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-C

Appearances:

Mr. Bruce Ehlke, Attorney at Law, P.O. Box 2155, Madison, Wisconsin 53701, on behalf of Local 1756, AFSCME, AFL-CIO.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. James R. Macy, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, on behalf of Waupaca County.

On March 26, 1987, Local 1756, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that Waupaca County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats., by conduct commencing with a January 6, 1987 notice to Complainant of a four-day work week and ending with a February 9, 1987 general layoff. Complainant subsequently filed an amended complaint raising other allegations.

On July 1, 1988, Commission Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order which dismissed the layoff complaint allegations specifically referenced above based upon the Examiner's determination that no violation of Secs. 111.70(3)(a)1, 4 or 5, Stats., had occurred.

Complainant then filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's dismissal of the layoff complaint allegations. On January 4, 1991, the Wisconsin Employment Relations Commission issued an Order signed by Chairman A. Henry Hempe and Commissioner William K. Strycker which affirmed the Examiner's dismissal of the layoff complaint allegations. Commissioner Herman Torosian dissented from the Order, indicating in his dissenting opinion that the County's layoff conduct violated Sec. 111.70(3)(a)5, Stats., and

derivatively Sec. 111.70(3)(a)1, Stats.

Complainant then sought judicial review of the Commission's Order. On January 30, 1992, Circuit Court Judge James T. Bayorgeon issued a written opinion concluding that the County's layoff conduct did violate Secs. 111.70(3)(a)1 and 5, Stats., and remanding the matter "to the Commission for enforcement of appropriate measures consistent with this opinion and the purposes of the statute." On February 14, 1992, Judge Bayorgeon issued a Judgement stating in pertinent part:

> . . . and that Waupaca County had breached said collective bargaining agreement in violation of Secs. 111.70)3)(a)1, and 5, Wis. Stats. NOW, THEREFORE, IT IS ORDERED AND ADJUDGED THAT the Order Affirming and Revising Examiner's Findings of Fact, and Affirming Examiner's Conclusions of Law and Order issued by the Wisconsin Employment Relations Commission is this matter on January 4, 1991, WERC Decision No. 24764-B, shall be and the same hereby is set aside, and that this matter is remanded to the Commission for enforcement of appropriate measures consistent with the determination of the Circuit Court and the purposes of the statute.

The County and the Commission then sought judicial review of the Circuit Court's Judgement. On July 8, 1993, the Court of Appeals, District IV, issued a decision affirming the Judgement of the Circuit Court. A footnote in the decision stated:

> 2/ Specifically, the Union claimed that the County's action violated Secs. 111.70(3)(a)1, 4 and 5, Stats., declaring it to be a prohibited practice to coerce municipal employes in the exercise of their collective bargaining rights, to refuse to bargain collectively, and to violate any provision of a collective bargaining agreement. As indicated, we decide this appeal on the latter issue.

The County and the Commission then filed petitions for review with the Wisconsin Supreme Court. On September 10, 1993, the Supreme Court issued an Order denying the petitions.

Following unsuccessful settlement efforts by the Complainant and the County, hearing as to the issue of remedy was held in Waupaca, Wisconsin, on May 19, 1994 before Examiner Peter G.

Davis. The parties thereafter filed written argument, the last of which was received July 27, 1994.

Having reviewed the record and the parties' positions, the Commission makes and issues the following

ORDER 1/

1. Consistent with Exhibit 2 and the parties' stipulations as to Ciura, Jorgenson, and Lawrence and as to the amount of sick leave accrual, Waupaca County shall make the most senior 80% of the laid-off Highway Department employes whole with interest 2/ for losses due to the general layoff which began February 9, 1987.

2. Waupaca County shall cease and desist from violating the Municipal Employment Relations Act.

3. Waupaca County shall notify all employes in the bargaining unit represented by Local 1756 by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by an authorized representative of the County and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to insure that said Notices are not altered, defaced or covered by other material.

4. Waupaca County shall notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 10th day of February, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(FOOTNOTES 1 AND 2 BEGIN ON PAGE 4)
(FOOTNOTES 1 AND 2, REFERENCED ON PAGE 3)

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 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.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on March 26, 1987, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann (1986). See generally Wilmot Union High School District, Dec. No. 18820-B, (WERC, 12/83) cites Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

" APPENDIX A "

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not violate the Municipal Employment Relations Act.

2. We will make whole, with interest, the most senior 80% of the laid off Highway Department employes represented by Local 1756, AFSCME for losses experienced during the general layoff which began February 9, 1987.

Dated at Waupaca, Wisconsin, this _____ day of _____, 1995.

Waupaca County

By _____

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

WAUPACA COUNTY

MEMORANDUM ACCOMPANYING ORDER

POSITIONS OF THE PARTIES

Respondent County

The County initially argues that no back pay is appropriate. It asserts the Highway Department's economic problems would have almost immediately forced the layoff of all Highway Department employes even if the County had initially proceeded with a partial layoff of the least senior 20% of the unit. Citing Brown County, Dec. No. 20857-D (WERC, 5/93), the County contends it is appropriate for the Commission to determine no back pay should be awarded where laid-off employes would not have been reinstated due to economic reasons unrelated to the employer's violation of law.

The County also alleges back pay would have the effect of giving Complainant a benefit Complainant sought but did not achieve at the bargaining table in 1987 (i.e., a specific ending date for the four-day work week originally proposed by the County). Had the County proceeded with a four-day work week (which the courts concluded was an appropriate option under Article 14.03), the duration of the four day week would have needed to be far greater than the duration of the February 9th through April 3, 1987 general layoff to achieve the same savings. Thus, the County argues it is not appropriate to assume for the purposes of remedy that a four-day work week would also have ended April 3, 1987. The County contends the Commission must consider the longer period of time a reduced work week would have been in place when fashioning a remedy.

The County further argues back pay would unduly penalize the County because the County is now subject to statutory levy limitations not in existence in 1987 when this dispute arose. A back pay remedy would have an unfair impact on County taxpayers given the new financial realities and the good faith nature of the County's position as to the contractual issue in question.

In the County's view, any remedy in excess of a cease and desist notice posting order is also contrary to the purposes of the Municipal Employment Relations Act. The good faith nature of the County's litigation position is demonstrated by the Examiner and Commission majority's acceptance of the County's position. Where the dispute was a contractual one precipitated by the County's undeniable financial difficulties, where the County successfully sought out additional Highway work to limit the length of the layoffs, and where the parties have since successfully bargained four successor contracts, the County argues back pay would be punitive and contrary to the Municipal Employment Relations Act's purpose of encouraging voluntary settlements through collective bargaining.

In the alternative, if the Commission determines back pay is appropriate, the County asserts all unit employes are not entitled to back pay. The County contends a work force layoff of 20% was inevitable. Thus, the least senior 20% of the work force are not entitled to back pay. Further, because a layoff of 20% would have lasted far longer than general layoff to save the same amount of money, the County argues the least senior 20% have, if anything, been overpaid.

Even if back pay is appropriate for some Highway Department employes, the County asserts interest is inappropriate because the back pay amount is not "readily determinable." The County cites State ex rel. Schilling & Klinger v. Baird, 65 Wis.2d 394 (1974), and Board of Education v. Wisconsin Employment Relations Commission, (CirCt. Brown, 12/72) as establishing that interest is inappropriate where genuine disputes as to the amount of back pay exist. Such genuine disputes exist here given the unresolved issues which are before the Commission on remand.

The County further argues that the parties' dispute represents no more than a good faith dispute over the proper interpretation to be a collective bargaining agreement. If the dispute had been resolved in the grievance arbitration forum, no interest would be available. Thus, providing interest would give the Complainant more than it would have received in the usual forum for such disputes and improperly encourages forum shopping.

Lastly, the County argues that even under the Commission's decision in Wilmot Union High School, Dec. No. 18820-B (WERC, 12/83) on the availability of interest, no interest should begin to accrue until the County was first found to have violated the contract by the Circuit Court. The County contends that in Wilmot and subsequent decisions, employer liability was first established by the hearing examiner, and the Commission reasoned an aggrieved employe should not be prejudiced by the delay occasioned by an appeal. Here, the prejudice does not exist because no liability existed until the Circuit Court reversed the Examiner and the Commission.

In reply to Complainant Union, the County urges the Commission to reject the Union's emotional assertion that this is a retaliation case which warrants back pay and interest for all employes. The County argues the Court of Appeals could have, but did not, base its decision on the retaliation claim. Rather, the Court based its decision on an analysis of a good faith contractual dispute.

Complainant Union

Complainant Union contends the appropriate remedy is back pay with interest for all Highway Department employes for the period of the layoff.

The Union asserts the Commission should reject the County argument that a more limited remedy is appropriate because some level of layoff was inevitable. The Union claims the County

argument is premised on self-serving and unreliable calculations as to the necessary and actual level of savings. Further, the Union argues the County is asking for, but should not receive, the benefit of every doubt as to what would have happened had the County not acted illegally. The Union contends the County should not be rewarded for its illegal conduct by after-the-fact calculations of savings that might have been. In summary, the Union asserts there is no reliable evidence as to what the County would have done had it not acted illegally.

The Union further urges the Commission to reject County claims that this case is simply a contract interpretation dispute. It contends the law of the case was established by the Circuit Court's conclusion that the County was retaliating against employes for their assertion of contractual rights and thus interfered with rights guaranteed by Sec. 111.70(2), Stats. Thus, the County's liability here cannot be mitigated by a claim of good faith. Furthermore, the County's unlawful retaliation punished all Highway Department employes, not just the most senior 80% of the unit. Thus, the Union contends the only way to remedy the wrong done in this case is to make all employes whole.

The Union claims it is immaterial that the County's wrongdoing was not determined until February, 1992. What is critical is that the County acted unlawfully in February, 1987, and that the employes are entitled to an effective remedy which includes interest on back pay. Citing Wilmot, supra and Brown County, supra the Union argues that interest is appropriate because there is a reasonably certain standard for measuring the amount of back pay owed.

DISCUSSION

This matter is before us pursuant to a remand from the Circuit Court for the purpose of determining the appropriate remedy "consistent with the determination of the Circuit Court and the purposes of the statutes."

The "determination" of the Circuit Court has been set forth earlier herein, and need not be repeated. As that determination indicates, the remedial authority and discretion of the Commission under Secs. 111.07(4) and 111.70(4)(a), Stats. is to be exercised "to effectuate the purposes of the Municipal Employment Relations Act (MERA)." WERC v. Evansville, 69 Wis.2d 140, 158 (1974); Board of Education v. WERC, 52 Wis.2d 625, 635 (1971). In Board of Education, supra, the Court defined the purposes of MERA as "fair employment and peaceful negotiation and settlement of municipal labor disputes." Section 111.70(6) of MERA declares "The public policy of the State as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining."

Having considered the matter, we are persuaded the remedy most consistent with the Circuit Court's determination and the purposes of the statute is to make whole with interest the most senior 80% of the Highway Department unit for the wages and benefits lost during the general layoff, as

well as the standard cease and desist and notice posting order.

Back pay for the most senior 80% of the bargaining unit best approximates the result which Article 14.03 of the contract would have produced had the County acted in compliance with its terms. Where, as here, the parties are unable to work out a solution for the need to "reduce the number of hours of work per day and/or per week," the Court concluded the contract required the County to "lay off the requisite number of employes." Here, as found by the Court, the "requisite number" means "approximately 20% of the employes, the equivalent of the four-day work week proposed by the County."

Such a remedy acknowledges and is consistent with the County's urging herein that the economic realities then confronting the County be considered. The economic reality the County itself identified at the time the dispute arose (a four-day work week) is the best measure of the County's economic need. However, when crafting a remedy, we have rejected the County's contention that it should benefit from receiving the amount saved during the general layoff by an equivalent savings from a 20% layoff, and perhaps even be allowed to recoup monies from the 20% least senior employes. Such a remedy would allow the County to profit from the wrongdoing found by the Court. Further, the record amply demonstrates that the vagaries of weather, additional contract work and the need for full crews determined the length of the general layoff, not some precisely established or understood savings level. Most importantly, it is the employe loss, not the employer savings, which is being remedied herein.

Because the County violation found by the Court breached the rights of all Highway Department unit employes, 3/ the Union correctly argues that a case can be made for full back pay for all laid-off employes. However, because our remedy is consistent with the result the parties' own contract would have produced, we think it is consistent with the determination of the Circuit Court and best effectuates the purposes of the Municipal Employment Relations Act because it parallels and acknowledges the collective bargaining process.

As to the question of whether interest is appropriate, in Wilmot Union High School, Dec. No. 18820-B (WERC, 12/83), we set forth our understanding of applicable Wisconsin law. We therein held:

> While our previous policy has been one of not ordering interest on money remedies under Sec. 111.07(4), Stats., for periods prior to a decision that the back pay involved is due and

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3/ This is so whether the rights in question are limited to those under the bargaining

agreement or also extend to those protected by Secs. 111.70(2) and (3)(a)1, Stats. Our remedy would not change no matter how one resolves the parties' dispute as to the impact of footnote 2 of the Court of Appeals decision on the Circuit Court's Judgement and opinion as to retaliation.

> owing, 9/ we are modifying that policy herein to conform to that required of administrative agencies by the Supreme Court in Anderson v. LIRC, 10/ and by the Court of Appeals in Madison Teachers v. WERC. 11/
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> Given those appellate court decisions, we must reject the District's contentions that the Commission should not order pre-decision interest in fashioning remedies pursuant to its Sec. 111.07(4), Stats., authority.
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> Although Anderson v. LIRC arose under the Wisconsin Fair Employment Act, the Sec. 111.36(3)(b), Stats., language conferring remedial authority upon LIRC closely parallels that in Sec. 111.07(4), Stats., conferring remedial authority upon the WERC under MERA, the Wisconsin Employment Peace Act, and the State Employment Labor Relations Act. The Supreme Court's rationale approving the objective of achieving make-whole relief by compensating those adversely affected by prohibited conduct for the time value of money applies for Sec. 111.07(4), Stats., remedies as well as to those issued pursuant to Sec. 111.36(3)(b) of the Wisconsin Fair Employment Act. Notably, the Supreme Court cited not only fair employment cases but also a labor relations case arising under the National Labor Relations Act for the proposition that "prejudgment interest on back pay awards has been accepted as an appropriate remedy under federal law" notwithstanding the absence of an express statutory provision for interest on back pay. 12/

9/ Madison Schools, 16471-D (5/81), aff'd in part, rev'd in part sub nom, Madison Teachers Incorporated et al v. WERC, et al., ___ Wis.2d ___ (Ct. App. IV, No. 82-579, 10/25/83).

10/ Judy Lynn Anderson v. State of Wisconsin, labor (sic) and Industry Review Commission, 111 Wis.2d 245 (1983).

11/ Madison Teachers v. WERC, Note 9, supra.

12/ 111 Wis.2d 245 at 258 (1983), citing, Isis Plumbing & Heating Co., 138 NLRB 716 (1962), rev'd on other grounds, 322 F.2d 913 (CA 9, 1963).

The Madison Teachers v. WERC case, of course, involved a remedial order issued pursuant to Sec. 111.07(4), Stats.

In both Anderson v. LIRC and Madison Teachers v. WERC, the Courts held inter alia, that the administrative agency involved had erred by not ordering interest as regards a period including the time from the beginning of the back pay period to the date of the initial decision holding that the back pay involved was due and owing. Each Court held that the agency involved had improperly failed to apply the general rule in Wisconsin that prejudgment interest is available as a matter of law on fixed and determinable claims or where there is a reasonably certain standard of measuring damages. 13/ In each case the Court treated employment-related back pay as sufficiently determinable under the Wisconsin rule standards, above, to entitle the affected complaint to interest from the respective date of each instance of loss of a monetary benefit due to the respondent's statutory violation. 14/ Each Court thereby applied interest not only to the period after a decision was issued to the effect that back pay was due and owing in the circumstances, but also to the period of time before any such decision had been issued.

Neither of the Courts' opinions specified in full the nature and derivation of the rate of interest that the Court was ordering. However, we are satisfied that an application of the Sec. 814.04(4), Stats., interest on verdict rate in effect at the time of

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13/ Anderson v. LIRC, supra, slip. op., 111 Wis.2d at 258-59, citing, Nelson v. Travelers Insurance Co., 102 Wis.2d 159, 167-68 (1981). Madison Teachers v. WERC, supra, slip. op. at 7-8, citing, Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 438 and First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis.2d 258, 276.

14/ Notably, in Anderson the Supreme Court was dealing with

> back pay liability that had potentially been increasing over a period of several years. The Court applied interest to the entire back pay period including a period after an offer of reinstatement that the Supreme Court held was not sufficient to terminate the accrual of back pay. 111 Wis.2d at 260.

the complaint was initially filed with the administrative agency is consistent with the outcome and rationale expressed in both of those cases, and is necessary and appropriate as an element in WERC money remedies under Sec. 111.07(4), Stats., in order for our agency to comply with the requirements of those appellate decisions. 15/

In Madison Teachers v. WERC, the Court of Appeals directed the trial court to modify the Commission's remedial order to include interest on back pay "at the statutory rate" from and after the date of respondent's prohibited practice began causing the employe the monetary loss involved. The Court of Appeals did not specify the specific statutory rate to be applied either in percentage terms or by reference to a specific statutory provisions. The Sec. 814.04(4), Stats., rate is a "statutory rate". (sic) It was one of the two statutory interest rates expressly referred to in the Commission decision at issue 16/, and its application herein appears in no way inconsistent with the outcome or rationale of the Court of Appeals decision in Madison Teachers v. WERC.

In Anderson v. LIRC, the Supreme Court expressly concluded that the agency should have imposed pre- and post-decision interest at a rate of "seven per cent (sic) per annum." Although the Supreme Court did not specifically explain the derivation of that interest rate, specification of that particular rate conclusively establishes that the Supreme Court was not applying

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15/ Section 814.04(4), Stats. (1980), reads as follows:

> (4) INTEREST ON VERDICT. Except as provided in s. 807.01(4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until

> judgment is entered shall be computed by the clerk and added to the costs.

16/ The other was the Sec. 815.05(8), Stats., rate applicable after entry of judgment.

the statutory "legal rate of interest" provided for in Sec. 138.04, Stats., either to the full back pay period or to the pre-decision period since that rate has, from 1974 to the present, remained at $5.00 per $100 outstanding per year. 17/ Hence, although we have found no previous Wisconsin case in which prejudgment interest was ordered at higher than the "legal rate of interest" specified in Sec. 138.04, Stats., Anderson v. LIRC provided for a higher rate in both the pre- and post-decision periods involved in that case. Finally, although the Sec. 814.04(4), Stats., rate was changed from "7% per annum" to "12% per annum" in Chapter 271, Laws of 1979, Sec. 3, effective May 11, 1980, that Act expressly made that change applicable only to legal actions initiated after the effective date of that legislation. 18/

Thus, the uniform seven percent per annum specified by the Supreme Court in its 1983 decision in Anderson v. LIRC is

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17/ Wis. Stats. Ann., Sec. 138.04.

18/ Chapter 271, Laws of 1979, provides in pertinent part as follows:

> Section 5. applicability
>
> The treatment of creation of sections ... 814.04(4) ... of the statutes apply only to actions commenced on or after the effective date of this act.

entirely consistent with the Sec. 814.04(4), Stats., rate of "7% per annum" in effect at the time the complaint in that matter was initially filed with the administrative agency on January 15, 1974. 19/

Accordingly, we conclude that the interest rate to be applied to monetary awards under Sec. 111.07(4), is the single and uniform rate provided for in Sec. 814.04(4), Stats., in effect when the complaint was filed with the agency. While the objective of making whole the affected party for the time value of money might be better served by the application of the rate that varies with market conditions during the period of back pay amount is unpaid, the Supreme Court's order in Anderson v. LIRC mandated treatment of the applicable interest rate as singular and uniform through the period of its application. The Supreme Court's further comment in that case that it chose "... the alternative of awarding pre-judgment interest, rather than increasing the award to present value, because the calculation of pre-judgment interest is far less complicated and would not require expert testimony" 20/ suggests that the Court may have taken ease of application into account in deciding upon the appropriate interest rate and mode of application thereof. In that regard, we note that the Sec. 814.04(4), Stats., rate is both readily known from the outset of the proceeding and unchanging after the complaint has been filed initiating the proceeding. Its use is therefore entirely consistent with ease of application considerations.

19/ Sec. 814.04(4)(, Stats. (1975), reads as follows:

> INTEREST ON VERDICT.

> When the judgment is for the recovery of money, interest at the rate of 7% per annum from the date of the verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

20/ 111 Wis.2d 245 at 259, n.9.

We note that the Court of Appeals expressly held in Madison Teachers v. WERC, "(t)he fact that interest was not demanded in the complaint is of no consequence." 21/ The instant complaint was filed on June 26, 1981, at a time when the Sec. 814.04(4), Stats., rate was "12% per year." We have therefore ordered interest on the back pay in this case at that rate. The facts before us in the instant case do not appear to require a detailed formula for determining the end back pay to which the interest rate shall be applied over time. 22/

21/ Slip. op. p. 8, citing, Bigley v. Brandau, 57 Wis.2d 198, 208 (1973).

22/ Cases involving lengthy periods of accumulating back pay/benefit obligations would present additional questions about how to compute net back pay and how to apply the applicable rate of interest. Under the National Labor Relations Board formula, for example, monetary losses and applicable set-offs are netted for each calendar quarter and interest accrues commencing with the last day of each calendar quarter of the back pay period on the amount due and owing for each quarterly period and continuing until compliance with back pay is achieved, see, F.W. Woolworth Company, 90 NLRB 289 (1950) and Isis Plumbing, 138 NLRB No. 97 (1962). Whether in a given case a method of calculation based on net back pay for the entire period or by calendar year, school year or some other time period is appropriate will be determined on the circumstances of the

case involved.

We continue to find the above-quoted language to be an accurate recitation of the law as to the interest, see Green County, Dec. No. 26798-B (WERC, 7/92); Brown County, Dec. No. 20857-D (WERC, 5/93), and generally responsive to the argument made by the County herein.

As reflected in Wilmot, we understand ourselves to be bound by the court's holding in Anderson v. LIRC, 111 Wis.2d 245 (1963), that interest is available as a matter of right from the date of loss and that the rate of interest is not discretionary with the agency but rather is the rate set forth in Sec. 814.04(4), Stats. After Anderson, our pre-Wilmot holdings to the contrary (as well as that of the Circuit Court cited by the County in Board of Education v. WERC, supra) are no longer good law.

The 12% simple interest applied to the back pay entitlement causes the County's back pay liability to increase by 1% of the principal each month that the principal is unpaid. See Brown County, supra. Here, the principal amount was established and came due with the end of the layoff on April 3, 1987.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of February, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner