STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO, Complainant, vs. GRANT COUNTY, Respondent.	Case 28 No. 37830 MP-1899 Decision No. 24154-B

Appearances:

Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Complainant.

Mr. Jack D. Walker, Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, having on November 19, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging that Grant County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats., by failing to reimburse employes for meals and thereby violating the collective bargaining agreement and the mediation-arbitration award and thereby altering the status quo which existed at the expiration of the contract; and Wisconsin Council for County and Municipal Employees, AFSCME, AFL-CIO, having on December 9, 1986, amended its complaint by adding an allegation that Grant County had committed prohibited practices within the meaning of Sec. 111.70(3)(a)7, Stats.; and the Commission having on December 18, 1986, appointed Examiner Andrew Roberts to conduct a hearing on said complaint and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Commission, having on January 29, 1987, vacated the appointment of Examiner Roberts and appointed James W. Engmann as the Examiner; and Grant County having on February 2, 1987, filed an answer and affirmative defenses with the Commission; and hearing on said complaint having been scheduled for February 11, 1987; and said hearing having been postponed to and held on April 22, 1987, in Lancaster, Wisconsin; and a transcript of said hearing having been received on August 6, 1987; and the parties having filed briefs and reply briefs, the last of which was received on October 26, 1987; and the Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter Complainant or Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and maintains its offices at 5 Odana Court, Madison, Wisconsin.

2. That Grant County, hereinafter Respondent or County, is a municipal employer within the meaning of Sec. 111.70(i)(j), Stats., and maintains its offices at the Grant County Courthouse, Lancaster, Wisconsin.

3. That prior to May 1, 1983, the Grant County Department of Social Services Personnel Manual contained the following policy:

NECESSARY EMPLOYMENT EXPENSES

. . .

> Meals that are taken outside of the headquarter city (Lancaster) are reimbursed with certain limitations. The agency will reimburse breakfast, lunch and dinner at actual cost, but not to exceed the rate the state reimburses the agency. At the current time, the maximums are: breakfast, $3.25; lunch, $4.25; and dinner, $9.00. These include tax and tip. The morning meal is reimbursed if the employee must leave home prior to 6:00 a.m. The noon meal if the departure is prior to 10:30 a.m. and return to office is not possible until after 2:30 p.m. The evening meal is reimburseable if the return is after 7:00 p.m. . . .

(Emphasis in original).

4. That on April 5, 1983, the Employee Relations Committee (ERC) of the Grant County Board of Supervisors met; and that the minutes of said meeting state in part:

> The ERC discussed why some employees receive compensation for meals when they are out of the City of Lancaster, but within the County. Motion by Stanton to recommend to the Grant County Board of Supervisors that no County employee or supervisor be reimbursed for meals while in Grant County unless meal price is included in a conference registration fees (sic). This motion to be effective May 1, 1983. The motion was seconded by Shipley. Carried.
>
> Discussion was held as to meal cost and when it is eligible for reimbursement. A motion by Fischer to recommend to the Grant County Board of Supervisors that the cost of a breakfast not to exceed $3.50 if the person leaves home by 6:00 A.M.; the cost of lunch not to exceed $4.50 if the person leaves home before 10:00 A.M.; and the cost of a dinner not to exceed $10.00 if the person would arrive home after 7:00 P.M. The cost includes tips and receipts must be turned in for payment. No reimbursement will be paid on alcoholic beverages. The motion was seconded by Dannenmann. Carried.

5. That on April 19, 1983, the Grant County Board of Supervisors met; that the minutes of said meeting state in part:

> Mr. Waters, seconded by Mr. Shipley, moved that no employees or supervisors be reimbursed for meals in Grant County unless part of a registration fee. A roll call vote was taken with 32 voting yes, 0 voting no, and 0 were absent. Therfore, the motion carried.
>
> Mr. Waters, seconded by Mr. Dannenmann, moved that out-of-county meal reimbursement be limited to $3.50 for breakfast, $4.50 for lunch, and $10.00 for dinner with receipts required. There will be no payment for alcoholic beverages. A roll call vote was taken with 31 voting yes, 1 voting no, and 0 were absent. Therefore, the motion carried.
>
> Mr. Bodden, seconded by Mr. Dannenmann, moved that the effective date for these changes be May 1, 1983. Motion carried.

and that elected officials and department heads were advised of these changes in a memo from the Grant County Board of Supervisors dated April 29, 1983, which memo included the minutes of the Board of Supervisors meeting of April 19, 1983, quoted above.

6. That on November 29, 1983, the Union was certified as the exclusive collective bargaining representative for all regular full-time and regular part-time employes of Grant County, excluding managerial, supervisory and confidential employes and all other employes. 1/

7. That on January 10, 1984, the Union and County exchanged their initial proposal on matters to be included in an initial collective bargaining agreement; that on April 9, 1984, the Union filed a petition requesting the Commission to initiate mediation/arbitration pursuant to Sec. 111.70(4)(cm)6, Stats.; that Local Union Vice President Jenean Krahn sent a memo to Union Staff Representative Jack Bernfeld dated May 7, 1984; and that said memo read as follows:

> Re: Meal Reimbursement for in-County meals
>
> Following is a list of meal expenses which I have incurred since May 1, 1983 & (sic) for which I have been denied reimbursement.

May 1983	$ 9.22
June 1983	9.25
July 1983	13.79
Aug. 1983	5.60
Sept. 1983	3.75
Oct. 1983	2.21
Nov. 1983	2.36
Dec. 1983	1.86
Jan. 1984	5.68
Feb. 1984	3.76
Mar. 1984	5.52
April 1984	13.37
TOTAL	$76.37

8. That pursuant to the petition for mediation/arbitration noted in Finding of Fact 7, the Commission's Investigator met with the parties on June 5, June 30 and September 10, 1984; that by March 7, 1985, the parties had submitted final offers to the Investigator who closed the investigation; that in its final offer the Union proposed the following language:

> **ARTICLE 23 - TRAVEL AND EXPENSE ALLOWANCE**
>
> 23.01 Employees who in the course of their duties are authorized to attend conferences, seminars or conduct business for the Employer, shall receive allowances and expenses as provided in this Article, consistent with the current practices. Should the County increase the level of reimbursement, above those established herein, for other County employees, said increase shall also apply to this bargaining unit.
>
> A) Mileage. Twenty-two cents (22¢) per mile;
>
> B) Meals:
>
> 1. Supper - up to $10.00 per receipt;
>
> 2. Lunch - up to $4.50 per receipt;
>
> 3. Breakfast - up to $3.50 per receipt;
>
> 4. Banquets - per receipt.
>
> Note: Social Workers shall also be reimbursed for the cost of meals taken in Grant County while on County business pursuant to the policy in effect prior to May, 1983.

1/ Grant County, Dec. No. 21063 (WERC, 11/83).

C) Reasonable hotel or motel expenses per receipt.

D) Other employment expenses, related to authorized conferences, seminars and business for the Employer, such as registration or parking fees shall be reimbursed to the employee pursuant to the current practices. Where possible, all such fees shall be paid in advance by the County.

and that the County proposed the following language in its final offer:

> Travel, meals, and physical exams, shall be paid as provided by County-wide policy, as it exists as of June 1, 1984, or as it may be changed after June 1, 1984 by County board action, provided such change is county-wide.

9. That the Commission, on March 28, 1985, appointed the Mediator/Arbitrator; that on August 9, 1985, the Mediator/Arbitrator held an arbitration hearing; and that at hearing, the Union through Staff Representative Jack Bernfeld described its proposal regarding Article 23 as follows:

> . . . . The next issue relates to our proposed Article 23, and the parallel proposal in the Employer's offer is Article 21. This relates to travel and expenses. We are proposing the County continue, in terms of providing meals and mileage allowances and other sorts of reimbursements based on what they're currently doing now. We are proposing that if the County would raise the levels of reimbursements for other employees, that those employees in our bargaining unit enjoy that same increase as well. The current mileage allowance is 22 cents, which I should note that was reduced from 25 cents several years ago. The current meal reimbursement rates are listed as we have proposed in No. 23.01B; and the policy relating to hotels and other expenses, that's consistent with -- we're asking the County just to do what they're doing now. I should note that one proposal in particular in 23.01B is our note. Prior to May of 1983, social workers in Grant County were reimbursed for meals eaten while on County business in Grant County. The County changed that practice, and we're seeking to have it reinstated.
>
> I have some exhibits relating to that as Union Exhibit 45. This is the top page and one page of what is now an outdated Social Services Department handbook; but the second page, the part that we want you to read is the necessary employment expenses. That middle paragraph is the germane paragraph in this document; and more particularly, it talks about how meals taken outside of the headquarter city will be reimbursed. It should be noted that social workers in Grant County are located all in Lancaster or in the headquarter city, and they are disbursed -- you know, they work out of Lancaster, and they're not set up in all these other towns around Lancaster. (Union Exhibit No. 45 is marked for identificiation) 2/
>
> . . . Relating to that, I have Union Exhibit 46, and this is a letter from the County Board with the signature of Mary Wirth. . . .This was a notification to the elected officials and department heads that the meal reimbursing policy was changed, particularly the provision in the second paragraph where it says, "no employees or supervisors be reimbursed for meals in Grant County." That they not be reimbursed, that was the change there. You also should note the third paragraph

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2/ Union Exhibit 45 before the Mediator/Arbitrator is the Grant County Department of Social Services Personnel Manual, the relevant portion of which is quoted in Finding of Fact 3.

where the reimbursement levels for other meals were set and that's consistent with our proposal. (Union Exhibit No. 46 is marked for identification) 3/

. . . Finally on that subject, which is Union Exhibit 47, is a letter I received from Jenean Krahn, an employee and member of the bargaining unit, which outlined what expenses she would have been reimbursed for for (sic) meals during the period of May, 1983 through April of 1984 had that policy stayed in effect. (Union Exhibit 47 is marked for identification) 4/

10. That in its brief submitted to the Mediator/Arbitrator, the Union argued its position as follows:

> . . . . The County currently reimburses employees for certain functions. The Union is proposing to continue this practice. The County appears to be proposing something similar although narrower in scope.
>
> The reimbursement levels set forth in Union Sections 23.01 A through D are the current levels and basis for reimbursement. The Union proposes that this serves as a floor. If these rates are improved, the employees in this unit would benefit. Conversely, the County limits the reimbursement of expenses to travel, meals and physical exams only. . . .
>
> This excludes reimbursement of certain expenses for the various conferences and seminars that are reimbursed now. Moreover, if the County cuts a benefit, the County proposes that it be cut for this unit as well -- without negotiations. The County has cut benefits before including mileage and meal reimbursement. . . .Why bargain a contract, if the benefits can be reduced unilaterally and without justification?
>
> The Union is proposing to restore one such reduced benefit. Prior to May, 1983, social workers were reimbursed for meals eaten in Grant County outside of Lancaster during the course of conducting County business. This made sense for several reasons. All social workers work from the headquarters city of Lancaster. Their work, however, requires them to travel to all corners of the County. This is no small journey. Grant County is by far the largest county in the region. . . .The County recognized this burden and compensated employees for meals purchased necessitated by this travel within certain limited parameters. Those parameters are described in an outdated Personnel Manual for the department (Union Exhibit 45). Note reference to mileage rate of 25¢ as noted in testimony. . . .The cost of this benefit was minimal. Exhibit 47 represents the typical reimbursement level over the course of one (1) year. The County changed its meal policy at the height of the Union organizing campaign (County Exhibit 46). Naturally, we strongly disagree with the conclusions reached by the WERC relating to our complaint about this policy change. . . .
>
> The Union offer regarding reimbursement is clear and unambiguous. The County's offer is vague and represents another takeaway.

3/ Union Exhibit 46 before the Mediator/Arbitrator is the memo from the Grant County Board of Supervisors to elected officials and department heads dated April 29, 1983, the relevant portion of which is quoted in Finding of Fact 5.

4/ Union Exhibit 47 before the Mediator/Arbitrator is the memo from Jenean Krahn to Jack Bernfeld dated May 7, 1984, the relevant portion of which is quoted in Finding of Fact 7.

(Emphasis on original); and that in its reply brief the Union argued as follows:

> The Union seeks to maintain the current level of reimbursements for various incidental expenses. The County proposes that it be given the right to reduce these benefits. This is hardly a reasonable position to take. We also seek to restore a small benefit unilaterally reduced - social worker meals - we are not seeking to expand it beyond its original parameters. For the reasons discussed earlier, our request is reasonable. It is not a unique benefit among comparables.

11. That on April 22, 1986, the Mediator/Arbitrator issued his Award 5/; that in his decision the Mediator/Arbitrator summarized the Union's position as follows:

> The Union argues that their proposal, in this regard, merely seeks to continue present practice with respect to expenses and physicals. They believe the County's proposal is more limited and could result in unilateral benefit cuts. In fact, one such benefit was changed during the organizing campaign. Prior to May, 1983, Social Workers were reimbursed for meals eaten in Grant County outside of Lancaster during the course of conducting County business.

that in the discussion section, the Mediator/Arbitrator stated as follows:

> c. Discussion. It is the opinion of the Arbitrator that the offers on this subject are in relative equilibrium -- both have equally unreasonable aspects. It is unreasonable to have all the negotiated benefits subject to unilateral decreases. This weighs against the Employer. On the other hand, the Union's proposal for meal reimbursement is not justified in the comparables. Thus, the competing differences on this issue will not have a significant impact on the offers as a whole.

that the Mediator/Arbitrator's Award stated, "The Union's final offer will be adopted as to the January 1, 1984 to December 31, 1985 contract between the Parties"; and that, as the Mediator-Arbitrator selected the Union's last offer, the Union's offer on travel expense allowance as cited in Finding of Fact 8 was incorporated into the 1984-85 collective bargaining agreement between the parties.

12. That Jenean Krahn, a social worker and bargaining unit member, was reimbursed for meals of $2.00 or less eaten in Grant County without providing a receipt; that said reimbursement occurred for the months of May and July, 1982, and January and February, 1983; that David K. Janney, a social worker and bargaining unit member, was reimbursed for meals of $2.00 or less eaten in Grant County without providing a receipt; that said reimbursements occurred for the months of February, March and April, 1983; that no reimbursement for any amount were paid after May 1, 1983, without a receipt; that the policy in effect prior to May 1, 1983, did not expressly require a receipt for reimbursement; that the practice in effect prior to May 1, 1983, was to require receipts for meal reimbursement up to a stated maximum except for meals of $2.00 or less; and that the practice also provided for payment of up to and including $2.00 for meals costing more but not accompanied by a receipt.

13. That effective May 1, 1983, the County changed its meal reimbursement policy in three ways; that it increased the amount it would reimburse; that it required a receipt for reimbursement for all meals of any amount; that it eliminated reimbursement for meals eaten in Grant County outside the City of Lancaster; that the final offer of the Union regarding Article 23 contained in Finding of Fact 8 included two of three changes; that the final offer included the increased maximum amounts to be reimbursed and the requirement of a receipt; and that the Note to Sec. 23.01(B) in its final offer is limited to reinstating the policy of paying for meals "eaten in Grant County".

5/ Grant County, Dec. No. 22428-A (Vernon, 4/86).

14. That on or before May 27, 1986, bargaining unit members Jenean Krahn and David Janney claimed lunch meals under $2.00 in the County without receipts; that Jon Angeli, Director of the Department of Social Services, denied reimbursement in a memo to Krahn and Janney dated May 27, 1986; that Janney as president of the Grant County Employees Union filed a grievance with Angeli in a memo dated June 10, 1988; that Angeli denied said grievance in a letter to Janney dated June 13, 1986; that the Union appealed the grievance to arbitration in a letter from Staff Representative Larry Rodenstein to Grant County Board Chairman Francis Busch dated July 14, 1986; that hearing in this matter was scheduled before Arbitrator David Shaw on November 3, 1986; that in a letter dated November 4, 1986, Rodenstein wrote to Arbitrator Shaw as follows:

> This letter shall confirm our telephone conversation of October 31, 1986. On that date, in a telephone conversation with Jack Walker, Melli, Walker, Pease & Ruhly, s.c. (sic), representing Grant County, Mr. Walker confirmed to me that it was the intention of Grant County to raise, as a procedural defense, the fact that the 1984-85 current agreement had already expired.
>
> In a three-way conversation later that afternoon between you, Mr. Walker and I, I acknowledged that the 1984-85 contract, which was the product of a 1986 mediator-arbitrator's award, had indeed expired. Therefore, given the county's position, the union was no longer prepared to move forward on November 3, 1986, with the arbitration. I indicated to you and Attorney Walker that the union would pursue this dispute in another forum. The parties agreed to cancel the November 3, 1986 date. Mr. Walker asserted that the county would dispute any withdrawal of the grievance without prejudice. The union had asked to cancel the hearing in light of the county's position, and had not made any mention of withdrawing the instant grievance with or without prejudice.
>
> The union stands ready and willing to arbitrate this matter on its merits should the county reconsider its current position. The union has not withdrawn its grievance, but it has been blocked from the arbitration proceeding by the position of the county that there is no effective collective bargaining agreement.

and that in a letter dated November 11, 1986, Attorney Jack Walker, counsel for the County, wrote to Arbitrator Shaw as follows:

> I am replying to Larry Rodenstein's letter to you dated November 4, 1986.
>
> I received Mr. Rodenstein's letter on November 10, 1986, although it bears an AFSCME postmark of November 4, 1986. Mr. Rodenstein states, "the (sic) parties agreed to cancel the November 3, 1986 date". That is not true. I did not agree to cancel the November 3, 1986 date; in fact, I objected to any cancellation or postponement unless the result of the unilateral action by the union in withdrawing its arbitration request was to bar the dispute on its merits. That was my position then and it is my position now.
>
> As far as the County is concerned, the grievance has been withdrawn with prejudice.

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

CONCLUSIONS OF LAW

1. That the County, by refusing to reimburse employes for meals of $2.00 or less without a receipt did not alter the status quo which existed at the

expiration of the collective bargaining agreement, and, therefore, the County did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4, Stats., and, derivitively, Sec. 111.70(3)(a)1, Stats.

2. That the County, by refusing to reimburse employes for meals of $2.00 or less without a receipt did not violate the collective bargaining agreement and, therefore, the County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

3. That the County, by refusing to reimburse employes for meals of $2.00 or less without a receipt did not fail to implement the Mediator/Arbitrator's Award and, therefore, the County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)7, Stats.

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

ORDER 6/

IT IS ORDERED that the complaint be, and the same hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann /s/
James W. Engmann, Examiner

6/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

GRANT COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

COMPLAINANT'S POSITION

On brief the Union contends that this dispute is essentially a dispute as to the proper interpretation of Section 23.01(B) of the collective bargaining agreement, that there is no dispute that the agreement has expired, that the mediator/arbitrator's award in April 1986 necessarily expired due to the contract duration of 1984-85, that the County refused to arbitrate the original grievance in this matter, and that MERA addresses problems of this nature in Sec. 111.70(3)(a)5, Stats.

The Union argues that it offered ample testimony and evidence that the County consistently reimbursed employes for work related meals of $2.00 or less without receipt prior to May 1, 1983, that employes' statements of expenses without receipts for meals of $2.00 or less were approved by an agent of the County, and that meals in excess of $2.00 were reimbursed without receipt at the rate of $2.00 per meal.

The Union asserts that the policy of reimbursing meals of $2.00 or less without receipts was consistently applied until the County changed the policy effective May 1, 1983, that the mediation/arbitration award as embodied in Section 23.01(B) contractualized the pre-May 1983 policy as the policy for reimbursing employes for the cost of meals, and that implementing the pre-May, 1983 policy modifies the meaning of Section 23.01(B) by requiring receipted meals only for reimbursements in excess of $2.00 per meal.

The Union argues that the only difference between the pre-May 1983 policy and the collective bargaining agreement is the maximum reimbursable rate, that the pre-May 1983 policy of reimbursing receiptless meals up to $2.00 per meal is continued in full force and effect for the entire term of the contract, including the hiatus period, that standards for interpreting contract language require that the phrase "pursuant to the policy in effect prior to May 1983" must be given meaning, and that the phrase modifies the meaning of "up to ...per receipt" to mean "up to ... per receipt except for reimbursement of meals of $2.00 which required no receipt pursuant to the pre-May 1983 policy."

The Union contends that the County violated the terms of the 1984-85 award, as well as failed to implement an arbitration decision, by its failure to reimburse employes up to $2.00 for meals without receipt, that the County continues to be in noncompliance with the terms and conditions of the agreement regarding the proper implementation of Section 23.01(B) and that, therefore, Grant County has violated Sec. 111.70(3)(a)1, 4, 5 and 7, Stats.

On reply brief, the Union argues that the County's claim is not accurate that the Union presented no evidence of claims for reimbursement of meals of $2.00 or less which were made during the term of the contract. The Union contends that the County's defense of the Sec. 111.70(3)(a)5, Stats. claim is not persuasive, and that as a product of the retroactive nature of the mediator/arbitrator's award of the expired 1984-85 contract, the circumstances in this case can be clearly distinguished from Barron County, Dec. No. 19514-A (10/82), relied on by the County.

The Union argues that the County interpretation and selective implementation in this matter is not consistent with the terms of the award, that the County decided to restore one element of the benefits (meals within Grant County) and to unilaterally deny the other element (receiptless meals of $2.00 or less), that the Union's final offer made no distinction between these two elements of the pre-May 1983 policy, that the parties operated in such a consistent manner in terms of reimbursing meals of $2.00 or less without a receipt that, even in the absence of a written agreement, the parties are bound over a reasonable period of time to a fixed course of action, and that the County's decision to restore only one element of the pre-May 1983 policy is arbitrary by its selective implementations of the mediation/arbitration award and is a violation of Sec. 111.70(1)7, Stats.

The Union also argues that the actions of the County in this matter violate Sec. 111.70(3)(a)4, Stats., that by its refusal to reimburse social workers for

meals of $2.00 or less without a receipt, the County altered the status quo, that when the mediator/arbitrator's award was issued, it became the status quo regarding meal reimbursement and that the failure of the County to reimburse those social workers who submitted vouchers for reimbursement for meals of $2.00 or less without a receipt constitutes a refusal to bargain on the part of the County.

RESPONDENT'S POSITION

On brief the County argues that the Union presented no evidence of unreimbursed in-county meals of $2.00 or less for the 1984-85 period, no evidence that the County violated Sec. 111.70(3)(a)1, Stats., no evidence that the County's action tended to interfere with, restrain or coerce County employes in the exercise of their rights under Sec. 111.70(2), Stats., and no evidence that the County's action was motivated by union amimus or had anything to do with Union membership; and that the Union's claim of a violation of Sec. 111.70(3)(a)5, Stats., must be dismissed because the claim arose after the contract expired.

The County also argues that to establish a violation of Sec. 111.70(3)(a)7, the Union must show something more than a dispute over contract interpretation, that said section provides it is a prohibited practice to refuse or otherwise fail to implement an interest arbitration award, that Commission rules state that a party may file a complaint if the other party fails to implement an interest arbitration award by failing to incorporate it into a written collective bargaining agreement, and that there is no claim that the County declined to incorporate the award into a contract.

Further, the County argues that the Union's interpretation of the contract is wrong, that the current practice at the time the Union's proposal was drafted, and therefore the 1984-85 contract term, required receipts for meal reimbursement, that the clear and unequivocal language of the contract requires a receipt for meal reimbursement, that the "Note" provision provides for only in-County meal reimbursement for social workers, that there was no policy prior to May 1983 that allowed reimbursement for in-County meals of $2.00 or less without a receipt, and that the Union's evidence failed to establish a consistent past practice of reimbursing social workers for meals of $2.00 or less without a receipt.

Finally, the County argues that the arbitration proceeding initiated by the Union is a bar to this proceeding, that if the grievance arbitration has been indefinitely postponed, the Commission has no jurisdiction over this case, that if the grievance has been withdrawn with prejudice, the Commission is barred from considering the merits of this complaint by the doctrine of res judication, that the Commission is without jurisdiction to interpret the interest arbitration award under Sec. 111.70(4), Stats., and that evidence regarding the reporting of in-county meal reimbursements as income for income tax purposes should have been admitted.

On reply brief, the County argues that the Union's claim of a violation of Sec. 111.70(3)(a)5, Stats., must be dismissed, that there was no policy in effect prior to May 1983 that allowed reimbursement for in-county meals of $2.00 or less without a receipt, that the Union failed to show by a clear and satisfactory preponderance of the evidence a consistent past practice, that the County has properly implemented the interest arbitration award and that the Union's claim of a violation of Sec. 111.70(3)(a) 1 and 4, Stats., must be dismissed.

DISCUSSION

In its brief the Union correctly states that this dispute is essentially one as to the proper interpretation of Section 23.01(B) of the collective bargaining agreement. If the County is correct in its interpretation of Section 23.01(B), the County did not violate the collective bargaining agreement and, thus, it did not violate Sec. 111.70(3)(a)5, Stats. In addition if the County's interpretation is correct, it properly implemented Section 23.01(B) and, thus, it did not violate Sec. 111.70(3)(a)7, Stats. Also if the County is correct, it did not alter the status quo in violation of Sec. 111.70(3)(a)4, Stats. Absent any finding of a violation of Sec. 111.70(3)(a)4, Stats., the County did not derivatively violate Sec. 111.70(3)(a)1, Stats. Before the merits of this complaint can be addressed however, it must be determined if the arbitration proceeding is a bar to this proceeding.

Arbitration Proceeding

The County argues that the arbitration proceeding initiated by the Union is a bar to this proceeding, that if the grievance arbitration has been indefinitely postponed, the Commission has no jurisdiction over this case, and that if the grievance has been withdrawn with prejudice, the Commission is barred from considering the merits of this complaint by the doctrine of res judication.

The collective bargaining agreement at issue herein contains a procedure for final and binding arbitration over contract compliance. The County correctly states that where the parties have an agreement containing such a procedure, the Commission's long-standing policy has been to refuse to assert its jurisdiction in cases involving the alleged violation of Sec. 111.70(3)(a)5, Stats., where the complainant has failed to exhaust the grievance and arbitration procedures, citing Columbia County, Dec. No. 22683-A (Crowley, 10/85) and Turtle Lake School District, Dec. No. 22219-B (Honeyman, 6/85). Because the Union filed this complaint case prior to decision in the arbitration case, the County argues that the Union has failed to exhaust the grievance and arbitration procedures and, therefore, the complaint must be dismissed.

This case is complicated by the fact that prior to April 22, 1986, no grievance and arbitration procedure existed; that once the Arbitrator/Mediator issued his Award, the grievance and arbitration procedures came into existence but expired under the terms of the collective bargaining agreement, and that while the grievance procedure comes within the status quo doctrine, such is not the case of the arbitration procedure. Since the arbitration procedure does not survive the expiration of the agreement, the Union has exhausted the grievance procedure. The fact that the County is willing to arbitrate this grievance is a nullity since its argument that the contract has expired decimates the arbitrator's jurisdiction.

As for the alleged violations of Secs. 111.70(3)(a)1, 4 and 7, Stats., the Commission will abstain from exercising its jurisdiction and defer to the arbitration procedure only after it is satisfied that the legislature's goal, to encourage the resolution of disputes through the method agreed to by the parties, will be realized, and that there are no superceding considerations in a particular case. 7/ Thus, the question of whether to exercise jurisdiction or to defer the alleged statutory violation to arbitration is within the Commission's discretion. 8/ The Commission has identified three conditions for deferral of a prohibited practice complaint to arbitration:

> 1. The parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator.
>
> 2. The collective bargaining agreement must clearly address itself to the dispute.
>
> 3. The dispute must not involve important issues of law or policy. 9/

In this case the County has not renounced its defense to the arbitration on the basis that the collective bargaining agreement had expired. Such a defense goes to the jurisdiction of the arbitrator and would prevent said arbitrator from reaching a decision on the merits.

For these reasons this Examiner will exercise the Commission's jurisdiction in this matter.

Section 23.01(B) of the collective bargaining agreement

7/ Racine Unified School District, Dec. No. 18443-B (Houlihan, 3/81).

8/ Monona Grove School District, Dec. No. 20700-A (Crowley, 10/83).

9/ Marshfield School District, Dec. No. 22573-A (Honeyman, 5/85).

The threshold issue of this case is the interpretation of Article 23 of the collective bargaining agreement. The dispute revolves around the "Note" to Section 23.01(B) which reads: "Social Workers should also be reimbursed for the cost of meals taken in Grant County while on County business pursuant to the policy in effect prior to May, 1983."

Prior to May 1, 1983, the County's personnel manual stated that meals outside Lancaster were reimbursed at the rates of $3.25 for breakfast, $4.25 for lunch and $9.00 for dinner. On April 5, 1983, the Employment Relations Committee of the County Board recommended three changes in this policy. First, the committee recommended that no one would be reimbursed for meals in Grant County, even if the meal was eaten outside of Lancaster. Second, the committee recommended that reimbursement rates be increased to $3.50 for breakfast, $4.50 for lunch and $10.00 for dinner. Third, the committee recommended that receipts must be turned in for payment. On April 19, 1983 the County Board approved these three recommendations effective May 1, 1983.

The Union is not arguing that the Note to Sec. 23.01(B) requires the County to pay the maximum amounts pursuant to the policy in effect prior to May 1, 1983, which amounts were lower than those after May 1, 1983. The Union would argue that the main section of Section 23.01(B) sets forth the correct amounts. Nor are the Union and County in disagreement that the Note to Sec. 23.01(B) applies to meals taken outside the city of Lancaster but inside Grant County. The parties agree this was the policy prior to May 1, 1983, and it is incorporated in the collective bargaining agreement through the Note to Section 23.01(B).

The parties disagree whether this Note to Section 23.01(B) requires the County to pay for meals of $2.00 or less without a receipt. The County argues that the Note does not impose such a requirement. According to the County, the clear and unequivocal language of Section 23.01(B) requires a receipt for meal reimbursement. The County argues that the Note only provides for in-county meal reimbursement for employes, and that there was no policy prior to May 1983 that allowed for reimbursement of meals of $2.00 or less without a receipt. The Union, on the other hand, argues that the policy or practice contractualized by the Note to Section 23.01(B) provides for two elements. First, the Union asserts it provides for employes working in Grant County to be reimbursed for in-county meals outside of Lancaster. Second, the Note provides for employes to be reimbursed for meals of $2.00 or less without a receipt and to be reimbursed $2.00 for meals over $2.00 without a receipt.

The contract language does not support the Union. Section 23.01 states, "Employers who, in the course of their duties are authorized to...conduct business for the employer, shall receive allowances and expenses as provided in this Article, consistent with the current practices." The "current practices" at the time this language was drafted were reimbursement for meals outside Grant County at the rate of up to $3.50 per receipt for breakfast, up to $4.50 per receipt for lunch and up to $10.00 per receipt for supper. In other words, the current practices were no reimbursement for meals in Grant County or for meals without a receipt.

The Note to Section 23.01(B) says nothing on its face about reimbursement for meals of $2.00 or less without a receipt. But, the Union argues, some meaning must be given to the words, "pursuant to the policy in effect prior to May 1, 1983." This is true, and, thus, the reimbursement of social workers for the cost of meals taken in Grant County is modified by the policy in effect prior to May 1, 1983. That policy, quoted in Finding of Fact 3, does not provide for the cost of all meals taken in Grant County, which the broad scope of the language of the Note states, but limits reimbursement to those meals that are taken outside the headquarter city of Lancaster. That policy also limits reimbursement for breakfast to those times when the employe must leave home prior to 6:00 a.m., for lunch if the employe's departure is prior to 10:30 a.m. and return is not possible prior to 2:30 p.m., and for supper if the employe's return is not possible prior to 7:00 p.m. Reimbursing employes within these limitations is reimbursing employes pursuant to the policy in effect prior to May 1, 1983.

The Union argues that the Note refers not only to the reimbursement for the cost of meals in Grant County but for the reimbursement of meals of $2.00 or less without a receipt. As such a practice existed prior to May 1, 1983, the Union argues that the phrase "per receipt" is modified by the Note to incorporate the practice of reimbursement for meals of $2.00 or less. According to the Union, the

County decided to restore one element of the benefits (meals within Grant County) and to unilaterally deny the other element (receiptless meals).

The evidence before this Examiner does not support the Union's position that this Note refers to anything other than meals taken in Grant County. The County changed the reimbursement rates effective May 1, 1983, and these new rates are reflected in the language of Section 23.01(B). The County required a receipt for all meals effective May 1, 1983, and that change is reflected in the language of Section 23.01(B). The County changed the policy effective May 1, 1983, of reimbursing meals taken in Grant County outside the city of Lancaster. The Union reversed that change through the Note to Section 23.01(B). The Note's impact is limited to cancelling the May 1, 1983 change of policy by the County regarding meals in Grant County outside of Lancaster. Little, if any, evidence was presented to the contrary.

This view is supported by the proceedings before the Mediator-Arbitrator. At hearing on August 7, 1985, the Union testified concerning Section 23.01(B) as follows:

> . . . We are proposing the County continue, in terms of providing meals and mileage allowances and other sorts of reimbursements based on what they're currently doing now. . .

On August 7, 1985, the "now" referred to above, the County was not reimbursing for meals in Grant County and the County was requiring a receipt for all meals, even those under $2.00. The Union continues to testify:

> . . . I should note that one proposal in particular in 23.01(B) is our note. Prior to May of 1983, social workers in Grant County were reimbursed for meals eaten while on County business in Grant County. The County changed that practice, and we're seeking to have it reinstated. . . .

The "practice" referred to above is the practice of reimbursing meals eaten in Grant County outside of Lancaster. Reinstating that policy is the purpose of the Union's Note. The County also changed the practice of requiring receipts for meals of $2.00 or less without a receipt. The Union had the opportunity to say that the Note referred to reimbursement for meals under $2.00 without a receipt. By not doing so, the implication is that the Note does not refer to this change and that the contract language requiring reimbursement "per receipt" controls all meals.

The Union continues to testify, referring to an exhibit (the relevant portion of which is stated in Finding of Fact 5) as follows:

> This was a notification to the elected officials and deapartment heads that the meal reimbursing policy was changed, particularly the provision...where it says, "no employees or supervisors be reimbursed for meals in Grant County." That they not be reimbursed, that was the change there.

Again the Union makes reference only to the change of reimbursement for meals in Grant County. Again the Union makes no reference to reimbursement for meals of $2.00 or less without a receipt. The Union continues to testify, stating:

> "You should also note the...paragraph (the second paragraph as quoted in Finding of Fact 3) where the reimbursement levels for other meals were set and that's consistent with our proposal."

Not only does the paragraph cited state the reimbursement levels, it also states that meals are reimbursed "with receipts required." Here the opportunity was presented to the Union to state that the requirement for receipts for meals of $2.00 or less was not consistent with the Union's proposal. The Union did not do so.

But the Union argues that the letter from Jenean Krahn, quoted in Finding of Fact 7, supports its position that the Note refers to reimbursement for meals of $2.00 or less. The testimony before the Mediator/Arbitrator shows otherwise. The Union testified as follows:

> Finally on that subject (reimbursement for meals in Grant County) is a letter...from Jenean Krahn, an employee and a member of the bargaining unit, which outlined what expenses she would have been reimbursed for for (sic) meals during the period of May, 1983 through April of 1984 had that policy stayed in effect.

That policy is not the policy of reimbursement for meals of $2.00 or less without a receipt but reimbursement for meals in Grant County outside of Lancaster.

The Union's argument remains consistent in its brief to the Mediator-Arbitrator. The Union states:

> The reimbursement levels set forth in Union Sections 23.01 A through D are the current level and basis for reimbursement.

Thus, the Union asserts that Section 23.01(B) is the current basis for reimbursement, which specifies reimbursement "per receipt". The Union continues:

> . . . The County has cut benefits before including mileage and meal reimbursement . . . . The Union is proposing to restore one such reduced benefit. Prior to May, 1983, Social Workers were reimbursed for meals eaten in Grant County outside of Lancaster during the course of conducting County business.

(Emphasis in original). Again the Union proposes only one change - that of meals in Grant County. The implication of this is clear. The Note refers to the one benefit the Union wished to reinstate: in-County meals outside Lancaster. The County also had cut the benefit reimbursement of meals of $2.00 or less without a receipt. The Union did not propose to restore that benefit. Thus, the level of meal reimbursement and the requirement for receipts are covered by the practice current at the time and codified in the language itself.

This is certainly the perception of the Mediator-Arbitrator. In his decision the Mediator-Arbitrator characterizes the Union's position as seeking to "continue present practice with respect to expenses and physicals." The practice at the time of the arbitration hearing was that the County did not pay for meals in Grant County nor did the County pay for meals, even those of $2.00 or less, without a receipt. The Mediator-Arbitrator also acknowledged that the Union was seeking to restore one benefit changed during the organizing campaign. "Prior to May, 1983, Social Workers were reimbursed for meals eaten in Grant County outside of Lancaster during the course of conducting County business." At no time does the Mediator-Arbitrator discuss the issue of meals of $2.00 or less without a receipt. He could not because there is no evidence that this issue was ever raised before the Mediator-Arbitrator, much less that the Note to Section 23.01(B) included this issue. All the argument and evidence presented to the Mediator-Arbitrator by the Union as to the Note to Section 23.01(B) refers to reimbursing social workers for meals eaten in Grant County outside the City of Lancaster. None of the arguments and evidence presented to the Mediator-Arbitrator by the Union as to the Note to Section 23.01(B) refer to reimbursement for meals of $2.00 or less without a receipt.

For these reasons I believe that the Note to Section 23.01(B) refers to in-County meals outside the city of Lancaster, and that the Union incorporated the changes regarding maximum amounts and receipts requirements in the language of Section 23.01(B).

Alleged violation of Sec. 111.70, Stats.

Section 111.70(3)(a)5, Stats., states in part that it is a prohibited practice for a municipal employer:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employe. . . .

The County argues that the Union presented no evidence that employes incurred in-County expenses of $2.00 or less during the 1984-85 contract and that, therefore, the complaint should be dismissed. The Union allege this is inaccurate, citing testimony of the local union president elicited by the Union representative as follows:

> Q Do you have vouchers that you put in for the period of 84-85?
>
> A Yes.
>
> Q Does that include two dollars?
>
> A I believe so.
>
> Q Would those vouchers represent some of the money that you - that you attempted to regain at the conclusion of the award?
>
> A Yes.
>
> Q And did you receive that money from them?
>
> A No, I didn't.

No such vouchers were produced nor admited into evidence. The County argues that the testimony of the Union president that "he believed so" fails to reach the standard of clear and satisfactory preponderance of the evidence necessary. I agree. Even if it did, the fact is that the contract does not provide for payment of meals of $2.00 or less without a receipt. Therefore the County did not violate Sec. 111.70(3)(a)5, Stats. For these reasons this allegation is dismissed.

Section 111.70(3)(a)7, Stats., states that it is a prohibited practice for a municipal employer

> To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cm).

The Union argues that the County failed to implement the mediation-arbitration award in that it unilaterally denied payment for meals of $2.00 or less without a receipt. The County argues that to establish a violation of this section, the Union must show something more than a dispute over contract interpretation.

In any case, contract interpretation resolves this dispute. As discussed above, the Note to Section 23.01(B) applies only to meals taken in Grant County. Since the Note does not require reimbursement for meals of $2.00 or less without a receipt, the County did not refuse or fail to implement the mediation-arbitration award by refusing to pay for said meals. Therefore the County did not violate Sec. 111.70(3)(a)7, Stats., and for that reason this allegation is dismissed.

Section 111.70(3)(a)4, Stats., states in part that it is a prohibited practice for a municipal employer

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate bargaining unit. . . .

The Union argues that since the April 1986 mediation-arbitration award containing Section 23.01(B) became the status quo, the failure of the County to reimburse employes for meals of $2.00 or less without a receipt altered the

status quo. The County argues said claim is time barred since the County never changed its practice regarding meal reimbursement since May 1983.

The County view of the status quo doctrine mistakes action of the Employer with obligation of the Employer. If the Note to Sec. 23.01(B) required reimbursement for meals of $2.00 or less without a receipt, that became the contractual requirement for the 1984-85 term. Since the contract expired, the authority of this contract requirement continued and to do anything other than what is required of the contract is to change a mandatory subject of bargaining unilaterally which is, absent waiver on necessity, a per se violation of the duty to bargain.

But the Note to Section 23.01(B) does not require payment for meals of $2.00 or less without a receipt. Therefore the County did not change the status quo by refusing to do so and, thus, did not violate Sec. 111.70(3)(a)4, Stats. For this reason, this allegation is dismissed.

Section 111.70(3)(a)1, Stats., 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 sub. (2).

The rights guaranteed in Sec. 111.70(2) Stats., include:

> the right of self-organization, and the right to force, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other muterial aid or protection. . .

The Union presented no evidence of an independent violation of Sec. 111.70(3)(a)1, Stats. As there is no finding of a violation of Sec. 111.70(3)(a)4, Stats., there is no derivative violation of Sec. 111.70(3)(a)1, Stats. For these reasons, the allegation is dismissed.

As there is no finding of any violation of Sec. 111.70(3)(a), Stats., the Complaint in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann /s/
James W. Engmann, Examiner