleasant Prairie, Wisconsin 53158.

2. Respondent Kenosha County, hereinafter referred to as the County or Employer, is a municipal employer which operates a county highway department. Its offices are located at 912 – 56th Street, Kenosha, Wisconsin 53140.

3. The Union and the Employer have been parties to a series of collective bargaining agreements for many years. The latest agreement was in effect from January 1, 2008 through December 31, 2010.

4. In June 2010, the parties exchanged their initial proposals and began bargaining for a successor labor agreement to the one referenced in Finding 3.

5. In July or August 2010, the Union took an Employer bargaining proposal back to the membership for a vote. The membership rejected the Employer's bargaining proposal.

6. Following the rejection of the Employer's bargaining proposal, negotiations between the parties resumed in October 2010. Those negotiations were unsuccessful.

7. On December 6, 2010, the Employer filed a petition with the Wisconsin Employment Relations Commission (WERC) for interest arbitration. The petition was filed by the County's labor counsel, Robert Mulcahy. As was required by the statute in effect at that time, attached to this petition was the County's preliminary final offer to the Union.

8. As was required by the statute in effect at that time, the Union filed a preliminary final offer with the WERC on December 20, 2010. This final offer was filed by AFSCME Council 40 Staff Representative Nick Kasmer. The Union's preliminary final offer was dated December 11, 2010.

9. On January 19, 2011, the parties met with WERC Mediator Richard McLaughlin for an interest arbitration investigation, commonly known as a mediation session.

During that mediation session, the County made a bargaining proposal which the Union's bargaining team rejected. The mediation did not succeed in resolving the parties' bargaining dispute.

10. On January 21, 2011, the County's Director of Personnel Services – Robert Riedl – sent the County's bargaining proposal which the Union's bargaining team had rejected in mediation to the members of AFSCME Local 70.

11. In response to Mediator McLaughlin's call for revised final offers to be submitted, both sides submitted revised final offers to Mediator McLaughlin by February 3, 2011. The County's final offer was captioned "Revised Tentative Offer 2/2/11." The Union's final offer was captioned "AFSCME Local 70 Final Offer to Kenosha County, February 3, 2011."

12. On February 17, 2011, County labor counsel Mulcahy sent an email to Union Representative Kasmer and WERC Mediator McLaughlin, among others, which withdrew the County's final offer(s). Said email provided in its entirety:

> Nick pls be advised in light of current developments the County withdraws all prior final offers. If there are any questions pls call me directly. Thanks Rob Mulcahy

13. It can be inferred from the following historical events that the reference in Mulcahy's email to "current developments" refers to Governor Walker's proposal to dramatically change the scope of public sector bargaining in Wisconsin. This proposal – which later became known as Act 10 – was introduced in the Wisconsin Legislature in mid-February 2011. It was adopted by the individual houses of the State Legislature on March 9 and 10 and was signed by the Governor on March 11, 2011. Act 10 became effective June 29, 2011.

14. After the County withdrew its prior final offer(s), Kasmer repeatedly asked Mediator McLaughlin to either get another final offer from the County or to certify one of the final offers that the Employer had previously filed (and subsequently withdrawn). Neither occurred. On March 4, 2011, Kasmer sent an email to Mediator McLaughlin asking that the parties' final offers be certified. No final offers were ever certified by Mediator McLaughlin, nor did he officially close the interest arbitration investigation.

15. During the months of March through June, 2011 – after Act 10 had been signed into law but before it became effective – communications between the Union and the County continued. Specifically, Kasmer had numerous discussions with Riedl that were aimed at either settling/extending the parties' collective bargaining agreement, or resuming the interest arbitration process. The parties also had face-to-face bargaining sessions on May 11, June 1 and June 8, 2011. Those discussions and bargaining sessions did not result in a successor agreement being reached before Act 10 took effect.

16. On June 13, 2011, Kasmer sent an email to McLaughlin and Riedl which indicated he wanted to have a conference call with them.

17. On June 23, 2011, McLaughlin sent the parties an email which inquired whether there was anything he could do to help.

18. Either that day or the next, McLaughlin held a conference call with the parties. In that conference call, McLaughlin told the County's representatives he believed the Union was entitled to get a final offer from the County. The exact wording of the Employer's response is unknown, but it was to the effect of "we'll get back to you."

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

CONCLUSION OF LAW

Prior to Act 10 becoming effective, the County was required to comply with the Municipal Employment Relations Act (MERA) as it then existed. Pre-Act 10, MERA required both parties to submit a final offer. While the Employer herein submitted two final offers, it withdrew both of them on February 17, 2011. Afterwards, it did not submit another final offer before Act 10 became effective, despite requests to do so. It should have submitted another final offer. The Employer's failure to submit another final offer violated Section 111.70(3)(a)4, and derivatively, Section 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

As a remedy for the violation noted in the Conclusion of Law, the Employer shall immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Notify members of the bargaining unit represented by the Union by posting copies of the attached "APPENDIX A" in the manner in which notices to bargaining unit employees are typically made. The Notice shall be signed by an official of the County and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission within 20 days of the date of this Order as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin, this 19th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

/s/ Raleigh Jones
Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE KENOSHA COUNTY HIGHWAY DEPARTMENT REPRESENTED BY KENOSHA COUNTY HIGHWAY EMPLOYEES, LOCAL 70, AFSCME COUNCIL 40

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 of the following:

> After the County withdrew its final offer(s) on February 17, 2011, it should have submitted another final offer prior to June 29, 2011 (when Act 10 became effective and the County no longer had to submit a final offer or go to interest arbitration for its general employees).

Dated this 19th day of November 2013.

KENOSHA COUNTY

By: _____

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Union

The Union contends that the County committed violations of Sections 111.70(3)(a)4 and 1 by its actions herein. Specifically, it contends that the County violated Section 111.70(3)(a)4 when it failed to bargain with the Union when it withdrew its "ultimate final offer," and all other offers previously made, and subsequently refused to participate further in the statutory interest arbitration proceeding that it had initiated. The Union also argues that, independent of its unlawful failure to bargain, the County's actions also interfered with the rights of its highway employees in contravention of Section 111.70(3)(a)1.

The Union begins its argument with some historical context. It notes that prior to Act 10, the interest arbitration provisions set forth in Section 111.70(4)(cm)6 were an integral part of the statutorily protected right of public sector employees to "collectively bargain" with their employers. The Union summarizes that statutory procedure thus: 1) the parties initially filed a "final offer" with the WERC; 2) then the parties engaged in mediation; 3) if mediation did not result in a voluntary settlement, then the parties filed their "ultimate final offer" with the mediator, who then closed the investigation; and 4) then the interest arbitration was held and an arbitrator issued an interest arbitration award. As the Union sees it, those provisions were supposed to provide a procedure to help the parties resolve disputes, when, after a reasonable period of negotiation, the parties had not been able to resolve a dispute related to a bargaining issue. As it relates to this case, the Union notes that when the County filed its petition for interest arbitration with the WERC, the parties had been negotiating for six months and had not been able to reach agreement on a new collective bargaining agreement.

Next, the Union asserts that the final offer which the Employer's representative submitted to the mediator on February 3, 2011 was the Employer's "ultimate final offer." The Union expressly disputes the Employer's assertion that, at that point (i.e., when that final offer was filed), the parties were at "the beginning of the process, not the end." According to the Union, the statutory procedure did not contemplate an indefinite series of "final offers."

Building on the premise that the final offer which the Employer submitted on February 3, 2011 was the Employer's "ultimate final offer," the Union submits that when the County subsequently withdrew its "ultimate final offer" and all other offers that it previously had filed with the WERC, all that remained to be done in the proceeding by the mediator was a "formality," namely, the formal recognition that the parties were deadlocked, and then the procedural step of closing the investigation (that the County had requested). According to the Union, the County's "certification" argument is a "red herring" because the reason there was

no certification in this case is because the County withdrew its "ultimate final offer" and then refused to participate in moving the matter to a conclusion. The Union avers that regardless of the stage that the parties were at in the interest arbitration process when the Employer withdrew its "ultimate final offer" and subsequently refused to participate further in the interest arbitration process, the County committed a refusal to bargain violation by its conduct herein. As the Union sees it, the County made a sham of the interest arbitration process.

As part of its argument on this point, the Union characterizes the Employer's assertion that it continued to bargain with the Union as a "stretch." According to the Union, to the extent that the Employer proposed anything at all to resolve the dispute, "their proposals necessarily involved unlawful regressive bargaining proposals" and, as a result, no progress was made toward a resolution of the bargaining dispute. Aside from that, even if the County continued to bargain with the Union, it is the Union's view that it did not do so in good faith.

As another part of its argument on this point, the Union addresses the County's assertion that the legislation that later was enacted as Act 10 created uncertainty about the collective bargaining process and possible future cuts in State funding for counties. The Union calls this "palpable nonsense." As the Union sees it, "uncertainty" has always been inherent in the relationship of the State to its counties.

The Union's final argument on this point is that although the County does not expressly say so, what it is essentially asserting as a justification for its refusal to bargain in this case is a "business necessity" defense (i.e. an argument that events beyond its control forced it to do what it did, in order to avoid devastating, irreparable harm). Building on that premise, the Union then argues that the case law regarding the "business necessity defense" is well established and does not support the Employer's argument. According to the Union, the County's actions herein were not compelled by anyone or anything; rather, the County did what it did because "that is what it wanted to do." Finally, the Union submits that the reasons proffered by the County for its actions herein do not justify its conduct.

Aside from its refusal to bargain claim, the Union also argues that the County committed an (independent) interference violation when it withdrew all of its previously made offers and refused to participate further in the interest arbitration process. That's because the County's actions herein effectively interfered with and denied the employees' right to a "fair, speedy [and] effective" resolution of their bargaining dispute with the County.

As a remedy for these violations, the Union asks that the Examiner issue an order which restores the status quo ante and makes the employees' whole for all losses caused by the County's conduct. The Union cites Section 990.04, Stats., for the proposition that pending actions are not defeated by the repeal of a statute. The Union characterizes this as an elementary rule of law. According to the Union, the remedy that must be provided in this case "is the remedy that would have been available under the law in effect at the time that the unlawful conduct occurred." Specifically, the Union asks the Examiner to order the County to

reinstate its "ultimate final offer" (i.e. the Employer final offer dated February 2, 2011) and "then participate in the interest arbitration proceeding that is had initiated, until said proceeding is concluded." If necessary, it asks the WERC to "certify" the parties' "ultimate final offers" which were submitted by February 3, 2011. It also asks that the County be ordered to pay interest, at the statutory rate, on any back wages that may be due and owing the employees as a result of the subsequent interest arbitration award. Finally, the Union asks the Examiner to award it reasonable attorney's fees and costs.

County

The County contends it did not commit a prohibited practice by its actions herein. It characterizes the Union's arguments to the contrary as "overly simplistic and ultimately wrong." It elaborates as follows.

First, the Employer contends that the mediation/arbitration process – which was controlled by the mediator – never resulted in a certification of final offers as the investigation was never closed. For background purposes, the County acknowledges that it was the party that filed for interest arbitration. After that happened, the parties exchanged initial final offers. Then the parties held a mediation session. Since the mediation session did not result in an agreement, the mediator called for revised tentative final offers. These were submitted by February 3, 2011. While the Union characterizes these final offers as "ultimate final offers," neither offer was labeled as such. It notes in this regard that the Union simply labeled their offer as a "final offer" and the County's was labeled as a "tentative final offer." At no point in any of the contemporaneous correspondence was that offer (i.e. the County's offer) referred to as an "ultimate final offer." That assertion by the Union is a blatant misrepresentation of the record which is designed to try and force the facts into the statutory requirements for the argument being advanced. Aside from that, the Employer emphasizes that these offers were never certified by the mediator (despite repeated requests by the Union to do so), nor did the mediator ever make a call to end the mediation process or declare the investigation to be closed. The Employer further opines that "typically in these proceedings the parties will, with the assistance of the Mediator/Arbitrator, exchange offers multiple times, with the aim of trying to find those issues upon which the parties agree and narrowing the issues that need to be arbitrated." The Employer further notes that its February 3, 2011 final offer contained possible "permissive" subjects of bargaining that would have to go through the Declaratory Ruling process before any interest arbitration could proceed. As the Employer sees it, the foregoing should make it clear that, "despite what the Union would assert, this exchange of tentative final offers was meant to be the beginning of the process, not the end." Said another way, the Employer anticipated that there would be further exchanges of proposals to narrow the issues. The County asserts that after it withdrew the tentative final offer(s) it had previously made it was never ordered by the mediator or anyone else from the WERC "to put it or any other offer on the table." According to the Employer, the mediator could have done so. The Employer avers that had the mediator done so, it "would have complied and the process would have proceeded." The Employer submits that it can be presumed that the reason the mediator

didn't press the point (meaning didn't take any further steps to proceed with the interest arbitration process) was because he was aware that further discussions were taking place in the hopes of resolving the dispute.

Next, building on that last point, the Employer emphasizes that during the time period involved herein (i.e. the time between February 17, when the County withdrew its offer, until the end of June, when Act 10 was enacted), the County continued to discuss possible agreements with the Union. This was done despite the uncertainty as to when Act 10 would take effect, what impact it would have, and what cuts in State funding the County would have to absorb and consider in making budget decisions. In May and June, the parties had three face-to-face bargaining sessions. During these sessions, substantive proposals were exchanged and discussions were had on various areas of agreement. Additionally, the parties also had less formal discussions. While these discussions did not lead to an agreement before Act 10 took effect, that does not negate the fact that they occurred. Thus, it's the Employer's view that it sat down and engaged in collective bargaining with the Union, despite the uncertainty as to the state of the law.

Third, the Employer contends that the introduction of Act 10 threw the entire negotiating process into a state of chaos, and created considerable uncertainty as to how the proposed changes would impact what had been a well understood system. Additionally, the County expected that Act 10 was the precursor to anticipated cuts in State funding to counties, adding to the uncertainty about how negotiations would be able to proceed, based upon the lack of knowledge regarding what budgets would look like. Because of the foregoing, even if the Employer failed to bargain with the Union by its actions here, such failure can and should be excused due to the tremendous uncertainty that the introduction of Act 10 "wrought upon the State." It cites *Public Utility Commission of Richland Center*, Dec. No. 33281-B (WERC, 6/12) to support that proposition. While the facts in that case are somewhat different (i.e. the employer in that instance suspended all negotiations completely, whereas the County here continued to negotiate), the Employer argues that the principle is the same: "the uncertainty caused by Act 10 can and should be used to excuse some degree of caution on the part of the employers and cannot be held to be a refusal to bargain."

The County argues that what the Union is trying to do in this case is turn back the clock and ignore everything that has happened in Wisconsin's public sector labor relations in the past two years. As the County sees it, the Union is seeking a do-over, because having rejected various offers made by the County before Act 10 was enacted, the Union now asks for an order that the County reinstate an offer which they know they cannot get in any other fashion. The Employer asks that the Examiner reject the remedy sought by the Union (i.e. that the County be ordered to continue with the interest arbitration process as it existed prior to Act 10). It asserts that if the Examiner finds that the County did engage in a prohibited practice, the only remedy which can appropriately be ordered "is to collectively bargain as currently provided for by law."

DISCUSSION

I. Introduction

The complaint alleged that the Employer refused to bargain with the Union in violation of Section 111.70(3)(a)4 when it withdrew the final offer(s) it had previously filed with the Commission, and thereafter refused to submit another final offer before Act 10 became effective. The complaint further alleged that this same action constituted a violation of Section 111.70(3)(a)1. While the complaint did not indicate whether the Section 111.70(3)(a)1 claim was a derivative claim or an independent claim, the Union's briefs make it clear that they are raising both a derivative and an independent Section 111.70(3)(a)1 interference claim.

II. The Refusal to Bargain Claim

I begin with some historical content. Prior to Act 10, the Municipal Employment Relations Act (MERA) provided in Section 111.70(4)(cm)6 that municipal employees had the right to take unresolved collective bargaining disputes to interest arbitration after certain procedural steps had been exhausted. Broadly speaking, the procedural steps in that process were as follows. The first step was that both sides had to submit a "preliminary final offer" to the Commission. The second step was that a mediation session was then conducted under the auspices of the Commission. The third step was that if the mediation was not successful and did not result in an agreed-upon new collective bargaining agreement, then the parties submitted an "ultimate final offer" to the Commission. The fourth step was that after that happened (i.e. after "ultimate final offers" were submitted), then the Commission mediator / investigator would certify those "ultimate final offers" and close the investigation. The fifth step was that after that happened, the parties would proceed to interest arbitration. The interest arbitration process involved scheduling the interest arbitration hearing; holding the hearing; afterwards filing briefs; and finally the issuance of an interest arbitration award wherein the interest arbitrator picked one side's "ultimate final offer" and that final offer would be incorporated into the parties' new collective bargaining agreement. Act 10 – which went into effect on June 29, 2011 – significantly changed MERA. As it relates to this case, it eliminated interest arbitration for general employees (such as the Kenosha County highway employees).

The reason I identified the various procedural steps of the (old) interest arbitration process was because this case deals with several steps of that process. Specifically, it deals with what I previously identified as the third and fourth steps.

Before I delve into the facts involved here which deal with those steps, it is noted that there's no question that the first two steps of the process I identified were satisfied. That's because both sides submitted "preliminary final offers" after the interest arbitration process was started by the Employer, and then a mediation session was held. That mediation was not successful – meaning it did not result in an agreed-upon new collective bargaining agreement – so the mediator / investigator started the final offer exchange process. Pursuant to the

mediator's directive, both sides submitted a revised final offer to the Commission. That happened by February 3, 2011.

It's what happened next that is the focus of this case. What happened was that on February 17, 2011, the County's labor counsel withdrew the County's final offer(s). When that happened, the mediator / investigator had not yet certified any final offer as being a party's "ultimate final offer." Additionally, he had not closed the final offer investigation and sent the parties to interest arbitration.

The first part of the Union's refusal to bargain claim is that when the Employer withdrew their final offer(s) on February 17, 2011, that action – in and of itself – constituted an unlawful refusal to bargain. I find otherwise for the following reasons. Under the (old) interest arbitration law, the purpose of exchanging final offers was to prompt the parties to realistically assess their positions and eliminate from their packages issues that would be unwise to place before an interest arbitrator. After the first exchange of final offers, the mediator / investigator usually sought to continue mediation if the offers – in the view of the mediator / investigator – seemed to bring the parties closer to a mediated settlement. In an important decision dealing with closing an investigation and certifying final offers, the Commission held in *School District of Franklin*, Dec. No. 22211 (WERC, 12/1984) that an investigation could not be closed by the mediator / investigator until both parties to the investigation had affirmatively indicated that they no longer wished to modify their final offers. The Commission found that the purpose of the impasse resolution procedure was to allow both parties to continue to modify their final offers "until neither party, having knowledge of the contents of the final offer of the other party, would amend any proposal in its final offer." *School District of Franklin* at p.3. Following that decision, it was not unheard of in Wisconsin's public sector bargaining for a party to pull a final offer off the table for a variety of reasons. A party could legally do that (i.e. pull a final offer off the table) up until the time that the mediator / investigator certified that an impasse existed and closed the investigation.

In this case, the mediator / investigator never certified that an impasse existed and closed the investigation. As previously noted, under the old interest arbitration law, those were prerequisites that had to be satisfied before a party could get before an interest arbitrator. Knowing that these steps were not satisfied here, the Union argues that the Commission should nonetheless now retroactively find that an impasse existed, close the investigation and send the parties to interest arbitration. Part of the Union's contention is based on the premise that the final offers which the parties filed by February 3, 2011 were their "ultimate final offers." The reason that the Union characterizes those final offers as "ultimate final offers" is because those were the magic words used in the portion of the old statute dealing with the prerequisites for interest arbitration. Repeating the point for emphasis, after the parties had filed their "ultimate final offer," then the mediator / investigator would close the investigation, certify those final offers and send the parties off to interest arbitration. Here, though, the facts belie the Union's assertion that the final offer which the Employer filed on February 2, 2011 was the Employer's "ultimate final offer." First, let's look at the caption of that document. It was entitled "Revised

Tentative Offer 2/2/11." On its face, the word "tentative" establishes that the Employer did not intend for it to be their "ultimate" final offer which they wanted certified. Said another way, the word "tentative" implied that the Employer anticipated that there would be further exchanges of proposals (subsequent final offers) to narrow the issues in dispute. Second, when the Employer filed that offer, it noted that it contained possible "permissive" subjects of bargaining that would have to go through the Declaratory Ruling process before any interest arbitration could proceed. Third, at no point in the correspondence which followed did the Employer ever refer to their offer dated February 2, 2011 as their "ultimate final offer." Fourth, the Employer never told the mediator / investigator that they wanted to have their offer dated February 2, 2011 certified and the investigation closed. The foregoing points establish that despite the Union's assertion, the final offer which the Employer filed February 2, 2011 was not its "ultimate final offer." That being so, the Examiner declines to treat the Employer's February 2, 2011 final offer as its "ultimate final offer," and use it as the basis to now retroactively certify the parties' final offers, close the investigation and send the parties off to interest arbitration.

The focus now turns to the second part of the Union's refusal to bargain claim. This portion deals with what happened **after** the Employer withdrew their final offer on February 17, 2011. What happened was this: for the next four months, the parties had numerous discussions that were aimed at either settling / extending the parties' collective bargaining agreement or resuming the interest arbitration process. The parties also had three bargaining sessions. Those discussions and bargaining sessions did not result in a successor agreement being reached before Act 10 took effect on June 29, 2011.

While the parties invite me to delve into the details of their discussions and bargaining that occurred during the tumultuous four-month period from the time Act 10 became law to its going into effect, I've decided that I need not do that.

Instead, I'm going to focus on the following. As already noted, the Employer could legally withdraw its final offer dated February 2, 2011. However, after it did that, it was still legally obligated to submit another final offer. That's because prior to Act 10 becoming effective, Section 111.70(4)(cm)(6) of MERA required both sides to submit a final offer once a petition for interest arbitration was filed. There's no question that a petition for interest arbitration was filed here; in fact, it was the County that filed that paperwork with the Commission. Once that petition was filed, both sides needed to file a final offer. The final offer that I'm referring to here is not the "ultimate final offer" that was referenced and discussed earlier. Instead, what I'm referring to here is what was characterized in the statute as "its preliminary final offer." A "preliminary final offer" could differ from an "ultimate final offer" in that the latter is what was certified as the offer to be reviewed by the interest arbitrator. In the four-month period that elapsed between the County pulling its previous final offer(s) on February 17, 2011 and Act 10 becoming effective on June 29, 2011, Union Representative Kasmer tried without success to get the Employer to submit another final offer. While I'm well aware that during this four-month period the Employer was having discussions

with the Union and even bargaining with them, it should have attended to one more matter. Specifically, it should have submitted another final offer. However, for whatever reason, it didn't. That was problematic, and the mediator told the Employer in a telephone call on either June 23 or 24, 2011 that the Union was entitled to get a final offer from the County. Since the County didn't file another final offer after it withdrew its previous final offer(s) on February 17, 2011, I don't need to decide whether the final offer which the Employer should have submitted was to be a "preliminary" final offer or its "ultimate final offer." In this case, it doesn't matter, because the Employer didn't submit any type of final offer after it withdrew its previous final offer(s) on February 17, 2011. By doing that (i.e. failing to submit another final offer after it withdrew its previous final offer(s)), the Employer committed a technical refusal to bargain violation.

III. The Interference Claim

As previously noted, the Union's briefs make it clear that they are raising both a derivative and an independent Section 111.70(3)(a)1 interference claim.

Having found a refusal to bargain violation, I further find that that same conduct also derivatively violated Section 111.70(3)(a)1. Since I've found a derivative interference violation, it's my view that I need not decide, in this particular case, whether an independent violation of Section 111.70(3)(a)1 also occurred.

IV. Remedy

I find that the remedy which is appropriate in this matter is for the County to post a notice which indicates that after it withdrew its previously filed final offer(s) on February 17, 2011, it should have submitted another final offer prior to June 29, 2011 (when Act 10 became effective and the Employer no longer had to submit a final offer or go to interest arbitration for its general employees). While a cease and desist order is normally ordered whenever a violation of MERA is found, I find that such an order is not warranted in this particular case. Here's why. A cease and desist order is intended to stop certain proscribed activity from occurring again. The proscribed activity involved in this case (i.e. failing to file a final offer) is unlikely to be repeated because under Act 10, municipal employers no longer have to file final offers or go to interest arbitration for their general employees (like the highway employees involved here). Consequently, I have not included a cease and desist order.

All the other remedies sought by the Union in this matter are denied for the following reasons.

The remedy which the Union seeks in this matter is an order from the Commission which requires the County to participate in the interest arbitration process until "said proceeding is concluded." In other words, the Union wants the Commission to direct the County to participate in the interest arbitration process until an interest arbitrator issues a final

decision. If such an order were issued, it would certainly be, in a word, unique. That's because a review of the interest arbitration decisions on the Commission's website shows that no interest arbitration decision has been issued covering general employees since Act 10 became effective on June 29, 2011. Thus, the Kenosha County highway employees would be the first – and only – general employees who would get to proceed to interest arbitration since Act 10 became effective over two years ago. Assuming for the sake of discussion that that could happen (i.e. that the Commission could order the County to proceed to interest arbitration with the Union), there's a fundamental problem with it happening in this particular case. The problem is this. To close an interest arbitration investigation, the Commission first needs to have the parties' "ultimate final offers" in hand. The Union wants the County's final offer dated February 2, 2011 to be the "ultimate final offer" that is certified. However, as previously noted, the problem with that contention is that that offer was not the Employer's "ultimate final offer" for the purpose of interest arbitration certification. Since that final offer wasn't the Employer's "ultimate final offer" back in February 2011, I'm not going to find that it is now, and order that the Employer reinstate its February 2, 2011 final offer and then use it as a basis to close the interest arbitration investigation.

Second, the Union asks that the County be ordered to pay interest on any back wages that may be due. This request presupposes, of course, that the Commission orders the County to participate in an interest arbitration hearing which the Union then wins (meaning the Union's offer is selected by the interest arbitrator). However, there is not going to be an interest arbitration hearing in this matter, so it follows from that that no interest is owed.

Finally, the Union's request for attorney's fees and costs is denied. In *Clark County*, Dec. No. 30361-B at 19, the Commission stated:

> Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate.

I find no "extraordinary remedy" is appropriate here under *Clark County*.

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Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

Dated at Madison, Wisconsin, this 19th day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Examiner