

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of :
AFSCME COUNCIL 40 : Case 3
Involving Certain Employees of : No. 37325 ME-110
ST. CROIX COUNTY : Decision No. 8932-E
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Appearances:

Mr. Jack Bernfeld, Staff Representative, 5 Odana Court, Madison, Wisconsin, appearing on behalf of the Union.
Mr. Thomas Koop, Labor Negotiator, 317 West River Drive, New Richmond, Wisconsin, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
ORDER AND DIRECTION OF ELECTION

Pursuant to a Direction of Election issued by it on February 6, 1987, the Wisconsin Employment Relations Commission (hereinafter Commission or WERC) having conducted an election among certain employees of St. Croix County in three Voting Groups; and on March 17, 1987, AFSCME District Council 40 having timely filed objections to the conduct of the election as regards Voting Group Nos. 2 and 3; and the Commission having determined that the objections raised substantial questions which could not be resolved without a hearing; and, pursuant to notice, a hearing on the objections having been conducted at Hudson, Wisconsin, on May 6, 1987, by Examiner Marshall L. Gratz, a member of the Commission's staff; and the parties having agreed to submit closing arguments orally on the record such that no written arguments were filed; and a transcript of the hearing having been received by the Commission on May 28, 1987; and the Commission having considered the record evidence and the parties' arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law, Order and Direction of Election.

FINDINGS OF FACT

1. That AFSCME Council 40, AFL-CIO and its affiliated local, St. Croix County Courthouse Local 576-B, are labor organizations with Council 40 offices at 5 Odana Court, Madison, Wisconsin 53719; that Council 40 and its affiliated Local 576-B are hereinafter referred to jointly as the Union; and that at all material times Kathryn Spott has been Local 576-B President and an authorized agent of the Union.
2. That St. Croix County is a municipal employer with offices at the County Courthouse, Hudson, Wisconsin 54016; that the County is governed by a Board of Supervisors; and that at all material times the County Board's Personnel Committee, the County's Personnel Director Debra Kathan, and its Labor Negotiator Thomas Koop have been authorized agents of the County.
3. That at all material times, the Union has been the exclusive representative of a bargaining unit consisting of certain nonprofessional County employees employed at the St. Croix County Courthouse; and that Council 40 and affiliated locals also represent two other bargaining units of County employees.
4. That on July 22, 1986, the Union filed a petition with the Commission seeking to include without a vote several then-unrepresented County positions in the Union's above-noted Courthouse unit; that at a January 27, 1987, hearing convened with respect to the petition, the parties formally entered into a stipulation whereby the inclusion of each of three separate groups of then-unrepresented positions would depend on whether a majority of those voting in the respective groups favored representation by the Union; that a secret ballot election was thereafter conducted in two locations on March 10, 1987, and tallies were distributed showing that a majority of those voting in Voting Group No. 1 favored representation by the Union and that a majority of those voting in Groups 2 and 3, respectively, did not favor representation by the Union.

5. That on March 17, 1987, the Union timely filed objections to the conduct of the above-noted election as follows:

. . . the outcome of the election in Voting Groups 2 and 3 was significantly affected by the election related conduct of St. Croix County. In particular, St. Croix County:

1. Made specific promises of benefit if said employees voted for no representation. Such promises were made within a short time period preceding the election;

2. Voted and approved changes in wages and benefits for those involved in said election on March 10, 1987, prior to completion of the voting that day.

It is our position that such conduct served to intimidate, interfere with and coerce employees in the exercise of their rights, and as such, significantly affected the results of the election. We therefore, request that the results of the election be set aside with respect to Voting Groups 2 and 3 and that the WERC order the County to recognize the Union as the exclusive representative of the employees in said Groups or, in the alternative, order that a new election among the employees in Voting Groups 2 and 3 be held forthwith.

6. That on March 26, 1987, the Commission issued its Certification of Results and Order Amending Certification of Representatives as regards Voting Group No. 1.; and that said Certification and Order noted that the Commission action regarding Voting Groups No. 2 and 3 was being held in abeyance pending the disposition of the above-noted objections.

7. That prior to the above-noted election on March 10, the Union, on or about February 18, 1987, sent the following letter to the employees in each of the three Voting Groups:

February 18, 1987

Dear St. Croix County Employee:

On March 10, 1987, you will have an opportunity to cast an important vote; a vote that will give you the chance to have a strong voice in determining your wages, hours and conditions of employment. The Wisconsin Employment Relations Commission (WERC) will conduct secret ballot elections among different groups of unrepresented employees to determine if a majority of each group desires to be included in the current courthouse bargaining unit represented by St. Croix County Courthouse Employees Union, Local 576-B, AFSCME. There are three (3) voting groups in the election:

1. Unrepresented sheriff's department employees;
2. Unrepresented district attorney's office employees;
3. Other unrepresented employees in the courthouse and related departments.

Any group voting for AFSCME representation will thereafter negotiate with the County regarding their wages, hours and conditions of employment. The county will no longer be able to determine your working conditions unilaterally. No one will lose any benefits by voting for the union. The county must negotiate with you and the union to establish your conditions of employment; they must negotiate before any change can take place.

In order to discuss the union, the upcoming election and its impact on you, we have scheduled a meeting as follows:

Date: Thursday, February 26, 1987
Time: 7:30 p.m.
Place: Hudson House
La Petite Room
Hudson, Wisconsin

Please try to attend this very important meeting.

If you have any questions, please contact an officer of Local 576-B:

President: Kathy Spott
VP: Sue Nelson
Secy-Treas: Kay Walsh
Steward: Mark Klanderman.

Or you may call Jack Bernfeld toll free in Madison at 1-800-362-8261, or Richard Rettke in Rice Lake at 715/234-9452.

Hope to see you on the 26th!

Sincerely,

Jack /s/

JACK BERNFELD
Council 40 Staff Representative

Richard Rettke /s/

RICHARD RETTKE
Council 40 Staff
Representative

8. That on or about March 4, 1987, the County sent the following letter to the employees in each of the three Voting Groups:

To: All employees scheduled to vote in the WERC-conducted election on 3/10/87

From: St. Croix County Personnel Committee

Re: AFSCME Union letter to employees, dated 2/18/87

On Feb. 18, 1987 the Courthouse Union sent you a letter containing the following statement: "No one will lose any benefits by voting for the union." Based upon a number of inquiries from our employees, this may be interpreted or construed to mean that the Union is guaranteeing that you will not lose any of your present benefits. This statement is misleading and possibly an unfair labor practice on the part of the Union.

Because of this misleading statement, the County feels compelled to place the facts before you so that you may be fully informed on this point and, therefore make an informed decision when you vote on March 10.

In answer to your question "will I lose my present benefits if I vote to be represented by the Union", the correct answer is that you may or may not lose some or all of your present benefits. In the event that you become part of the Courthouse bargaining unit, the County and the Union will meet for the purpose of negotiating your wages, hours, benefits, and working conditions.

The County believes that Union employees should be covered only by those benefits outlined in the Union contract, and should not receive the non-union benefits now provided to you. We do not know what position the Union will take, but if we assume that they will want to continue your present benefit package, this is subject to negotiations.

In the event that the County and the Union cannot agree as to which benefits you would receive, such final decision is made by an arbitrator. An arbitrator may decide either way and it is, therefore, possible to lose your present non-union benefits if the arbitrator decides to award you those benefits granted under the Courthouse contract. The only sure way to retain your present non-union benefits is to vote "no union" on March 10.

We hope that we have clarified the question many of you have asked, that is, "will I lose the present benefits that I receive as a non-union employee if I decide to vote for union representation?" Regardless of whether you decide to vote for a union or no-union on March 10 we ask that every employee vote, as the majority of those voting will determine whether or not you will be represented by the union.

cc: Affected department supervisors
File

9. That on or about March 5, 1987, the County sent the following letter to all unrepresented personnel, including the employees in each of the three Voting Groups:

To: Permanent, Non-Represented Employees

From: St. Croix County Personnel Committee

Re: Compensation package for 1987

The Personnel Committee will be recommending to the County Board at the March 10 meeting the acceptance of the proposals outlined herein. These proposals reflect changes to the wages and benefits for 1987. Please direct any questions or concerns to the Personnel Office.

1.) across-the-board increase of 3%, effective 1/1/87, applied to all classifications

2.) provision of an HMO option to our eligible non-represented employees; the rate of the premium coverage during the months from initial enrollment through March, 1988, distributed as follows:

County Contribution: \$150.32/mo.

Employee Contribution: \$ 6.30/mo.

3.) the standard health insurance policy currently in place for eligible employees will be reduced in premium costs for 1987, from \$209.53 to \$200.00; the rate of contribution for premiums paid to cover the months in 1987 will be as follows:

County Contribution: \$150.32/mo.

Employee Contribution: \$ 49.68/mo.

The Finance Director has spent considerable time in reviewing our health insurance experience and consulting with experts to determine appropriate actions to be taken in maintaining our standard plan. Based upon the last three months of experience--which is substantially better than our 1986 level usage--the County is reducing the monthly premiums, as noted above.

--employees will receive the difference between the rates listed herein as employee contributions and their actual payments, retro-actively to the payment deducted in December, 1986 which covered premium costs for the month of January, 1987 (\$9.53/mo.)

--employees will have the option of remaining on the standard plan or changing their health insurance coverage to the HMO policy (HMO-Midwest)

- 4.) employees will have the option to purchase, at their own cost, additional life insurance; employees can double the value of their current County-paid policy to two times the employee's annual salary, rounded up to the nearest thousand at a rate of .027% times annual salary times 12
- 5.) employees will have the option to purchase, at their own cost, dependent life insurance coverage of \$5,000 for spouse and \$2,500 for each child at an approximate total cost of \$2.00/mo.
- 6.) the County has set aside money in a "merit pool" fund to be awarded to employees judged as exceptional in their job performances
- 7.) an updated Classification/Compensation schedule will be issued which clearly outlines wage progression for employees with less than four years of service to the County in their present job and who are performing at a fully satisfactory level or above

10. That on or about March 6, 1987, the Union sent the following letter to the employees in each of the three Voting Groups:

St. Croix County Courthouse Local 576-B
Hudson, WI 54016

March 6, 1987

Dear St. Croix County Employee:

I'd like to thank each of you who attended the meeting on February 26th. Your questions and concerns were genuine and I hope we answered them to your satisfaction. If you are still apprehensive about the union or did not attend the meeting, I strongly urge you to contact myself or Jack Bernfeld. The more facts you have the easier it will be to make an informed decision on March 10th.

The Courthouse Union membership stands firm on protecting your present benefits and in providing a signed contract containing benefits that are not available to you as an unrepresented County employee. I strongly believe that through the mediation/arbitration process your present benefits will be preserved as well as gaining existing union benefits. It's very doubtful that an arbitrator would feel compelled to take away benefits that have been in effect for several years just because you have chosen to become a member of a union.

Presently the County is under close scrutiny by taxpayers and pressure to cut back is strong. In your present situation you are at the mercy of changing interests and attitudes of County officials. Without a signed union contract which spells out specific obligations imposed upon the County, your interests and attitudes may very well be ignored. This relates to the letter sent to you by the Personnel Committee dated March 4, 1987. The mere fact that the County felt it necessary to write you a letter concerning your free choice of voting to belong to a union raises several questions.

- 1) Why would the County care whether or not you are represented by a union unless it meant the County had to give you more rights?
- 2) Is the County implying that it would treat you differently if you exercise your free choice and join a union?
- 3) What would the County gain by not having you in the union?

The answer to these questions is this--The County does not want to give up their complete control over you. Right now they have the ability to change your benefits and rights without your input. An example of this would be the Hays Study; how much input did you have in that and was your placement in it satisfactory to you? If you are to vote into the union the County must then share their decision making power with the union at the bargaining table.

Lastly, the memo from Personnel Committee dated March 5th contains many promises, but no guarantees of wage and benefit increases. It is all dependent upon County Board approval.

Several of the recommendations are sketchy such as the "merit pool." How much money has been set aside, who will be judging the employees, how many employees will be eligible per year, etc.?

Don't let the County make your decisions. On March 10th you will have the opportunity to let the County know what YOU want.

Please contact me if you have any questions. I can be reached at 386-5581, Ext. 318 from 8:30 a.m. to 4:30 p.m. or at my home 386-9535 after 5 p.m. Jack Bernfeld can be reached at 800-362-8261.

Sincerely,

Kathy Spott
President, Courthouse Local 576-B

11. That the Union also made an effort on the eve of the election to contact by phone each of the employees in the three Voting Groups to offer to answer any remaining questions that any of the employees had.

12. That from at least 1977 through September of 1985, it was the County's practice to consider, approve and announce changes in wages and benefits for nonrepresented employees at or after the time it approved contracts negotiated with the unions representing its bargaining units of represented employees; that prior to 1985, the wage changes and benefits of nonrepresented employees tended to parallel closely those negotiated with the unions; that beginning in 1985, the County Board undertook a conscious effort to unlink and differentiate the unrepresented employees' compensation arrangements from those of represented employees, including implementation of a Hay Classification Compensation Study which it began to implement in October of 1985 and continued to implement in January of 1986 and by some additional anniversary date raises from July of 1986 through June of 1987; that as a result of the County's actions from October of 1985 on, there were a number of differences between represented and nonrepresented employees' compensation plans by the time arrangements had been made for the conduct of the above-noted March 10, 1987, election.

13. That the Union included the paragraph containing the underlining in its above-noted February 18 letter after several employees expressed concern to Union officers and representatives that they would automatically become covered by the existing union contract if their voting group voted in favor of the Union.

14. That the County sent its above-noted March 4, 1987, letter after several employees told County representatives that they were confused as to how the Union could guarantee that there would be no adverse effect if a majority of their voting group voted for the Union inasmuch as the Union's letter itself acknowledged that ultimate benefit determinations depend on the results of the negotiation process.

15. That the County's March 5, 1987, letter was the first of its kind sent by the County before County Board approval of the compensation plan for non-represented personnel; that the County previously had notified nonrepresented employees of compensation changes only after the County Board had approved such

changes; that the County Board's Personnel Committee conferred with nonrepresented employees concerning certain compensation plan matters other than wages in November of 1986; and that at that time, various individuals in the nonrepresented employee groups complained that they were not provided any advance notification of the Personnel Committee's recommendations before they were taken up so that concerned nonrepresented employees could make their views known to members of the County Board in advance of County Board actions on Personnel Committee recommendations.

16. That because the Personnel Committee was involved in negotiations concerning several labor contracts in late 1986, it chose not to decide what its recommendations would be regarding nonrepresented compensation plan changes for 1987 until it became clearer what the results of the negotiations with the unions were likely to be; that by February of 1987, it became clear that the County and the Union were going to be unable to settle their contracts without resort to the final offer interest arbitration process; that sometime prior to February 24, 1987, the Personnel Committee had decided on its nonrepresented compensation plan change recommendations for 1987 and had further decided to send a written notice containing those recommendations to the affected employees on February 24, 1987, the date on which final offers were to be submitted to the WERC investigator handling the AFSCME labor contract investigations; that the County delayed distribution of those letters, however, when the County learned that the Union's final offer submission would be delayed until sometime after February 24; and that when the County ultimately sent its notification letter on March 5, 1987, as noted above, the Union's final offer(s) had not yet been submitted to the WERC investigator.

17. That March 10, 1987, was the second Tuesday of the month and a regular County Board meeting date, as scheduled sometime during 1986; that the Personnel Committee's recommendations concerning nonrepresented compensation plan changes were on the agenda for approximately noon on that date, but were approved in their entirety sometime between 12:20 p.m. and 1:50 p.m. on that day; and that although it is possible that some votes were cast in the representation election after the County Board had taken the above-noted action, there is no evidence that any employee eligible to vote in the election knew of that action until after the polls had closed at the second (later) location at 2:00 p.m.

18. That after March 10, 1987, the County implemented the above-noted 1987 nonrepresented compensation plan changes for its nonrepresented employees including those in Voting Groups 2 and 3, but has not implemented those changes for the employees in Voting Group No. 1; and that as of the date of the hearing in this matter, the parties were engaged in collective bargaining negotiations concerning the wages, hours and conditions of employment of the employees in Voting Group No. 1 who were newly included in the bargaining unit in March of 1987.

CONCLUSIONS OF LAW

1. That the County's March 4, 1987, letter statement, "The only sure way to retain your present non-union benefits is to vote 'no union' on March 10," constituted a promise to the employees that the County would not diminish their benefits in the future if they voted "no union" on March 10.

2. That the County's March 5, 1987, letter, coming as it did in the context of the March 4 letter statement noted in Conclusion of Law 1, above, constituted a promise to the employees that their benefits would probably be increased in the manner set forth in the March 5 letter if they voted "no union" on March 10.

3. That the conduct noted in Conclusions of Law 1 and 2, above, is conduct which rendered it improbable that the voters would be able to freely cast a ballot for the Union.

4. That neither the Union's opportunities to respond to the County's conduct noted in Conclusions of Law 1 and 2 above, nor the Union's actual letter and phone call responses to that conduct obviated the tendency of that conduct to affect the outcome of the vote.

5. By the conduct noted in Conclusions of Law 1 and 2, above, and in view of the proximity in time of that conduct to the March 10, 1987 election, the County destroyed the conditions necessary for a free and fair election on that date, which conditions are implicitly contemplated and required by Sec. 111.70(4)(d)2.a., Stats.

6. That the fact that the County's Board of Supervisors acted on the Personnel Committee's recommended nonrepresented employee compensation plan improvements before the close of the polls in the second (later) polling place on March 10, 1987, did not constitute interference with or coercion of employees in their exercise of free choice in the election since no employee has been shown to have had knowledge of the County Board action prior to close of the polls.

ORDER

1. That the Union's Objection No. 1 set forth in Finding of Fact 5, above, shall be and hereby is sustained.

2. That the Union's Objection No. 2 set forth in Finding of Fact 5, above, shall be and hereby is overruled.

3. That the results of the elections conducted on March 10, 1987, as regards Voting Groups 2 and 3 shall be and hereby are set aside.

4. That the Union's request for an unconditional order that the County bargain with the Union concerning Voting Groups 2 and 3 without any further election shall be and hereby is denied.

5. That a new election shall be conducted in Voting Groups 2 and 3, as more fully provided in the following:

DIRECTION OF ELECTION

IT IS HEREBY DIRECTED that new elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five days from the date of this Decision in the following voting Groups:

Voting Group No. 2

All regular full-time employees in the St. Croix County District Attorney's office in the classifications of Child Support Specialist I, Child Support Specialist II, Child Support Assistant, and the Victim/Witness Assistance Specialist, excluding elected officials, Sheriff's Secretary, and supervisory employee who were employed on July 9, 1987, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees voting desire to be represented by AFSCME Council 40, for the purposes of collective bargaining with St. Croix County, and further, should the required number of employees vote in favor of such representation, then said employees should be included in the overall bargaining unit consisting of all full-time regular Courthouse employees of St. Croix County, including all regular full-time employees in the St. Croix County Sheriff's Department in the classifications of Dispatcher and Clerk-Jail, excluding elected officials, Sheriff's Secretary, and supervisory employees.

Voting Group No. 3

All regular full-time employees in the classifications of Assistant Librarian, Books-By-Mail Clerk, Secretary-Library/Land Conservation, Secretary-Council on Aging, Drafting Technician, Office Aide-Public Health, and Computer Operator, excluding elected officials, Sheriff's Secretary, and supervisory employees, who were employed on July 9, 1987, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees voting desire to be represented by AFSCME Council 40, for the purposes of collective bargaining with St. Croix County, and further, should the required number of employees vote in favor of such representation, then said employees shall be included in the overall bargaining unit consisting of all full-time regular Courthouse employees of St. Croix County,

including all regular full-time employees in the St. Croix County Sheriff's Department in the classifications of Dispatcher and Clerk-Jail, excluding elected officials, Sheriff's Secretary, and supervisory employees.

Given under our hands and seal at the City of
Madison, Wisconsin this 9th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

ST. CROIX COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND DIRECTION OF ELECTION

The factual background and the Union's objections are set forth in the Findings of Fact, above, and need not be reiterated here.

It can be noted at the outset, however, that at the hearing on objections herein, the County offered to prove by means of documentary and testimonial evidence that several of the eligibles in Voting Group 2 had informed the County and the Union in January of 1987 that they did not wish to be represented by the Union. (tr. 34-41, rejected Exhibit 9). The Examiner rejected that offer of proof on the grounds that proof of subjective employee attitudes are irrelevant in a case of this kind, and we agree. Accord, Town of Weston (Water Utility), Dec. No. 16449-B (WERC 2/79). It is by means of a secret ballot election that employee sentiment is determined under MERA, and objections to County conduct allegedly affecting the fairness of the election cannot be overcome by proof that at some time prior to the election employees eligible to vote in the election were not interested in Union representation.

The parties' positions and our analysis regarding the merits of the objections are set forth below.

POSITION OF THE UNION

The objected-to conduct occurred as alleged and interfered with and coerced the employees so as to deny them a free choice in the election.

First, the County's March 4 and 5 correspondence to the employees eligible to vote constituted promises of favorable treatment which promises were made by authoritative and authorized County officials proximate in time to the date of the election. The County's promises were not and could not have been justified by a misrepresentation in the Union's February 18 letter. The employees told the Union they were concerned that choosing Union representation would make them immediately and automatically covered by the terms of the Courthouse unit labor contract, to their comparative detriment in some respects. The paragraph in question in the Union's February 18 letter merely sought to assure them that bargaining would occur before any change would be made. Thus, the County wrongly concluded that the Union was telling the employees that Union representation would guarantee them at least no worse than they were getting.

In any event, the County's letters contained more than merely an effort to set the record straight. They also contained promises of benefits which constituted interference and coercion. Specifically, the County's March 4 letter promises and guarantees employees no loss of benefits if they vote no union. That letter says, "The only sure way to retain your present nonunion benefits is to vote 'no union' on March 10th." That both threatens that the employees would or could lose benefits by voting for the Union and promises that the employees would not and could not lose benefits by voting for no representation. The County's letter of March 5, coming right after the letter of March 4 essentially promises employees that they would be receiving wage and compensation increases if they voted for no representation. While the letter made it clear that these Personnel Committee recommendations were subject to final County Board approval, that does not remove the improper effect of this official communication from the County Board's Personnel Committee shortly before the election.

Secondly, the County was obligated to maintain status quo regarding wages and conditions of employment during the pendency of the election petition and prior to the vote. Rather than honoring that obligation and maintaining neutrality, the County Board, with knowledge that the election was in progress, acted to change status quo on the date of the election and at a time that was before the second polling place closed and before at least some of the eligibles cast a ballot. The County Board action was not a part of any established County practice. On the contrary, since 1977, the County has had a practice of implementing nonrepresented compensation packages only at or after the time collectively bargained packages were implemented. 1986 is the only exception, and that was due to the Hay study implementation which was not involved in 1987.

As a consequence of the County's actions, the Commission should set aside the results of the votes in Groups 2 and 3 and either order the County to immediately bargain with the Union about the employees in those groups or at least order a new election with respect to those groups.

POSITION OF THE COUNTY

The County did not intend to, and did not in fact, interfere with or coerce employees in their free choice in the election. On the contrary, the County made a conscious effort to maintain neutrality and responded to Union communications to the employees only to relieve employee confusion caused by the Union's false and misleading February 18 assurance that the employees could not lose benefits by voting for the Union. There is no evidence of anti-union animus on the County's part.

The County's March 4 letter merely cleared the air and answered employee inquiries to management resulting from Union's confusing and misleading February 18 letter statement that no one would lose benefits by voting for the Union. The County did not misunderstand the Union's March 4 letter; it was the employees who misunderstood it, and the County merely wrote them to clear the air. Since negotiations would follow a certification of the Union as exclusive representative, the existing levels of compensation might increase or decrease as a consequence of those negotiations, and the Union could not guarantee what the outcome would be. The County had the right to set the record straight by so informing the employees in writing prior to the vote. Indeed, the County chose to correct--and thereby mitigate--the Union's misrepresentation rather than to pursue formal proceedings before the Commission on the subject.

The County also had the right, and took the opportunity in the March 4 letter, to state what position the County would take in bargaining as regards the voters if they voted to be represented by the Union. It was and is the County's position that the agreement applicable to all other Courthouse employees should be extended to groups that vote to be included in that unit, even though that would make some improvements and some disimprovements relative to their existing benefits and working conditions. There is nothing wrong with stating what position the County intended to take with respect to negotiations. The County stated its position factually and without misrepresentation.

The County's March 4 letter also stated that "the only sure way of maintaining your present benefits was voting no union." That is also a fact, not a falsehood, not a misrepresentation.

The County's March 5 letter was the result of decisions that were made well in advance of and entirely unrelated to the filing of the initial petition in this matter. The County had previously decided to differentiate nonrepresented from represented compensation plans and to afford nonrepresented employees an opportunity to know the substance of the Personnel Committee's recommendations before they are acted upon by the County Board. Thus, the County's prior practice of settling union contracts before implementing nonrepresented packages ended in 1985. Accordingly, as is permitted by the Federal law, the Personnel Committee's March 5 letter merely carried forward a practice of yearly reviewing the nonrepresented employees' compensation package, and of doing so in the usual way in 1987. The County asserts it had a right to do that. Furthermore, "We do not believe that we are restricted from advising our nonrepresented employees of such proposed changes to their compensation benefit package merely because an election is taking place." (County closing argument at tr. 84.) The date of the issuance of the March 5 letter was delayed because of the Union's delay in effecting final offer exchanges. The County had intended to send that letter in late February but delayed the mailing for a while in an (ultimately unsuccessful) effort to avoid revealing the unrepresented package to the Union until final offers were submitted.

Since the evidence shows that no employee learned of the County Board's approval of the nonrepresented compensation package until after the voting was completed, the County Board's action could not have affected the vote.

The County's post-election implementation of benefit improvements for Groups 2 and 3 but not for Group 1 was appropriate because the County is obligated to bargain with the Union before altering the wages, hours and conditions of employment of those newly added to the Union bargaining unit. To have granted those benefits without first bargaining would have been a prohibited practice.

If any impropriety is found on the County's part, it was mitigated by Kathy Spott's Union letter of March 6 and her calls to the eligibles on the night before the election to answer any questions they might have. As that Union March 6 letter correctly emphasized, the County's March 5 letter contained no guarantees.

Finally, as the County offered to prove, four employees came forward on their own and made unsolicited pre-election statements against union representation prior to the filing of the initial petition. This shows that the County's conduct could not have affected the votes of at least the Child Support Specialists, in any event.

For the foregoing reasons, the County requests that the results of the votes be certified and that the Union's request for new elections be denied. The Union's additional request for an unconditional bargaining order is clearly beyond the scope of this proceeding and could not be granted even if it were deemed warranted, which it is not.

DISCUSSION

The basic issue in this case is whether the County's objected-to conduct denied the employees the conditions necessary for a free and fair election choice. We conclude that the County did interfere with the employees' free choice in the election by promising the employees certain levels of benefits if they voted against union representation. Accordingly, we have set aside the results of the election as to Voting Groups 2 and 3 and have directed new elections.

It is our view that the County's letters of March 4 and 5 constituted a promise to the recipients that their wage and benefit levels would at least be maintained, and probably improved in the manner specified in the March 5 letter, if the employees voted against union representation.

The March 4 letter stated, "The only sure way to retain your present non-union benefits is to vote 'no union' on March 10." We find that assertion, both alone and in the context in which it was presented, constituted a promise, indeed a guarantee, that the employees would be assured of continuing to enjoy their present benefits if they voted no union. Since the power to change or continue unchanged the benefits of nonrepresented employees is a matter within the County Board's discretion, the above-quoted March 4 assurance represented a pledge from the County that it would not exercise its power in such a way as to change those benefits if the employees would vote "no union." It was a statement of "fact" only because it was an authoritative statement of intent--i.e., a promise--concerning the employees' level of future benefits if they remained nonrepresented. While the County had the right to communicate facts regarding the nature and risks of the collective bargaining process, its March 4 letter went beyond that to effectively promise a course of County conduct favorable to the employees if they voted against representation.

The County's March 5 letter amounted to a promise of likely improvements in benefits for those employee groups voting "no union." It is true that the County letter emphasized that the noted improvements were only recommended as of that date. While that removes any impression that the improvements were guaranteed, it does not remove the message that the County Board's Personnel Committee would be doing its best to provide improvements to those groups that voted against representation.

The March 5 letter and the March 10 County Board action were not continuations of past practices. No previous letter paralleling the March 5 letter had ever been sent, and the timing of that letter and of Personnel Committee's submission of recommendations were wholly discretionary with the County and based upon strategic considerations relating to its negotiations with the Union. While this was not the first time the County implemented changes in nonrepresented compensation arrangements before ratifying its labor contracts covering the same periods of time--1986 was the first--the County had no established practice regarding when it would make these changes. Since this was wholly a matter of discretion, it was a matter which the County could have delayed until its April County Board meeting (i.e., after the election) without changing its prior practices in any way.

In other words, we agree with the County that the pendency of a representation petition does not make an improper promise of benefits out of a municipal employer's announcing and acting upon recommended nonrepresented

compensation plan changes in a time frame and manner consistent with its established practices in those regards. However, here there was no historically established time frame for such County actions and indeed no previous instance in which any such announcement had been received by the employees. The County's issuance--even if by coincidence--of the first ever announcement of Personnel Committee recommendations just five days before the representation election and the day after the County's March 4 letter stating that only a "no union" vote would assure employees of a certain level of benefits constituted an additional promise of benefits in all of the instant circumstances.

The foregoing promises of favorable treatment of those voting for no representation, coming as they did from authoritative representatives of the employer and shortly before the election, would in our opinion tend to improperly interfere with the requisite free employee choice guaranteed by MERA.

It is true that the Union had an opportunity to communicate with the employees both in writing and by phone after the employees received the County's March 4 and 5 letters. However, those opportunities do not obviate or wholly mitigate the effects of the County's above-noted promises. While a misrepresentation by the other side might well be mitigated by a subsequent opportunity for a correcting communication, no amount of clarification can reasonably be presumed to remove the effects of the instant authoritative and recently-issued employer promises of favorable treatment for the employees if they vote for no representation.

The question in a proceeding such as this is whether the County's conduct rendered it improbable that an employee would be able to freely cast a ballot either for or against the Union. Fond du Lac County, Dec. No. 16096-B (WERC, 9/78), and Town of Weston (Water Utility), supra. It is therefore not an adequate defense for the County to show--as the County has here--that its promises were not motivated by animus toward the Union and that its communications were not consciously intended to interfere with or coerce the employees' free choice.

For all of the foregoing reasons, we have sustained the Union's first objection. 1/ On that basis we have ordered the results of the election as to Voting Groups 2 and 3 set aside and have directed that a new election be conducted as to those two Voting Groups.

The Union's request for an unconditional order that the County recognize and immediately bargain with the Union as regards Groups 2 and 3 is not appropriate in the circumstances of this case. Moreover, as the County correctly asserts, a bargaining order could not be granted in an objections proceeding even if it were deemed warranted in the circumstances, which it is not.

Dated at Madison, Wisconsin this 9th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

1/ Although it has no effect on the outcome of our decision, and without analyzing the merits of the objection in detail, we have overruled the Union's second objection because there is no showing that any employee had learned of the County Board's approval of the nonrepresented compensation plan improvements before the polls closed at the second location at 2:00 p.m.