STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEWAUNEE COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 1470, AFSCME, AFL-CIO, Complainant, vs. KEWAUNEE COUNTY, HAROLD J. RECKELBERG, EDMUND P. LEANNAH, EARL W. OPICHKA, ELROY C. HOPPE, WILMER L. DRAB, GARY J. THAYSE, MARVIN C. KRAUSE, GEORGE PAIDER, JOHN N. JOSKI, and JAMES J. JADIN, Respondents.	Case 9 No. 33097 MP-1577 Decision No. 21624-B

Appearances:

Mr. Michael J. Wilson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220, appearing on behalf of the Complainant.

Nash, Spindler, Dean & Grimstad, Attorneys at Law, by Mr. John M. Spindler, 210 East Waldo Boulevard, Manitowoc, Wisconsin 54220-0928, appearing on behalf of the Respondents.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Richard B. McLaughlin having, on November 5, 1984, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding, wherein he concluded that the above-named Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act by refusing to bargain with the Complainant concerning the wages, hours and conditions of employment for two positions accreted to the unit represented by Complainant and by proposing, discussing, signing and enforcing an agreement with the individuals occupying said positions; and having further concluded that Respondent did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)2 and 3, Stats., by entering into a contract with these individuals, and therefore dismissed those charges; and Complainant having, on November 26, 1984, filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on January 2, 1985; and the Commission having reviewed the record in the matter, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Examiner's Findings of Fact 1-13 shall be and hereby are affirmed and adopted as the Commission's.

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 (Continued on Page 2)

2. That the Examiner's Findings of Fact are enlarged by adding the following:

> 14. That on or about April 10, 1984, the County Board adopted resolution No. 74-4-84 which applied the unilateral increases in wages granted under the management agreement to Maigatter and Fager retroactively for the period January 1, 1984 to April 1, 1984.

1/ (Continued)
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.

3. That the Examiner's Conclusions of Law 1-4, 6 and 8 shall be and hereby are affirmed and adopted as the Commission's and the Examiner's Conclusions of Law 5 and 7 are amended to read as follows:

> 5. Kewaunee County, by proposing, discussing, signing and enforcing a management agreement with Maigatter and Fager as individuals, and by unilaterally granting retroactive wage and benefit increases to Maigatter and Fager, all without prior negotiation or consultation with Complainant has committed prohibited practices within the meaning of Sec. 111.70 (3)(a)4, Stats., and, derivatively, of Sec. 111.70(3)(a)1, Stats.
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> 7. Maigatter and Fager acted as individuals in discussing, signing and abiding by a management agreement with Kewaunee County, and do not constitute a "labor organization" within the meaning of Sec. 111.70(1)(h), Stats. Thus, Kewaunee County, in proposing, discussing, signing and enforcing a management agreement with Maigetter and Fager did not commit a violation of Sec. 111.70(3)(a)2, Stats.

5. That the Examiner's Order shall be modified by including the following paragraph under 1.

> c. Implementing a wage increase to bargaining unit employes prior to the exhaustion of its duty to bargain with Kewaunee County Highway Department Employees, Local 1470, AFSCME, AFL-CIO.

and the Examiner's Order as modified is hereby affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

KEWAUNEE COUNTY

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating this proceeding, the Complainant alleged that the Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., by refusing to bargain collectively on the wages, hours and conditions of employment for the Solid Waste Manager and Solid Waste Manager Assistant positions after it had been determined in a unit clarification proceeding that the two positions were included in the Highway Department collective bargaining unit which at all times material was represented exclusively by the Complainant. The complaint further alleged that Respondents, subsequent to the unit clarification proceeding, entered into a private contract with the individuals occupying the positions of Solid Waste Manager and Solid Waste Manager Assistant and unilaterally granted them retroactive wages and benefits without any prior notice or negotiations with the Complainant. The Respondents denied that they had committed any prohibited practice and insisted they had subcontracted the County's landfill operations to the individuals who thereby ceased to be employes and became independent contractors and their former positions were eliminated.

THE EXAMINER'S DECISION

The Examiner found that, after the Commission's unit clarification decision which included the two positions in the bargaining unit, the County had the duty to bargain with the Union concerning the wages, hours and conditions of employment of the two positions. The Examiner determined that the County's signing an agreement with the two individuals occupying the positions did not create a subcontractual relationship and these individuals remained employes of the County and the positions remained in the unit. The Examiner concluded that the County violated Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to bargain with the Union on the wages, hours and conditions of employment for the two positions, and by dealing directly with the employes and unilaterally implementing changes in their wages, hours and conditions of employment by its management agreement. The Examiner also found that the County, by entering into the management agreement with these employes, committed an independent violation of Sec. 111.70(3)(a)1, Stats.

The Examiner determined that the evidence failed to establish the existence of any labor or employe organization involving the two employes and the County, and therefore dismissed the allegation of a violation of Sec. 111.70(3)(a)2, Stats. The Examiner also dismissed the allegation of a violation of Sec. 111.70(3)(a)3, Stats., finding that the County's conduct in entering into the management contract with the two employes was not undertaken based on any protected concerted activity by the two employes and was not motivated by a desire to discourage the exercise of protected rights by other employes in the highway department.

With respect to remedy, the Examiner ordered the County to cease and desist from refusing to bargain with the Union with respect to the wages, hours and conditions of employment of the two positions and from implementing any subcontracting of the work done by these employes prior to the exhaustion of its duty to bargain the decision to subcontract and its impact. The Examiner ordered the County to return to the status quo by treating the two employes the way they would have been had they been included in the unit on January 31, 1984.

PETITION FOR REVIEW

The Complainant contends that the Findings of Fact and Conclusions of Law should be amended to include the County's adoption of Resolution 74-4-84 on April 10, 1984, which it alleges provided a unilateral wage and fringe benefit increase to the two employes retroactive to January 1, 1984, in violation of Sec. 111.70(3)(a)4 and 1, Stats. The Complainant asserts that Finding of Fact 5 is not supported by the best evidence and the first sentence of Finding of Fact 11 was not supported by the evidence in such a broad context. It submits

that Findings of Fact 11 and 12 as they refer to "individual contracts" are in error and should have indicated that Respondents created and dominated an "employee organization." It argues that the management agreement was not an individual contract but a collective bargaining agreement negotiated between the County and an employe organization. It points out that the definition of an employe organization is very broad under MERA and an organization is not even required to have a name but simply to claim to represent employes. It submits that the evidence establishes more of an organization here than previously required by the Commission. As a consequence, the Complainant contends that the Examiner's Conclusion of Law 7 is erroneous. The Complainant also challenges Finding of Fact 12 as not being supported by the record and asserts that Conclusion of Law 8 is therefore in error. It contends that the County was not seeking to save money or preserve part-time employment at its landfill, but simply wanted to replace the Union. It argues that the Respondents' conduct was pure discrimination for the Union's filing the unit clarification petition. It maintains that the County violated Sec. 111.70(3)(a)3 by attempting to undermine the unit by separating employes from their employment. In its Petition for Review, the Complainant does not seek a specific remedy, but requests an appropriate remedy for any additional violations as determined by the Commission.

The Respondents contend that the issue with respect to Resolution 74-4-84 is moot because it was passed after the management agreement was approved and became effective. The County asserts that Finding of Fact 5 is supported by the evidence and there was no objection at the hearing that the evidence presented was not the "best evidence." It submits that Finding of Fact 11 is supported by the testimony and that the term "individual contract" and subcontract are used interchangeably. The County claims that it is only the Complainant's conclusion that an "employe organization" was created and the Examiner's conclusion was properly based on the entire record. The County asserts that Finding of Fact 12 correctly summarizes the testimony of witnesses and the evidence supports the Examiner's Findings of Fact and Conclusions of Law. It asks that the Petition for Review be dismissed or that the Examiner's decision be affirmed.

DISCUSSION

The Examiner concluded that the County's unilateral implementation of the specific wages, hours and conditions of employment afforded to Maigatter and Fager in the management agreement violated its statutory duty to bargain as defined in Sec. 111.70(1)(d), Stats. The management agreement was approved on March 14, 1984, and became effective on April 1, 1984, and provided an increase in wages to $9.00/hour and $8.00/hour to Maigatter and Fager respectively. On April 10, 1984, the County Board adopted Resolution No. 74-4-84 which in effect applied the $9.00/hour and $8.00/hour in wages retroactively for the period January 1, 1984 to April 1, 1984. The Examiner made no finding with respect to Resolution No. 74-4-84. We find that this retroactive wage increase was a separate unilateral act without any negotiation with the Union after it became the certified exclusive representative of these employes. Consequently, the County violated its duty to bargain and committed another prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. We have modified the Examiner's Findings of Fact and Conclusions of Law to include this violation. We have not found it necessary to modify the Examiner's order, however, since it already provided the same cease and desist, affirmative action and notice posting remedy for unlawful unilateral change that would have been appropriate for the separate unilateral change noted above.

The Union contends that Finding of Fact 5 is not supported by the "best evidence." The record establishes that at the hearing during the testimony of Michael Dovichi, an employe of Robert E. Lee and Associates, Respondents' counsel produced and handed him a document entitled, "The Kewaunee County Comprehensive Solid Waste Management Plan," dated January, 1980, which document had been prepared by Robert E. Lee and Associates, and questioned Dovichi as to the contents of this document. 2/ No objection was made by the Union at that time that the testimony by Dovichi as to the contents of the written document was objectionable on the basis that it was not the best evidence. No evidence was presented that his testimony was erroneous. The record is silent as to whether the Union requested to see the document or asked that it be made an exhibit. The

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2/ Tr. 112-117.

failure to raise any objection at the hearing to the testimony of Dovichi as to the contents of this document constitutes a waiver of the objection. 3/ The record supports the Examiner's findings with respect to the contents of the document and we have therefore affirmed and adopted his Finding of Fact 5.

The Union asserts that the initial clause of the first sentence of Finding of Fact 11 is not supported by the evidence in such a broad context. Our review of the record indicates that members of the County's Solid Waste Management Committee (SWMC), since perhaps as early as 1980, had discussed the possibility of contracting out the operation of the landfill. 4/ On or about October 7, 1982, the SWMC made a suggestion that its consultant, Robert E. Lee and Associates, hire personnel and operate the landfill. 5/ We conclude that the clause is supported by the record, and we therefore have adopted the Examiner's Finding of Fact 11.

The Union submits that the Examiner erred in failing to find in Findings of Fact 11 and 12 the existence of an "employee organization" created and dominated by the Respondents, and consequently the Examiner's Conclusion of Law 7 was necessarily in error and should be reversed as Respondents by this conduct violated Sec. 111.70(3)(a)2, Stats.

Section 111.70(1)(h), Stats. defines a "labor organization" as "any employee organization" in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment." The Union correctly points out that under this definition, no formal structure is required, 6/ and no constitution, by-laws, formal membership dues 7/ or even a name 8/ is needed to be a labor organization. There are only two requirements of a labor organization: 1) employe participation and 2) a purpose of bargaining wages, hours and working conditions. 9/ We concur with the Examiner's conclusion that the record fails to demonstrate any participation by Maigatter and Fager in an "organization" that meets the requirements of Sec. 111.70(1)(h). The evidence established that the County requested a total dollar amount from Maigatter and Fager to operate the landfill. The employes submitted a dollar amount which was accepted by the County and embodied in the management contract. This evidence is not sufficient to establish any labor or employe organization in which the employes participated for purposes of negotiating with the County. The mere fact that the employes were asked to submit a figure is not sufficient to distinguish this from the County's merely submitting to the employes a completed subcontract which the employes signed rather than lose their jobs. In either case, no labor or employe organization is present since there is no employe participation in such an organization with the requisite purpose.

The Union's assertion of the County's creation and domination of a labor organization is not supported. Domination requires an employer's active involvement in creating or supporting a labor organization which is representing employes. 10/ The County action in asking for a dollar amount and signing the

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3/ McCormick, Evidence, Section 54.

4/ Tr. 46-47, 65-66, 78-79, 113-117.

5/ Tr. 65, 116.

6/ City of Milwaukee (Museum Board), Dec. No. 14819 (WERC, 8/76).

7/ Manitowoc County, Dec. No. 10899 (WERC, 3/72); City of Cudahy, Dec. No. 19507 (WERC, 7/82).

8/ Brown County, Dec. No. 19891 (WERC, 9/82).

9/ School District of Weyauwega-Fremont, Dec. No. 21285, (WERC, 12/83); City of Clintonville (Utility Commission), Dec. No. 18747 (WERC, 6/81).

10/ Dane County, Dec. No. 11622-A (WERC, 10/73); Menomonie Joint School District No. 1, Dec. No. 14811-C (3/78), aff'd by operation of law, Dec. No. 14811-D (WERC, 4/78); Western Wisconsin VTAE District, Dec. No. 17714-B (6/81), aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81).

management agreement is insufficient to establish that the County tried to create a labor organization which it dominated. Thus, a violation of Sec. 111.70(3)(a)2, Stats., has not been established.

Finally, the Union asserts that the Examiner erred by not finding a violation of Sec. 111.70(3)(a)3, Stats. 11/ More specifically, the Union asserts that the Examiner's Finding of Fact 12 erroneously accepted the individual Respondents' testimony with respect to their good faith intent; and that his Conclusion of Law 8 erroneously concluded that the County's conduct regarding the employment status of and management agreement with Maigatter and Fager "was not motivated by a purpose to chill the exercise of rights protected by Sec. 111.70(2), Stats., among the remaining members of the Kewaunee County Highway Department bargaining unit."

Our review of the transcript supports the Examiner's findings with respect to the individual Respondents' reasons for entering into the management agreement. 12/ As the County argues in its reply brief (at 2), Finding of Fact 12 "correctly summarizes the testimony of the several witnesses called as Kewaunee County Committee members with respect to their reasons for entering into an individual contract with Maigatter and Fager."

We also agree with the Examiner's Conclusion of Law 8 in all respects. However, while we are satisfied that the Examiner applied the appropriate legal principles to the case, there are certain additional (and in some respects different) inferences that we would draw from the facts as compared with those set forth in the discussion of this issue in the Examiner's Memorandum.

As the Examiner noted, the analysis of the discrimination allegation is necessarily atypical due to the unusual fact situation involved, to wit, the two employes the County attempted to terminate from County employment were not shown to have engaged in protected activity. Thus, the Union's discrimination argument centers, instead, on the collective exercise of protected rights in filing the unit clarification petition and attempting to bargain for the positions added to the bargaining unit, and on the adverse effects of the management agreement on the Union and its membership.

The Examiner properly concluded that conventional analysis regarding alleged violations of Sec. 111.70(3)(a)3, Stats.--which would turn on whether the employer's animus toward an employe's protected concerted activity motivated it to take discriminatory action against that employe 13/--is not readily applicable to the unusual fact situation involved herein. The Examiner appropriately relied, instead, on the mode of analysis set forth in Winnebago County 14/ which presented essentially the same problem. In that case, after concluding that conventional analysis was not applicable, the examiner reasoned as follows:

11/ That section, in pertinent part, makes it a prohibited practice for a municipal employer "To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . . ."

12/ Tr. 35, 44, 51-52, 64, 79-81.

13/ See, e.g., Juneau County, Dec. No. 12593-AB(WERC, 1/77); School District of Marinette, Dec. No. 17897-B (11/81), aff'd by operation of law, Dec. No. 17897-C (WERC, 12/81); and City of Shullsburg, Dec. No. 19586-A (6/83), aff'd by operation of law, Dec. No. 19586-B, (WERC, 7/83) (identifying the elements ordinarily necessary to prove MERA discrimination as: 1) employes have engaged in protected activities; 2) the employer had knowledge of the activity; 3) the employer was hostile or bore animus to the activity; and 4) the employer took action against the employes which was motivated, at least in part, by the employes' protected activity.)

14/ Winnebago County (Department of Social Services), Dec. No. 16930-A (Davis, 8/79), aff'd by operation of law, Dec. No. 16930-B (WERC, 9/79). Accord, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965) ("a partial closing is an unfair labor practice under Sec. 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." Id. at ___, 58 LRRM at 2661).

> Thus, one is left with the somewhat unique situation of having the employes who engaged in the concerted activity of filing a unit clarification petition not being the recipients of the adverse consequences which flowed therefrom. 4/ Nevertheless, the undersigned is persuaded that a finding of discrimination is warranted if it is shown that the municipal employer's action was motivated by a purpose to chill the exercise of protected rights among the remaining unit employes and if the employer may reasonably have foreseen that its elimination of positions will likely have that effect. 5/ Examination of the instant record leads the undersigned to conclude that the Respondent's decision to eliminate the CETA positions was not motivated by a desire to chill the exercise of 111.70(2) rights among remaining employes. Rather, the Respondent, as evidenced by its statements during the March 8 meeting, appears to have acted upon concern over what it perceived to be the adverse consequences of having CETA employes subject to the job posting and layoff/recall provisions of the bargaining agreement. Thus no violation of Section 111.70(3)(a)3 has been found.
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> 4/ The undersigned has concluded that this rare situation also renders a Great Dane Trailer analysis inapposite. See NLRB v. Grant Dane Trailer Inc., 388 U.S. 26, 65 LRRM 2465 (1967); Fennimore Joint School District No. 5, Decision No. 14305-B (12/78).
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> 5/ Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965).

In the Kewaunee situation before us, we infer from the facts found by the Examiner that the Respondents were hostile toward the Union's unit clarification petition activity insofar as it related to the landfill positions, and hostile to the Union's demand to bargain about wages, hours and conditions of employment of those positions. While that hostility derived from concerns about the operational consequences of unionization of those two positions, it was hostility against protected Union activity nonetheless.

We further infer from the facts found by the Examiner that the Respondents could reasonably have foreseen that its attempts to (essentially involuntarily) terminate Maigatter and Fager's employment, to eliminate the landfill positions from County employment, and to secure their services by means of the management agreement would have the effect of chilling the remaining Highway Department unit employes from engaging in the protected concerted activities of processing unit clarification petitions and of demanding bargaining with respect to positions newly included in the unit by means of such petitions.

Notwithstanding those inferences, however, the additional case law requirement noted above for proving Sec. 111.70(3)(a)3 discrimination in the sort of unusual fact situation presented here has not been met. For, notwithstanding the above inferences, we agree with the Examiner that the record does not warrant the further inference that the Respondents, or any of them, were motivated in whole or in part by a purpose of chilling the exercise of protected rights among the remaining Highway unit employes. 15/ The parties have and have had a longstanding, on-going bargaining relationship as regards the remainder of the Highway Department unit. We are satisfied in the circumstances that the Respondents' anti-Union-activity intentions were limited to its opposition to unionization of the landfill positions, and that its conduct has not been shown to have been motivated in whole or in part to chill the remaining Highway Department unit employes'

15/ Winnebago County, supra, Note 14, Compare id. with Darlington Mfg. Co. v. NLRB, 397 F.2d 760, 68 LRRM 2356 (CA 4, 1968) (en banc) (enforcing Board decision, on remand, that requisite intent to chill remaining employes' union activities by closure of one of several plants had been proven based on generally anti-union statements made by the employer).

activities protected by Sec. 111.70(2), Stats. Thus, while the County could have foreseen that their conduct would have a chilling effect on the balance of the unit, we are not persuaded by the record evidence that they engaged in the disputed conduct in whole or in part to achieve that prohibited effect.

Thus, as in Winnebago County, supra, while the Respondents' conduct at issue was properly held to be unlawful interference under Sec. 111.70(3)(a)1, Stats., it does not meet one of the requirements applicable to a discrimination allegation in the unusual type of factual setting involved. Moreover, the Examiner's remedy for the (3)(a)1 violation herein--with which, commendably, the Respondents have already complied in all respects--contains all of the same elements as would have been appropriately included had a (3)(a)3 violation been found. A discrimination violation would, however, have warranted the addition of a reference to discrimination in the cease and desist and notice for posting aspects of the Examiner's order.

In view of our conclusions above, however, we have affirmed the Examiner's Finding of Fact 12 and Conclusion of Law 8, and we have not ordered inclusion of references to discrimination in the Examiner's remedial order.

Dated at Madison, Wisconsin this 20th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner