STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMONEE FALLS EDUCATION ASSOCIATION,	:	
Complainant,	:	Case 39 No. 31045 MP-1434
vs.	:	Decision No. 20499-B
MENOMONEE FALLS SCHOOL DISTRICT and the BOARD OF EDUCATION OF THE MENOMONEE FALLS SCHOOL DISTRICT	:	

Appearances:

Kelly, Haus & Katz, Attorneys at Law, by Mr. William Haus, 121 East Wilson Street, Madison, Wisconsin 53703-3213, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John F. Maloney, and Mr. Robert H. Buikema, 815 E. Mason Street, Suite 1600, Milwaukee, Wisconsin 53202-4080, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND MODIFYING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having on July 2, 1984, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-matter, wherein he concluded that the District had committed unilateral change refusals to bargain within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., by unilaterally deducting health insurance contributions from employe paychecks to cover premium increases experienced following a contractual reopening of bargaining about health insurance, contrary to the status quo health insurance arrangement which the Examiner found required the District to pay any health insurance increases experienced pending the results of the reopened bargaining; and the Examiner having noted that the District had retroactively implemented a Mediator-Arbitrator's award adopting the District's final offer with respect to the health insurance contributions for said period; and for that reason the Examiner having declined to order the District repay the unreimbursed portion of the health insurance contributions it deducted from employe paychecks prior to the implementation of the award; and the Examiner having, instead, concluded that ordering the District to pay the affected employes interest on the amount of money improperly deducted was an adequate monetary remedy; and, on July 23, 1984, the Association having timely filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision and, in particular, of the Examiner's remedial order; and the parties having filed briefs and reply briefs, the last of which was received on February 27, 1985; and the Commission having reviewed the record, the Examiner's decision, the petition for review, and the parties' briefs, and being satisfied that the Examiner's Findings of Fact should be affirmed and that the Examiner's Conclusion of Law and Order should be modified.

NOW, THEREFORE, it is

ORDERED 1/

A. That Examiner's Findings of Fact are hereby affirmed and adopted as the Commission's.

1/ See Footnote 1 on Page Two.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

B. That the Examiner's Conclusion of Law and Order are hereby modified to read as follows:

MODIFIED CONCLUSIONS OF LAW

1. That neither the issuance nor the implementation of Mediator-Arbitrator Seitz' March 12, 1983, award rendered the instant complaint proceeding or the Union's request for monetary relief moot.

2. That Respondent Menomonee Falls School District, by deducting the cost of health insurance premium increases as regards the period September 1, 1982, through March, 1983, and by retaining the entirety of said amounts through the date it received Seitz' award issued on March 12, 1983, and by retaining that portion of said amounts that it ultimately repaid to employes through the date of said repayments, committed unilateral change refusals to bargain in violation of Secs. 111.70(3)(a)4 and 1, Stats.

MODIFIED ORDER

IT IS ORDERED that the Menomonee Falls School District, its officers, agents, and officials shall immediately:

1. Cease and desist from unilateral changes in status quo health insurance arrangements affecting teacher bargaining unit employes.

2. Take the following affirmative action which will effecutate the purpose of the Municipal Employment Relations Act:

a. Make whole each present and former teacher bargaining unit employe for losses experienced by reason of the District's unlawful conduct specified in Conclusion of Law 2, above, by paying to each interest at the rate of 12 percent per year 2/ on each of the amounts of money it unlawfully withheld from the employe, which interest shall be paid for the period of time beginning on the date the District unlawfully deducted such amount and ending on the date the District issued the employe a health insurance reimbusement check following the District's receipt of the Seitz award.

b. Notify its teacher bargaining unit employes by posting in conspicuous places on the premises where notices to such employes are usually posted, a copy of the notice attached hereto and marked "MODIFIED APPENDIX A." Such copy shall be signed by an authorized representative of the District, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on January 20, 1983, at a time when the Sec. 814.04(4) rate was "12 percent per year." Sec. 814.04(4), Wis. Stats. Ann. (1983) See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

c. Notify the Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MODIFIED APPENDIX A

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, the Menomonee Falls School District hereby notifies its teacher unit employes that:

1. WE WILL NOT commit unlawful unilateral change in wages, hours and conditions of employment of employes in the teacher bargaining unit represented by the Menomonee Falls Education Association.

2. WE WILL make whole each present and former teacher bargaining unit employe for losses experienced by reason of the District's unlawful unilateral change in District health insurance contributions as regards the period September 1, 1982, through March, 1983, by paying interest at the rate of 12 percent per year on each of the amounts of money unlawfully withheld from the employe which interest shall be paid for the period of time beginning on the date the District unlawfully deducted such amount and ending on the date the District issued the employe a health insurance reimbursement check following our receipt of the mediation-arbitration award concerning the 1982-83 reopener negotiations.

Dated at _____ , Wisconsin this _____ day of _____ , 1985.

By _____

For the Menomonee Falls School District

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MENOMONEE FALLS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT
AND MODIFYING EXAMINER'S CONCLUSION OF LAW AND ORDER

BACKGROUND

The Association's January 20, 1983, complaint initiating this proceeding alleged that the District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., by deducting contributions from employe paychecks for increased health insurance premiums as regards the period September 1, 1982, through March 12, 1983, when a mediation-arbitration award was issued in the matter. The Association alleged that the District thereby changed the status quo health insurance arrangements in effect after the April 1, 1982, reopening date specified in the parties' 1981-83 agreement for negotiations concerning health insurance among other topics. The parties waived hearing and the Examiner based his decision on a stipulation of facts and the parties' written arguments.

The parties entered into an agreement covering the period from August 10, 1981, through August 9, 1983, which provided for a reopener on 1982-83 basic salary, health insurance, and dental insurance and on the 1983-84 calendar. During negotiations under the limited contract reopener, the parties bargained about the amount the District and employes would be obligated to pay toward health insurance for the up-coming 1982-83 school year. The predecessor language provided that the District would "pay the hospital and medical insurance premiums." The matter went to mediation-arbitration under Sec. 111.70(4)(cm)6, Stats., with the District's final offer proposing a dollar cap on its health insurance obligations that would have required the employes to pay the difference between its proposed cap and the actual premium, and the Association's final offer proposing retention of the status quo health insurance language. (Dental insurance was also an unresolved issue submitted in the mediation-arbitration, but it is not directly involved in the Complaint allegations.)

On September 1, 1982, as anticipated by the parties, the health insurance rates for the 1982-83 school year were increased to $140.80 per month for family coverage and $53.82 per month for single coverage. On September 30, 1982, during the pendency of the reopener negotiations, the District sent each bargaining unit employe a note stating that the health insurance premium increase was being deducted from their paychecks. Consistent with that notification, and without the Association's agreement, the District deducted $26.34 from monthly wages for those employes with family health coverage and $10.08 from those with single health coverage. 3/

Mediator-Arbitrator Reynolds Seitz met with the parties on October 18 and November 8, 1982, and, following the submission of written arguments by the parties, issued his award in the matter on March 12, 1983, selecting the District's final offer. Thereafter, the District issued checks reimbursing the employes for that portion of the above-noted health insurance increase deductions that represented the difference between the 1981-82 health insurance rates and the employer contribution level provided for the in District's final offer. Specifically, the District reimbursed $17.17 per month of the family deductions and $6.57 per month of the single deductions taken between September 1, 1982, and March, 1983.

3/ We recognize that there is apparently a minor discrepancy between the amount the parties stipulate was deducted by the District from single plan health insurance recipients ($10.08) and the arithmetic difference between the stipulated pre- and post-September 1, 1982, single plan rates ($53.82 - $43.76 = $10.06). In our view, this discrepancy is too small to warrant our requesting a clarification of the matter at this point in the proceeding.

THE EXAMINER'S DECISION

Based on the foregoing facts, the Examiner concluded that the award and its implementation did not render the complaint moot and that the District's paycheck deductions deviated from the status quo of full payment of health insurance premiums (including any post-reopening increases) which the District was obligated to maintain by the statutory duty to bargain. Accordingly, the Examiner issued the following Conclusion of Law:

> Since the issue herein constitutes a continuing case and controversy which has not been rendered moot, the District violated Section 111.70(3)(a)1 and 4 of MERA by unlawfully charging teachers for increased insurance premiums at a time when the District was required to pay the full costs of such premiums.

By way of remedy, the Examiner ordered the District to pay interest on the amounts of money that it improperly withheld from the employes, but he rejected the Association's request that he also order the District to reimburse the employes in full for the amounts so deducted. The Examiner reasoned that because the mediator-arbitrator had adopted the District's final offer containing a dollar cap on the District's health insurance obligation, and because the District had reimbursed the employes for amounts deducted up to that cap, interest on the monies improperly withheld represented an adequate monetary remedy. In that regard, the Examiner ordered the District to:

> Pay interest at a rate of 12% per year on the money it improperly withheld from teachers for health insurance from the beginning of the 1982-1983 school year to the issuance of Arbitrator Seitz's Award on March 12, 1983.

THE PETITION FOR REVIEW AND ASSOCIATION ARGUMENTS IN SUPPORT THEREOF

The Association's petition for review is limited to the issue of remedy. It asserts that the Examiner erred in limiting the monetary remedy to the payment of interest.

The Association maintains that the District should be required to repay the entirety of the amounts deducted in addition to paying interest thereon, citing City of Brookfield, Dec. No. 19822-C (WERC, 11/84). In that case, the Association argues, the Commission made it clear that the outcome in a mediation-arbitration proceeding does not define or limit the remedy appropriate in a related unilateral change refusal to bargain complaint case. Rather, the Association argues, the Commission held that the appropriate remedy in such a case is to provide the employes with that which they would have received but for the District's prohibited practice (without regard to their ultimate agreement or award), not just the interest on this amount.

The Association rejects as artificial the District's effort to distinguish City of Brookfield on an economic vs. non-economic issue basis. The Association asserts that retroactive reductions of status quo fringe benefit must be bargained just as must any other change. The Association also questions the District's interpretation of the case law regarding retroactivity, and it disputes the District's assertions that the health insurance change proposed in the District final offer (and the mediator-arbitrator's award selecting it) was intended to effect that change retroactively. In the latter regard, the Association asserts that the District's proposal was framed in terms of what the District's maximum health insurance premium obligation "will be", which language is more appropriately viewed as prospective only rather than retroactive, and that the award does not contain any indication that the mediator-arbitrator intended it to retroactively reduce the employer's premium payment obligation under the status quo.

The Association further contends that the Examiner's limiting the remedy to interest does not, for the most part, meaningfully rectify the District's prohibited practice and fails to discourage similar violations in the future. Finally, the Association contends that the Examiner's order must be modified to prevent the District from benefiting from the effect its unlawful conduct may well have had on the outcome of the mediation-arbitration.

POSITION OF THE DISTRICT

The District asserts that the legal effect of the mediator-arbitrator's award was the retroactive application of the District's final offer on wages and health insurance to September 1, 1982. Such an interpretation of the award, it argues, is consistent with what the District identifies as an established case law principle that economic changes are ordinarily to be given retroactive effect and that non-economic changes are not. 4/

Therefore, the District argues, the Association is seeking an order from the Commission which would compel it to pay more in health insurance contributions during the period in question than is provided for in the agreement that resulted from the mediation-arbitration process. The District urges the Commission not to grant the Association something that it was unable to obtain in negotiations and in mediation-arbitration. The District asserts that, in essence, the Association is requesting monetary relief that would make the employes involved more than whole.

The District further asserts that the requested modification of the Examiner's order would be improper because it would require the District to abrogate the arbitrator's award and to violate the parties' collective bargaining agreement, justifying the District to respond by pursuing repayment of the excess payment from bargaining unit members on a theory of "quantum meruit."

The District argues that the City of Brookfield decision relied upon by the Association is inapposite because it involved a unilateral change in work schedule--a language item generally not subject to retroactive application--whereas the instant case involves a purely economic item which traditionally is given retroactive effect.

DISCUSSION:

Deviation from the Status Quo

We agree with the Examiner's conclusion that the District's conduct deviated from the status quo and violated the District's duty to refrain from making unlawful unilateral changes in existing health insurance arrangements following September 1, 1982. We do not adopt the Examiner's rationale in that regard in all respects, but his ultimate conclusion is consistent with the dynamic status quo principles set forth in our decision in Wisconsin Rapids Schools, Dec. No. 19084-C (WERC, 3/85) which was issued after the Examiner decision had been issued herein. For that reason, and because the parties have limited their arguments to the question of appropriate remedy, we have not set forth a detailed application of the Wisconsin Rapids Schools principles to the instant situation.

Mootness

On the question of whether the instant proceeding was rendered moot by the issuance and implementation of the March 12, 1983, mediation-arbitration award, we agree with the Examiner's conclusion and the supporting rationale stated by the Examiner in his Memorandum.

Remedy

With regard to the remedy, we conclude that the Examiner fashioned the proper remedy and that the additional relief requested by the Association is not warranted in the circumstances of this case. Thus, while we have made technical modifications in the wording of the Examiner's Conclusion of Law and Order, we are affirming the general nature of his remedy and rejecting the Association's challenge as to its propriety.

4/ Citing, Prairie Farm Jt. School District No. 5, Dec. No. 12740-A (5/75), aff'd by operation of law, Dec. No. 12740-B (WERC, 6/75) and Barneveld Jt. School District No. 15, Dec. No. 12538-A (4/75), aff'd with modifications Dec. No. 12538-B (WERC, 11/75).

The statutory provisions regarding "Prevention of prohibited practices" provide, among other things, that the Commission has the authority to remedy prohibited practices by requiring "the person complained of . . . to take such affirmative action, including reinstatement of employes with or without pay, as the Commission deems proper." Secs. 111.70(4)(a) and 111.07(4), Stats.

In several cases issued since the Examiner's decision herein, we have had occasion to review/fashion remedies for unlawful unilateral change refusals to bargain and to comment upon the impact of bargaining and/or interest arbitration outcomes on the proper remedy in such cases. Those cases included City of Brookfield, supra, Green County, Dec. No. 20308-B (WERC, 11/84) and Wisconsin Rapids Schools, supra.

We set forth many of the basic considerations applicable in such cases in the following portion of Green County, supra, at 18-19:

> The Commission's remedial authority includes requiring the person complained of to take such affirmative action . . . as the Commission deems proper. (Sections 111.70(4)(a) and 111.07(4), Stats.) The MERA Declaration of Policy set forth in Sec. 111.70(6), Stats., calls for the parties to have an opportunity to reach a voluntary settlement through collective bargaining. Unlawful unilateral changes such as that committed by the County herein tend to undercut both the integrity of the statutory bargaining process and the status of the Union as the exclusive collective bargaining representative, thereby interfering with employe rights to bargain collectively through their chosen representative.
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> The conventional remedy for a unilateral change refusal to bargain includes an order to reinstate the status quo existing prior to the change and to make whole affected employes for losses they experienced by reason of the unlawful conduct. (See, e.g., Mid-State VTAE, Dec. No. 14958-C (5/77) aff'd Dec. No. 14958-D (WERC, 4/78); and Milwaukee Metropolitan Sewerage District, Dec. No. 17123-B (3/81) aff'd 17123-C (WERC, 3/82)). The purposes of reinstatement of the status quo ante is to restore the parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view, the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations in the future.
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> If the Commission does not make the employes adversely affected by those changes whole for losses caused by the County's unlawful conduct, there would be no meaningful disincentive for the County and other parties to commit similar violations in the future. While making whole the employes in that way may in some circumstances give the employes a benefit they are ultimately unable to achieve through the collective bargaining and final offer arbitration processes, we find that to be the necessary and appropriate consequence of the unlawful conduct involved.

In each of the above-noted cases, we held that the underlying purposes of MERA will be best served by requiring the party that committed the prohibited practice to make whole with interest those affected by the unlawful change for losses caused by the unlawful conduct. Our order for affirmative relief in each case was fashioned expressly in terms of making whole the employes for losses so experienced. We expressly overruled a prior examiner decision in Turtle Lake Schools, Dec. No. 16030-B, C (McCrary, 3/79), aff'd by operation of law, Dec. No. 16030-D (4/79) in which the examiner concluded that the pendency of a mediation-arbitration in which the complainant union might be awarded the relief it was requesting from the Commission made monetary relief unavailable in the complaint proceeding. While we also recognized that a party could waive its right

to pursue such a remedy, we noted that such a waiver would have to be proven by clear and unequivocal contract language or bargaining history, and that such a waiver could not be mandatorily bargained for by the offending party. We therefore concluded that, absent proof of such a waiver, neither the pendency of nor the outcome in negotiations or final offer interest arbitration should preempt the Commission from exercising its statutory responsibility to determine the appropriate remedy for a violation of a statute which it administers.

However, notwithstanding possible contrary implications of certain dicta in one or more of those decisions, we did not intend to establish a per se rule that the outcome in bargaining or interest arbitration will never have a bearing on the question of how to make whole employes for losses experienced by reason of the unlawful conduct involved. Rather, the outcome of the bargaining or interest arbitration--while it will not render moot a claim for monetary relief nor necessarily dictate what monetary relief is appropriate--may be relevant to and have an effect upon the nature of the remedial order by which we make whole employes for losses experienced by reason of the unlawful conduct involved. For, we are satisfied that the underlying purposes of MERA will ordinarily be effectuated by make whole relief whereby the employes are placed in the position they would have been in had the employer complied with the status quo and thereafter received the award or entered into the agreement that in fact was ultimately issued or achieved in the matter. Thus, if an award or agreement provides for a right of the employer to recoup certain monies from the employes retroactively relative to the status quo, then our order ought not ordinarily defeat the employer's rights in that regard. An employer's right to recoup such monies would surely survive where we remedy the violation prior to the time the outcome of the bargain is known, and we think it should similarly be the normal result where the outcome of the bargain becomes a part of the record prior to our formulation of the remedy.

In our view, the Examiner's remedy providing for interest prevents the District from benefiting from its wrong and makes the employes whole for the losses they experienced. The mediator-arbitrator had before him the predecessor language of Section 16 A.1., and was deciding between final offers that differed as to, among other things, the language that would succeed Section 16 A.1. The District's unlawful conduct herein has not been shown to have affected the outcome of the award. While the Association is not required to bargain for maintenance of the status quo or for a remedy for an employer's failure to maintain the status quo, the Association is not entitled as a matter of course to relief that grants it more than the employes would have been entitled to under the terms of an award or agreement that provides the employer with the right to retroactively recoup certain monies from the employes relative to the status quo.

The Association's reliance on City of Brookfield, supra, is understandable in view of the breadth of some of the dicta in that case, but it is nonetheless misplaced. In that case we ordered the City to pay the employes what they would have received had the employes worked the hours they were in fact assigned under the terms of the status quo compensation arrangements. While we knew in doing so that the City's offer providing for summer hours consistent with the City's unilateral changes had been selected, neither that award nor the resultant contract provided the City with a right to retroactively recoup from the employes monies that were (or should have been) paid the employes under the status quo pay arrangements for the hours they actually worked. It was for that reason that the award--albeit in favor of the City and consistent with the City's unilateral change in hours--did not have an effect on our determination of what losses the Brookfield employes experienced by reason of the City's unlawful conduct. Nevertheless, consistent with our above-described mode of analysis, the Brookfield employes were granted that which they lost by reason of the unlawful conduct considering the effect, if any, (and there was none in that case) that the terms of the award and resultant contract had on the nature of the loss experienced by the employes. While making whole the Brookfield employes in that way gave them something they were ultimately unable to achieve through the collective bargaining and final offer arbitration processes, we found that to be the necessary and appropriate consequence of the City's unlawful conduct in the circumstances of that case.

In the instant case, contrary to the Association's contention, we find that the change in the District's premium payment obligation--from the status quo of full payment, to caps of $131.63 family and $50.33 single provided for in the

mediation-arbitration award--was retroactive throughout the period beginning at the outset of the 1982-83 school year. The award was being issued in the context of the parties' existing agreement reopener provision (Section 2.D.), which stated that said agreement would ". . . be reopened as of April 1, 1982 solely and exclusively for the purpose of negotiating the following items for the 1982-83 school year . . . Health . . . Insurance, Section 16, A.1. . . ." (emphasis added). The mediator-arbitrator expressly referred to that fact in the introductory section of his award, noting that "The collective bargaining arose under the reopener contained in Section 2.D. of the 1981-83 Agreement. . . ." In the context of that reopener language, the health insurance issue being addressed in the award was what will the District be obligated to pay toward employe health insurance "for the 1982-83 school year," and the District's final offer selected in the award provided the answer that "The District will pay up to $131.63 . . . for family . . . or up to $50.33 . . . for single. . . ." Notably, the "District will pay" language of the District's final offer concerning Section 16, A.1., parallels the existing contract language in that section, to wit, "The District will pay the hospital and medical premiums, family or single plan." In view of the foregoing, we find no merit in the Association's assertion that the absence of express retroactivity provisions in the District's offer or in the award require that the dollar caps on District health insurance premium obligations should be treated as effective only prospectively upon issuance of the award.

Hence, under the terms of the award, the District would be entitled to recoup monies from each present and former employe to the extent that the cap was exceeded by the monies paid for health insurance by the District during the period September 1, 1982, through the date of the District's receipt of the mediation-arbitration award. In our view, the employes' loss due to the unlawful conduct of the District was a loss of the use of the monies deducted for the periods of time those deductions were respectively taken to the date of the District's reimbursement to the employes of the difference between the dollar cap on its retroactive obligations and the amount it had previously contributed toward the employes health insurance. 5/

To order the additional relief requested herein by the Association would, in the instant circumstances, make the employes more than whole. The circumstances of this case do not warrant consideration of such an extrordinary remedy approach. As noted, this case is unlike City of Brookfield, supra, because the award herein would have afforded the District the right to retroactively recoup monies it paid toward health insurance in excess of the retroactive dollar cap awarded whereas the Brookfield award could not be viewed as affording the City the right to recoup monies from those employes for overtime compensation payable to them under the status quo overtime language for the hours in fact worked by those employes during the hiatus.

For all of the foregoing reasons, then, we have agreed with the Examiner's conclusion that the proper monetary remedy herein is one limited to interest.

We have reworded the Examiner's Conclusion of Law and Order primarily to make it clear that the District's retention of the ultimately reimbursed portion of the unlawfully deducted monies remained unlawful until the reimbursement checks were issued and to clearly provide that the make whole relief being ordered herein requires interest on the entirety of the amounts deducted for the period from the unlawful deduction until the issuance of the reimbursement checks.

We have fashioned our Modified Conclusions of Law in that way in order to be consistent with our reasoning that the law required the District to continue to pay the full premium except to the extent that the award permitted a retroactive

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5/ The Examiner's decision and Order could be read to cut off the period of the unlawful withholding of employe monies, and the period for which the employer was being required to pay interest, at the date of issuance of the Seitz award. For reasons noted in the two concluding paragraphs of this memorandum, however, we conclude that the time period during which the District's unlawful conduct deprived the employes of the use of the entirety of the monies deducted included the additional time it took the District to issue the reimbursement checks following the issuance of and the District's receipt of the award.

recoupment of a portion of those payments. We have fashioned our Modified Order in that way to be consistent with our effort to as nearly as possible return the employes and the District to the positions they would have been in had the District complied with the law and then implemented the award retroactively. In that regard, it seems reasonable to presume that had the District maintained the status quo, it would have taken as much time before recouping its retroactive overpayments for health insurance as it actually took to issue the health insurance difference checks to the employes after receiving the award. Our Order merely gives effect to that presumption in determining the length of time the District's failure to maintain the status quo can fairly be said to have caused the employes to lose the use of the various amounts of money involved.

Dated at Madison, Wisconsin this 4th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner