STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO,<br><br>Complainant,<br><br>vs.<br><br>CITY OF SPARTA and CITY OF SPARTA WATER COMMISSION,<br><br>Respondents. | Case IV<br>No. 18023 MP-371<br>Decision No. 12778-A |

Appearances:
Mr. Walter J. Klopp, District Representative, appearing on behalf of the Complainant.
City Attorney Steven Luse Abbott and Assistant City Attorney J. David Rice, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, having filed with the Wisconsin Employment Relations Commission a complaint alleging that City of Sparta committed prohibited practices in violation of Sec. 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Marshall L. Gratz to act as Examiner and to make and issue findings of fact, conclusions of law and order pursuant to Sec. 111.07 of the Wisconsin Employment Peace Act, as made applicable to municipal employment by Sec. 111.70(4)(b) of MERA; and the Examiner having conducted a hearing in the matter at Sparta, Wisconsin on July 11, 1974; and during the course of said hearing, Complainant having been permitted to join City of Sparta Water Commission as a second Respondent and having been permitted to amend the complaint in certain other respects; and the Examiner having considered the evidence and arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, referred to herein as Complainant, is a labor organization with offices at 4646 Frey Street, Madison, Wisconsin, 53703.

2. That City of Sparta, referred to herein as Respondent City, is

a municipal employer with its principal offices at City Hall, Sparta, Wisconsin, 54656; and that Mr. Steven Buse Abbott, City Attorney, and the Honorable Tom Gomez, Mayor, are authorized agents of Respondent City.

3. That City of Sparta Water Commission, referred to herein as Respondent Commission, is a municipal employer with its principal office at City Hall, Sparta, Wisconsin, 54656; that said Abbott is an authorized agent of Respondent Commission; that Respondent Commission is a five-person Board of Directors, appointed by the Mayor and confirmed by the City Council of Respondent City; and that Respondent Commission governs the City of Sparta Water Utility, a municipal entity organized under Sec. 198.22 of the Wisconsin Statutes that is separate and distinct from Respondent City.

4. That on April 17, 1974, Complainant addressed and sent a letter to Respondent City, with a copy to, inter alia, Abbott, claiming to represent a majority of the employes in the unit consisting of

> "All regular full-time and regular part-time employees employed by the City of Sparta in its Departments [sic] of Public Works, Sewer, Water and Parks; but excluding department heads and/or supervisors, as defined in the Act, craft and professional employees, clerical employees, law enforcement personnel and all other employees of the City of Sparta."

and requesting that Respondent City voluntarily recognize Complainant as the representative of such employes for purposes of collective bargaining and giving notice that Complainant had on even date filed an election petition with the WERC with respect to said unit; and that by having sent said copy of said April 17, 1974 letter to Abbott, Complainant put Respondent Commission on notice of the matters set forth therein.

5. That Complainant filed a petition for election in said claimed bargaining unit with respect to which petition a hearing was conducted by a Hearing Officer of the WERC on June 6, 1974; that Complainant, in the instant complaint, expressly waived any effects of the acts complained of herein upon any election conducted pursuant to said petition; and that on August 5, 1974, pursuant to said petition, the WERC determined that Respondent City and the City of Sparta Water Utility (governed by Respondent Commission) are separate municipal employers and directed representation elections in separate units consisting generally of Respondent City's Department (sic) of Public Works, Sewer,

and Parks [1] and of Water Utility employes. [2]

6. That on April 8, 1974, the President of the United States signed into law the Fair Labor Standard Amendments of 1974 which, inter alia, made applicable to Respondents, for the first time, certain minimum standards for compensation of their employes with respect to hours worked in excess of 40 in a week, referred to herein as overtime or overtime hours; that such Standards require that such employes be compensated for overtime work at the rate of time-and-one-half their normal compensation for nonovertime hours of work and that they be compensated therefor in the form of wages (rather than compensatory time off) unless overtime earned or to be earned in a given workweek is balanced by compensatory time off taken either (a) at straight time within the same 7-day workweek established for overtime computation purposes or, if not taken within the same workweek, (b) at time-and-one half within the pay period covering such workweek.

7. That on April 26, 1974, authorized agents of both of the Respondents met together and discussed with legal counsel the potential impact of Fair Labor Standards Act (FLSA) compliance under the then-existing work schedules of their various employes upon their respective previously established budgets; that also discussed at said meeting was the question of whether the pendency of the aforesaid election petition affected the Respondents' right to modify said work schedules; and that pursuant to decisions made at said meeting, Respondents, on or shortly after May 1, 1974, implemented or announced plans to implement the following changes in the mode of payment and rate of overtime compensation and in the numbers of hours of overtime work thereafter to be assigned:

a. In Respondent City's Department of Public Works, Sewer and Parks: overtime which was previously paid in wages at straight time was changed to payment in wages at time-and-one-half; the four and one-half hours worked regularly on alternate Saturdays were eliminated; however, the five overtime hours regularly worked each week (in the form of nine-hour workdays each weekday) was not altered; that street sweeping, mosquito fogging, centerline painting and other work assignments previously performed during overtime hours were either reduced, rescheduled or eliminated with a resultant

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[1] City of Sparta, Dec. No. 12913 (8/74).

[2] City of Sparta Water Utility, Dec. No. 12912 (8/74).

additional reduction in the number of overtime hours worked by Department employes;

b. In the Water Utility, overtime compensation was changed from compensatory time off at straight time to wages at time-and-one-half.

8. That water meter reading overtime worked by Water Utility employes in previous years was eliminated prior to the beginning of 1974 as a result of improvements in meter reading efficiency, including the widespread replacement of inside meters with meters readable from the outside of a customer's home or building; and that such reduction was effected before, not after, the Complainant's request for recognition and before Complainant's petition for election was filed and is therefore clearly unrelated thereto.

9. That the April 26, 1974, decisions and the announcements and implementations thereof which followed were unilateral acts of the Respondents as to which Respondents at no time notified or bargained with Complainant.

10. That no employe of either of the Respondents suffered a reduction in take-home pay as a result of the changes noted in Finding No. 7 above.

11. That the purposes of Respondent City's effectuation of the changes noted in subparagraph (a) of Finding No. 7 above and of Respondent Commission's effectuation of the changes noted in subparagraph (b) of Finding No. 7 above were to comply with the FLSA standards while at the same time adhering to previously established operating budgets and maintaining at least existing levels of employe take-home pay; and that Complainant has failed to show by a clear and satisfactory preponderance of the evidence that any such changes were to any extent motivated by anti-union animus or an intent to discourage municipal employes' union membership or activities.

12. That the changes noted in Finding No. 7 were made during the pendency of a question of representation with respect to the employes of each of the Respondents and were made shortly after Complainant's filing of an election petition with respect to the employes affected; but that notwithstanding the timing thereof, said changes were not likely to have interfered with, restrained or coerced any municipal employe in the exercise of the rights provided in Sec. 111.70(2) of MERA since such changes (1) were occasioned by an event outside of the control of Respondents (extension of FLSA coverage to Respondents

which, but for said changes, would have raised labor costs substantially above established budget levels, and (2) were effected without a reduction in employe take-home pay despite an overall reduction in the hours worked by some employes.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That by unilaterally changing the wages, hours and conditions of employment of certain of the employes in its Department of Public Works, Sewer and Parks, as noted in Finding No. 7 above, Respondent City of Sparta neither discriminated with respect to hire or tenure or other terms or conditions of employment for the purpose of encouraging or discouraging membership in Complainant or any other labor organization nor interfered with, restrained or coerced all or any of its employes in the exercise of their rights set forth in Sec. 111.70(2) of MERA and therefore did not commit a prohibited practice in violation of either Sec. 111.70(3)(a)3 or Sec. 111.70(3)(a)1 of MERA.

2. That by unilaterally changing the wages, hours and conditions of employment of certain of the employes of the City of Sparta Utility as noted in Finding No. 7 above, Respondent City of Sparta Water Commission neither discriminated with respect to hire or tenure or other terms or conditions of employment for the purpose of encouraging or discouraging membership in Complainant or any other labor organization nor interfered with, restrained or coerced all or any of its employes in the exercise of their rights set forth in Sec. 111.70(2) of MERA and therefore did not commit a prohibited practice in violation of either Sec. 111.70(3)(a)3 or Sec. 111.70(3)(a)1 of MERA.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS HEREBY ORDERED that the complaint in the above matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 20th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint, as initially filed, alleged that Respondent City violated Secs. 111.70(3)(a)1 and 3 [3] by making and announcing plans to make certain unilateral changes in the wages, hours and conditions of employment (specifically in work schedules and the form and rates of overtime compensation) of employes employed ". . . in its Departments of Public Works, Sewer, Water and Parks. . ." within a short period of time after the Complainant raised a question of representation with respect to such employes. At the hearing, the Complainant amended its complaint, so as to join Respondent Commission as a Respondent in the event that the WERC determined, in a then-pending representation proceeding [4] that Respondent City and the City of Sparta Water Utility were separate municipal employers within the meaning of MERA. Respondents, in their answer as amended at the hearing, admit that the Respondents are separate municipal employers, admit that certain changes were made by the Respondents in the wages, hours and conditions of employment of certain of the employes of each shortly after Complainant sent its letter of April 17, 1974, requesting recognition, but Respondents deny that such changes constituted prohibited practices and affirmatively allege that such changes were effected solely for the purpose of complying with the extension (effective May 1, 1974) of Fair Labor Standards Act (FLSA) coverage to the Respondent while maintaining the previously budgeted levels of labor costs and previous levels of employe take-home pay.

On August 5, 1974, the WERC issued a determination that Respondent City and the City of Sparta Water Utility are separate municipal

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[3] Those sections provide as follows:

> "(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
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> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
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> . . .
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> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement."

[4] See notes 5 and 7, below, and texts accompanying.

employers under MERA. [5] At the same time it issued separate directions of election, one with respect to certain employes employed by the City of Sparta in its Department of Public Works, Sewer and Parks [6] and another with respect to certain employes employed by the City of Sparta Water Utility. [7] Accordingly, Respondent Commission has been found herein to be a municipal employer with respect to certain employes of the City of Sparta Water Utility, separate and apart from Respondent City, which is, of course, a municipal employer with respect to employes in its Department of Public Works, Sewer and Parks.

POSITIONS OF THE PARTIES

There was an initial brief by Respondents, a reply brief by Complainant, and a subsequent reply brief by Respondents, the last of which was received by the Examiner on September 20, 1974.

The Complainant argues that ". . . the whole thrust and intent . . ." of MERA in situations where a question of representation has been raised is that wages, hours and conditions of employment must be maintained intact until such time as the question of representation is resolved; that ". . . [i]n essence, existent conditions have the same validity as a formal labor agreement"; that in the face of legal advice from its own counsel to that effect, Respondents both decided, nonetheless, to make changes in longstanding work scheduling and overtime payment practices; that such changes had an adverse effect on the employes involved even if their take-home pay was not reduced since, but for such changes, the advent of FLSA coverage would have entitled such employes to significant increases in take-home pay; that it frustrates the purpose of FLSA to reduce employes' overtime hours since that law has been authoritatively interpreted as one not intended to negate more favorable local laws; that several Wisconsin municipal employers subject to collective bargaining agreements have maintained their employes' schedule of work hours notwithstanding an increased budget impact due to FLSA, and Respondents ought not be permitted to do less with respect to their employes; that the timing of Respondents' implementation and announcement of changes indicates both that such changes and "threatened"

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[5] City of Sparta, Dec. No. 12913 (8/74).

[6] Ibid.

[7] City of Sparta Water Utility, Dec. No. 12912 (8/74).

changes were intended as a discriminatory reprisal for Complainant's organizational activity and, in any event, were of such a nature as would naturally interfere with and coerce the employes in the exercise of their rights under MERA, since Respondents ". . . were aware in February that passage of the F.L.S.A. was a certainty. . .", and since Respondents did not meet to consider changes adverse to the employes until shortly after receipt of Complainant's request for recognition; that for all of the foregoing reasons, the Examiner should conclude that Respondents violated Secs. 111.70(3)(a)3 and 1 of MERA and order them to post notices and to make affected employes whole ". . . by payment of the hours they otherwise would have worked had not the (Respondent) City revised the work schedules and reduced the hours."

The Respondents argue that they received notice that the FLSA had been amended effective May 1, 1974 "[s]hortly after the [Complainant's above-noted election]petition was filed . . ."; that Complainant's assertion that Respondents had such notice in February is unsupported by the record evidence; that there is no competent evidence supporting the assertion that Respondents were advised by their Counsel that the changes made herein would be unlawful, and that, in any event, any such advice would not bind the Examiner to a similar conclusion of law; that the changes did not reduce any employe's take-home pay; that if such changes had not been made, Respondents' compliance with FLSA (in effect as of May 1, 1974) would have increased their labor costs substantially above previously established budget levels; that Respondent Commission's decision to change overtime compensation from compensatory time off at straight time to wages at time-and-one-half was a reasonable and understandable response to the restrictive FLSA conditions precedent to a valid compensatory time-off plan for overtime compensation; that under such circumstances the changes were not such as would probably have interfered with, restrained, or coerced the employes in their exercise of MERA rights; that there is no evidence of anti-union animus on the part of Respondents; that to conclude that Respondents violated either Sec. 111.70(3)(a)3 or 1, Complainant had to, and failed to, prove by a clear and satisfactory preponderance of the evidence that such changes were both anti-union motivated and of such a nature as would probably have interfered with, restrained or coerced the employes in their exercise of MERA rights; that the changes did not violate the spirit of the FLSA since that act does not guarantee any particular number of hours of work, and, since in any event, the WERC lacks jurisdiction to determine whether violations of the FLSA were committed by Respondents; that since Complainant was neither the recognized nor certified representative of the employes affected by the changes at the time of the changes, Respondents had no obligation either to give notice of such changes to Complainant or to discuss same with Complainant; that Complainant's

reference on brief to the response to FLSA by other municipal employers who are parties to collective bargaining agreements is not supported by record evidence and is, in any event, irrelevant since Respondents were not parties to collective bargaining agreements with Complainant at the time the changes were made and because disparate treatment among employes of different municipal employers is not discrimination within the meaning of Sec. 111.70(3)(a)3; and that for the foregoing reasons, the Examiner should conclude that neither of the Respondents committed prohibited practices and should dismiss the complaint as to each of the Respondents.

DISCUSSION

It is undisputed that, in various ways, Respondent City reduced the number of overtime hours assigned to employes in its Department of Public Works, Sewer, and Parks, and that Respondent Commission changed the mode of payment of overtime to its employes from straight time compensatory time off to time-and-one-half wages. It is also undisputed that by doing so at the time they did, the Respondents unilaterally changed the wages, hours and conditions of employment of their respective employes during the pendency of a question of representation with respect to such employes.

The fact that the changes noted in Finding No. 7 were made was essentially undisputed. The Respondents presented evidence calculated to show that the street-sweeping schedule that was changed had been of uncertain prior duration and that the number of hours of mosquito fogging previously assigned had varied widely depending upon the desires of particular aldermen of Respondent City. However, in view of the overall result reached herein, detailed analysis of such evidence has been foregone since a determination of the precise nature of the prior practices and the changes effected therein is not necessary.

Respondents have correctly pointed out that the evidence concerning the response of other municipal employers to the FLSA amendments cannot be given any consideration herein since such evidence was presented for the first time in Complainant's brief. Even if it were considered, such evidence would not alter the result reached herein since, unlike the Respondents, the municipal employers referred to in Complainant's briefs were parties to collective bargaining agreements in existence at the time the FLSA amendments became effective. Moreover, the mere fact that Respondents treat their employes differently

than do other municipal employers does not establish a basis for concluding that Respondents have discriminated within the meaning of Sec. 111.70(3)(a)3 of MERA.

Of greater import is the resolution of the factual dispute as to whether, as is asserted in Complainant's brief, Respondents ". . . were aware in February [1974] that passage of the F.L.S.A. was a certainty." In their brief, Respondents assert that Respondent City received notice that the FLSA had been amended effective May 1, 1974 ". . . [s]hortly after the petition was filed [circa April 17, 1974]". Neither of those seemingly contradictory assertions is satisfactorily supported by the record evidence. No authorized representative of either Respondent was shown to have had the awareness asserted by Complainant to have existed in February. Moreover, none of the actions of Respondents' agents reflected in the record are such as would imply the asserted awareness as of February. While the record indicates that both Respondents were assisted by legal counsel, it would be pure speculation to conclude from that fact that such counsel had the asserted awareness in February. Thus, since Complainant bears the burden of proving the facts it alleges in support of its complaint, there cannot be a finding made in conformity with the above assertion of Complainant.

In April and May, 1974, when the complained-of changes were decided upon and implemented or at least announced, Complainant was neither the recognized nor the certified representative of the employe groups herein in question. Therefore, Respondents were not under a duty to bargain in good faith with Complainant with respect to the wages, hours and conditions of employment of the respective employe groups at such times. Nevertheless, Respondents were not free to alter their employes' wages, hours and conditions of employment if such alteration were motivated, even in part, by anti-union animus, [8] nor are they free, regardless of motive, to change the wages, hours and conditions of their employes in such a way as would be likely to interfere with, restrain or coerce such employes in the exercise of their rights set forth in Sec. 111.70(2) of MERA. [9] [10]

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[8] See, e.g., Milwaukee Board of School Directors, Dec. Nos. 9242-A, B (4/71); Village of West Milwaukee, Dec. No. 9845-B (10/71).

[9] A conclusion that a prohibited practice within the meaning of Sec. 111.70(3)(a)1 has been committed does not require a finding of anti-union animus or motivation, but rather may be grounded on any actions which are likely to interfere with, restrain or coerce employes in the exercise of their MERA rights. City of Waukesha (Water Utility), Dec. No. 11486 (12/72); see also, City of Milwaukee, Dec. No. 8420 (2/68) at 12-13.

[10] Section 111.70(2) provides in part as follows: (Cont'd on page 11)

Where, as here, such changes are made during the pendency of a question of representation, evidence that the municipal employer was aware of the pendency of such question and/or evidence that such changes were made shortly after the municipal employer became aware of such pendency is evidence probative both as to whether the changes were unlawfully motivated and as to whether the changes were likely to have an unlawful impact on employe exercise of rights. But while such evidence is probative as to both those issues, it is not necessarily conclusive as to either of them. Thus, contrary to Complainant's arguments, it is not the case that all changes in wages, hours and conditions of employment with respect to employes as to whom there is pending a question of representation necessarily will constitute a prohibited practice. 11/

Upon review of the record in the instant case, the Examiner concludes that, notwithstanding the timing of the changes at issue herein, Respondent has failed to meet its burden of proving that Respondents committed a prohibited practice in violation of either Sec. 111.70(3)(a)1 or 3. The record does not establish by a clear and satisfactory preponderance of the evidence 12/ that the changes noted in Finding No. 7 were unlawfully motivated. There was testimony to the effect that at the April 26 meeting and at a later meeting of the Water Commission on May 6, the only reasons discussed for the changes were the needs to avoid overtime expenditures that would arise by reason of compliance with the FLSA unless certain reductions in hours and changes in overtime compensation

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10/ (Cont'd from page 10)

"(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . . ."

11/ Whether or not Respondents were advised by their Counsel that no such changes could lawfully be made during the pendency of a question of representation is irrelevant. A party's conduct must be measured against the requirements of the law as interpreted by the WERC and the courts, not by the opinions of such party's counsel. Moreover, it is possible that said counsel recommended a course that would avoid litigation rather than one which, while lawful, might risk litigation such as the instant proceeding.

12/ That standard of proof is required by Sec. 111.07(3) of the Wisconsin Employment Peace Act, made applicable to municipal employment by Sec. 111.70(4)(b) of MERA.

methods were made. There were no discussions of any kind suggestive of an intent to discourage union membership or activity. The existence of Complainant's petition was discussed on April 26 only insofar as its legal impact on the Respondents' rights to make the contemplated changes were concerned. Moreover, the changes effected by Respondent City were accomplished in quite a neutral fashion such that no reductions in employe take-home pay resulted notwithstanding the reductions in the numbers of hours worked by many employes in return for such take-home pay. Furthermore, Respondent Commission's change-over to a wages rather than a compensatory time off mode of overtime compensation was a reasonable response in view of the restrictive requirements which Respondent would have had to meet in order to establish a time-off plan of overtime compensation consistent with the FLSA. 13/

In view of the foregoing evidence, the factor of the timing of the changes involved herein, is not sufficient, in the Examiner's view, to sustain the Complainant's burden to prove anti-union animus by a clear and satisfactory preponderance of the evidence. Therefore, no violation of Sec. 111.70(3)(a)3 has been found herein.

The Examiner also finds that Complainant has not met its burden of proving that either the announcement or the implementation of the changes involved herein was likely to interfere with, restrain or coerce any of the Respondents' employes in their exercise of MERA rights. For the context of the changes was devoid of any threats or promises related to union activities that might have caused the changes to seem associated with an anti-union motivation on Respondents' part. Moreover, the appearance to the employes of the nature of the changes was not inherently coercive; the employes knew or soon learned that their take-home pay was not being reduced though their hours of work, in many cases, were being cut; and the Water Utility employes knew that their rate of overtime compensation was being increased, which softened any adverse impact the change from compensatory time off to wages may have had. Furthermore, the inception of FLSA did not create a vested right in the employes to an increase in take-home pay. 14/

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13/ Some of those requirements are noted in Finding No. 6, above. See, 94 Wage and Hour Manual, 1701-1713 (1970); 29 Code of Federal Regulations, Secs. 778.104 and 778.326 (1969).

14/ Complainant's reference to the FLSA regulations (noted in POSITIONS OF THE PARTIES, above) indicates only that such law is not intended to preempt more favorable labor standards provided for in local laws. That regulation does not establish the further proposition that either the spirit or the letter of the FLSA requires that all overtime previously worked must be continued after the effective date of the Federal standards.

Those of the employes who may nevertheless have expected such an increase because of an awareness that FLSA coverage was imminent also necessarily had reason to know that the instant changes were directly related to the inception of that imminent FLSA coverage and that the passage of FLSA was an event outside the Respondents' control which, without the interposition of the instant changes, would have had a substantial upward impact on Respondents' labor costs. Those employes who were not aware that FLSA coverage was imminent had no reason to expect any increase in take-home pay on or about May 1, 1974. Therefore, the instant changes did not cause any of the affected employes to suffer deprivations of such a nature or under such circumstances as were likely to chill their desire for union membership or activity. Hence, no violation of Sec. 111.70(3)(a)1 has been found herein.

For the foregoing reasons, the instant complaint has been dismissed.

Dated at Milwaukee, Wisconsin, this 20th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner