

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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-B

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**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.

On January 13, 2012, Kenosha County Highway Employees, Local 70, Council 40, AFSCME, AFL-CIO (hereinafter 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 §§ 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 §§ 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. Following the

hearing, both sides submitted written argument. On November 19, 2013, the examiner issued a decision concluding that the County violated §§ 111.70(3)(a)4 and (3)(a)1, Stats. On December 6, 2013, the Union filed a petition for review together with a brief in support with the Commission. On January 29, 2014, the County submitted a responsive brief together with a request for review, and on February 8, 2014, we received the Union's reply brief.

The Commission has reviewed the transcripts of proceedings and the written argument of the parties and issues the following:

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

Findings of Fact Nos. 1 through 12 of the examiner's decision are adopted by the Commission and read as follows:

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

Findings of Fact Nos. 13 through 18 of the examiner's decision are deleted and the following Findings of Fact are made as follows.

13. The withdrawal of the tentative final offer occurred because of the pendency of the legislative proposal which ultimately became Act 10 and which was signed by the Governor on March 11, 2011.

14. On March 4 and April 5, 2011, Kasmer requested in writing that McLaughlin certify final offers from the parties. No final offers were ever certified by McLaughlin nor did he at any time close the interest arbitration investigation.

15. During the period from March 11 through June of 2011, the parties had several discussions regarding settlement and/or extensions of the expired collective bargaining

agreement. The parties met face to face on May 11, June 1 and June 8, 2011, and engaged in the bargaining of a successor agreement.

16. On June 13, 2011, Kasmer sent an email to McLaughlin and Riedl suggesting a conference call to “discuss the County’s final offer.”

17. On June 22, 2011, McLaughlin responded to Riedl and Kasmer by email as follows: “So what is going on in Kenosha County? Let me know what, if anything, I can do to be of any use ... .”

### CONCLUSION OF LAW

That the failure of the County to submit a final offer after February 17, 2011, did not constitute a failure to bargain in violation of §§ 111.70(3)(a)4 and (3)(a)1, Stats.

### ORDER

That the complaint of Kenosha County Highway Employees, Local 70, Council 40, AFSCME, AFL-CIO, be and the same hereby is dismissed.

Dated at Madison, Wisconsin, this 6th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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

This dispute began with run of the mill contract negotiations beginning in the summer of 2010 in anticipation of the expiration of the then current agreement on December 31, 2010. No agreement was reached and in need of outside assistance, the County filed a petition for interest arbitration in December 2010. Preliminary final offers were exchanged as well as modified offers as the process moved along in customary fashion.

All of that routine bargaining changed dramatically with the introduction of proposed legislation and the ultimate passage of what became 2011 Act 10. The new law was signed by the Governor on March 11, 2011. Had the law been published, its impact on the interest arbitration process would have been immediate. Without an agreement in place, the Union would have been restricted to bargaining over base wages and remedial interest arbitration would not have been available.

The law, however, was not published as a result of a Dane County circuit court order enjoining the Secretary of State from doing so. That litigation moved through the judicial system and was ultimately resolved by a decision of the Supreme Court on June 14, 2011 in *State ex rel Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis.2d 70, 798 N.W.2d 436. The law was ultimately published and became effective on June 29, 2011.

On February 17, 2011, counsel for the County withdrew the County's tentative final offer. The action was taken because of the eminent passage of law which would likely have eliminated interest arbitration. With the injunctive relief granted by the Dane County circuit court on March 17, 2011, labor and management were in a state of turmoil. For those municipal and school district employers and unions without contracts in place, the future of their relationships was very much up in the air. The strategy of some labor unions was to make significant concessions in hopes of getting agreements that would forestall the impact of Act 10. Others elected to wait in anticipation that political or judicial developments would resolve matters in their favor. Employers faced the same uncertainty and strategic dilemmas.

Here, the Union and the County were wrestling with the same concerns. In early March and in early April, Union representative Kasmer requested that the Commission representative "certify" final offers. Under Wis. Adm. Code § ERC 32.13, when the Commission is satisfied that an impasse has been reached and the required steps followed, it will issue an order initiating arbitration.

The Commission representative took no action on the Kasmer requests. The parties themselves renewed their efforts to voluntarily resolve the contract dispute. Face-to-face negotiation sessions occurred on three occasions in May and June. Other communications between both sides also occurred.

On June 13, 2011, Kasmer sent an email to Commission representative McLaughlin and County Personnel Director Riedl suggesting the scheduling of a conference call to discuss the “County’s final offer.” On June 22, 2011, McLaughlin responded to Kasmer and Riedl by email offering his assistance.

### Examiner Decision

The examiner concluded that the initial withdrawal of the tentative offer by the County in February 2011 did not constitute a refusal to bargain. He correctly reasoned that the County’s offer was not an ultimate final offer and that the County was free, prior to the certification and close of the investigation, to modify its final offer even if their intent was to pull it off the table. As he noted, the offer itself was labeled as a “tentative” final offer.

The examiner did, however, conclude that a “technical” refusal to bargain occurred because the employer did not submit another final offer between February 17 and June 29, 2011. We disagree with the examiner in that regard and conclude that no refusal to bargain occurred. The examiner found a “technical” violation of the duty to bargain based upon the statutory obligation of both sides to submit a final offer under § 111.70(4)(cm)6 (2009-10 Stats.). The difficulty with that reasoning is that it was incumbent upon the Commission’s representative to pursue that matter and he choose not to do so. Furthermore, the predicate “deadlock” disappeared as the parties resumed voluntary negotiations. The remedy for a party’s failure to submit a “single final offer” is that the investigator closes the investigation based upon the latest written position of a party. Wis. Adm. Code § ERC 32.09(2). Given the uncertainty of the very existence of interest arbitration, together with the renewal of voluntary bargaining, it is easy to see why the investigator did not push the matter.

The examiner also placed emphasis on the hearsay testimony of Kasmer to the effect that McLaughlin purportedly told the County on June 23 or 24, 2011 “that the Union was entitled to at least a final offer from the County.”<sup>1</sup> By that date, the Supreme Court had issued its decision and the elimination of interest arbitration was a *fait accompli*. All that remained was the ministerial act of publication. Even if the County had immediately submitted an ultimate final offer and McLaughlin would have closed the investigation, this matter never would have been certified prior to the effective date of the new law.

We dismiss this matter in its entirety and our result eliminates any need to address the Union’s claim for alternative relief.

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<sup>1</sup>The statement was proffered during the Union’s rebuttal portion of the hearing and standing alone it cannot constitute substantial evidence to support the conclusion that the County engaged in unlawful conduct. *Williams v. Housing Authority of the City of Milwaukee*, 2010 WI App. 14 ¶15, 323 Wis.2d 179, 779 N.W.2d 185.

Dated at Madison, Wisconsin, this 6th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner