STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1756, AFSCME, AFL-CIO, Complainant, vs. WAUPACA COUNTY (HIGHWAY DEPARTMENT) Respondent.	Case 41 No. 38584 MP-1951 Decision No. 24764-B

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Local 1756, AFSCME, AFL-CIO.

Di Renzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, 231 East Wisconsin Avenue, P.O. Box 788, Neenah, Wisconsin 54956-0788, appearing on behalf of Waupaca County (Highway Department).

ORDER AFFIRMING AND REVISING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Richard B. McLaughlin having on July 1, 1988 issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein: (1) Waupaca County was found to have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats., as to certain County conduct relative to morning breaks, insurance coverage and vacation staffing and therefore ordered to take remedial action; and (2) Waupaca County was found not to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 4 or 5, Stats. as to certain County conduct involving the layoff of employes; and Local 1756, AFSCME, AFL-CIO having timely filed a petition pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., with the Wisconsin Employment Relations Commission seeking review of the portion of the Examiner's decision relating to employe layoffs; and the parties thereafter having engaged in lengthy but ultimately unsuccessful efforts to settle the matter; and the parties then having filed written argument in support of and in opposition to the petition for review, the last of which was received on July 7, 1989; and the Commission having reviewed the record, the Examiner's decision, the petition for review and the parties' written argument, makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact 1-3 are affirmed.

B. Examiner's Finding of Fact 4 is affirmed as amended by the Commission through the addition of the words underlined below.

4. . . .

> During a mediation session conducted in April of 1981, the parties agreed upon the language which appears as the second sentence of Section 14.03, as set forth in Finding of Fact 3. The language was presented by the mediator to the Union following a County caucus. The Union concluded, as a result of this mediation, that the County

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An

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1/ See footnote 1/ on page 2.

agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

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

> would effect future reductions by a layoff of the necessary number of the least senior employes and not by a reduction in the normal work week of all unit employes unless such a reduction was agreed to by the Union.
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> . . .

C. Examiner's Findings of Fact 5-19 are affirmed.

D. Examiner's Finding of Fact 20 is affirmed as amended by the Commission through the addition of the words underlined below:

> 20. As of January 16, and February 9, 1987, Bonnell, Bernhagen and the County Highway Committee had a good faith belief that the Highway Department's drop in revenues and the increase in its maintenance costs were going to significantly and adversely impact the Highway Department's ability to meet its 1987 budget, and further that meeting the Highway Department's payroll throughout the winter of 1986-87 would deprive anticipated paving and other maintenance and construction projects of needed funding. This good faith belief had a sound basis in fact, since the Highway Department did experience in December of 1986 and in January of 1987 a

significant decrease in non-County based sources of revenue, coupled with a significant increase in County funded expenditures for routine maintenance. As of January 16 and February 9, 1987, the County had not yet secured authorization for Sate special maintenance work, or for construction work involving significant federal funding. The County's inability to secure such work by that date was due to circumstances beyond the County's control.

E. Examiner's Finding of Fact 21-22 are affirmed.

F. Examiner's Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
William K. Strycker, Commissioner

I concur in part
and dissent in part.

_____
Herman Torosian, Commissioner

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

BACKGROUND

The Union's original complaint, filed with the Commission on March 26, 1987, alleged that the County violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by its conduct from the January 16, 1987, notice to the Union of a four-day work-week to the February 9, 1987, effectuation of a general layoff. The Union also alleged in the original complaint that in the period following the February 9, 1987 layoff, the County utilized supervisory and other personnel to perform the work formerly done by the laid off bargaining unit members, in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats. The County's answer to the original complaint, filed with the Commission on April 7, 1987, denied the alleged statutory violations.

On May 22, 1987, the Union filed an amended complaint which alleged in addition to the County conduct challenged by the original complaint, that the County's unilateral imposition of: a 30 day waiting period for insurance coverage, a change in vacation staffing requirements, and the limitation on the morning break also constituted violations of Secs. 111.70(3)(a)1, 4 and 5, Stats. The County filed an answer to the amended complaint dated June 5, 1987, in which the County denied the additional allegations.

At the start of the three days of hearing on the complaint, the parties stipulated that the Examiner should exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine the contractual allegations raised by the Union. In addition, the County filed a motion alleging that the Union had failed to comply with certain provisions contained in the parties' collective bargaining agreement regarding the "Settlement of Prohibited Practice Problems," and that it followed that the additional allegations of the amended complaint should not be considered properly before the Examiner for determination. At the close of the hearing, the parties reached an understanding regarding the allegations of the amended complaint, and the County's motion regarding that amendment, by which the County would "either schedule a meeting consistent with the contract or write to the Examiner and the other party and indicate that the defense, the motion has been withdrawn and that therefore the matter's (sic) submitted to the Examiner on the basis of the amended complaint as it may further be amended this afternoon . . . " The parties also stipulated that none of the several grievances relating to "an improper recall of employes based upon a revision of the seniority provisions of the contract" were before the Commission for determination. After the statement of these understandings, the Union requested that allegations regarding the performance of bargaining unit work by supervisors be considered stricken from the amended complaint. With no objection from the County, the Examiner granted the Union's request. In a letter to the Examiner received on October 26, 1987, the County stated the following:

> Waupaca County hereby withdraws its objection to your consideration of the Amended Complaint as amended by the Union at the hearing. At the conclusion of the hearing, the Union withdrew that portion of the Complaint dealing with supervisors performing bargaining unit work.
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> . . .

The Examiner's Decision

As to that portion of the Union complaint which focused on the propriety of the general layoff, the Examiner concluded that the County had not committed any prohibited practice within the meaning of Secs. 111.70(3)(a)1, 4 or 5, Stats. He reasoned that the general layoff was governed by Article 2.01 E) which granted the County the right to "layoff" employes for "lack of work or other legitimate reasons." He determined that the general layoff did not violate Article 2.01 E) because the layoff was based upon the County's good faith belief that there was a lack of funds for available work. He rejected the Union's assertion that the general layoff was motivated by a desire to punish employes for their opposition to the four-day work-week which the County had proposed.

As to the Union contention that the County violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by its conduct when the employes were recalled from the general layoff, the Examiner found that the County had violated Sec. 111.70(3)(a)5 and derivatively Sec. 111.70(3)(a)1, Stats., by taking certain action concerning morning break sites, group health insurance coverage, and vacation staffing.

POSITIONS OF THE PARTIES ON REVIEW

The Union timely filed a petition for review. The County did not file a petition for review.

The Union's Initial Brief

In its initial brief in support of its petition for review, the Union asserts that there are three basic questions presented on review.

> 1. Did the County interfere with, restrain or coerce the bargaining unit employes in their exercise of Sec. 111.70(2) rights when the County laid off all employes after the employes failed to agree to a four day work week for an indefinite period of time?

The Union contends that this question must be answered in the affirmative. It argues that although the County asserts a business reason for laying off all unrepresented employes, the County's argument depends entirely on after-the-fact calculations and explanations.

> 2. Did the County fail to bargain collectively with the Union when it presented the employes with a "take it or leave it" demand that they unconditionally accept a four day work week, and then laid all the employes off when the Union failed to agree.

The Union asserts that the answer to this question is also yes.

> 3. Did the County violate the collective bargaining agreement when it laid off all the bargaining unit employes instead of only the least senior 20% of the employes?

The Union again asserts that this question must also be answered in the affirmative.

More specifically, the Union asserts that the County had a statutory and contractual obligation to bargain with the Union over any reduction in the bargaining unit employes' work hours or work-week. The Union argues that the County did not meet this obligation to bargain in good faith and thus violated Sec. 111.70(3)(a)4, Stats. The Union alleges that it is clear from the record that the County had determined to implement a four-day work-week prior to any discussions with the Union. When the County belatedly offered to discuss the matter with the Union, the Union argues that the County made no effort to bargain but instead limited itself to saying "no" to whatever the Union proposed and threatened a general layoff if the Union did not accept the decision the County had already made.

The Union further argues that there was no lack of work or other legitimate reason to justify the general layoff which the County imposed. The Union contends that work was available for the employes despite the relatively mild winter. The Union therefore alleges that the general layoff imposed by the County was not a consequence of the County's financial position but rather a Union result of the employes' assertion of what they believed to be their rights under the collective bargaining agreement to bargain over a four-day work-week. The therefore asserts that the employes were punished collectively for having acted in concert to assert their rights and that the County thereby violated Sec. 111.70(3)(a)1, Stats.

The Union alleges that the general layoff also violated the requirement in Article 14.03 of the collective bargaining agreement that any layoff be limited to the "requisite number of employes." The Union contends that the language of Article 14.03 and the related bargaining history clearly establish that the County was limited to laying off the least senior 20% of the bargaining unit when the Union would not agree to a four-day work-week. Thus, the Union asserts that the County's action in this regard also violated Sec. 111.70(3)(a)5, Stats.

Given the County's unlawful actions, the Union asks that the Examiner's decision be reversed as to the issues surrounding the general layoff and that the employes be made whole for any and all losses they suffered because of the County's unlawful actions.

The County's Responsive Brief

The County asserts that the Examiner correctly concluded that this case does not involve a reduction of hours or a reduced work-week but rather a general layoff. As it believes that it implemented the general layoff in a manner consistent with the parties' collective bargaining agreement, the County urges the Commission to affirm the Examiner.

The County contends that Article 14.03 of the contract does not modify, limit or in any way change the County's contractual right to lay off under Article 2.01 E) of the parties' agreement. The County further asserts that Article 14.03 leaves the County free to determine what the "requisite" number of employes for layoff will be in the event that the County and the Union cannot reach agreement on a reduced work-week. Lastly, the County argues that it honored its obligation to meet in good faith with the Union to discuss solutions to the County's fiscal problems and did not punish or retaliate against the bargaining unit employes when an agreement could not be reached.

The County concluded its brief with the following summary:

> This Prohibited Practice proceeding is a layoff and not a work week or workday reduction case. The Employer never implemented a work reduction and, therefore, did not violate any bargaining duty associated with the implementation of a reduced work week.
>
> The County elected to lay off employees in the face of emergency financial conditions. The decision to lay off all employees, reserving the workforce for winter maintenance (ice and snow control) and not using summer revenues to make work for 80% or some other percentage of bargaining unit employees during the months of February and March of 1987 constituted a completely legitimate exercise of management discretion.
>
> This case also involves a sharp difference in the perception of the management of the County Highway Department. Employees were angry and resentful because the County choose (sic) to operate in a manner it believed was most efficient by utilizing full crews or no crews and by postponing work in order to conserve revenues and reduce expenditures at a time when revenues were drastically reduced.
>
> The evidence is overwhelming that the layoff was based upon financial considerations. The Highway Committee began reviewing financial data and the lack of work/reduced revenue problem in early January of 1987. The layoff was an appropriate response to this crisis.
>
> The County did not violate any bargaining obligation with respect to the contractually imposed section 14.03 meeting. Section 14.03 does not impose a bargaining duty upon the County. Even assuming the County was required to bargain, it did bargain in good faith. The County considered Union proposals, caucused concerning proposals, and listened. Agreement was impossible because of the call pay issue.
>
> No one panicked. The County acted responsibly. No one was retaliated against or punished. There is no basis to find that the County violated the contract, violated the statute, or engaged in any unlawful conduct. The findings of the Commission Examiner regarding the general layoff by the County on February 9, 1987 should be upheld.

The Union's Reply Brief

The Union contends that the County has still failed to explain why it implemented a general layoff of all employes without there having been any intervening change in the circumstances which prompted the County to consider and demand Union agreement to a four-day work-week. The Union asserts that if the County from the beginning had proposed or demanded a four-day work-week or, as an alternative, a general layoff for a term that would have provided a comparable savings in labor costs, the County's argument in the Examiner's decision would have more merit. However, the Union asserts that that is not what happened here. It contends that the "labor cost savings" that resulted from the indefinite layoff of all bargaining unit employes was grossly disproportionate to that which the County's representatives had said was needed. The Union concludes its brief with the following summary:

> This case is not a simple "layoff case" where the only question is whether there was some financial justification for the "layoff". The County's own representatives defined what this case is all about--a reduction in the employees' work hours or work week, when they decided upon, attempted to unilaterally implement and then demanded that the bargaining unit employees accept a a (sic) four-day work week. It was the County's representatives who linked the indefinite general

> layoff to the employees' insistence that their collective bargaining rights be respected. When the County implemented the indefinite layoff at issue here, for the stated reason that the employees had failed to accept the four-day work week that had been demanded and, instead, had insisted that the County respect their contractual rights, Waupaca County, at the very least, breached Section 14.03 of the parties' collective bargaining agreement and interfered with the rights guaranteed to the employees at Sec. 111.70(2), Wis. Stat. The Examiner erred when he reasoned otherwise.

DISCUSSION

We affirm the well-reasoned decision of the Examiner. In this decision Waupaca County was found to have committed prohibited practices in certain instances involving morning breaks, insurance coverage and vacation staffing, but was absolved of the charge that it had committed other prohibited practices with respect to the general layoff of Highway Department employes. We believe this result has abundant support in the record.

As the Examiner found, 2/ Waupaca County experienced a mild winter in 1986-87. The accumulation of snow was the smallest for at least the five preceding winters. As a result, the County Highway Department snow removal income had decreased alarmingly, while its county road maintenance expenses had risen.

The impending fiscal crisis demanded a solution. On January 2, 1987, the Highway Committee began to discuss the possibility of a four-day work-week. 3/ By January 13, that possibility had evolved into an anticipated action of which the Union was advised. 4/ On January 16, the County Highway Committee voted to institute a four-day work-week, effective January 23, 1987. On the same date, following committee action, the Highway Commissioner posted a written "notice to all employes" announcing that a four-day work-week would commence with the work-week beginning Monday, January 19, 1987. The notice attributed the necessity for reduced work hours to the mild winter the county was experiencing, promised to resume the normal work-week ". . .if and when the work load increases or conditions require. . .," suggested employes might want to use their vacation time to cushion the adverse pay impact a reduced work-week would have, and requested employes to be readily available to work in the event of adverse weather.

The following Monday, January 19, the County provided the Union representative with a letter dated January 19, 1987, over the signature of the County Highway Commissioner. Such letter recounted the County's earlier (January 13) notification to the Union of an anticipated reduced work-week, announced the first day of the proposed layoff was tentatively scheduled for the following Friday (January 23), noted that Article 14.03 of the labor agreement mandated that the parties meet ". . .to work out a mutually satisfactory solution. . ." in the event it is necessary to reduce hours, and asked the Union if it desired to meet. 5/

The parties did meet the following Wednesday, January 21. In response to the County's announcement of its intention to implement a four-day work-week for an indefinite period of time, the Union proposed that the reduced work-week terminate on a date certain, and that any work done on a Friday during any reduced work-week be subject to a minimum of two hours "call time". The Union's final position proposed a termination date for the reduced work-week in mid-March and one hour of call time. While the County's bargaining team caucused regarding the various Union proposals, it agreed to none, and at least twice informed the Union that if the County's position was unacceptable to the Union, the County would institute a general layoff of bargaining unit employes. 6/

Notwithstanding the Highway Committee's action of the previous week designating January 23 as the first day employes were to be off without pay, no layoffs occurred. The Union met on January 24, rejected the County's four-day work-week proposal, and advised the County of same. 7/

2/ Examiner's Findings of Fact 6 and 7, at pp. 4-6.

3/ Examiner's Finding of Fact 8, at pp. 6, 7.

4/ Supra.

5/ Supra.

6/ Examiner's Finding of Fact 9, at p. 7.

7/ Examiner's Finding of Fact 10, at pp. 7, 8.

On February 5, 1987, the County Highway Committee voted a "general layoff of all represented people (in the Highway Department bargaining unit), to begin effective February 9, 1987 . . ." which would continue for as long as needed. Such layoff was implemented on the date specified by the Committee and continued through April 3, 1987, although employes were called in from time to time, as needed, during the general layoff period.

On this state of this record, the Union argues that the County: 1) refused to bargain collectively with the Union contrary to both the provisions of Sec. 111.70(3)(a)4, Stats., and Article 14.03 of the collective bargaining agreement; 2) interfered with bargaining unit employes in the exercise of their legal rights contrary to the provisions of Sec. 111.70(3)(a)1; 3) violated the parties' collective bargaining agreement contrary to the provisions of Sec. 111.70(3)(a)5, Stats.

Duty to Bargain - Statutory

Section 111.70(3)(a)4, Stats., and Article 14.03 of the parties' collective bargaining agreement form the dual prongs of the Union's assertion that the County violated its duty to bargain in this instance. We turn first to consider the County's statutory collective bargaining responsibilities.

Generally, 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 collective bargaining unit. Citing City of Brookfield, 8/, and Town of Salem, 9/ as authority that both a change in scheduled work hours and a reduction of hours constitute mandatory subjects of bargaining, the Union argues that these case interpretations of the statutory duty to bargain collectively imposed this duty on the County with respect to its proposed reduction of hours.

We disagree with this contention. As correctly noted by the Examiner, "(t)he duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters on which the Union has otherwise clearly and unmistakably waived its right to bargain." 10/

Indisputably, in the instant matter, the County's conduct complained of by the Union took place during the term of the parties' 1986-87 collective bargaining agreement. No contention is made that that agreement was not a product of good faith bargaining. It is also undisputed that "layoffs" are covered in Articles II and VIII of that agreement. A reduction "of hours per day and/or per week" is covered, as well, in Article XIV of said agreement. Based on these contractual provisions, the Examiner determined that ". . . the parties' 1986-87 agreement clearly and unmistakably covers the matters at issue . . ." 11/ Thus, the Examiner concluded, "the Union has waived its right to bargain, except insofar as such a right is granted by the parties' agreement." 12/

We see no reasonable room for disagreement on this point. Inasmuch as both layoffs and the reduction of hours are covered in the parties' collective bargaining agreement, the County had no statutory obligation to bargain with the Union over those matters while that agreement was in effect.

We do not believe the record fairly sustains these allegations, and thus affirm the analysis and result reached by the Examiner.

Duty to Bargain - Contractual

The contention remains that the County was under a contractual duty to negotiate the reduction in work schedule. While this is essentially a question of whether the County violated the labor agreement contrary to the provisions of Sec. 111.70(3)(a)5, Stats., for convenience of continuity we deal with it here.

According to the Union's theory, the provisions of Article 14.03 require the County to bargain collectively with the Union any reduction of work schedule hours. Article 14.03 of the parties' collective bargaining agreement provides as follows:

Should there be any necessity to reduce the number of hours

8/ Decision No. 17947 (WERC, 7/80).

9/ Decision No. 18812-A (WERC, 2/82).

10/ Examiner's discussion, 19, citing City of Richland Center, Dec. No. 22912-B (WERC, 8/86), at 4.

11/ Supra, 19.

12/ Supra.

> of work per day and/or per week, the Highway Commission shall meet with the bargaining committee of the Union to work out a mutually satisfactory solution to the matter. In the event a satisfactory solution cannot be worked out then the Employer shall layoff the requisite number of employees consistent with the collective bargaining agreement.

Contrary to the Union position, the County argues that the aforesaid language does not require what would generally be described as bargaining. While we acknowledge an arguable basis for the County's contention, we find it unnecessary to walk a semantic tight rope to dispose of the issue on that basis.

Even if County actions can be characterized as less than adroit, the County's failure to budge from its original alternatives (reduced work schedule or general layoff) is not a sufficient basis to determine it failed to bargain collectively. "The duty to bargain . . . does not compel either party to agree to a proposal or require the making of any concession." 13/ In the case herein, the parties met; each side made a proposal (the County in the alternative, the Union, sequentially). Each party held strong views: the Union was unwilling to agree to a four-day work-week schedule without a firm ending date; the County was unwilling to agree to a firm ending date because it did not yet know the extent of its financial dilemma. Thus, neither ending date proposed by the Union was satisfactory to the County. Moreover, the County perceived the Union's additional position regarding call-in pay as increasing the cost of responding to each snow emergency by $600 to $700. This was also unacceptable to the County. Given the foregoing, although the meeting lasted over two hours during which several caucuses occurred, it is not surprising that agreement was not reached.

Thus, in our view even if the language of Article 14.03 of the parties' collective bargaining agreement can be reasonably interpreted as requiring collective bargaining, we find an insufficient record basis to conclude that the County failed to comply with such duty. Accordingly, as pertains to the contractual collective bargaining issue, we are unable to find that the County violated the collective bargaining agreement contrary to the provisions of Sec. 111.70(3)(a)5, Stats.

Interference with Employees/Violation of Collective Bargaining Agreement

The Union alleged that the County interfered with the bargaining unit employes' exercise of (Sec. 111.70(2), Stats.) rights by changing certain conditions of their employment after recalling them to work. The Examiner disposed of this issue in favor of the Union. The County chose not to appeal. With this background, we content ourselves with observing that we find the record amply supports the Examiner's finding against the County.

However, the Union further alleges that the County interfered with the bargaining unit employes' exercise of (Sec. 111.70(2), Stats.) rights by implementing a general layoff of indefinite duration after the parties reached an impasse regarding the terms and conditions of the proposed four-day work-week. As the Examiner noted, this allegation turns on interpreting the 1986-87 collective bargaining agreement of the parties and is thus inextricably entwined with another contract compliance issue arising under Sec. 111.70(3)(a)5, Stats. 14/

The Examiner found this entanglement of issues to have resulted from the language of Article 2.01 E) of the collective bargaining agreement of the parties. 15/ We agree, but also believe that Articles 2.01 F) and 2.01 I) of the parties' collective bargaining agreement contribute. 16/ The Examiner

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13/ Section 111.70(1)(a), Stats., which defines, generally, "collective bargaining."

14/ "The Union's Sec. 111.70(3)(a)1, Stats., allegations also ultimately turn on the parties' 1986-87 labor agreement, and thus on Sec. 111.70(3)(a)5, Stats. A County violation of Sec. 111.70(3)(a)5, Stats. would also constitute a derivative violation of Sec. 111.70(3)(a)1, Stats." Examiner's opinion, p. 20.

15/ Article 2.01 E) of the parties' labor agreement grants County management the right "to layoff employes because of lack of work or other legitimate reasons."

16/ Article 2.01 F) of the parties' collective bargaining agreement grants the Commissioner the right "to maintain the efficiency of the highway

further concluded that if the threat of a general layoff was retribution for exercising contractual rights, then no legitimate reason for the layoff existed. 17/ But he also reasoned that if the layoff was implemented due to financial difficulties, the layoff was contractually permitted. 18/ We agree with these observations, as well.

The County's contractual basis for layoff enabled it "to layoff employees because of lack of work or other legitimate reasons." 19/ While the Union was able to make a showing that some work was available during the duration of the general layoff, we are not persuaded that County lacked "other legitimate reasons" (which, of course, is the alternative contractual condition precedent for a layoff).

Indeed, we believe the County has convincingly demonstrated "other legitimate reasons." Those reasons are contained in the County's funding shortage due to the mild winter it was experiencing. Clearly, some work was available during the duration of the general layoff. Such work, however, was not of an income generating type for the County. Had the County continued to perform it, not only would no income have been generated for the County, but the funding shortage it faced would have been exacerbated.

We find significant that the County identified no fixed funding shortage in January, 1987. It is not disputed that at that time the County was unable to ascertain the specific dollar deficit it needed to make up. Viewed in this light, it seems evident that the County's failure to agree to the Union proposals as to when the proposed four-day work-week schedule should terminate was not intended to be punitive to the bargaining unit; it simply lacked sufficient specific knowledge to have had an intelligent basis for agreement on this point.

Moreover, like the Examiner, we are impressed by the fact that during the general layoff period the County Highway Commissioner tried to attract income generating work. He was ultimately successful in obtaining additional State funded maintenance work which was approved by April 3, 1987. That, of course, is the date unit employes were recalled from the general layoff.

We find the Waupaca County Highway Commissioner's testimony supportive of the County's good faith in instituting a general layoff in yet another respect. (From the record, Commissioner Bonnell appears to us to be reasonably well-qualified and experienced. He has been with the Waupaca County Highway Department for approximately thirty years, working his way from a relatively low position to the top position in the Department.)

Commissioner Bonnell's testimony that he preferred a complete layoff because he believed it to be the most efficient and economical way of proceeding is clear, concise and rational. Cross-examination produced no challenges, contradictions, modifications or credibility issues. The Union presented no witness in rebuttal.

Significantly, Commissioner Bonnell's view is totally consistent with the County's original proposal to reduce the five-day work-week to four-days. During the contemplated four-day work-week the entire bargaining unit would be employed; one day per week, however, none of the unit would be employed. Thus, under either a reduced work-week concept or a general layoff concept, the entire work force would be either employed or not employed during the same time frames. 20/ The proposed indefinite (long-term) four-day work-week would have ultimately resulted in the same savings as a total layoff would have produced over a lesser period. But, with the Union's rejection of the proposed reduced work-week without a firm ending date, the County's only remaining alternative,

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department operation."

Article 2.01 I) of the parties' collective bargaining agreement grants the Highway Commissioner the right "to determine the kinds and amounts of services to be performed as pertains to the Highway Department operations and the number and kinds of classifications to perform such services."

17/ Examiner's discussion, 20.

18/ Supra.

19/ Article 2.01 E) Collective Bargaining Agreement, Waupaca County and AFSCME, Local 1756.

20/ Although we have no quarrel with this conclusion, whether it is right or wrong is not for us to judge. It is a conclusion expressly left within the discretion of the Highway Department management. See Article 2.01 F) granting the Commissioner the right "to maintain the efficiency of the Highway Department operation" and Article 2.01 I) giving the Commissioner the right "to determine the kinds and amounts of services to be performed as pertains to the Highway Department operations and the numbers and kinds of classifications to perform such services."

consistent with its objectives of efficiency and economy to avert the impending fiscal disaster, was a total layoff.

Since we concur with the Examiner's conclusion that Article 14.03 is not controlling in this matter, extensive commentary about its application is unnecessary. Suffice to say we are not persuaded that the term "requisite" is directly tied to the work reduction sentence preceding it. We read "requisite" according to its plain, ordinary meaning: "required; absolutely needed; essential." 21/ These terms have substantially different meanings than, say, "equivalent" or "comparable" which the parties could have easily substituted had either word more accurately reflected the interpretation now urged by the Union.

In any event, this language represented County responsiveness to a Union proposal which eliminated the County's right to unilaterally impose a work-week reduction. The Union now argues such language also linked the permissible number of layoffs directly to the reduced work schedule proposed by the County. In our view, the County's counter-proposal, ultimately agreed to by the parties, provided the reduced work-week protection the Union was seeking, but did not tie resultant layoffs directly to the reduced work-week level or serve to diminish Article 2.01 E) rights. 22/

Our dissenting colleague argues that under this interpretation the Union receives nothing from the newly bargained language of Article 14.03. His argument is based on his assumption that "the prohibition of a reduced work-week (here a four-day week) will almost certainly result in a general layoff of all employes." We disagree. It is clear the Union was successful in eliminating the County's right to implement unilaterally a reduced work-week. Moreover, we do not believe that failed reduced work-week discussions will inevitably lead to a general layoff. What the County did in the instant case was due to the extraordinary fiscal disaster facing the County. In many situations, however, it seems to us a general layoff would be difficult to justify under the "legitimate reasons" safeguard contained in Article 2.01 E). In summary, while our colleague suggests our interpretation leaves the Union with "nothing at all," in actuality it is his interpretation which would encourage the County to avoid Article 14.03 completely, thus truly leaving the Union with "nothing at all."

We note, again, that in January 1987, the County was not able to specify the extent of its funding shortage. Had it been able to do so, not only would it have been in a position to agree to an appropriate ending date for the proposed four-day work-week (as previously noted), but, absent Union agreement to the four-day work-week, the County could have identified the specific duration of the general layoff needed to make up the fiscal shortfall. But that circumstance did not exist: the need was not to reduce the work force expenditure by 20% (as argued by our colleague) <u>because the County's specific need was unknown</u>. 23/

21/ <u>The American Heritage Dictionary of the English Language</u>, American Heritage Publishing Company, New York, 1969.

22/ The Examiner's Finding of Fact 4 states: "The Union concluded, as a result of the mediation, that the County would effect future reductions by a lay off of the necessary number of the least senior employes and not by a reduction in the normal work week of all unit employees." This viewpoint was reflected in a Union proposal submitted through the mediator ". . . that we (Union) needed language pertaining to the situation with no reduction in hours of work day or work week, in the event of a reduction it shall be by layoff." TR. 311.

The County responded with a proposal through the mediator which consisted of what is now the second sentence of Article 14.03 which states:

> In the event a satisfactory solution can not be worked out then the Employer shall layoff the requisite number of employees <u>consistent with the collective bargaining agreement</u> (Emphasis added). TR. 311.

Since the collective bargaining agreement also includes the provisions for layoff contained in Article 2.01 E), a plausible case can be made that the County has not limited its ability to layoff as our dissenting colleague suggests (except for the limitations contained within Article 2.01 E)).
There is, moreover, nothing in the record which suggests that the County's counter-proposal was intended to limit its layoff rights beyond Article 2.01 E) restrictions. On this basis we find the Union's account of the bargaining history as factually correct, but lending itself to differing contractual interpretations, and thus inconclusive.

23/ It is also fairly evident that a 20% reduction of the workforce would rarely if ever produce the same amount of savings as would be created by a 20% reduction of the work-week over the same period, due to significant variations in County obligations such as unemployment compensation, over-

We acknowledge the argument offered by our dissenting colleague that once the County begins down the contractual pathway offered by Article 14.03 of the collective bargaining agreement it is then committed either to negotiate a reduced work-week or layoff the number of employes which would equate, on a percentage basis, to the reduced work-week proposed. However, we are unable to discover any contract language or evidence of record which persuasively supports this view. Thus, unlike our colleague, we do not find a nexus between "requisite number" and the first sentence of the Article 14.03 language, at least in the sense that constitutes layoff limitations on the County in addition to that provided under Article 2.01 E) of the parties' labor agreement. 24/ Put another way, we perceive no legal impediment which prevents the County from moving from an initial intent to implement a reduced work-week to the alternate position of instituting a general layoff.

Based on the aforesaid, we are not persuaded that the County's implementation of a general layoff was motivated by a desire to punish Union members for rejecting the County's proposed indefinite four-day work-week. On the contrary, under the facts of this case we believe a general layoff instituted by the County was an option specifically permitted the County by the above-referenced terms of the labor agreement. This was an option we perceive as being available to the County even after it explored a four-day work-week with the Union, and, thus, was accomplished by the County in a manner consistent with applicable contractual provisions.

Dated at Madison, Wisconsin this 4th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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William K. Strycker, Commissioner

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time, and possible call-in pay. This is another indicator that at the time final agreement to the present Article 14.03 language was reached, the County and the Union never reached a "meeting of the minds" on this point.

24/ We note that the Union representative explicitly acknowledged that the "requisite number" set forth in the second sentence of Article 14.03 is determined by the County. TR. pp.382-383. While some what ambiguous such testimony suggests Union recognition that the County has substantially greater latitude than a mere, formulistic conversion of a reduced work-week proposal to an identical percentage of employes to be laid off. In any event, it does not appear to support the "nexus argument" of our dissenting colleague.

DISSENT

While I affirm the Examiner's disposition of the refusal to bargain allegation, I dissent from the majority's determination that the County did not violate Secs. 111.70(3)(a)1 or 5, Stats.

The Union argues that the County violated Article 14.03 when it laid off more than the "requisite number of employees." The majority summarily concluded that Article 14.03 is not controlling because the County implemented a general and not a partial layoff of employes. Thus, since the County laid off all the employes in the unit, the determinative issue to the majority is whether the County had "legitimate reasons" for a general layoff within the meaning of Article 2.01 E), irrespective of Article 14.03.

I disagree with the majority's analysis and application of the contractual language. The majority fails to recognize the interplay between Articles 2.01 E) and 14.03. Article 14.03 reads as follows:

> Should there be any necessity to reduce the number of hours of work per day and/or per week, the Highway Committee shall meet with the Bargaining Committee of the Union to work out a mutually satisfactory solution to the matter. In the event a satisfactory solution cannot be worked out, then the Employer shall lay off the requisite number of employees consistent with the collective bargaining agreement.

Here the County found a "necessity to reduce the number of hours of work . . . per week . . ." On January 15, it made the decision to implement a four-day work-week. It decided its "need" could be met by the savings generated by the reduced work-week of indefinite duration. The County posted a notice on the same day advising employes that the four-day week would become effective January 19. As required by Article 14.03, the County met with the Union on January 21, 1987. Unable to reach a "solution," the County was obligated, under Article 14.03, to "lay off the requisite number of employes consistent with the collective bargaining agreement." In my opinion, when read in conjunction with Article II, this language most reasonably means that the County must lay off only the necessary (requisite) number of employes to realize the savings anticipated by its decision to implement a reduced four-day work-week. The nexus between the first and second sentence is clear: instead of affecting the entire work force by a reduced four-day work-week, affect only a portion of the work force by laying off only the requisite number of employes needed to generate the weekly savings of a reduced four-day work-week that the County determined it needed. The layoffs have to be "consistent with the collective bargaining agreement," i.e., layoff by seniority, etc. Not only is this the most reasonable interpretation of Article 14.03 and one that harmonizes Article II and Article 14.03 the best, it is also consistent with bargaining history. While the majority argues that the County did not know the length of time it needed to accomplish its savings, this lack of knowledge by the County is not important to the case. If it were important, the County would not have been able to make a decision to implement a four-day work-week as it did in January 1987, and insist that the Union agree to same, when it did not known the duration of its proposed work-week reduction. Indeed, it is clear that despite the uncertainty, the County would simply have proceeded with the four-day work-week had the Union not exercised its Article 14.03 rights.

The bargaining history relating to Article 14.03 is as follows. There was a previous partial layoff in the form of a four-day work-week during the winter of 1980-81. Shortly thereafter, the Union addressed the situation during the 1981 negotiations. I find it important to note that in those negotiations the parties consciously addressed the very situation that is now in issue. It is clear the Union's primary purpose was two fold: (1) to prevent unilateral implementation of a reduced work day or week; and (2) to have the County implement a partial layoff of employes instead. The Union made a philosophical choice that it would rather have as few employes affected (disrupted) as possible and therefore opted for a partial layoff of a "requisite number of employees" rather than a reduced work-week. To prevent the County from implementing a reduced work day or week without the latter alternative really gives the Union nothing at all. 25/ There is no dispute from the County that this was indeed the Union's objective. The question then becomes did the Union achieve its obvious and stated objective. As I discussed and concluded above, I think the Union did based on the contract language alone. I think it becomes even clearer when bargaining history is considered.

The only testimony with respect to bargaining history was the testimony of the Union negotiator, Malcolm Einerson. The majority correctly finds that the Union proposed through the mediator the following language, "no reduction

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25/ It is not uncommon for a Union to make a language proposal and end up with no language at all. But here the majority is in essence saying the Union negotiated and agreed to language that gives them nothing at all. To me this is not a reasonable interpretation of the language.

in hours of work day or work week - In the event of a reduction, it shall be by layoff," and that the County responded with what is now the second sentence of Article 14.03. The only other testimony relative to bargaining table conduct is Einerson's testimony that the Union advised the County during negotiations and mediation that its Article 14.03 proposal meant that instead of partially laying off all employes by a reduced work-week, the work-week should stay the same and there should be a layoff of the least senior employes. The Union stated that instead of going to a four-day work-week, the County should lay off 20% of the employes. There is no dispute what the Union was seeking through its Article 14.03 proposal, and there is no denial by the County that the Union conveyed its intent. It is with this background that Article 14.03 came into existence.

In summary, when reading Articles II and 14.03 together, I conclude that once the County decides to implement a reduced four-day week in order to realize savings, it must negotiate such an agreement with the Union or, if agreement cannot be reached, lay off only the requisite number of employes that would equate a four-day week. In other words, once the County chooses to proceed under its Article 14.03 option, then it's a matter of determining the type of partial layoff that will be employed, i.e., a four-day week or an approximate layoff of 20% of the employes. To interpret the agreement otherwise would turn Article 14.03 into worthless language under which the Union must either go along with the County's decision to implement a four-day week or else face a layoff of the entire work force.

The majority reasons that the parties' use of the "requisite" does not support the Union's interpretation of Article 14.03 and that the word "equivalent" or "comparable" would have been a better choice to convey the intent claimed by the Union. But there is nothing wrong with the use of the word requisite. As the majority points out requisite means "required." When the Union will not agree to reduce the existing work week, (here a 40 hour week), the County must then lay off, consistent with the agreement, only the required number of employes to accomplish the equivalent of same. The use of the word "requisite" doesn't give the County more latitude as the majority argues, (see footnote no. 24), but rather restricts the County to the "required number of employees" needed in making a conversion from the reduced work-week it seeks to a full work-week with less employes. The flaw in the majority's analysis is that they fail to recognize the nexus between the first and second sentences of Article 14.03. Once it is recognized that the second sentence was specifically negotiated with the exact facts of this case in mind, i.e., the County's decision to reduce the work-week, the nexus and the fact that Article 14.03 limits the County's layoff options become clear.

The majority cites Commissioner Bonnell's testimony that he preferred a full layoff to a partial layoff because he believed having a full complement of employes available when needed was the most efficient way to run the department. 26/ The majority notes that "Cross-examiner produced no challenges, contradictions, modifications or credibility issues. The Union presented no witness in rebuttal." This is true, but there was no need for rebuttal because Bonnell's operational concerns are no relevant to the issue. His testimony may go to the County's good faith in making its decision, but it doesn't establish that the County had a right under Article 14.03 to revert to Article II or it didn't. The fact that Bonnell operationally prefers a full complement of employes cannot change the meaning and requirements of Article 14.03. The majority's reliance on Bonnell's operational concern might have some significance had Bonnell testified that his operational concern had been conveyed to the Union during bargaining and was therefore part of the bargaining history of the development of Article 14.03. But it wasn't. The fact is that under the facts of this case the County was contractually obligated to lay off 20% of the work force.

The majority interprets Article 14.03 to allow the County, even after it has decided to reduce the number of hours per week by implementing a reduced four-day work-week, to in essence determine "requisite" to mean whatever it determines it to mean, and further that "consistent with the collective bargaining agreement" allows the County to lay off all the employes pursuant to Article II of the agreement. In support of their position, they note that ". . . the Union representative explicitly acknowledged that the 'requisite number' set forth in the second sentence of Article 14.03 is determined by the County." (see footnote no. 24) The Union Representative referred to is Cindy Fenton who succeeded Malcolm Einerson the Union Representative who negotiated the disputed language. The meaning of Fenton's testimony referred above to by the majority becomes clearer when read with the question and answer that preceded said testimony. She was asked "Okay. Does the contract limit the number of employees that the county may layoff at a particular time?" She answered "The language says 'the requisite number.'" Thus, her testimony to me

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26/ The majority relies heavily on Bonnell's testimony that operationally he preferred a shorter week with all employes on the job than a full week with fewer employes. Interestingly, there is no evidence that this concern was ever conveyed to the Union when they met on January 21, 1987. Instead, they were simply told that if they didn't agree to the four-day work-week, they would all be laid off.

most reasonably means that while the County determines the number of employes to lay off, it is restricted by the "requisite number" requirement of the second sentence of Article 14.03 which is in turn tied to the first sentence of Article 14.03 relating to work-week reduction. Further, Fenton's testimony that the requisite number is determined by the County was in the context of labor relations, where the Employer acts and the Union reacts. This is also true when the Employer makes a decision with respect to "lack of work or other legitimate reasons" under Article II. 27/ Would the majority conclude that because the County in the first instance determines if there is "lack of work or other legitimate reasons" for a layoff that the Union cannot dispute the County's decision? Of course not. The County's determination of "requisite" is no different. Fenton's testimony is consistent with Einerson's testimony on the same point. He testified ". . . the requisite number of employees would be based upon, for example the 20 percent as I referenced earlier." (Tr. p. 329) When reviewing Einerson's testimony in its entirety it is clear that he is interpreting Article 14.03 to mean that the County, in laying off the "requisite number," has to follow the contract which equates "requisite number" with, in this case, a four (4) day work-week; i.e., 20%. Einerson testified that the 20% concept was conveyed in mediation and earlier (in face-to-face negotiations) to the County. 28/

In support of its conclusion, the majority also reasons that in agreeing to the new Article 14.03 language, the Union secured work-week protection and the County, notwithstanding same, retained its 2.01 E) rights. (see page 12 and footnote no. 22) This, in my opinion, is not a plausible interpretation of Article 14.03 <u>especially</u> in light of bargaining history. What work-week protection did the Union get under the majority's interpretation if the alternative to such protection is a layoff of <u>all</u> employes. What has the Union gained, since, under the majority's interpretation, the trade-off for the prohibition of a reduced work-week (here a four-day week) will almost certainly result in a general layoff of all employes. The Union, in practice, is in the same predicament as before, i.e., the County can implement a four-day work-week. Thus, the majority's interpretation really leaves the parties where they were before they negotiated the new Article 14.03 language. Neither the contract language nor the parties' bargaining history supports such a conclusion. In trying to give real meaning to its interpretation of Article 14.03 the majority reasons that ". . . we do not believe that failed reduced work-week discussions will inevitably lead to a general layoff. What the County did in the instant case was due to the extraordinary fiscal disaster facing the County. In many situations, however, it seems to us a general layoff would be difficult to justify under the 'legitimate reasons' safe guard contained in Article 2.01 E)." But what the majority fails to realize is that the value of the new language negotiated in Article 14.03 must be measured against what the majority describes as "extraordinary fiscal disaster" situation present in this case. It was negotiated in the context of a specific situation, i.e., the 1980-81 four-day reduced work-week because that was the situation they were concerned with; not situations of a lesser nature. Indeed the parties' history with respect to layoff or reduction of hours and/or work-week only includes a layoff in 1957-58, the 1980-81 four-day work-week reduction that gave rise to the instant disputed language, and the four-day work-week reduction implemented in this case. Waupaca County's entire history, as best as could be recalled, includes only situations of an extraordinary and serious nature like the layoff in this case. The situation the majority refers to in support of its position (that the language in question gives the Union protection) has never occurred as far as the parties could recall.

27/ In reference to Article 2.01 E) Einerson testified on cross-examination as follows:

> Q.So the reasonableness of the employees' action could be place in dispute; is that what you're saying?
> A. Yes.
> (Tr. p. 326)

28/ The majority argues that 20% reduction of the work force would rarely produce the same amount of savings as 20% reduction of the work-week due to variations in County obligations such as unemployment compensation, overtime and possible call-in pay. This, however, fails to recognize that in addition to wages there may also be savings in equipment, fringes and operating expenses by having fewer employes working. Also, while the <u>exact</u> conversion point raised by the majority is one they find <u>significant</u>, it is a point that the County apparently did not consider troublesome since
continued

28/ continued

it was never raised by the County in negotiations or in its brief in support of its position. Further, since the County clearly understood the Union's 20% proposal, the exact conversion issue raised by the majority can hardly be said to be an indicator that the parties never reached a "meeting of the minds" on this point as claimed by the majority.

I also conclude that the County did not meet its obligation under Article 14.03 to seek a "mutually satisfactory solution" with the Union. On January 13, 1987, the County issued a letter to the union representative advising her that the County ". . . is anticipating a reduction in the number of days of work per week, to four (4) eight (8) hour days per week." The minutes of the January 16, 1987, Highway Committee meeting and the January 16, 1987, NOTICE TO ALL EMPLOYEES reflect that just three days later, and without having met with the Union yet, the County had already begun to implement a four-day work-week. Further, when the County formally met with the Union its position from the outset was that the Union either accept the four-day week or all the employes would be laid off. Such conduct is not consistent with the mutual search for solutions contemplated by Article 14.03. As such, it constitutes an additional violation of Sec. 111.70(3)(a)5, Stats., and a derivative violation of Sec. 111.70(3)(a)1.

I am not convinced, as argued by the Union, that the County's action was motivated by a desire to punish the employes for concertedly failing to agree to the four-day week nor that the action had a reasonable tendency to interfere with employe Sec. 111.70(2) rights, thereby violating Sec. 111.70(3)(a)1. Instead, I am persuaded that the County decided to implement a general layoff because it simply preferred that to a 20% layoff of employes as proposed by the Union. While such conduct constitutes a Sec. 111.70(3)(a)5 breach of contract violation as discussed above, it does not constitute conduct which tends to independently interfere with employe rights in violation of Sec. 111.70(3)(a)1.

Dated at Madison, Wisconsin this 4th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner