STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA COUNTY EMPLOYEES LOCALS 1090, 990 - WELFARE, 1392, and 70, AFSCME, AFL-CIO, Complainants, vs. KENOSHA COUNTY, Respondent.	:	Case XXVI No. 20784 MP-659 Decision No. 14937-A
KENOSHA COUNTY INSTITUTION EMPLOYEES LOCAL 1392, Complainant, vs. KENOSHA COUNTY, Respondent.	:	Case XXVII No. 20818 MP-661 Decision No. 14943-A

Appearances:
Lawton & Cates, by Mr. David B. Gaebler, and Mr. Bruce Ehlke, appearing on behalf of the Complainants.
Bridgen, Petajan, Lindner & Honzik, S.C., Attorneys at Law, by Mr. Eugene J. Hayman, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having on September 1, 1976 and September 16, 1976 filed complaints with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of the staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5) of the Wisconsin Statutes; and a consolidated hearing on said complaints having been held in Kenosha, Wisconsin on November 8, 1976; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Kenosha County Employees Local 1090, WCCME, AFSCME, AFL-CIO, herein Complainant Local 1090, is a labor organization functioning as the collective bargaining representative of "all full-time employees of the County Parks, except the yearly salaried Park Director, Assistant Park Director, Administrative Assistant and Supervisor II employees".

2. That Kenosha County Courthouse Employees, Local 990, WCCME, AFSCME, AFL-CIO, herein Complainant Local 990, is a labor organization functioning as the collective bargaining representative of "Kenosha County Courthouse Employees, excluding elected officials, County Board appointed administrative officials and building service employees".

3. That Kenosha County Welfare Department Professional and Clerical Employees, Local 990, WCCME, AFSCME, AFL-CIO, herein Complainant Local 990 - Welfare, is a labor organization functioning as the collective bargaining representative of "Kenosha County Welfare Department Professional and Clerical employes, but to exclude the Directors, Administrative Assistants, elected officials, building service employees and supervisory employees".

4. That Kenosha County Institution Employees, Local 1392, WCCME, AFSCME, AFL-CIO, herein Complainant Local 1392, is a labor organization functioning as the collective bargaining representative of "all Brookside and Willowbrook employees except supervisory employees, administrators stenographer and registered nurses" employed by Kenosha County.

5. That Kenosha County Employees, Local 70, WCCME, AFSCME, AFL-CIO, herein Complainant Local 70, is a labor organization functioning as the collective bargaining representative of "all Kenosha County Highway employees, except the yearly salaried supervisory employees".

6. That Kenosha County, herein Respondent, is a municipal employer.

7. That in the Fall of 1975 Respondent and all of the Complainant Locals began collective bargaining for their 1976 bargaining agreements; that Respondent's principal representative during said negotiations was Eugene J. Hayman while Complainant Locals were represented by Richard Abelson; that when the 1975 collective bargaining agreements expired on December 31, 1976 no settlement of the 1976 contracts had been reached and the parties formally extended the terms of the 1975 agreements until January 9, 1976; that as bargaining continued after January 9, 1976 the parties had a tacit understanding that the terms of the 1975 bargaining agreements would remain in effect unless any of the Complainant Locals struck the Respondent; and that in late February 1976 Hayman informed Abelson that Respondent would cut off all employe benefits if a strike occurred.

8. That on March 1, 1976 all of Complainant Locals struck the Respondent; that on March 3, 1976 Respondent directed Wisconsin Physicians Service to suspend all hospital, surgical and major medical insurance coverage for employes represented by Complainant Locals effective 12:01 a.m. March 1, 1976; and that on March 11, 1976, as the strike continued, the Respondent informed the presidents of all of Complainant Locals that "the County's fringe benefit program, including Hospital; Surgical, Medical Insurance and the accident and Sickness Pay Maintenance Plan was suspended for striking employes effective Monday, March 1, 1976."

9. That on or about March 26, 1976 the parties reached a tentative settlement of their 1976 collective bargaining agreements; that prior to said settlement the bargaining focused upon the issues of retroactivity with respect to wages and accrual of seniority; that as a part of the tentative settlement the parties agreed that the wage increase would be retroactive to February 1 and that employe seniority would be uninterrupted; that early in March the parties had had a brief inconclusive discussion about the status of insurance benefits; that following said discussion the issue of insurance benefits or their retroactivity never arose in any communication between the parties.

10. That the strike continued through March 31, 1976 until all parties had ratified the tentative settlement; that certain employes represented by Complainant Locals 990 and 990-Welfare had continued to work during the duration of the strike; that on April 15, 1976 the Respondent paid those non-striking employes who it believed had been prevented from working on March 30, 1976 by Complainant Locals 990 and 990-Welfare's picket line; that Respondent did not pay striking employes represented by Complainant Locals 990 and 990-Welfare for the date of March 30, 1976; that on April 28, 1976 Complainant Locals 990 and 990-Welfare filed a grievance protesting Respondent's April 15 action; that said grievance was processed through the contractual grievance procedure; and that on July 14, 1976 Respondent informed Complainant Locals 990 and 990-Welfare that it was rejecting Complainant Locals' request that the grievance be arbitrated.

11. That insurance benefits were reinstated for all employes effective April 1, 1976; that Respondent never paid insurance premiums for any striking employes for the month of March; that premium payments were made for non-striking employes for the month of March; that vacation benefits accrued during the strike inasmuch as the parties had agreed that seniority would be uninterrupted; that the collective bargaining agreements reached by Respondent and the Complainant Locals contained the following provisions:

"ARTICLE XVIII - INSURANCE

Section 18.1. Hospital-Surgical. For the duration of this Agreement, the County shall make payment to the carrier to be selected by the County of Funds sufficient to pay for a comprehensive hospital-surgical-major medical coverage policy including Outpatient Diagnostic and X-Ray, Supplemental Hospital and Emergency Medical benefits, and a $25 deductible Dental plan, as follows:

. . .

ARTICLE XXV - DURATION

Section 25.1. Term. This Agreement shall become effective January 1, 1976, except for wages which shall become effective February 1, 1976, and shall remain in effect through December 31, 1978, and shall be automatically renewed for periods of one (1) year thereafter unless either party shall serve upon the other a written notice of its desire to modify or to terminate this Agreement. Such notice is to be served no later than the date of the July meeting of the County Board."

12. That the collective bargaining agreements between Respondent and Complainant Locals 1392, 990, and 990-Welfare provide for final and binding arbitration of unresolved grievances and contain the following provisions:

"ARTICLE I - RECOGNITION

. . .

Section 1.2 Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to

establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner.

. . .

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

. . .

ARTICLE VI - SENIORITY

. . .

Section 6.4 Layoff. In the event it becomes necessary to reduce the number of employees in a department, the probationary employees shall be the first to be laid off and then the employees with the least institution-wise seniority. Employees laid off in reduction of force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be less than three (3) years. When vacancies occur in a department, while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed on these jobs. In the event an employee declines to return to work when recalled under this section, such employee shall forfeit all accumulated seniority rights."

13. That certain employes represented by Complainant Local 1392 worked during the strike; that as a part of the strike settlement Complainant Local 1392 and Respondent agreed that all employes represented by Local 1392 would be laid off and then recalled in order of seniority, that while said employes were on layoff awaiting recall, Respondent continued to pay those employes who had worked during the strike; and that laid off employes who did not work during the strike were not so paid.

14. That in November 1975, while bargaining with the Respondent for a successor agreement, Complainant Local 1392 proposed the establishment of an "E" shift at Respondent's institutions to provide additional manpower during certain periods of the day; that said proposal was rejected by the Respondent who informed Complainant Local 1392 that it could unilaterally establish such a shift if needed; that the issue of "E" shift was never again raised during negotiations; that in June 1976 representatives of Respondent and Complainant Local 1392 began to meet on a regular basis to discuss matters of mutual concern; that at one such meeting in the summer of 1976 several employes, including the vice-president of Complainant Local, suggested the establishment of an additional shift to meet certain staffing needs; that at a meeting held shortly thereafter, the Respondent's Assistant Director of Nurses, presented a document to Complainant Local's representatives which set forth the manner in which such a shift could be staffed; that on August 19, 1976 the Respondent posted a document which stated 'JOB POSTING . . . TWELVE (12) CURRENT A SHIFT NURSING ATTENDANTS TO WORK AN EARLY A SHIFT BEGINNING AT 6:00 AM AND ENDING AT 2:30 PM'; that three employes signed this job posting; that at a

subsequent meeting representatives of Complainant Local suggested that the posting be expanded to become available to employes on all shifts to see how many employes would "volunteer"; that the Respondent did subsequently repost the early "A" shift positions for all employes and one additional employe signed the posting; that in September 1976 Respondent unilaterally established the additional shift using the four employes who signed the posting and the eight employes with lowest seniority from the "A" shift; and that prior to said implementation Complainant Local 1392 never requested that Respondent bargain about the establishment of said shift or its impact upon employes.

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

CONCLUSIONS OF LAW

1. That Respondent Kenosha County, by unilaterally suspending insurance coverage for employes represented by Complainant Locals while the employes were on strike, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1 or 4 of the Municipal Employment Relations Act.

2. That Respondent Kenosha County, by failing to retroactively reinstate insurance coverage for striking employes for March 1976 did not violate the parties' 1976 collective bargaining agreements had thus did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

3. That Respondent Kenosha County, by unilaterally making wage payments to only those laid off employes represented by Complainant Local 1392 who did not strike, violated the 1976 bargaining agreement between it and Complainant Local 1392 and thereby committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

4. That Respondent Kenosha County by unilaterally making wage payments to only those laid off employes represented by Complainant Local 1392 who did not strike, committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

5. That the April 28, 1976 grievance filed by Complainant Locals 990 and 990-Welfare protesting the April 15, 1976 wage payments to certain employes represented by said Local raises a claim which on its face is covered by the terms of the collective bargaining agreement between Respondent and Complainant Locals 990 and 990-Welfare.

6. That Respondent has violated and continues to violate the terms of Article III of the collective bargaining agreement existing between it and Complainant Locals 990 and 990-Welfare by refusing to arbitrate the April 28, 1976 grievance and thus has committed and continues to commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

7. That Respondent, by unilaterally establishing an additional shift which affected certain employes represented by Complainant Local 1392, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

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

ORDER

That Respondent Kenosha County, its officers and agents shall immediately:

1. Cease and desist from:

   (a) Violating the terms of the collective bargaining agreements existing between it and Complainant Locals 990, 990-Welfare and 1392.

   (b) Taking any action which would tend to interfere with the exercise of employe rights protected under Section 111.70(2).

   (c) Refusing to bargain with Complainant Local 1392 over unilateral changes in wages, hours and working conditions of employes represented by Complainant Local.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act.

   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and Complainant Local 990 and 990-Welfare with respect to Complainant Locals 990 and 990-Welfare's April 28, 1976 grievance.

   (b) Notify Complainant Locals 990 and 990-Welfare that it will proceed to arbitration of said grievance.

   (c) Participate with Complainant Locals 990 and 990-Welfare in the arbitration proceedings before an arbitrator with respect to the April 28, 1976 grievance.

   (d) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that all remaining portions of the complaints be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 2nd day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants contend that Respondent committed certain prohibited practices by: (1) unilaterally suspending insurance coverage for employes represented by Complainants while Complainants were engaging in an illegal strike; (2) failing to retroactively reinstate insurance benefits for striking employes; (3) paying non-striking employes represented by Local 1392 who were on layoff status while laid off striking employes were not receiving compensation; (4) refusing to arbitrate a grievance arising out of Respondent's payment of wages to nonstriking employes, and (5) unilaterally implementing a shift change affecting employes represented by Complainant Local 1392. The Respondent asserts that none of its aforementioned actions constitute prohibited practices and thus requests that the complaint be dismissed in its entirety.

Suspension of Insurance Coverage

The record reveals that Complainant Locals struck the Respondent on March 1, 1976 and that shortly thereafter Respondent, true to its word, responded by suspending insurance coverage for employes represented by Complainant Locals. Complainants assert that the Respondent had a duty to bargain with Complainants before suspending benefits and thus that the Respondent's unilateral suspension of benefits violated this statutory duty. 1/ This assertion must be rejected.

Initially it must be noted that the Wisconsin Employment Relations Commission has concluded that an illegal strike does not relieve the municipal employer of the duty to bargain with respect to issues raised by said strike if said issues deal with mandatory subjects of bargaining. 2/ However in the instant matter there appears to be no allegation that the Respondent refused to bargain over the resolution of issues raised by the Complainants' illegal strike. Indeed it is clear from the record that the Respondent did so bargain. Rather Complainants appear to be asserting that a municipal employer has a duty to bargain over the manner in which it will respond to an illegal strike.

Complainants have presented absolutely no authority from either the public or private sector for the proposition that an employer, when confronted with a legal or illegal strike, must bargain with the representative of the striking employes over its decision of whether it will respond to the strike by withholding wages and fringe benefits. One suspects that no such authority exists inasmuch as

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1/ The record indicates that after January 9, 1976 the parties had a tacit understanding that the contracts which existed on December 31, 1975 would remain in effect as bargaining continued unless there was a strike. Thus at the time Respondent suspended coverage no contract existed between the parties. In light of this fact Complainants' refusal to bargain allegation does not appear to be based upon an assertion that Respondent made an illegal unilateral change during the term of existing bargaining agreements. Thus its allegations have not been viewed from this perspective by the Examiner. If by chance the undersigned has misinterpreted Complainants' position and their allegation is in part premised upon an alleged unilateral change during the term of the contracts, such an allegation is found to be totally without merit as it is clear that no contract existed at the time of the suspension.

2/ Madison Joint School District No. 8 (14365) 2/76.

such a bargaining requirement would be abhorrent to the basic balance of power which a strike situation unveils; that balance being the employe's ability to withhold services and the employer's ability to respond by withholding wages and benefits. Complainants have argued that while Respondent could unilaterally withhold wages for striking employes, it could not take said unilateral action with respect to fringe benefits. This contention is premised upon Complainants' assertion that wages are intimately linked to the performance of services and thus may be withheld during a strike but that fringe benefits are related to one's status as an employe which continues during a strike. Initially it must be pointed out that fringe benefits, like wages, clearly constitute compensation for services performed by an employe and thus the distinction between said benefits and wages advanced by Complainants would appear to be illusory. However, even if one were to accept Complainants' distinction, there has been no authority presented to Examiner for the proposition that this distinction is a significant one with respect to Respondent's alleged duty to bargain. Having been presented with no authority for the establishment of a duty to bargain in the instant situation and being unable to conceive of a basis for same, the undersigned must conclude that Respondent's unilateral suspension of insurance coverage did not violate Section 111.70(3)(a)4 of MERA.

Complainants have also asserted that the suspension of insurance coverage constituted interference with the exercise of employe rights protected by MERA. This assertion must also be rejected. Section 111.70(3)(a)1 of MERA makes it a prohibited practice for a municipal employer to "interfere with restrain or coerce municipal employes in the exercise of their rights guaranteed in [Section 111.70] sub. 2." The right to strike is not protected or "guaranteed" by Section 111.70(2); indeed public employe strikes are expressly prohibited by Section 111.70(4)1. Thus any action by Respondent, such as a suspension of insurance coverage, which may tend to interfere with the unprotected employe decision to strike or to remain on strike does not constitute interference in violation of Section 111.70(3)(a)1.

Retroactivity of Insurance Benefits

The Complainants have asserted that the Respondent's failure to reinstate the striking employes insurance coverage for the month of March 1976 constitutes a violation of the parties' 1976 bargaining agreements. When the parties' contract provides for the final and binding impartial resolution of such issues, the Commission will not assert its jurisdiction under Section 111.70(3)(a)5 to determine whether a contractual violation has been committed. Exceptions to this general policy of deferral to arbitration arise when the parties waive resort to this contractual process or when one of the parties ignores or frustrates use of the contractual means of dispute resolution.

The issue of deferral to arbitration was never raised by the parties. In addition both parties litigated the merits of the contractual issue. Given the parties' conduct and their positions, the undersigned concludes that the parties have waived resort to the arbitration process and desire to have the contractual issue resolved herein. Thus the Examiner will exercise the Commission's jurisdiction under Section 111.70(3)(a)5 to determine whether the Respondents failure to retroactively provide insurance benefits to striking employes constitutes a violation of the parties' bargaining agreement.

Complainants assert that the duration clause of the parties' bargaining agreements unambiguously indicates that the terms of said agreements, including the insurance provisions, were to be retroactively effective as of January 1, 1976, with the sole exception of wages which were effective February 1, 1976. They contend that if the parties desired to exclude insurance coverage from the January 1, 1976

retroactivity they would have expressly stated the exclusion as they did with respect to wages. Believing that the duration clause unambiguously reinstates insurance coverage for the March 1976 strike, Complainants urge that no parole evidence should be considered by the Examiner.

The ultimate goal when interpreting a collective bargaining agreement is to determine the parties' intent with respect to the issue at hand. In this instance the undersigned has been asked by the Complainants to find that the content of the general duration clause is such an unambiguous statement of the parties' intent with respect to retroactive insurance coverage that one need not resort to parole evidence. The Examiner must decline Complainant's invitation.

Initially the Examiner feels compelled to point out that after a long bitter strike marked by the suspension of insurance coverage, it seems unlikely that the parties would choose a general duration clause as the means of indicating that insurance coverage would be retroactively reinstated. Indeed, in light of the importance of the resolution of the insurance coverage issue, it could reasonably be argued that if the parties had desired to reinstate coverage they would have specifically stated same and thus that the absence of any specific provision indicates that the parties did not agree to retroactive reinstatement. However, as the parties chose the duration clause to express their intent with respect to the effective date of "wages" and the remainder of the bargaining agreements is silent, Complainants' assertion that this clause also expresses the parties' intent with respect to the insurance issue becomes a reasonable one. Yet as revealed by the parties' contractual statement with respect to the effective date of "wages", the duration clause is not sufficiently unambiguous to preclude utilization of all available relevant evidence regarding the parties' intent.

A portion of the duration clause relied upon by Complainants as an expression of intent explicitly states that "wages . . . shall become effective February 1, 1976." Viewing this language in isolation, one might reasonably conclude that from February 1, 1976 until the expiration of the contracts, a period which includes the March 1976 strike, the employes are entitled to receive the wages dictated by the contracts. Yet the record reveals that despite this February 1, 1976 date, no striking employe ever received any wages for the period when they were on strike. Given the fact that one arguably unambiguous portion of the duration clause (i.e. February 1, 1976) does not accurately reflect the parties' intent with respect to wages, the undersigned must conclude that the remaining portions of said clause simply cannot be relied upon as an unambiguous expression of the parties' intent with respect to the retroactive availability of insurance coverage for March 1976. Thus the undersigned must turn to the parties' bargaining history in an effort to discover whether said clause was in fact intended to express the parties' intent on insurance and, if so, what answer to the issue at hand is provided therein.

The record contains uncontradicted testimony that, with the exception of a brief inconclusive discussion shortly after the suspension of insurance coverage, the parties never discussed the issue of retroactive insurance coverage for striking employes. The record reveals that as the parties struggled to reach a strike settlement, the issues of wages and seniority were predominant, with the parties ultimately agreeing that wage increases would be effective February 1 and that seniority would be uninterrupted. The Complainants never demanded retroactive coverage as a requirement for settlement and Respondent never offered such coverage. While this virtual silence is rather

stunning in light of the importance of the benefit involved and Respondent's open suspension of coverage, the record clearly indicates this absence of bargaining on the specific issue in question. Given this bargaining silence on the issue of retroactive insurance coverage, the Examiner simply cannot conclude that it was the parties' intent to contractually provide retroactive coverage through a general duration clause or through any other portion of the contract.

In reaching this conclusion, the Examiner has considered Abelson's testimony that WERC mediators "assured us that in conjunction with the duration clause, a no reprisal no recrimination clause would cover our concerns about seniority and fringe benefits provisions of the labor agreement". The undersigned simply cannot credit such self-serving heresay testimony. However it should be noted that even if a mediator made such a comment, such as assertion, absent a demand for retroactive coverage or an offer of same, would provide insufficient basis for concluding that the parties mutually intended to provide such coverage. The Examiner has also considered Complainants' argument that certain other benefits have been retroactively granted effective January 1, 1976 although not specifically bargained, and thus that insurance coverage should receive the same treatment. More specifically Complainants allege that vacation benefits continued to accrue during the strike and that claims for dental insurance benefits, which first appeared in the 1976 contracts, were paid for January and February, 1976. With respect to vacation benefits, the parties' strike settlement specifically indicated that seniority would be unbroken by the strike and thus it can reasonably be concluded that vacation time would continue to be earned by an employe. Regarding the payment of dental benefits, no specific paid claims were presented and there was no persuasive conclusive evidence that the Respondent paid premiums for January and February 1976. Thus this argument has also been rejected.

Having concluded that the parties' bargaining agreements do not provide for retroactive insurance coverage, the Respondent's failure to provide same does not violate the parties' agreements and thus does not constitute a violation of Section 111.70(3)(a)5.

Payments to Laid - Off Non-striking Employes

It is undisputed that the strike settlement agreement between Respondent and Complainant Local 1392 called for all employes to be laid off and then recalled in order of seniority. Said agreement did not contain any provision indicating that any employe was to receive any payment while on lay-off status. It is also undisputed that the Respondent made payments to the non-striking employes who were laid-off while failing to make similar payments to those laid off employes who had struck. The record reveals that Respondent took this action because it did not want the strike settlement agreement to have the effect of "penalizing" employes who had worked during the strike. Complainants allege that by making these payments Respondent violated the parties' 1976 bargaining agreement; violated its duty to bargain with Complainant Local 1392, and interfered with employes in the exercise of the Section 111.70(2) rights. Complainants ask that Respondent be found to have committed the alleged prohibited practices but do not request any specific affirmative relief.

As stated earlier, when the parties' bargaining agreement provides for the binding impartial resolution of contractual disputes, the Commission will not normally exercise its Section 111.70(3)(a)5 jurisdiction. However as the parties fully litigated the question of whether Respondent's payments violated the parties' bargaining agreement and the issue of deferral to arbitration was never raised,

the Examiner again concludes that the parties have waived resort to the arbitration process and thus will exercise the Commission's statutory jurisdiction to determine whether Respondent's action violated the parties' bargaining agreement. As there has been no allegation that the action in question also violated the parties' settlement agreement, the Examiner will make no finding with respect to that issue.

A preliminary question which must be resolved is whether the parties intended that the terms of the new bargaining agreement, especially the layoff clause contained therein, should govern the strike settlement layoff. Given the silence of the settlement agreement with respect to this issue and the fact that the layoffs would be occurring during the term of the new contract which contained layoff language, it is reasonable to conclude that the parties intended that the newly reached bargaining agreement would govern.

Turning to the merits of the allegation at hand, the bargaining agreement is silent with respect to whether employes are to receive any payments while on layoff. However inasmuch as such payments run contrary to the common attributes of layoff status, the Examiner concludes that said silence should reasonably be viewed as an adoption of the general concept that employes who have been laid off do not continue to receive payments from the Employer. It seems doubtful that Respondent would dispute this conclusion as it indicates that it made the payments not because of any contractual obligation but rather because it did not wish to "penalize" non-striking employes.

Having concluded that the bargaining agreement was to govern the layoff and that said agreement does not provide for payments to laid-off employes, the Examiner must conclude that the payments made to certain employes circumvented the layoff provisions of the agreement. By making said payments the Respondent in essence removed the recipients from layoff status under the contract and placed them in something akin to vacation status. Such circumvention constitutes a violation of the parties' bargaining agreement and thus a violation of Section 111.70(3)(a)5. In reaching this conclusion, the Examiner has rejected Respondent's argument that the layoff agreement which it reached with Complainant Local 1392 to settle the strike should not be the basis for "penalizing" employes who did not engage in an illegal strike. Respondent was not forced to relinquish its desire to protect non-strikers from any wage loss caused by the layoff agreement and must be found to have sacrificed this desire in order to settle the strike. Respondent cannot regain, through a unilateral extension of benefits, that which is sacrificed at the bargaining table without violating the parties' bargaining agreement.

As the wage payments made by Respondent to certain laid-off employes constituted a change in the wages and conditions of employment for said employes during the term at the bargaining agreement, Respondent had a duty to bargain over said payments prior to their extension to the employes. The record clearly reveals that Respondent did not so bargain and thus it must be found that Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)4.

Complainants have also alleged that the unilateral wages payments interfered with employe's rights under Section 111.70 and thus constituted a violation of Section 111.70(3)(a)1. As discussed earlier, the instant strike was not protected concerted activity and thus if the potential impact of Respondent's action was solely upon employes' future propensity to strike, no statutory violation would be found. However, the unilateral extension of wages to certain employes which occurred after the strike had been resolved and which violated the newly established bargaining agreement has a tendency not only to affect future strike decision s but also to undermine the future

position of Complainant as bargaining representative. When an employer grants benefits in such a manner, employes might well begin to wonder about the utility of supporting their bargaining representative. Given this tendency of the Respondent's action to interfere with an employe's willingness to engage in protected concerted activity on behalf of its bargaining representative, it must be concluded that Respondent's unilateral extension of benefits constituted interference with employes' Section 111.70 rights and a prohibited practice within the meaning of Section 111.70(3)(a)1.

Having concluded that the Respondent's payments constituted the aforementioned prohibited practices, the Examiner is confronted with the question of whether any affirmative relief would effectuate the purposes of the Municipal Employment Relations Act. With respect to the contractual violation, an affirmative remedy might well require that employes who received payments while on layoff return same to the Employer. Inasmuch as this would work undue hardship upon said employes and would be likely to reopen wounds created by the March 1976 strike, the undersigned concludes that such affirmative relief would be inappropriate. Turning to the refusal to bargain, the commonly utilized remedy would require that Respondent rescind its action and then, upon request, bargain with respect to such payments. Such action would again entail the loss of payments by the recipients and for the reasons cited above, the Examiner finds such relief inappropriate. In addition no useful purpose would be served by ordering Respondent to bargain about payments which existed for a short period of time, which ended over a year ago, and which will likely never be repeated. Thus with respect to the statutory violations discussed above, the Examiner has only ordered that Respondent cease and desist from committing said violations. It is noteworthy that Complainants' prayer for relief did not contain a request for any specific affirmative remedy for said violations.

Refusal to Arbitrate

Section 111.70(3)(a)5 of the Municipal Employment Relations Act makes it a prohibited practice for a Municipal Employer "to violate any collective bargaining agreement agreed upon by the parties . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . ." When interpreting said provision with respect to questions of procedural and substantive arbitrability the Commission has followed the federal substantive law set forth in the Trilogy cases 3/ and John Wiley and Sons, Inc. vs. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964). Thus in actions seeking enforcement of arbitration provisions contained in collective bargaining agreements, the Commission will give such clauses their fullest meaning and restrict itself to a determination of whether the party seeking arbitration makes a claim which, on it face, is covered by the bargaining agreement. 4/ Therefore, the issue

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3/ Steelworkers vs. American Mfg. Co., 353 U.S. 564 (1960); Steelworkers vs. Warrior and Gulf Navigation Co., 353 U.S. 574 (1960); Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

4/ Oostburg Joint School Dist., (11196-A) 11/72; Monona Grove Joint School Dist., (11614-A) 7/73; Weyerhauser Joint School Dist., (12984) 8/74; Portage Joint School Dist. No. 1, (14372-A) 8/76; Spooner Joint School Dist. No. 1, (14416-A) 9/76.

before the Examiner is limited to a determination of whether the instant grievance is arbitrable under the parties' bargaining agreement.

Article III of the parties' 1976 bargaining agreement indicates that "any difference or misunderstanding involving the interpretation or application of this agreement . . . which may arise between an employer or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled . . ." via the grievance/arbitration procedure. The grievance in question filed by Complainant Locals 990 and 990-Welfare alleges that the April 15, 1976 payment of wages to certain employes who did not work on March 30 while denying wages to others who also did not work on said date "is an act of discrimination by management." Inasmuch as the management rights clause in the 1976 agreement forbids the Respondent from exercising said rights "in a discriminatory manner" and as one could conclude that the payment of wages to employes is the exercise of a management right which is subject to this no discrimination proviso, the Examiner concludes that the instant grievance on its face, constitutes a "difference or misunderstanding involving the interpretation or application of this agreement" and thus that said grievance would be substantively arbitrable under the 1976 contract if said contract was in effect at the time the grievance arose.

Respondent's refusal to arbitrate the grievance does not appear to be based on a position which would conflict with this conclusion. Rather the Respondent asserts that the grievance arose on March 30 at a time when no contract existed between the parties and thus that it has no obligation to arbitrate said grievance. It further contends that the 1976 bargaining agreement which purports on its face to go back to the expiration date of the 1975 contract does not make the matter retroactively arbitrable given the absence of a specific agreement regarding such a retroactive application. The Complainants' counter by asserting that the grievance arose on April 15 and thus that a bargaining agreement did exist when the grievance arose.

The Examiner accepts the proposition that there is no duty to arbitrate a grievance which arises when no collective bargaining agreement exists between the parties. 5/ However, the issue before the Examiner does not require a determination of whether the grievance in fact arose when a contract existed but rather whether the grievance raises a claim which on its face calls for the interpretation of the parties' 1976 bargaining agreement. Inasmuch as the duration clause on its face indicates that the 1976 bargaining agreement became effective January 1, 1976, the Examiner concludes that the grievance does raise a claim which appears to call for the interpretation of the 1976 agreement and thus that Respondent must arbitrate said grievance. It should be clear however that this conclusion does not constitute any determination with respect to the merits of the grievance.

Implementation of "E" Shift

As the establishment of an additional shift is integrally related to Respondent's judgment as to how it may best pursue its goal of providing quality health care services, the Examiner concludes that the decision to establish said shift is a permissive and not a mandatory

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5/ It should be noted however that the Commission has yet to adopt this conclusion. City of Greenfield (14026-A) which Respondent cited for said proposition is currently on appeal to the Commission. Splicewood Corp. (3139) 5/52 is factually distinguishable in that it presented a situation where the grievance arose before the contract expired and it was the Employer's response to an arbitration request which occurred after expiration.

subject of bargaining. 6/ Thus Respondent had no duty to bargain with Complainant Local 1392 regarding its decision to establish the additional shift. However as the establishment of said shift affects the "wages, hours and working conditions" of employes assigned thereto, the impact of the decision to establish the shift is a mandatory subject of bargaining. Thus Respondent was obligated to bargain with Complainant Local 1392 regarding the impact of the shift unless Complainant Local waived its right to bargain by its conduct or through the content of the parties' bargaining agreement. 7/ The Examiner thus turns to an examination of the issue of waiver.

The Commission has consistently indicated that it will not find a waiver of the statutory right to bargain on a mandatory subject of bargaining absent clear and unmistakable evidence requiring that result. 8/ The record reveals that representatives of Complainant Local 1392 suggested the establishment of the additional shift; that they were aware of the manner in which the Respondent proposed to implement such an additional shift; and that they were fully aware of the posting of the additional shift. Absent this posting, it might have been reasonable for Complainant Local 1392 to conclude that the Respondent was not seriously contemplating the establishment of the shift. However, after the shift positions were posted, it must be concluded that Complainant had been put on notice of the impending nature of the shift's establishment. Being aware of this contemplated change, it was incumbent upon Complainant to request bargaining on the impact the shift would have upon employes' "wages, hours and working conditions." Given Complainants' failure to make this bargaining request prior to the shift's establishment, it must be concluded that the record contains clear and unmistakable evidence that Complainant waived its right to bargain about the impact of the additional shift.

Dated at Madison, Wisconsin this 2nd day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

6/ While the Commission has not confronted this precise issue in the public sector, the Examiner notes that in Oak Creek-Franklin Jt. School Dist. No. 1 (11827-D) 9/74 the Commission found teacher-pupil contact hours to be a permissive subject of bargaining. While the analogy between the establishment of an additional shift and the length of the school day is far from perfect, the undersigned believes that the Commission's conclusion in Oak Creek-Franklin Jt. School Dist. No. 1 provides some support for that reached herein.

7/ City of Madison, (15095) 12/76; Middleton Joint School District No. 3, (14680-A, B) 6/76; City of Green Bay, (12411-A, B) 4/76; Milwaukee County, (12734-A, B) 2/75.

8/ City of Milwaukee, (13495) 4/75; City of Menomonie, (12674-A, B) 10/74; Fennimore Jt. School Dist., (11865-A, B) 7/74; Madison Jt. School Dist., (12610) 4/74; City of Brookfield, (11406-A, B) Aff'd Waukesha County Cir. Ct. 6/74.