STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LA CROSSE COUNTY INSTITUTION EMPLOYEES LOCAL 227, AFSCME, AFL-CIO, Complainant, vs. LA CROSSE COUNTY, Respondent.	Case IX No. 12350 MP-54 Decision No. 8683-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson for the Complainant.
Mr. Ray A. Sundet, Corporation Counsel, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Byron Yaffe, a member of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on such complaint having been held at La Crosse, Wisconsin, on October 31, 1968, before the Examiner and the Examiner having considered the evidence, arguments and briefs of counsel; and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant, La Crosse County Institution Employees, Local 227, AFSCME, AFL-CIO, hereinafter referred to as the Union is a labor organization having offices in La Crosse, Wisconsin.

2. That the Respondent, La Crosse County, hereinafter referred to as the Respondent, is a Municipal Employer having its principle offices at the La Crosse County Courthouse, La Crosse, Wisconsin.

3. That on April 30, 1968, the Wisconsin Employment Relations Commission after a representation election conducted by it, certified the Union as exclusive bargaining representative of all employes of the Respondent in the Oak Forest Sanitorium and Nursing Home, excluding supervisory, confidential and professional employes.

4. That in the fall of 1966, La Crosse County operated three institutions: a County Hospital for the mentally ill, Hillview Home for the aged and the Oak Forest Sanitorium for TB patients and the aged. At that time, each institution was governed by a superintendent and a Board of Trustees.

5. That the Board of Trustees of the Oak Forest Sanitorium on November 14, 1966, granted to the employes at the Sanitorium one free meal per day pursuant to the request by the employes for a cost of living adjustment. The granting of this benefit, however, was not authorized by the La Crosse County Board, which has full responsibility for determining the wages and other forms of compensation of the employes at the County Institutions. The County Board became aware of the meal policy at the Sanitorium shortly after the certification of the Union as the bargaining representative of the employes at the Sanitorium.

6. That on June 20, 1968, shortly after the County Board became aware of the fact that the employes at Oak Forest Sanitorium were receiving a free meal, it passed a resolution prohibiting County institutions from providing free meals until such practice is authorized by the County Board.

7. That shortly before the adoption of the above resolution, the County Board also learned that certain employes at the County Hospital were receiving as compensation, a free meal; however, the County Board permitted this practice to continue.

8. That there exists no clear and satisfactory preponderance of the evidence that the Respondent was motivated, even in part, by a desire to undermine the Union when it prohibited the continuation of the unauthorized practice of granting one free meal to the employes of the Oak Forest Sanitorium.

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

CONCLUSION OF LAW

That La Crosse County, by unilaterally prohibiting the continuation of the practice of granting employes of Oak Forest Sanitorium one free meal, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)(1) and (2) Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaint filed in this proceeding naming La Crosse County as the Respondent be, and the same hereby is, dismissed.

Dates at Madison, Wisconsin, this 20th day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

La Crosse County maintains three institutions: the County Hospital for the mentally ill, the Hillview Home for the aged, and the Oak Forest Sanatorium for the TB patients and the aged, hereinafter referred to as the Sanitorium. At the time of the incident giving rise to this proceeding, each institution was governed by a superintendent and a Board of Trustees; however, since that date this organizational relationship has been modified so that presently one Board of Trustees manages all three institutions. The County Board also has an Institutions Committee which has the following prescribed responsibilities:

> " The Committee shall act as a liaison for the Trustees of Hillview Home; the La Crosse County Hospital; and Oak Forest Sanatorium and Nursing home, according to the rules set up by the County Board.
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> The Committee shall, together with the Board of trustees of each institution, submit the annual budgets to the finance committee of the County Board at their annual budget hearing.
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> 1. Superintendent of Institutions shall furnish a written summary of bids and results to the Trustees and recommendations to all members of the Institutional Committee promptly. The Chairman of the Institutions Committee to be notified when bids are opened.
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> 2. Superintendent shall mail copies of the minutes of the Trustees meeting to the members of the Institutions Committee.
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> 3. The Superintendent shall furnish a copy of the budget to all Members of the Institutions Committee thirty (30) days before the presentation to the Finance Committee.

4. When the Finance Committee is involved in employee wage negotiations, it shall keep the Institutions Committee advised.

5. The Trustees at our Institutions are to notify the Institutions Committee when they deem it necessary to change administrative staff or physician so that the County Board is informed.

6. The Institutions Committee is to be promptly informed after the annual audit as to changes of rates so the same can be presented to the County Board, Director of Welfare and Director of Relief."

On March 1, 1966, the Sanitorium issued a Personnel Policy Handbook which provided in pertinent part that meals would be furnished employes at 35 cents for breakfast and supper and 65 cents for dinner.

In the fall of 1966 the employes of the Sanitorium met with the Board of Trustees of that institution and requested of the Trustees a cost of living salary increase. The Chairman of the Board of Trustees, Mr. Bice, advised the employes that he would not be able to grant their requested cost of living increase, but that he would give them a free meal because that was about all he could do for them. Accordingly, on November 14, 1966, the Trustees of the Sanitorium met and resolved that the employes would be given one free meal per shift. This policy change was recorded in the minutes of the Board of Trustees meeting on that date.

On April 30, 1968, La Crosse County Institution Employees, Local 227, AFSCME, AFL-CIO, hereinafter referred to as the Union, was certified as the bargaining representative for the employes at the Sanitorium. Shortly thereafter, on May 4, 1968, the Trustees of the Sanitorium held a meeting, the minutes of which indicate the following:

" The employes meals were discussed. They were eating one meal a day per their eight-hours and coffee breaks without charge. This privilege was given to them about two years ago because they were disgruntled and unhappy, feeling one shift, the 7:00 to 3:00 p.m. shift, was getting more than the others even though there was a variance in the price of meal tickets. The Board considered discontinuing the practice of giving free meals, but the understanding is that it is not good to attempt this now that the Union has entered the picture. It is our understanding the two other county institutions charge or lunches are carried."

Mr. Charles Guenther, Chairman of the Institutions Committee, learned of the meal practice some time during late May or early June 1967 and on June 20, 1968, introduced a resolution before the County Board which provided:

> "WHEREAS, your Institutions committee has met to consider the matter of providing free meals for employees of the County Institution; and,
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> WHEREAS, it has come to the attention of said committee that some of the institutions are providing these meals; and,
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> WHEREAS, this appears to be a matter of wages and compensation within the province of the County Board rather than the institutions themselves,
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> NOW THEREFORE, BE IT RESOLVED that for the remainder of 1968 and until altered by this board no free meals shall be provided for the employees of said institutions."

Some time prior to the introduction of this resolution Mr. Ray A. Sundet, Corporation Counsel for La Crosse County wrote Mr. Guenther the following letter:

> "I am writing to you concerning the granting of meals at Oak Forest Sanitarium. I did not realize that they had been serving the employees free meals for several years and now I Understand that La Crosse County Hospital has started to give free meals in the last couple months. I do not know if the latter information is correct, however, I had thought originally that if Oak Forest had been granting these free meals for a considerable period of time that it might be better to continue this practice until we negotiate a Union Contract with them this fall in view of the fact that their numbers are relatively small. If it is true that West Salem has started then I view this matter differently and suggest that the Institutions committee bring in a resolution prohibiting the institutions from providing free meals as this, in effect, is additional compensation and needs to be bargained. If you have any questions in this regard or desire that I draft a resolution, kindly contact me."

The resolution was unanimously adopted by the County Board at the meeting on June 20, 1968.

On August 21, 1967, the County Board and the Union held a negotiation meeting. Prior to this meeting, on July 9, 1968, Mr. Guido Cecchini, the District Staff Representative for the Union, wrote Mr. Sundet the following letter:

"Pursuant to our telephone conversation, I am writing, as you requested, in regard to the action taken by the Oak Forest Sanitorium Trustees, which takes away the free meals from the employees of the Sanitorium. Said action constitutes a change in benefits and condition of employment and as you know is not permitted without negotiations.

Now, therefore, the employees of the Oak Forest Sanitorium through their representative demand that all cost charged them for meals be refunded and that conditions remain as existed before the election."

During the course of the meeting on August 21 Mr. Cecchini demanded a response to his letter and Mr. Jerome Klos, a member of the Institutions Committee and the County Board, replied that the granting of meals was unauthorized, that the County Board is not bound by such acts which were done without its authorization, and that it would not change its position.

Mr. Cecchini also raised the question of the applicability of the County Board's resolution prohibiting free meals to the County Hospital. It is clear from the record that certain employes at the County Hospital--namely, the farm boss, the engineer, the head nurse, ward attendants who work during regularly scheduled meals, and people who work nights--receive meals as part of their compensation, and that the County Board became aware of this unauthorized practice at the time the dispute in question arose. The resolution prohibiting free meals, however, did not apply to those employes who were receiving meals at the County Hospital. In response to Mr. Cecchini's question, Mr. Klos stated that the employes receiving meals at the County Hospital were receiving them in place of extra duty and in place of wages, although it was admitted that the County Board had not authorized this practice. Thus, Mr. Klos admitted that the County Board did make certain exceptions in the application of the resolution, particularly in the County Hospital, however, he further stated that the Board had the right to cease the unauthorized practice even though they chose to permit exceptions to the general rule.

The Union argues that under Section 111.70(3)(a)(1) Wisconsin Statutes, a unilateral withdrawal of benefits after certification of a Union as the employes' bargaining representative and prior to the commencement of negotiations constitutes a prohibited practice

because it interferes with the employes' rights to belong to a Union and to engage in Union activities. It is the Union's position that such a withdrawal of benefits seriously undermines the position of the Union in its capacity as the bargaining representative of the employes.

In this instance the Union asserts that the Employer's unilateral withdrawal of the free meal benefit was motivated by its anti-union animus. It is argued this is evidenced by the County Board's failure to consider alternative courses of action, by its failure to make a fair investigation before coming to the decision, by the time proximity between the certification and the action taken, and by the County Board's failure to prove its asserted defense of lack of knowledge and authority. Instead, it is submitted that the evidence indicates that even after the County Board passed the resolution, a free meal practice was permitted to continue at another institution. Lastly, it is argued that even if the County Board had supported its position in the record, it does not constitute an adequate defense in that the employes should not be penalized because of the County Board's negligence.

The Union notes that the National Labor Relations Board has consistently held that unilateral action without negotiation constitutes interference, restraint and coercion under the National Labor Relations Act, as amended, as well as a refusal to bargain under the same Act. It further argues that the unilateral withdrawal of the meal privilege in this instance undermined the Union in the following manner: (1) It was to the economic detriment of the employes and therefore it undermined the Union bargaining position in the forthcoming negotiations; (2) It undermined the Union in that it had a coercive psychological effect on the employes; (3) It undermined the Union by preventing the Union from getting under way with negotiations, particularly after the Union filed the prohibited practice complaint with the Commission and the County Board refused to further negotiate pending the disposition of that complaint.

The Union contends that the County Board realized that its action would likely affect the Union's position, and in support of this conclusion, the Union notes that at a meeting on May 4, the same day that the results of the Union election were announced, the Board of Trustees considered the subject of free meals and the minutes of said meeting indicate:

"The Board considers discontinuing the practice of giving free meals, but the understanding is that it is not good to attempt this now that the Union has entered the picture."

The County Board's Corporation Counsel also recognized this fact, which is demonstrated by his letter to Mr. Guenther during the period that the Board was considering the free meal issue, in which he stated:

". . . It might be better to continue this practice until we negotiate a union contract with them this fall."

The Union also argues that the fact that the County Board did nothing prior to the certification of the Union to correct other unauthorized practices at the institution, namely, the payment of night differential without the authority of the County Board, when viewed in contrast with its action after the certification with respect to another allegedly unauthorized practice, demonstrates that the motivation behind the actions taken after the Union certification clearly must have been related to the recent unionization of the employes.

Lastly, the Union argues that even if the free meal privilege was not authorized by the County Board, as long as the employes had cause to believe that the Trustees who had granted them the benefits were acting for and on behalf of the County, the County Board could not unilaterally withdraw such benefits on the basis of the Board of Trustees' lack of authority, without being subject to the liabilities imposed upon it by Section 111.70(3)(a)(1), Wisconsin Statutes, because of the coercive tendencies of the revocation of such benefits. Under the existing circumstances the Union argues that the County Board should be estopped from denying the authority of the Trustees to grant the benefits.

In conclusion, the Union argues that all of the evidence plus the County Board's failure to choose a more neutral course compels the conclusion that part of its motivation was anti-union animus, and therefore the County Board's withdrawal of the meal privilege constitutes prohibited practices within the meaning of Section 111.70(3)(a)(1) and (2), Wisconsin Statutes.

The La Crosse County Board argues that at the time the dispute in question arose, the County Board's Institutions Committee, as well as the Board, was rarely consulted on any matters by the Trustees of the three institutions. In fact, since such time the Board has modified its organization so that one Board of Trustees

now manages all three institutions, and in addition, the Institutions Committee now has additional responsibilities and communications with the Trustees. The Respondent notes that the record clearly demonstrates that at no time prior to the incident in question did the Trustees of the Sanitorium communicate to the Institutions Committee or the County Board that it had modified the meal policy to provide one free meal. Because of this lack of communication it is clear that the County Board was unaware of the practice. It is argued that the powers of the Trustees of County Institutions pursuant to the Wisconsin Statutes are limited and do not include matters related to appropriations, salaries and wages, which are exclusively within the jurisdiction of the County Board, and it is further argued that the compensation of employes includes their salaries and fringe benefits, such as insurance, retirement, and meals. Since it is clear from the record that the meals in this instance were not given for the convenience of the Sanitorium, they were taxable to the employes just as are wages, and because they constitute wages, the Board of Trustees lacked the authority to grant this benefit without authorization by the County Board. Thus, the Respondent contends that because the County Board was opposed to free meals, since it operates three unionized institutions, and since the other institutions do not grant free meals, it would have been discriminatory against the employes of the other institutions to permit the practice to continue.

The Respondent argues that there is no evidence that the decision was made because of the union activities of the employes at the Sanitorium, and it is further argued that it is unreasonable to conclude that it was related to their union activities in view of the fact that employes in all of the institutions in the County are unionized, including the employes at the County Hospital who receive meals, and furthermore, the employes at the Sanitorium constitute the smallest bargaining unit in the County.

Although the Union asserts that the action taken by the Respondent was motivated, at least in part, by a desire to undermine the Union, and that the conduct of the Respondent supports this conclusion, in order to prevail in this proceeding the Union must demonstrate this fact by a clear preponderance of the evidence.[1/] The record supports the Union's assertion that the Respondent was aware that its

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1/ Kenosha School Board, 39 Wis (2d) 197, 6/68.
Wauwatosa Board of Education, WERC Dec. Nos. 8319-B, 6/68 and 8319-C, 7/68.

unilateral withdrawal of the free meal benefit would possibly have the effect of undermining the Union; that the Respondent failed to consider alternative courses of action; that it failed to investigate the matter before coming to the decision; and that the decision was made shortly after the certification of the Union. The Examiner finds, however, that all of the above factors do not clearly demonstrate that the Respondent's conduct was motivated by anti-union animus. Even though these factors are relevant to such a finding, in this instance, where it is alleged that a unilateral withdrawal of benefits constitutes unlawful interference and discrimination because it was, at least in part, unlawfully motivated, additional evidence material to the Respondent's motivation is required in order for the Complainant to meet its burden of proof.

The Respondent asserts essentially that the benefit in question was one which was not authorized, and accordingly the County Board had the absolute discretion to withdraw the benefit when it learned that the Sanitorium's Board of Trustees had granted the benefit without authorization. It is further argued that the County Board could not permit the practice to continue in view of the fact that the employes in the other County institutions did not receive such benefits, and therefore, if the practice were permitted to continue, the County Board would be discriminating against the employes in the other institutions. The record, however, does not entirely support the above assertions of the Respondent.

It is clear, for example, that shortly after the County Board became aware of the fact that the employes at the Sanitorium were receiving meals in lieu of compensation, it learned that certain employes in the County Hospital had for a substantial period of time also been receiving a similar benefit. Nevertheless, the County Board, although in its resolution it prohibited "free meals" in any of its institutions, permitted the County Hospital to continue granting such benefit. Therefore, the assertion by the Respondent that it could not permit the practice to continue because it would then become discriminatory cannot be credited.

Similarly, the Respondent argues that the granting of the benefit by the Sanitorium Trustees was unauthorized and such unauthorized practices could not be permitted to continue without specific authorization by the County Board. The Board, however, did permit the County Hospital to continue granting free meals without authorization, since it did not specifically authorize this practice, nor did it include a specific exception in the

resolution adopted on June 20, 1968 prohibiting the granting of free meals at any of the County institutions. Furthermore, there is evidence in the record that the County Board has permitted other unauthorized compensation practices to continue at the institutions without specific authorization. For example, there is evidence that in the past the County Board became aware of the fact that night differentials were being paid to certain employes in the institutions, and even though this practice had not been authorized by the County Board, it took no action either authorizing or prohibiting said practice. Thus, although the Examiner concedes that the granting of this benefit by the Sanitorium Trustees was unauthorized, the record also demonstrates that the County Board has permitted similar unauthorized acts to continue.

In view of all of the foregoing, the Examiner concludes that the reasons given by the Respondent for the withdrawal of the benefit were, at least in part, pretexts.

A most difficult issue then arises in view of the above finding. As the Examiner has indicated above, the Complainant in this case has the burden of proving by a clear preponderance of the evidence that by the conduct in question, the Respondent intended to discourage membership in the Union and to interfere with, restrain, and coerce the employes in the exercise of their rights provided in Section 111.70(2), Wisconsin Statutes.

Although anti-union animus need not be clearly demonstrated in order to find that a municipal employer has committed a prohibited practice within the meaning of Section 111.70(3)(a)(1) where the conduct is likely to interfere with the employes' rights to engage in or refrain from the activities set forth in Section 111.70(2), such as unlawful threats or promises of benefit, where, as in this instance, the conduct in question is alleged to constitute interference and discrimination within the meaning of Section 111.70 (3)(a)(1) and (2), it is fundamental that the element of anti-union animus must be found to support the finding.[2/]

Clearly in the private sector, where an Employer engages in conduct similar to the conduct in question--namely, unilaterally withdrawing employe benefits without negotiating said action with the bargaining representative of the employes affected--such conduct would constitute a refusal to bargain as well as interference

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2/ City of Milwaukee, WERC Dec. No. 8420, 2/68.

with the employes statuatory rights. This is so because a unilateral withdrawal of benefits by an employer in the private sector, irrespective of the employer's motivation in taking such action, interferes with the employes' right, through their bargaining representative, to negotiate their wages, hours and working conditions.

However, Section 111.70, Wisconsin Statutes, as construed by the Wisconsin Employment Relations Commission, does not include a refusal to bargain as a prohibited practice,[3/] and accordingly, absent a clear showing of unlawful intent, a municipal employer's refusal to negotiate changes in benefits, even though such activity undermines the bargaining representative, does not constitute a prohibited practice.

Thus although the conduct in question would constitute interference in the private sector because it also would constitute a refusal to bargain, Section 111.70(3)(a)(1), Wisconsin Statutes does not contemplate that a unilateral withdrawal of benefits by a municipal employer constitutes interference absent a clear showing that the municipal employer's motivation was unlawful

The Union has in this instance alleged that the Respondent's act constituted unlawful discrimination and interference, and it has attempted to prove this allegation by demonstrating that the Respondent was motivated, at least in part, by its desire to undermine the Union.

As has been noted above, the Examiner is of the opinion that the Complainant has not met its burden of proof merely by demonstrating that the Respondent was aware of the fact that the withdrawal of the free meal benefit would possibly have the effect of undermining the Union; that the decision to withdraw the benefit was made shortly after the certification of the Union, and that the Respondent failed to consider a more neutral course of action. However, the Union further argues that additional evidence of the Respondent's unlawful intent is the fact that the Respondent has failed to prove its asserted defense that the action was taken because it was unauthorized and discriminatory. As has been noted above, the Examiner has found that these reasons were, at least in part, pretexts.

3/ City of New Berlin, Dec. No. 7293, 3/66; Milwaukee Board of School Directors, Dec. No. 6883-A, 3/66; La Crosse County, Dec. No. 7707-A, 6/67; City of Portage, Dec. No. 8378, 1/68; City of Milwaukee, Dec. No. 8410, 2/68; Wauwatosa Board of Education, Dec. Nos. 8319-B, 6/68 and 8319-C, 7/68.

Normally, where an Employer acts in a manner which would undermine the status of the Union or which would coerce employes in the exercise of their protected statuatory rights, and where the Respondent's explanation for such conduct is not credited and is found to be a pretext, a reasonable inference may be made that the conduct was unlawfully motivated. However, in this instance it is difficult to make this inference since there is not a scintilla of independent evidence of anti-union animus; and in addition, although the Respondent withdrew the benefit from the employes at the Sanitorium shortly after the Union's certification, it permitted the County Hospital to continue an almost identical practice, even though the employes at that institution were represented by the same Union.

Thus, although the Respondent has failed to substantiate its claim in a credible manner that its decision was based upon the fact that the free meal benefit was unauthorized and discriminatory, the Examiner is of the opinion that the Complainant has nevertheless failed to prove by a clear preponderance of the evidence that the decision was at least in part motivated by a desire to undermine the Union.

It appears instead that the County Board, upon learning of the unauthorized free meal practice, precipitously decided to prohibit its continuance, and when this decision was challenged by the Union, it attempted to develop a rationale to support its decision. There is, however, no substantial evidence that the decision was based upon anything but the County Board's opposition to the Trustees' unauthorized action. Such conduct clearly has had the effect of undermining the employes' bargaining representative, and in the Exmainer's opinion, such conduct is contrary to the spirit of Section 111.70 Wisconsin Statutes, which was intended to protect the right of employes "to be represented by labor organizations of their own choice in conferences and negotiations with the Municipal Employer or their representatives on questions of wages, hours and conditions of employment." However, the statute does not prohibit all conduct contrary to this policy, and accordingly, the Examiner cannot find a prohibited practice within the meaning of the statute in this instance.

Dated at Madison, Wisconsin, this 20th day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner