

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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PRICE COUNTY HIGHWAY	:	
DEPARTMENT EMPLOYEES LOCAL	:	
1405, WCCME, AFSCME, AFL-CIO,	:	
	:	Case 37
Complainant,	:	No. 38417 MP-1938
	:	Decision No. 24504-A
vs.	:	
	:	
PRICE COUNTY,	:	
	:	
Respondent.	:	
	:	
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Appearance s:

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

Slaby, Deda & Marshall, Attorneys at Law, by Mr. David B. Deda, 215 North Lake Avenue, P.O. Box 7, Phillips, Wisconsin 54555, appearing on behalf of Respondent.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On February 26, 1987, the above-named Complainant filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had violated Secs. 111.70(3)(a)1 and 3, Stats., by laying off 14 employes represented by Complainant on and after February 5, 1987 in retaliation for Complainant's wage proposals in bargaining and for the Complainant's February 3, 1987 filing of a grievance concerning nonpayment of clothing allowance during January of 1987. The Commission appointed the undersigned Marshall L. Gratz, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats.

Pursuant to notice, the Examiner conducted hearing in the matter on June 8, 1987 at Phillips, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. Briefing in the matter was completed on September 24, 1987. The Examiner has considered the evidence and arguments and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Complainant, Price County Highway Department Employees Local 1405, WCCME, AFSCME, AFL-CIO (also referred to herein as the Union) is a labor organization with offices at 5 Odana Court, Madison, Wisconsin 53719. At all times material to this proceeding, Alan Haskins has been the president of Complainant and Phillip Salamone has been the District Council Business Representative responsible for servicing Complainant.

2. The Respondent, Price County, (also referred to herein as the County) is a municipal employer with offices at Price County Courthouse, North Lake Avenue, Phillips, Wisconsin 54555. Respondent is governed by an elected Board of Supervisors. Its operating departments include a Highway Department (also referred to herein as the Department) which is responsible for the construction and maintenance of the State and County roads within Respondent's geographic boundaries. Supervising the Department and its employes are Highway Commissioner Leon Namtsu, Patrol Superintendent Bill Knaack, and Shop Superintendent Ken Hilgart. The Department's operations are the general responsibility of the Highway Committee of Respondent's Board of Supervisors. Respondent's negotiations with unions concerning wages, hours and conditions of union-organized employes are the responsibility of the Personnel Committee. At all material times, Wilbert

Blomberg was chair of the Personnel Committee and a member of the Highway Committee, and Charles Lemke--who first became a member of Respondent's Board of Supervisors in April of 1986--was a member of the Personnel Committee but not of the Highway Committee. While the memberships of those committees overlapped, neither the Personnel Committee nor the Highway Committee included a majority of the members of the other committee. In all of the respects noted herein, Namtsu, Knaack, Hilgart, Lemke, the Personnel Committee and the Highway Committee were acting in the scope of their authority as agents of Respondent.

3. As of early February 1987, in addition to supervisors Namtsu, Hilgart and Knaack, Respondent's Highway Department consisted of 34 full-time nonsupervisory employes. At all times material to this proceeding, Complainant has been the exclusive collective bargaining representative of a bargaining unit consisting of those nonsupervisory employes (referred to herein as the Highway employes) plus with one Forestry employe (who is not a Highway Department employe, is not included on the Highway seniority list, and was not affected by the layoff that is the subject of the instant proceeding). The parties' 1985-86 collective bargaining agreement describes the unit as follows:

. . . all regular full-time and regular part-time employees working an average of more than 15 hours per week during any calendar year for the Price County Highway Department as certified by the WERC and as listed by job classifications in Appendix A (of the parties' collective bargaining agreements) and Foreman in Forestry Department. Employees excluded from the Union's representation include the Highway Commissioner, Highway Patrol Superintendent, Highway Shop Superintendent, confidential and managerial employes, supervisors, employees hired for the summer months only, part-time employees who do not work an average of 15 hours per week during the calendar year.

AFSCME locals also represent the County's Courthouse unit and its Professional Social Workers unit.

4. The Highway unit agreement for calendar years 1985-86 contained provisions granting the County the rights, subject to a reasonableness standard, to "relieve employees from their duties because of lack of work or any other legitimate reasons" and to contract out for goods or services after first considering "the impact of any such action" and notifying and conferring with the Union prior to taking such action. That agreement requires layoffs and recall to be by inverse order of length of service, such that the County has no right to deviate from seniority order to retain or recall employes qualified to do the available work. It contains a provision dealing with notice of recall but no express provision concerning advance notice of layoff. The agreement grievance procedure calls for grievance initiation in writing to the immediate supervisor and resort to the Personnel Committee in the event of dissatisfaction with the supervisor's written response. The agreement generally specifies a normal work day for most Highway employes beginning at 7:30 AM and ending 4:00 PM; a clothing allowance of \$75.00 per year "payable each January"; and health insurance coverage as to which the County has the right to change carrier or to self-fund so long as the benefits remain substantially equal to or better than those currently in existence.

5. Alan Haskins has been a year-round Highway Department employe since May 18, 1982, and the Union president since sometime in 1983. As president, he has been the Union's lead representative in most grievance processing with supervision and the Personnel Committee and has taken an active role in contract negotiations, as well. Namtsu was hired as Highway Commissioner from the outside on or about January 1, 1984. That marked the first time that an outsider was hired as Highway Commissioner. Haskins' father, who has been a Highway employe since May of 1960, had unsuccessfully sought the Highway Commissioner vacancy for which Namtsu was ultimately selected. Prior to Namtsu's arrival, there had been essentially no effort on the County's part to contract out work historically performed by Highway unit personnel. Since Namtsu's arrival, the County has contracted out for a variety of goods and services that had not theretofore been contracted out for by the County. The relationship between the Union and the County has historically involved relatively few grievances. One grievance that ultimately went to arbitration, and in which the County ultimately prevailed, involved a Union grievance initiated circa late 1985 claiming that the County had improperly converted a bargaining unit parts man position into a supervisory Shop

Superintendent position which it had filled with Hilgart. On May 6, 1986, during the pendency of that grievance, Namtsu had a conversation with his wife's sister's fiance', Robert Gebert, a Highway employe, on the occasion of a graduation party on a Saturday in a bar in Mosinee. During that conversation, Gebert asked Namtsu what he would do if the Union prevailed on the parts man grievance involving Hilgart's position. Namtsu responded defensively that if the County lost that case, "he would lay the help off and he would contract the work out; and he added onto that that I could take that back to our stinking president and tell him." In addition, when a Highway unit employe asked Hilgart in late 1985 or early 1986 what he would do if the Union prevailed on that grievance and he were required to join the Union, Hilgart responded "that he would never join our chicken shit union." After Haskins learned of those comments by Namtsu and Hilgart and of a situation in which a Highway employe believed Namtsu had lied to the employe, Haskins concluded that supervision did not like him and that as a matter of personal preference Haskins would not thereafter converse with any of the Department's supervisors about anything other than Union business, job-related matters and brief daily greetings. Since that time, Haskins has engaged in no small talk or socializing of any kind with supervision, on the job or off. The other Union officers, some of whom are also actively involved in grievance processing and contract negotiations, have not similarly limited their communications with the three department supervisors.

6. In early June of 1986, Salamone, during his first week of service as staff representative for the County's AFSCME units, visited the Highway Shop accompanied by his outgoing predecessor, one Barrington. They arrived at 3:30 PM in advance of the contractually specified general 4:00 PM quitting time. Barrington introduced Salamone to Haskins. While they were conversing, Knaack, who is Haskins' immediate supervisor, inquired what was going on. Haskins replied that they were engaged in Union business. Knaack responded that if Haskins was engaged in Union business he would have to punch out since Union business was not permitted on County work time. The 1985-86 agreement made no provision for Union business on County time.

7. The collective bargaining agreements in all three of the AFSCME units expired by their terms on December 31, 1986. Bargaining about successor agreements was initiated by exchanges of written proposals followed by initial meetings for purposes of general explanations of the parties' rationales for their initial proposals. The County's initial proposal contained a general wage increase of 10 cents per hour. The Union's initial proposal sought general wage increases of 45 cents an hour in each of two years along with increases in clothing and tool allowances, holidays and vacations and certain other contract modifications, including addition of a provision for a reasonable amount of time for the Union president to conduct Union business on County time. The rationale explanation session in the Highway unit was held on September 23, 1986. At that session, newly-elected Personnel Committee member Lemke commented in relation to the monetary issues that the County has a limited "pile of money" which if used up too fast would require the County to layoff employes to make ends meet. Lemke made similar comments in the initial negotiation meetings of the Personnel Committee with the other units with which the County was negotiating, including earlier sessions with the AFSCME Courthouse and Social Worker units. Lemke's cautionary comment was not repeated or otherwise referred to at any other time during the Highway unit negotiations. Also during that initial session, Haskins had occasion to describe to the Personnel Committee some past actions on the County's part which the Union felt had been violative of the existing 1985-86 agreement, but which had not been grieved. Haskins made reference to a job posting matter, to Namtsu's failure to date his responses to grievances, and to Namtsu's purchase of some gravel from the outside without first conferring with the Union. Namtsu replied that "he didn't have to contact the Union every time he wanted to buy something." Haskins responded that Namtsu should read the agreement (in an apparent reference to the proviso that the County will notify and confer with the Union in advance of contracting for the purchase of goods and services). Both Namtsu and Haskins raised their voices during this heated exchange, and it required the concerted efforts of Blomberg, County negotiator/attorney David Deda and Salamone to restore calm sufficiently so that the meeting could constructively proceed. There were other occasions during bargaining with County representatives when Haskins raised his voice. The bargaining teams met at least twice more prior to scheduling a February 5, 1987 meeting. A primary focus of those interim meetings was discussion of the status of the County's investigation of a possible change to WPS-HIP from Blue Cross-Blue Shield in anticipation of a large increase

in Blue Cross premiums. It was agreed well in advance that the parties would meet on February 5, 1987, at which time the Union would state its final bargaining position including its willingness or unwillingness to agree to a change to WPS-HIP.

8. In early September of 1986, the Highway Committee submitted its proposed budget for calendar 1987. As approved by the Finance Committee, the proposed Highway budget represented a 5% increase over its 1986 budget and included funding for certain planned 1987 road repairs and improvements on County roads to be performed during 1987. The County's Board of Supervisors reduced the proposed budgets for each of the County's departments (including the Highway budget) by 2%, such that the proposed budget for 1987 was reduced by \$56,000. The Board of Supervisors' decision to reduce its proposed budget in that way was made in the context of a sharp drop in the County's cash deposits/investments (from \$1,400,000 to \$700,000 November 1985 to November 1986, due in part to substantial reductions in federal funding including elimination of \$250,000 in federal revenue sharing) and in the context of a cumulative 254% increase in County tax levies over the preceding four years and what would have been an additional 34% increase for 1987 compared with an increase in equalized property values of less than 1/10th of 1% from 1985 to 1986. The Board of Supervisors did not, however, choose to adopt a County sales tax as a means of reducing the property tax.

9. The bulk of the work typically performed by the Highway Department during the winter months consists of keeping the State, County and some Town roads within the County clear of snow and ice (i.e., salting, plowing and sanding), cutting and clearing brush within a specified distance from the center line of State and County roads (not performable when snow accumulations in ditches and along the roads prevent access to the areas in need of brushing), and performing patching of cracks and potholes. The County is equipped to crush gravel for use in road construction and maintenance. The crushing operation involves four or five employes and has historically begun in April when the employes and gravel moving equipment are again able to access the pit area and begin operations. Crushing operations routinely require maintenance work on the equipment involving building up rollers by means of a welding torch. That work has historically been performed by the single blacksmith position in the unit.

10. The revenue side of the County's Highway budget includes (among others) revenues derived from County property tax levy proceeds, State gasoline tax aids, State reimbursements for labor and equipment used in removing snow from State roads, and Town payments for labor and equipment used in clearing snow from Town roads. The State places maximums in terms of crew size and dollar amount on the labor reimbursement for work on State roads that it will pay for. The State pays a fixed reimbursement to the County for having patrol trucks available in the event of snowstorms, but the actual State equipment rental payments for snow removal vary depending upon whether a truck was used, whether it was used with or without a plow, salter, or underbody device, and whether other equipment such as a grader was utilized in the State road clearing operations.

11. The winter of 1986-87 was unusually mild throughout. There were fewer than normal storms requiring salting, sanding or plowing by Department personnel and equipment, and the storms that did occur tended to be less severe and to require fewer hours of Department activity per storm to return the roads to normal winter driving condition. The County had no occasion during the winter when it found a grader needed to remove heavy wet accumulations on State highways, as compared with 14 and 48 hours of grader use on State roads in the preceding two winters. As a consequence of the continuing mild weather, prior to February 5, 1987, the County was doing more brush clearing on both State and County roads than had typically been done in that period in prior years. While the County continued to take full advantage of the State maximum labor reimbursement, the County's anticipated State reimbursements for equipment use on snow removal was significantly lower than had been budgeted due to the infrequency and mildness of the winter's snowstorms. On the other hand, some savings against anticipated budget expenses for equipment repairs were enjoyed as a consequence of the less-than-usual wear and tear on equipment associated with the less-than-usual extent of operation of that equipment in snow removal operations.

12. Highway Committee meetings are generally held on the first Tuesday of each month. Those meetings are attended by Namtsu and at least sometimes by Hilgart and Knaack, as well. At both its December and January meetings, the Highway Committee discussed the need to find ways to make up the \$56,000 cut from its budget by the Board of Supervisors. Among other measures to that end, the

Highway Committee approved the sale of certain excess equipment, indefinitely postponed a scheduled purchase of replacement patrol trucks, and decided not to hire any summer help, contrary to its historical pattern of hiring from 1-5 student helpers in prior summers. The record does not clearly indicate whether the Highway Committee decided upon those measures before or after February 5, 1987. At its December, January and February meetings, the Highway Committee also discussed the option of laying off Highway Department employes in relation to the mildness of the weather and the need to make up the budget cut. No decision to authorize a layoff was taken at either the December or the January meeting. Pursuant to its longstanding first Tuesday of the month schedule, the Highway Committee was scheduled to meet on February 3. That meeting was scheduled and held at night.

13. The Highway unit's paydays are the 5th and 20th of each month. Neither of the two paychecks issued to Highway unit employes in January of 1987 contained a payment of the annual clothing allowance which the 1985-86 agreement provided shall be "payable each January." On February 3, 1987, Haskins submitted to Namtsu a grievance, signed by Haskins, challenging the County's failure to pay the clothing allowance in January of 1987 and requesting:

a late penalty of \$5.00 per month should be attached to each man's clothing allowance. Example: If allowance is paid in February, allowance would be \$80.00; in March \$85 also County Clerk Clarence Cvengros should make formal written apology to the members of Union Local #1405 for his obvious disregard for our contract and any inconvenience he may have caused.

Namtsu's first words to Haskins upon being handed the grievance were, "What are you giving this to me for? I don't want this." Haskins thereupon explained to Namtsu that Namtsu was the County's designated recipient of grievances at the first step and that the Union had no choice but to initiate this grievance as all others with him as prescribed in the agreement. Namtsu thereupon received and processed the grievance in accordance with the terms of the agreement grievance procedure. The clothing allowance was paid with the paycheck issued on February 5 which consisted of a payroll period including a portion of January. Namtsu thereafter denied the grievance in writing. The Union appealed the matter to the Personnel Committee. The Personnel Committee responded in writing on March 3, 1987, as follows:

We, the Price County Personnel Committee, approve your Grievance Appeal regarding the date of pay of your Clothing Allowance and hereby direct the Highway Office personnel to forward the applicable Clothing allowance voucher to the County Clerk's Office no later than January 15 of each year. Although we do feel that the monies are not paid inappropriately if added to the January 31 payroll, we understand your feelings in the matter and concur with your request for earlier payment.

The Union did not pursue the grievance further after receiving that response.

14. At its meeting on the night of February 3, 1987, the Highway Committee decided that a layoff of Highway Department employes should be imposed if and to the extent possible without rendering the County unable to keep the roads open in case of snowstorms. The Committee authorized Namtsu to decide how many employes the County could lay off, if any, consistent with that objective. The Highway Committee also decided that any such layoff should be announced before the scheduled February 5 bargaining session so that the Union would know of the layoff going into that bargaining session. The Highway Committee also decided that the layoff should be implemented without advance notice to avoid the possibility of vandalism on the part of employes affected by the layoff. After conferring with Hilgart and Knaack regarding manpower needs, and after reviewing the seniority list, Namtsu concluded that the Highway Committee's objectives could be achieved if the County laid off 13 nonsupervisory employes and retained the remaining 3 supervisors and 21 nonsupervisory employes. However, the 13th and 14th lowest on the seniority list, Union president Haskins and Lyndon Schancer, respectively, had equal seniority, and the County and the Union did not have an established method of breaking seniority ties. For that reason, Namtsu decided to lay off the 14 (rather than 13) least senior employes on the seniority list. Namtsu posted a notice listing the names of those laid off at the timeclock after the employes had

left for the day of February 4, which notice stated that the listed employes were laid off effective at the beginning of work on February 5. On the morning of February 5, each of the 14 reported for work and then left without beginning work, and each was paid the applicable 2-hour minimum for February 5.

15. The February 5 bargaining meetings with the Courthouse and Social Worker units had been scheduled for 5:00 PM and that with the Highway unit had been scheduled for 7:00 PM. However, at approximately 5:30 PM the bargaining teams for all three AFSCME-represented groups entered together and met with the Personnel Committee. The Union stated that it was unwilling to agree to the insurance change from Blue Cross to WPS-HIP in any of the units, conveyed the Union's final offers as regards each of the three contracts (including a new proposal for top-of-the list superseniority for layoff for Union president, at least in the Highway unit proposal), and the meeting ended shortly thereafter when the Union bargaining teams walked out together. The next Highway unit negotiations were in a mediation session held on May 12, 1987.

16. During the winters since 1979-80 and prior to 1986-87, the County had laid off Highway unit employes only in 1981-82 and 1984-85. In each instance it had given each of the employes affected two weeks notice in advance of being laid off. In neither instance did the layoff reach Alan Haskins' on the seniority list. In tabular form, the three layoffs compare as follows:

	1981-82	1984-85	1986-87
number of employes laid off	6	6	14
total number of employes on highway unit seniority list	32 or 33	36 or 37	34
total man-months of layoff	31.5	20.5	42.0
range of duration of layoff	1 month to 8.5 months	3 weeks to 5.5 months	3 months
average duration of layoff	5.25 months	3.41 months	3 months
date of earliest start of layoff	8-28-81	11-9-84	2-5-86
date of latest end of layoff	5-10-82	4-29-85	5-4-87

17. Throughout the 1987 layoff, except when emergencies required otherwise, supervision maintained the State crew size at 12 by substituting another of the retained employes for the one State crew member who was laid off. Supervision also retained the established six patrol truck plowing routes on State roads. The County's State crew also continued patching and brush clearing on the State roads in such a way as to use as nearly possible all of the available State labor reimbursement dollars available. Supervision consolidated the crews assigned to County roads, ceased brush clearing and did minimal if any patching on County roads for the entirety of the layoff, and adjusted the grader snow-plowing routes by taking two of the County's nine graders out of service and by plowing the Town of Elk routes after completion of County routes. Since approximately the beginning of the winter of 1985-86, the County had routinely used the two graders to plow the Town of Elk at the same time that the other seven graders were being used to plow the County roads. Prior to the winter of 1985-86, the timing of Town of Elk plowing had been controlled by the Town Chairman and had varied, tending to be done on the day after rather than the day of the storm. It took longer to plow the Town of Elk routes after the County routes were completed than it would have taken to plow them simultaneously, but the Town's roads were nonetheless cleared sooner than they would have been under the day-after timing frequently ordered by the Town Chairman in prior years. At no time during the layoff did the County find itself unable to adequately clear the roads of snow with the retained employes.

18. During the layoff, the County contracted out to a private contractor the construction of two salt sheds, which work was performed in April of 1987. Historically, Highway unit employes had constructed the County's three existing salt sheds some 12 to 15 years previous and had exclusively maintained and modified those sheds as needed thereafter. The County has historically contracted

out other construction jobs, however, including the recent replacement of the Highway Shop roof, without a grievance being filed about it by the Union. In the end of December 1986 or the beginning of January 1987, Namtsu had informally told Highway unit employes, that because there was not much snow, one of the jobs that would be done by Highway employes during the Spring of 1987 was the construction of two salt sheds and that Peter Hanish and Donald Fox would respectively be leading crews in that construction. Upon learning of Namtsu's intentions, Fox, who had been involved in the construction of the existing sheds some 12-15 years earlier, made it known at least to certain of his fellow employes, that he did not want to be involved in the salt shed construction because he disliked working with Creosote. Creosote is a substance that was used in the construction of the existing sheds and that would necessarily have been involved in the construction of the new sheds, as well. To use it safely requires considerable care and attention to safety standards and use guidelines. The Union grieved the contracting out of salt shed construction work, and that grievance had not been heard as of the time of the hearing in this matter. The County could have recalled employes from layoff so as to permit Highway employes to perform the construction of the two salt sheds in April of 1987. It chose instead to contract out that work. Whether the County violated the terms of the agreement by its contracting out is a matter for resolution through the contract grievance procedure, and no determination is made herein on that question. Whether the County chose to subcontract the salt shed work because it learned that Fox did not want to work with Creosote, or because to do so would have required the County to call back unneeded individuals in order to reach the seniority list level of those capable of constructing the sheds, or for some other reason, is not established by the record. However, the County has not been shown by a clear and satisfactory preponderance of the evidence to have chosen to contract out that work in whole or in part on account of anti-Union animus.

19. Sometime in April during the layoff, the County began its crushing operation despite the fact that the blacksmith was on layoff. After approximately 4000 cubic yards of gravel had been crushed, it came time for the rolls to be rebuilt, and that work was assigned to one of the retained mechanics. That individual experienced welder's flash before completing the rebuilding and did not come to work the following day as a consequence of the welder's flash. The County did not thereafter attempt to have the rolls rebuilt or to resume crushing operations until the blacksmith returned from layoff on May 4. The blacksmith was David Vyskocil, third lowest on the seniority list. Since the layoff and through early June 1987, the crushing operation has been operated on an overtime basis. The County could have called Vyskocil back to work during April, but to do so it would also have had to call back the eleven more senior employes on the seniority list.

20. The layoff did not result in an increase in overtime hours worked relative to the number of overtime hours worked in the comparable period the previous year. The County assigned 565.5 hours of overtime work to the retained employes during the layoff, compared with 659 hours of overtime assigned to Highway employes during the comparable portion of 1986.

21. The laid off employes received Unemployment Compensation benefits which amounted to approximately one-half their straight time base take home pay, and they paid their own insurance premiums for the three months of the layoff. On balance, the layoff resulted in a net cost saving to the County, though the amount of that saving cannot be determined from the record.

22. No County department besides the Highway Department laid off any of its employes during 1986 or through June of 1987, and no County supervisory personnel were laid off during that period.

23. Following the layoff, and following a mediation session on May 12, 1987, a tentative agreement on a voluntary settlement was reached in the Highway unit and ratified by the Highway unit membership in early June, 1987. As of the June 8, 1987 hearing in this matter, that settlement was to be considered for ratification at a County Board of Supervisors meeting scheduled for June 15, 1987. In reaching that tentative agreement, the Union withdrew its demand for language granting the Union president a reasonable amount of County time for Union business in response to the County's bargaining table assurances that Knaack's directing Haskins to punch out for the discussion with Salamone and Barrington in early June of 1986 was an unfortunate incident that would not occur again. The settlement provided, among other things, for wage increases of 25 for 1987 and 27 cents for

1988, for top-of-the-list superseniority for layoff purposes for the Union president, and for the right of either party to reopen the agreement concerning health insurance on 30 days written notice to the other party. Following the settlement, in the early summer of 1987, the Union grieved that the County had failed to notify and confer with the Union in advance of its contracting out for two miles of blacktopping. That grievance was settled after a meeting was arranged between Union representatives and the Highway Committee wherein the Highway Committee gave assurances that in the future the Union would be notified in advance of any Highway Committee meeting at which contracting out was to be considered.

24. The fact that several Wisconsin counties had laid off highway workers on account of the mildness of the winter of 1986-87 was the subject of newspaper articles in the Milwaukee Journal dated February 8, 1987 and The Star News dated February 18, 1987. The Star News article also noted that numerous other Wisconsin counties had not implemented such layoffs.

25. Namtsu and the Highway Committee knew generally of Haskins' activities on behalf of the Union and of the Union's activities and bargaining proposals on behalf of the employes in the Highway unit. Namtsu and Blomberg knew what positions the Union had taken in its bargaining with the Personnel Committee, and it is inferred from the dual membership of Blomberg and perhaps others on both the Highway and Personnel Committee that the Highway Committee knew of the positions the Union had taken in the negotiations concerning a successor agreement, as well. Namtsu had received the clothing allowance grievance before he met with the Highway Committee on the night of February 3, 1987, before he determined the number of employes to be laid off, and before he implemented that layoff. However, Blomberg did not know of the existence of the clothing allowance grievance on the night of February 3, from which fact the Examiner infers that the Highway Committee did not know of or hear of that grievance during its February 3 meeting.

26. The amount of brush clearing performed by the County before brushing on County roads was terminated at the time of the layoff exceeded the amount of brush clearing performed by the County in a typical winter season. Nevertheless, by its nature, brush clearing is a function that can always be said to be available so long as snowfall conditions do not prevent access to the roadside areas. Throughout the layoff, accumulated snowfall conditions were such that the County could have assigned brush clearing on County roads to the employes whom it chose instead to lay off and to continue on layoff. In addition, although the County has only one pug mill for heating the blacktop used by a patching crew, there may also have been patching work on County roads that could have been assigned to the employes whom the County chose instead to layoff and continue on lay off. Finally, the County could have continued its crushing operation had it been willing to recall the eleven laid off employes more senior than blacksmith Vyskocil to have Vyskocil do the needed roll rebuilding work. The County chose instead to keep those 12 employes on layoff. The County's decisions in those regards (brushing, patching and crushing) were exercises of management discretion generally reserved to the County under the terms of the agreement. Those management decisions have been affirmatively shown herein to have been made in whole because the County preferred to pursue the goal of saving money more than it desired the benefit to the County of having that additional work performed prior to May 4, 1987.

27. Neither the facts set forth above nor the record evidence taken as a whole establishes by a clear and satisfactory preponderance of the evidence that Respondent's initiation or continuation of the layoff of all or any of the 14 Highway unit employes from February 5, 1987 to May 4, 1987 was motivated, in whole or in part, by hostility on the part of Respondent's agents toward Complainant or toward the activities in support of Complainant of any of the laid off employes.

CONCLUSION OF LAW

The Respondent has not been shown to have committed any prohibited practice within the meaning of Secs. 111.70(3)(a)3 and/or 1 by its layoff of Highway unit employes from February 5, 1987 through May 4, 1987.

ORDER 1/

1. The complaint in the above matter is hereby dismissed.
2. Respondent's request for an order that Complainant pay Respondent's fees, costs and disbursements for the processing of this claim is hereby denied.

Dated at Madison, Wisconsin this 19th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

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- 1/ 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.

PRICE COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW

BACKGROUND

In its complaint, Complainant Union alleges that Respondent County violated Secs. 111.70(3)(a)3 and 1, Stats., by laying off 14 employes represented by Complainant on and after February 5, 1987 in retaliation for Complainant's wage proposals theretofore submitted in bargaining and for the Complainant's February 3, 1987 filing of a grievance concerning the County's failure to pay the clothing allowance during January, 1987. The Complainant further alleges that the County had indicated during negotiations that if the Union persisted in its wage proposals, layoffs would occur. The Complainant also alleges that Union president Alan Haskins was the most senior employe laid off and that the layoff was inconsistent with prior layoffs. It requests declaratory, cease and desist, reinstatement, back pay, and fees and costs reimbursement remedies.

In its answer, Respondent County admitted that it had laid off the 14 least senior nonsupervisory Highway employes for the period from the beginning of work on February 5, 1987 through the beginning of work on May 4, 1987. However, the County denied that the layoff was motivated in any way by anti-union sentiments on the part of the Respondent and asserted, instead, that it was imposed, as prior layoffs had been, based on work available and budget considerations. The County denied that its agents had tied layoffs to Union persistence on wage demands and denied that it had failed to pay the clothing allowance in January of 1987 stating, "it is unclear as to whether the allowance was paid during January because the allowance was paid with the paycheck for the last half of January, which paycheck would have been paid to employees on or about February 5, 1987." The County's answer concludes with requests that complaint be dismissed in its entirety and that the Union be ordered to pay the County's fees, costs and disbursements for processing of the instant claim.

COMPLAINANT'S POST-HEARING ARGUMENTS

Complainant argues that the record shows that the County was hostile to and bore animus toward the Union and in particular toward Union president Alan Haskins. It argues that in several undisputed instances County officials threatened and harrassed the Union for representing its members. Specifically, nine months before the layoff, Highway Commissioner Namtsu threatened to layoff unit employes if the Union prevailed in the parts man grievance. Five months before the layoff, at the initial bargaining session on September 23, 1986, County Board Member and bargaining team member Lepke threatened to layoff unit employes if the Union persisted in its bargaining demands. The Union asserts that clothing allowance grievance appears to have been the last straw for the County. In retaliation for this grievance, it claims, over 40% of the bargaining unit was laid off without notice. Complainant argues that Namtsu and perhaps the Highway Committee members as well were angered by the clothing allowance grievance. There can therefore be no doubt, the Union argues, that the decision to layoff was motivated, at least in part, by the desire of the County to punish the Union and Haskins.

Even if a partial layoff was justified, Complainant argues that the depth of the layoff was motivated by the County's desire to retaliate against Haskins and the Union or to intimidate the employes against future Union activism. No prior layoff had been so severe or imposed with so little notice. There was no justification for the depth and length of the layoff, and it did not wind up saving the County much money.

Complainant asserts that the reasons given by the County for the layoffs--a lack of funds and inadequate work due to the admittedly mild winter--were pretexts not supported by the record facts.

For those reasons and others more specifically noted in the Discussion below, Complainant asks that the Examiner conclude that by laying off the 14 Highway employes at least in part because of anti-union animus, the County committed discrimination and interference in violation of Secs. 111.70(3)(a)3 and 1. As the

remedy, the Complainant requests that Examiner declare the County's conduct unlawful, order the County to cease and desist from such conduct in the future, order the County to reinstate all affected employes with full-back pay, benefits and rights, and order the County to pay the Complainant's fees, costs and disbursements for the processing of the complaint.

RESPONDENT'S POST-HEARING ARGUMENTS

Respondent asserts that its laying off 14 employes for approximately three months February 5 - May 4, 1987 was a lawfully-motivated management response to the lack of work caused by the usually mild weather experienced throughout the winter of 1986-87 and to the fact that the County was and is losing sources of revenues. Respondent notes that the parties' collective bargaining agreement recognizes the County's right to layoff due to lack of work or other legitimate reasons and that it is undisputed that the County followed the proper procedure in laying off the 14 employes. Respondent asserts that there is no contractual provision for advance notice of layoff, and explains the absence of advance notice of the layoff by the facts that the Highway Committee meets only once monthly and that the Committee did not want to mislead the Union by concealing the layoff until after a bargaining session scheduled for the evening of February 5, 1987.

Respondent argues that the idea of laying off Highway employes due to lack of funds and lack of work had been discussed within the Highway Committee for a number of months preceding February 5. It did not surface as a reprisal for the clothing allowance grievance. Indeed, the Highway Committee has not been shown to have known of the clothing allowance grievance when it met for its February meeting and made its decisions regarding a layoff.

Respondent further argues that the number of employes laid off was logically determined, rather than based on Namtsu's or the Highway Committee's effort to retaliate against or intimidate Haskins or the Union. The Highway Committee directed Namtsu to base the decision of whether and how many to lay off on how many employes he needed to keep the highways open in case of snowstorms. 20 of 34 employes were retained. At that point there were seven County road plow routes, four County sanding routes, six State plow routes, and four Shop positions that needed to be filled, totalling 21 to be retained. As it happens, however, to lay off 13 would have required a choice between two employes with the same date of hire. Because there would have been a problem had the County treated those two employes differently, Namtsu decided to lay off a total of 14 employes. As it turned out, Respondent argues, the County retained just enough employes to keep the roads open throughout the balance of winter.

Respondent argues that layoffs of Respondent's Highway Department employes have occurred in the past and that layoffs of highway employes were implemented in several other Wisconsin counties because of the mild winter of 1986-87. Respondent argues that it continued the affected employes on layoff until the spring construction season began because the weather remained mild enough to permit it to do so while meeting the Department's snow removal needs.

Respondent further argues that the County's financial situation had been deteriorating during the several years preceding the winter of 1986-87, leading the County's Board of Supervisors to cut the proposed Highway budget by 2% or \$56,000.

Respondent further asserts that the Union has not shown that any of the County's agents bore animosity toward the Union. On the contrary, it notes that there were relatively few grievances involving the Highway unit; that the County called back all 14 employes on May 4, 1987; that the decision to recall was unrelated to any contract settlements, grievances or any other concessions made to the County by the Union; and that the County agreed to the Union's request for "superseniority" for the Union president for layoff purposes effective in the 1987-88 agreement. Respondent further argues that had it been acting in whole or in part out of anti-union hostility, it could have worked the entire unit their two hour minimum or half a day each day and then sent them home if there were no snow, such that they would have not qualified for Unemployment Compensation benefits. The County, it argues, made a responsible economic decision, consistent with the terms of its labor contract and not out of any hostility toward the Union or toward the Union activities of any of the employes involved.

For those reasons and others more specifically noted in the Discussion below, the County requests that the Examiner dismiss the complaint.

DISCUSSION

In order to prevail on its claim that the instant layoff constituted encouragement or discouragement of membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment violative of Secs. 111.70(3)(a)3 and 1, Complainant must prove all of the following elements by a clear and satisfactory preponderance of the evidence: (1) that the laid off employees were engaged in protected concerted activity; (2) that the County's agents had knowledge of said activity; (3) that the County was hostile toward such activity; and (4) that at least part of the County's motivation for laying off the affected employees was the County's hostility toward their protected concerted activities. E.g., Town of Salem, Dec. No. 18812-A (WERC, 2/82). The fact that the employer has additional legitimate grounds for its action is no defense if anti-union animus is shown to be any part of its decision to impose an adverse action. See, generally, Muskego-Norway Schools v. WERC, 35 Wis.2d 540 (1967).

The record evidence clearly establishes that the Union in general and Haskins in particular engaged in protected concerted activities on behalf of County Highway employees, both in contract negotiations and in contract administration. Haskins has been Union president for the 5 years preceding the layoff. As such he has been the Union's principal spokesperson in most contract administration matters and has also been involved in the Union's contract negotiations with the Personnel Committee.

As noted in Finding of Fact 25, it seems fair to the Examiner to charge all of the relevant agents of Respondent with general knowledge of those negotiation and contract administration activities occurring prior to February 3, 1987, on the part of the Union and Haskins. It is also clear that Namtsu knew of the February 3, 1987 initiation of the clothing allowance grievance at the time he determined how many employees could be laid off without rendering the County unable to respond adequately in the event of a snowstorm. However, the Examiner has found that the record does not establish that the Highway Committee had been apprised of the existence of the clothing allowance grievance at the time it authorized Namtsu to implement a layoff of Highway Department employees. Highway Committee chair Blomberg credibly testified that he was not aware of that grievance during the Committee's February 3 meeting, and the Examiner infers from that that Namtsu did not have occasion to mention it to that Committee. The facts that grievance processing was not the Highway Committee's responsibility and that the grievance itself represented a minor dispute about the appropriate interpretation of whether the payment could properly be included with the January 31 payroll or had to be included on a paycheck issued during January, lend further support to the notion that Namtsu did not have occasion to mention it to the Highway Committee at its meeting on the night of February 3. 2/

The record contains some evidence of hostility on the part of County agents toward the Union activities of Haskins' and toward the Union generally. However, upon careful examination, that evidence is of limited significance, and in several respects there is other evidence inconsistent with anti-union animus on Respondent's part. The evidence bearing on hostility is considered below first in an overview of the relationships involved and then point by point.

By way of an overview of the basic relationships, the record shows that Namtsu became Respondent's Highway Commissioner circa January of 1984, such that he and Haskins had a significant period of time in which to interact in their respective capacities in contract negotiation and administration matters. It is fair to say that, at all material times, the relationships between Haskins and the three supervisors have not been friendly. There was evident bad blood between Haskins and the Union on the one hand and Namtsu and Hilgart on the other as

2/ Namtsu unqualifiedly testified that the Committee meeting was at night on February 3 (tr. 180), overcoming the uncertainty in that regard elsewhere in the record (tr. 110) upon which the County had based an argument that the meeting might have been conducted prior to Haskins' submission of the clothing allowance grievance.

regards the parts man grievance in late-1985 through at least mid-1986. However, the County prevailed in the resultant arbitration award, and both the hostile comments of Namtsu and Higart were responses to pointed questions from employees rather than threats initiated by the supervisors. While Haskins has chosen to limit his interactions with supervisors only to Union business, job-related matters and cursory greetings, he himself testified that that has been a matter of personal preference on his part. (tr. 63). Viewing the record in its entirety, it appears to the Examiner that Haskins' difficulties with Namtsu and supervision stem to a considerable extent from the fact that Namtsu was the first outsider brought in to head the Department and that during Namtsu's tenure, the County has exercised its management's rights more aggressively than it had during Namtsu's predecessors' tenures.

Notwithstanding Haskins' interpersonal difficulties with supervision, the record indicates that the parties' relationship is a reasonably healthy one. No other Union officials have had problems communicating with any of management's representatives (tr. 100). The number of grievances filed during Namtsu's tenure has been modest. A number of substantive settlements of grievances have been achieved between the Union and the County without protracted or hostile grievance processing. 3/ The parties were also ultimately able to reach voluntary agreement on a 1987-88 agreement despite the heated exchange that took place at the initial September 23, 1986 meeting. 4/

Turning then, to a point by point hostility evidence analysis, the Union cites the following instances in which it argues that Namtsu and other Highway department supervisors and County officials have acted hostile toward or otherwise revealed hostility toward the Union activities.

First, the Union argues that in May, 1986, Namtsu expressed his unhappiness about a grievance filed by Haskins in a conversation with bargaining unit employe Robert Gebert, stating that "if they (the County) lost the grievance, he would lay the help off and he would contract the work out; and he added onto that that I could take that back to our stinking president and tell him, and which is Al Haskins." (tr. 97). Gebert's credible testimony to that effect has been credited as against Namtsu's testimony that he did not recall making such a statement and that it was unlikely that he would do so because he keeps matters concerning his work to himself on his off hours. In the Examiner's view, Gebert's testimony on this point shows hostility as regards the grievance and Haskins' protected activities generally. However, the significance of the remark for the instant case is lessened by the fact that the comment was remote in time from the layoff, occurring some nine months before. In addition, the remark was a response to Gebert's question and was given well outside the workplace and the supervisor-subordinate relationship (occurring at a bar in Mosinee on a Saturday during a graduation party with Gebert who was Namtsu's wife's sister's fiance'). Finally, it can be noted that the County rather than the Union prevailed in the parts man grievance involving Ken Hilgart's position.

As a second indication of hostility, the Union asserts that in June of 1986, Patrol Superintendent Knaack acted in a harrassing manner toward Haskins when Salamone and Barrington came to the shop to meet him. (tr. 14). Respondent counters that the supervisor merely told Haskins to punch out if he was going to be doing Union business during scheduled work time, and that Knaack was merely

3/ For example, although the parts man grievance went to award, the February 3, 1987 grievance over clothing allowance was resolved on the basis of a respectfully-worded second step (Personnel Committee) response. Similarly, the parties worked out a settlement of a later grievance concerning alleged noncompliance with the notify and confer requirements of the contracting out language as regards contemplated contracting out of two miles of blacktopping. (tr. 91).

4/ Notably, the tentative agreement reached between the parties added the provision for Union president superseniority for layoffs requested for the first time on February 5, 1987, and the Union was willing to drop its request for language expressly providing the Union president with a reasonable amount of Union business on County time in return for the County's bargaining table assurances that the early June incident between Knaack and Haskins (see Finding of Fact 6) would not occur again.

adhering to the agreement which made no provision for conducting Union business on County time. (tr. 29). The Examiner finds that Knaack's actions were unquestionably brusque, unfriendly, and, as the County later acknowledged at the bargaining table, "unfortunate." However, the fact that Knaack's actions were apparently consistent with the parties' agreement, (given the absence of an express provision for Union business on County time in the parties' agreement, the fact that no grievance was filed about the incident, and the fact that the Union sought and achieved a remedy for the problem in the subsequent round of bargaining), undercuts the Union's claim that Knaack's conduct was a significant instance of anti-union harassment.

A third indication of hostility cited by the Union occurred at the parties' first negotiating session for the 1987-88 labor agreement on September 23, 1986, where Namtsu and Haskins had a heated exchange about whether Namtsu had followed contractual requirements regarding certain contracting out. The evidence indicates that both Haskins and Namtsu raised their voices in that discussion and that that was not the only time Haskins had occasion to raise his voice during bargaining. (tr. 32-33) Heated discussions at the bargaining table are not an uncommon occurrence during labor contract bargaining generally, and they are even less remarkable herein given the fact that under Namtsu's predecessor the County had not contracted out so as to present such problems. For those reasons, and because the heated exchange in September of 1986 on the subject of contracting out procedures was some five months prior to the effective date of the layoff, it does not strongly establish the existence of anti-union animus in February-May of 1987 on the part of Namtsu or the Highway Committee. As a countervailing consideration regarding contracting out procedures, it can be noted that as regards a later grievance regarding alleged failure to notify and confer with the Union about contracting out for goods and services (blacktopping in the summer of 1987), the parties were able to work out a procedure designed to avoid such disputes in the future whereby the Highway Committee would directly notify the Union of any of its meetings at which contracting out for goods or services would be discussed.

As a fourth indication of hostility, the Union asserts that at that same September 23, 1986 meeting, according to Union witnesses (tr. 17, 31, 42-3) Personnel Committee member Charles Lepke threatened layoffs if the Union persisted in its wage proposals. Respondent contends that, according to County witnesses (tr. 31 and 161), Lepke's alleged threat was merely a statement that the funds available for the County to spend during the year are limited and that if it reaches a point where it would be spending all of it before the end of the year, then something would have to be done. Union witness Salamone described Lepke's bargaining table statement as follows, "Basically that there was just so much money that the County had and that if the Union persisted in these kinds of demands that they would have no choice but to lay off." (tr. 31). Lepke denied specifically threatening to lay anybody off, and noted that his presentations on the subject were poked fun of on several occasions later in certain of the bargains (tr. 160-61). The Examiner has found that Lepke's comments were made one time only during the general opening discussions and never mentioned again during the bargaining. It is undisputed that Lepke was in his first year as a member of the Personnel Committee and that he made a similar comment during the initial meeting in each of the other negotiations in which the Personnel Committee was involved that year. In the foregoing circumstances, Lepke's comment appears to be a rather innocent description of Lepke's views of economic reality rather than a hostile threat of reprisal for Union activities. It can also be noted that Lepke was not a member of the Highway Committee which made the decision to authorize the layoffs at issue herein.

As a fifth indication of County hostility toward Union activities, the Union argues that during the work day on February 3, 1987, when Haskins filed the written grievance with Namtsu regarding the County's failure to pay the annual clothing allowance "during January" as required by the terms of the agreement, Namtsu at first reacted by saying, "What are you giving this to me for? I don't want this." (tr. 46). Respondent argues that Namtsu's response was logically and entirely explained by the fact that the County Clerk was responsible for making the clothing allowance payment, and the grievance (Ex. 3) on its face sought relief in part in the form of an apology to the Union members by the Clerk for his disregard of contract and for any inconvenience caused. Moreover, Namtsu

processed the grievance in accordance with the agreement 5/ and it was ultimately settled in the Union's favor at the Personnel Committee step on March 2, 1987. The grievance concerned a relatively minor issue of contract interpretation. It was addressed more to the Clerk's alleged wrongdoing than to any on Namtsu's part. For those reasons, the Examiner does not find Namtsu's February 3 reply to be evidence of anti-union hostility.

For the foregoing reasons, while there is some direct evidence of anti-union hostility by Respondent's agents toward Haskins and the Union, that evidence is rather remote in time from the layoff and undercut somewhat by countervailing indications of the absence of hostility in other aspects of the County's conduct.

Furthermore, the Examiner finds that the County's explanations for its conduct are persuasively supported by record fact rather than being pretextual in nature as claimed by the Union.

Basically the Examiner has found that the winter weather had been extremely mild. As a result, the Highway Committee had been considering the idea of a layoff among Highway Department employes during its December and January meetings prior to its February 3 meeting. The Highway Committee decided to authorize Namtsu to lay off as many employes (if any) as he could while maintaining a workforce sufficient to clear the roads of snow adequately and that Namtsu should announce and implement any such layoff immediately. Namtsu then determined the number to be laid off in accordance with the Committee's stated objectives and implemented the layoff immediately in accordance with the Committee's stated preference in that regard. 6/

The mildness of the weather in the winter season of 1986-87 substantially reduced the County's need for Highway Department employes to perform snow plowing and sanding work, which is a significant portion of the work typically performed during that season by those employes. The County Board had reduced the proposed Highway budget by 2% or \$56,000 due to a worsening financial condition and in order to reduce what would otherwise have been a projected property tax levy increase of 34% on top of substantial property tax increases over the preceding 4 years. After holding off on a decision to reduce its force as long as it felt it could, the Highway Committee finally decided at its February 3 monthly meeting to authorize Namtsu to layoff any Department employes he could spare without rendering the County unable to adequately respond to a snowstorm. Namtsu implemented that decision in the strict seniority order prescribed in the applicable labor agreement and in accord with objectives established by the Highway Committee.

5/ The parties' 1985-86 agreement nominally expired on December 31, 1986, and the parties' successor agreement was pending County ratification as of the June 8, 1987 hearing in this matter. Accordingly, references herein to the requirements of the agreement at times after January 1, 1987 are to the statutory duty to bargain requirement to maintain the status quo wages, hours and conditions of employment in effect on December 31, 1987. See, e.g., City of Brookfield, Dec. No. 19877-C (WERC, 11/84). In the instant circumstances, the status quo was the same as the terms set forth in the expired agreement in all material respects.

6/ According to Namtsu's testimony, he had dissuaded the Highway Committee from its inclination to authorize layoffs at the December 1986 and January 1987 meetings (tr. 202). The testimony of Highway Committee members Blomberg and James Yunk (tr. 162-163), on the other hand, suggests that the Committee was following Namtsu's lead and initiative as regards the need for a layoff of Highway Department employes. By all accounts, neither the nature nor the existence of the Highway Committee's discussions of layoffs was contained in any of the minutes of any of the Highway Committee's meetings. Blomberg explained that on the basis that the discussions had been general in nature, the Committee had hoped that no layoff would be necessary, the fact that recording and participating simultaneously is difficult, and a concern about premature revelation of the discussions to the Union. (tr. 172, 173-4).

As the Union states in its brief, with the exception of a limited number of seasonal employes, Highway Department employes usually work year round. They perform a variety of construction and maintenance tasks throughout the year. During the winter season this work mainly consists of cutting and clearing brush, snow removal operations and patching of roads. The crushing operation typically begins in April. Prior to the February 5, 1987 layoff, the Department's winter operation had included nine grader plow routes (including two routes in the Town of Elk), six State road patrol truck plow routes, and four County road sanding routes. The County shop was also staffed. In the several winter seasons prior to 1987, there had been layoffs of fewer employes in 81-82 and 84-85, each time with two weeks' prior notice to each of the employes affected.

The Union argues that the timing of the Committee's layoff authorization decision tends to show that it was motivated at least in part by the Union's filing of the clothing allowance grievance. Respondent argues that the Highway Committee has not been shown to have known about the clothing allowance grievance on February 3 when it decided to authorize the layoff. For the reasons noted above, the Examiner has found that although Namtsu knew of the clothing allowance grievance on the night of February 3, he did not inform the Highway Committee about it and that Committee did not know about the grievance during its meeting on the night of February 3, he did not inform the Highway Committee about it and that Committee did not know about the grievance during its meeting on the night of February 3. In any event, the clothing allowance grievance does not seem to the Examiner to be the sort of event that would likely contribute to a decision to lay off a number of Highway Department employes. The obligation to pay the clothing allowance in January was clearly such that the County could not reasonably have expected to be free of that requirement. The significance of the grievance was more related to whether a payment on a February paycheck for work performed in the latter part of January could satisfy the language specifying that the allowance was payable in January of each year. The County in fact paid the clothing allowance on the first paycheck in February issued February 5. As noted above, the grievance was ultimately settled between the parties in early March and in the Union's favor as regards future County conduct. Finally, the evidence establishes that the Highway Committee had been considering the option of a lay off of Highway employes at its December and January meetings. The decision to authorize a layoff came only after the mild weather continued through its February 3 meeting. For those reasons, the timing of the Committee's decision to authorize a layoff in relation to the filing of the clothing allowance grievance does not tend to show that the decision to lay off was unlawfully motivated.

The Union argues that the unprecedented lack of notice to employes in advance of the effective date of the layoff is evidence that it was motivated at least in part by anti-union animus. The record supports the Union's contention that in the two sets of layoffs in 1981-82 and 1984-85, each laid off employe had been given two weeks advance notice of layoff, whereas the instant layoff was imposed without any notice whatsoever. The Examiner finds persuasive Respondent's explanation that the Committee preferred being straight forward with the Union by announcing the layoff before the previously scheduled February 5 bargaining session so that the Union would know of the layoff when it came into that meeting rather than finding out about it after the meeting. The Highway Committee's concern that the employes slated for layoff might engage in vandalism if permitted to work for an advance notice period (tr. 186) persuasively explains why no notice was given in this instance. It can also be noted that while the parties' collective bargaining agreement contains express provisions regarding a period of notice of recall, it contains no requirement of advance notice of layoff. For the foregoing reasons, the Examiner concludes that the unprecedented absence of advance notice of layoff has not been shown to be due at least in part to anti-Union animus on Respondent's part.

The Union argues that the fact that no other department of the County laid off employes shows that the County was focusing its adverse actions on the Highway unit. The Examiner finds this argument unpersuasive, however, because it overlooks the fact that the Highway Department was uniquely impacted by the unusually mild weather: its anticipated revenues were reduced by the loss of anticipated State and Town equipment rental reimbursements (net of possible savings on wear and tear) thereby exacerbating the effects of the 2% reduction in its proposed budget, while at the same time the need for its employes' primary winter work function was at an exceptionally low level.

The Union points to the facts that the 14 Highway unit employees laid off constituted many more employees than had been laid off in any previous year. However, as Respondent argues, the extent of the instant layoff was not disproportionate or unreasonable in comparison with previous layoffs when all of the circumstances are considered. As noted in Finding of Fact 16, the average duration of the layoffs was shorter in 1986-87 than in 1981-82 and 1983-84, and the duration of some of the 1981-82 layoffs was significantly longer than the 1986-87 layoffs. On the other hand, the overall man-month impact of the 1986-87 layoff was greater than in either of those prior instances, and the number of employees laid off was more than double the number laid off in the previous years' layoffs. When these numbers are considered in the context of the evidence that layoffs due to the mild winter were occurring in a number of other Wisconsin counties in the winter of 1986-87 and in the context of the undisputed testimony that the 1986-87 winter was substantially milder than the other winters noted above, the duration and extent of the instant layoff does not cast doubt on the County's business explanations for its decision to impose the layoff. Moreover, the Examiner finds the record evidence supportive of the County's contention that it logically determined the number of employees to be laid off upon consideration of its manpower needs relative to keeping the roads open in the event of snowstorms.

The Union points out that Haskins and one other employee with the same starting date were the most senior employees laid off, suggesting that the County expanded the lay off unnecessarily in order to include Haskins. The Examiner finds that Namtsu determined the number to be laid off logically and based exclusively on lawful considerations. After conferring about manpower needs with his Shop and Patrol Superintendents, Namtsu reasoned that the Town of Elk routes could be performed when County road plowing was completed rather than concurrently, such that there were seven County road grader plowing routes, four County sanding routes, six State patrol truck plow routes, and four shop positions that needed to be filled with retained employees, totalling 21 to be retained. As it happens, however, to lay off 13 would have required a choice between two employees with the same date of hire. Haskins himself testified that there was no agreed-upon method by which seniority ties were to be broken; that "That's why I believe 14 people were laid off instead of 13;" and that laying off 13 would "definitely" have been a very awkward alternative for the County. (tr. 69). The County claims that, as it turned out, it retained just enough employees to clear the roads for the balance of the winter season. Whether that had turned out to be the case or not, in light of the abovenoted evidence, the Examiner cannot conclude that Namtsu expanded the number to be laid off to 13 or from 13 to 14 in order to assure that Haskins would be affected by the layoff. It is also notable that in the ensuing round of contract bargaining, the County agreed to the Union's proposal for top-of-the-list superseniority for layoffs for the Union's president. While this development occurred after the layoff and during the pendency of the instant complaint, it nonetheless appears starkly inconsistent with the notion that the County bore animus toward Haskins and toward Union activities.

Finally, the Union argues that in the several respects noted and discussed below, the instant layoff resulted in substantial curtailment of services provided by unit employees. The Union argues that the County therefore cannot legitimately claim that the layoff was due in part to a lack of work. Alternatively, the Union argues that even if a layoff of some duration was lawfully motivated, the continuation of the layoff for so long a period of time was motivated at least in part by anti-union animus. Respondent generally counters that it continued the affected employees on layoff until the spring construction season began because the weather remained mild enough to permit it to do so while meeting the Department's snow removal needs.

The Union argues that there cannot be said to have been a lack of work since: the County eliminated two plow routes in the Town of Elk; the County ceased clearing brush on County roads during the lay off even though only 1/3 to 1/2 of the needed work had been done by February 5; the unusually mild winter increased the need for road patching, whereas the County did no patching during the layoff; and the County found it necessary to work the retained employees an unusually high number of overtime hours during the layoff. Respondent counters that the primary work of bargaining unit employees during the winter season is snow removal operations and that brush cutting is used only to fill time when there is no snow to be removed. The Examiner's review of the evidence reveals that the County could have assigned County road brushing and perhaps County road patching work instead of laying off the employees as it did. Brushing work can always be said to

be available unless ruled out by heavy snow accumulations, which were not present in the instant winter season. On the other hand, the record establishes that, even with its cessation of brushing on County roads during the layoff, because of the lack of snow removal work, the County had actually accomplished more brush cutting in the winter of 1986-87 than is done in a normal winter. (tr. 75-76). The situation regarding the Town of Elk is as noted in Finding 17. The County's decision to park two graders and to have the Town of Elk plowed after rather than simultaneous with the County routes slowed the clearing of the Town's roads somewhat but got the job done more promptly than had been the case in years prior to 1985-86 when the Town Chairman had controlled the timing and had frequently had the Town plowed the day after the storm or on an every-other-storm basis. The County's modification of routes in that regard does not tend to show that the County's explanations of its layoff decision were pretextual. Finally, the record evidence shows there was not more overtime than normal worked during the lay off. Rather, Exhibits 8 and 9 show 565.5 overtime hours worked during the layoff and 659 overtime hours worked during the comparable period of time in 1986.

The Union also points out that the County ceased crushing operations despite the fact that it obviously had a need for crushed materials as evidenced by the substantial amount of post-layoff overtime it has assigned to the crushing operation. The relevant facts are outlined in Findings of Fact 9 and 19. The Examiner is persuaded that the County had a need for the crushed material that could have been produced had it called blacksmith Vyskocil back to work. However, to do so, the County would also have had to call back the eleven employes more senior than Vyskocil. By all accounts, the agreement afforded the County no right to deviate from seniority order in order to retain or recall employes qualified to do the available work. (tr. 155). Moreover, the harmful results of the mechanic's attempt to perform the critical roll rebuilding welding work raises questions about whether the retained employes could perform that work safely. In those circumstances, the County's choice not to recall Vyskocil and the eleven employes senior to him and not to proceed without Vyskocil cannot be attributed in whole or in part to anti-Union animus on the County's part.

Finally, the Union points out--as evidence that there retained employes were not sufficient to perform the available work--that the County contracted with a private firm to construct two salt sheds during the month of April during the layoff. As noted in Finding of Fact 18, the County's three existing salt sheds had been constructed and maintained exclusively by Highway unit employes and Namtsu had informally told Highway unit employes in late December 1986 or early January 1987 that because of the mild weather he planned to assign the building of the two salt sheds in the spring of 1987 to two crews of Highway unit employes to be led by Donald Fox and Peter Hanish. Respondent's arguments on this point note that there is a separate grievance pending on the question of whether the contracting out of salt shed construction violated the parties' collective bargaining agreement; that there is no language expressly granting the Union jurisdiction over carpenter work such as salt shed construction; that there are no carpentry-work-related job titles in the Highway collective bargaining agreement; and that the County has contracted out various other construction projects over the years, including recent project on the Highway Shop roof, without a grievance by the Union.

The decision to contract out rather than to follow Namtsu's original plans is not explained in the record. The County's claim that the terms of the agreement contract permitted it to contract out the shed construction work while Highway unit employes were on layoff is for the pending grievance arbitration proceeding to resolve. However, that claimed right does not explain why the County contracted out rather than pursuing Namtsu's original plan to use Highway employes.

Nevertheless, the Examiner concludes that the Union has not shown by the requisite clear and satisfactory preponderance of the evidence that the County was motivated in doing so by anti-union animus. As noted above, the Examiner has found the direct evidence of anti-union hostility to be remote in time from the decision to layoff and counterbalanced by other evidence inconsistent with anti-Union animus. Indeed, the very fact that as of late-December 1986 or early-January of 1987 Namtsu planned to have Highway employes do that work is somewhat inconsistent with the notion that Namtsu was intent upon intimidating or retaliating against Haskins and the Highway employes for Union activities. Furthermore, the County has affirmatively established that both its initial imposition of the layoff and its continuation of the layoff in the face of available work (e.g., County road brushing) were lawfully motivated in whole. And

finally, because of the limited extent to which the parties' pleadings, proofs and arguments addressed the salt shed subcontracting issue, the Examiner is unable to determine by the requisite clear and satisfactory preponderance of the evidence precisely when and by whom the decision to subcontract was made, let alone whether anti-union animus in whole or in part motivated that decision.

More specifically, the salt shed contracting was not referred to in the complaint, though understandably so since the complaint was filed in late February of 1987 whereas the salt shed work was performed in April of that year. The complaint was not thereafter amended to conform to the proof concerning that issue, though both parties addressed the issue to at least some extent in the proofs they offered and in their post-hearing briefs.

The proofs offered on the subject were quite limited. There was no evidence offered by either party regarding who decided to contract that work out, when that decision was made, what if any notification was given the Union of that decision, what if any conferring with the Union occurred on the subject and when, which employes besides Fox and Hanish (neither of whom had been laid off) were qualified to perform salt shed construction work, whether any of those employes were on layoff and, if so, what their seniority standing was in relation to others on lay off who were not qualified to work on salt shed construction. Indeed, neither party inquired of Namtsu, Blomberg or others why the County had decided to contract out the salt shed construction.

In sum, the parties did not litigate this aspect of the case in depth, perhaps because--as the County noted at the conclusion of the arguments in its reply brief (at p. 16)--a contract grievance was actively pending on the issue.

The limited record developed on the question does not relieve the Examiner of the responsibility of determining whether the Union has met its burden of proving that the salt shed contracting was done in whole or in part because of anti-union animus. However, from the limited record developed on the issue, the Examiner simply cannot determine why that contracting out was done. From the instant record, one can speculate: that the salt shed work may have been contracted out because Fox' reluctance to work with Creosote (tr. 106) became known to management; because assigning the work to Highway employes would have required calling back a number of unneeded individuals; because members of the County Board had been under political pressure from constituents not to have a full Highway crew employed during the mild winter (tr. 202-203); or, in whole or in part, because of anti-union animus on Namtsu's or the Highway Committee's part. However, because the limited proofs do not establish any of those motivations by the requisite clear and satisfactory preponderance of the evidence, the Union has failed to meet its statutory burden of proof. It is to be emphasized, however, especially in light of the limited extent to which the contracting out issue was tried before the Examiner, that the Examiner's decision herein does not address itself to the contract interpretation question before the grievance arbitrator in the pending grievance matter regarding the salt shed contracting.

In sum, the Union's contention that there was "plenty of work available for all employes" is undercut by the facts that the winter weather was undisputedly extremely mild; that the roads were kept clear of snow despite the layoff; and that the parties' agreement did not guarantee employes year-round work, but rather gave management the right to decide how much money is to be spent and what work is to be performed. Apart from the question of salt shed contracting out, the Examiner is persuaded that Respondent kept the 14 employes on layoff until the spring construction season not because of anti-union animus, but because the County was able to perform the necessary snow removal work without them and because it found it preferable to save some money toward making up that which had been cut from its proposed budget by the Board of Supervisors in November of 1986 rather than have the remaining available crushing, brushing and patching work performed by the laid off employes prior to May 4, 1987. As noted immediately above, the Examiner cannot determine from the limited proofs developed in this record what the County's motivations were in contracting out the salt shed construction.

For the foregoing reasons, the Examiner has concluded that the Union has failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that any aspect or portion of the instant layoff was motivated in whole or in part by hostility of Respondent's agents toward Haskins' or other Highway employes' activities on behalf of the Union. Accordingly, the Examiner

has concluded both that no Sec. 111.70(3)(a)3 discrimination has been proven and that no derivative interference violation of Sec. 111.70(3)(a)1 has been proven herein either. 7/

The Examiner has therefore dismissed the instant Complaint in its entirety.

There is, however, no basis in Commission practice or in the parties' collective bargaining relationship or in the circumstances of this case for an order requiring the Union to pay the County's fees, costs and disbursements for processing this claim. Accordingly, the Examiner has denied the County's request to that effect set forth in its answer.

Dated at Madison, Wisconsin this 19th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

7/ If and to the extent that the Union's complaint is asserting that the layoff constituted an independent interference violation of Sec. 111.70(3)(a)1 because of the tendency of the layoff in the circumstances to chill Highway employees' exercise of MERA rights, the Examiner rejects that contention on the grounds that, as noted elsewhere above, the layoff has been found herein to have been imposed in pursuit of legitimate County business objectives. See generally, Waukesha County, Dec. No. 14662-A (1/78) and Commission cases cited at Notes 12 and 13, p. 23, aff'd, -B (WERC, 3/78).