STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WOOD COUNTY COURTHOUSE AND SOCIAL SERVICES EMPLOYEES, LOCAL 2486, AFSCME, AFL-CIO, Complainant, vs. WOOD COUNTY, Respondent.	Case 68 No. 38697 MP-1963 Decision No. 24799-A

Appearances:

Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing at hearing and Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 603 Zblewski Road, Stevens Point, Wisconsin 54481 appearing at hearing and on brief on behalf of Local 2486

William G. Weiland, Corporation Council, Wood County, 400 Market Street, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of Wood County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wood County Courthouse and Social Services Employees, Local 2486, AFSCME, AFL-CIO, having filed a complaint on April 24, 1987, with the Wisconsin Employment Relations Commission alleging that Wood County had committed prohibited practices by violating Secs. 111.70(3)(a) 2, 3 and 4, Stats., when it refused to compensate certain employes for the performance of on-call status; and on August 25, 1987, the Commission having appointed James W. Engmann, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order; and on September 15, 1987, Wood County having filed an answer to said complaint and a motion to dismiss said complaint for failure of the Complainant to file said complaint within the time limits of Sec. 111.07(14), Stats.; and a hearing in this matter having been held on October 6, 1987, in Wisconsin Rapids, Wisconsin; and the Complainant having moved to amend the complaint at hearing so as to delete the allegation of a violation of Sec. 111.70(3)(a)2, Stats., and to add allegations of violations of Secs. 111.70(3)(a)1 and 5, Stats.; and the motion having been granted; and a stenographic record of the proceedings having been prepared and received by the Examiner on October 20, 1987; and the parties having submitted post-hearing briefs, reply briefs and exhibits, the last of which was received by the Examiner on May 23, 1988; and the Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wood County Courthouse and Social Services Employees, Local 2486, AFSCME, AFL-CIO, hereinafter referred to as the Complainant or Union, is a labor organization which maintains its offices at 603 Zblewski Road, Stevens Point, Wisconsin.

2. That Wood County, hereinafter referred to as the Respondent or County, is a municipal employer which maintains its offices at the Wood County Courthouse, 400 Market Street, Wisconsin Rapids, Wisconsin.

3. That the County and the Union have been parties to a series of collective bargaining agreements; that during negotiations for the 1984-85 agreement, the parties agreed to the accretion into the unit of the positions of dispatcher, matron, jailer and assistant nutritionist effective with the 1984-85

agreement; that to reflect that agreement the parties amended Article II - Recognition in the 1984-85 agreement to read as follows:

Article II - Recognition

> The Employer hereby recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Wood County Courthouse and annexes including all regular full-time and regular part-time professional and clerical employees of the Department of Social Services, regular full-time and regular part-time dispatcher/matron, but excluding elected officials, department heads, supervisory personnel, custodial and maintenance personnel, law enforcement personnel, and registered nurses for the purposes of conferences and negotiations on questions of wages, hours and conditions of employment.

that during negotiations for the 1984-85 agreement the County and the Union agreed that the terms of the previous agreement as modified through negotiations would apply to these accreted positions except where the parties agreed to terms for these employes different from the previous contract; that the Union submitted proposals during negotiations as to placement of each of these accreted positions on the salary schedule; that the Union also submitted proposals on issues unique to the positions of dispatchers, matron and jailer; that those proposals agreed to by the parties were incorporated into the 1984-85 agreement; and except in those areas where the parties agreed to treat the accreted employes differently, the terms of the previous agreement as modified through negotiations were applied to the accreted employes.

4. That on July 12, 1985, Union President Robert J. Goettner wrote to County Supervisor Robert Ness, Chair of the Personnel Committee, requesting that the County voluntarily agree to accrete employes in Unified Services into the bargaining unit described above; that on or about August 26, 1985, the Union served notice on the County that it wished to reopen the existing collective bargaining agreement for the purpose of negotiating a successor agreement; that at that time the Union submitted proposals to be effective January 1, 1986; that proposal one involved Article II, quoted above, and read as follows:

> Amend the recognition clause to include the following positions within the Unified Services office:
>
> Entrance Program Secretarial positions -- Group II
> Unified Service Clerk positions -- Group II
> Driver -- Group I
> P.M. Resident Manager -- Group II
> Night Resident Manager -- Group II
> Day Resident Manager -- Group II
> Relief Manager -- Group II
> Emergency Manager/Driver -- Group II
> Social Worker I -- Social Worker Schedule
> Social Worker II -- Social Worker Schedule
> Social Worker III -- Social Worker Schedule
> Certified Alcohol Counselors -- to be discussed (comparable to Social Worker I rates)

that proposal seven from the Union involved Article XII; that in the 1984-85 agreement, Article XII read in part as follows:

Article XII

. . .

> On-Call System: Participation in the on-call program is voluntary. In the event there are insufficient volunteers (at least six) to man the program, the director of the Department of Social Services shall designate, subject to Juvenile Court approval, social workers to participate in the on-call system. On-call status workers shall be compensated as follows:

1. $18.75 per day for Monday through Friday;

2. $33.50 per day for Saturday (sic), Sundays and holidays;

3. Time and one-half pay for actual hours worked between 4:45 p.m. Friday through 8 a.m. Monday.

that proposal seven from the Union stated as follows:

> Upgrade as follows:
>
> $18.75 to $20.00 per day for Monday thru Friday
> $33.50 to $35.00 per day for Saturdays, Sundays and Holidays.
>
> The above shall also apply for emergency government employees required to carry pagers.

that during the course of negotiations the County agreed to the Union's proposal to accrete the Unified Service employes into this bargaining unit; that the parties also agreed to add emergency government employes to Article II; that in the 1986-87 collective bargaining agreement, Article II was modified to reflect that agreement as follows:

Article II - Recognition

> The Employer hereby recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Wood County Courthouse and annexes including all regular full-time and regular part-time professional and clerical employees of the Department of Social Services, regular full-time and regular part-time dispatcher/matron, all regular full-time and regular part-time professional and nonprofessional employees of Unified Services, regular full-time and regular part-time Emergency Government employees, but excluding elected officials, department heads, supervisory personnel, custodial and maintenance personnel, law enforcement personnel, and registered nurses for the purposes of conferences and negotiations on questions of wages, hours and conditions of employment. (Underlining added to show changes.)

that the parties agreed to the placement of Unified Service employes on the salary schedule; that the parties agreed that the rate of pay for the on-call system would be increased; that the parties agreed to add holidays to the time and one-half section; that prior to the 1986-87 agreement the on-call system did not provide for payment to emergency government employes required to carry pagers; that the parties agreed to add emergency government employes to the on-call system; that the parties agreed upon an on-call rate for these employes; and the 1986-87 agreement was modified to reflect these agreements as follows:

Article XII

. . .

On-Call System: Participation in the on-call program is voluntary. In the event there are insufficient volunteers (at least six) to staff the program, the director of the Department of Social Services shall designate, subject to Juvenile Court approval, social workers to participate in the on-call system. On-call status workers shall be compensated as follows:

1. $19.00 per day for Monday through Friday;

2. $34.00 per day for Saturday (sic), Sundays and holidays;

3. Time and one-half pay for actual hours worked between 4:45 p.m. Friday through 8 a.m. Monday, and on contractually recognized holidays.

In addition, employees employed in the emergency government department shall receive $4.00 per day for carrying a beeper on Saturday, Sunday and contractually recognized holidays. (Underlining added to show changes.)

5. That at the time of negotiations for the 1986-87 collective bargaining agreement, the Union was not aware of what benefits the accreted Unified Service employes were receiving; that the Union's only concern specific to the accreted employes was their placement on the salary schedule and the rate of pay they would receive; that since the accreted employes were similiar in classification to current employes, the Union did not believe it needed specific proposals for them; that the Union intended and believed that the agreement to be bargained would be applied to the accreted employes; that the County intended and believed that the previous collective bargaining agreement would be applied to the accreted employes unless the parties agreed to terms for these employes different from the agreement; and that at the time of negotiating the 1986-87 agreement, County Supervisor Robert Ness, Chair of the Personnel Committee, was not aware that some of the accreted employes received on-call pay.

6. That during negotiations for the 1986-87 agreement the Union did not know that the Unified Services employes were on a calendar year basis for vacations; that the 1984-85 and 1986-87 agreements provide for vacations on a May 1 to April 30 basis; that during negotiations the Union did not know that some of the Unified Services employes worked a 40 hour week; that the 1984-85 and 1986-87 agreements provide for a 38.75 hour week; that up until the time of hearing in this matter, the Union President did not know that the Unified Services employes had floating holidays; that the 1984-85 and 1986-87 agreements provide for set holidays; that the Union did know that the Unified Services employes received a health insurance contribution different from that specified in the agreement; that negotiations between the County and the Union began on October 31, 1985; that the parties met on five other occasions to negotiate a successor agreement; that the parties reached tentative agreement on February 18, 1986; that the Union ratified said agreement on March 12, 1986; that the County ratified said agreement on March 18, 1986; that on April 2, 1986, Union President Goettner met with Wood County Corporation Counsel William G. Weiland; that Weiland advised Goettner at that meeting that vacation for the accreted employes would be converted from a calendar year basis to a May 1 to April 30 basis, consistent with the agreement; that Weiland and Goettner discussed how to convert the accreted employes from a calendar year basis to a May 1 to April 30 basis for vacations; that Weiland advised Goettner that those accreted employes working a 40 hour workweek would be changed to a 38.75 hour workweek as specified in the agreement; that the County converted the floating holidays previously received by the accreted employes to the set holidays specified by the agreement; that the County changed its level of contribution for the accreted employes health insurance to that percentage specified in the agreement; that the Union assumed and intended that the accreted employes would receive the percentage of health insurance contributions specified in the agreement; that the County and the Union did not negotiate vacations, workweek, holidays or health insurance contributions specifically for the accreted employes; that the County and the Union assumed and intended that those provisions and all other provisions of the contract would be applied to the accreted employes; that the Union did not challenge the application of 1986-87 contract to the accreted employes other than this action regarding on-call pay; and that the record is devoid of evidence as to whether Weiland and Goettner discussed on-call pay at their meeting on April 2, 1986.

7. That Union President Goettner first found out on March 17, 1986 that some Unified Services employes received on-call pay; that Mary Rossmeier, one of the Unified Services employes accreted into the unit, called Goettner and told him she had heard that the Unified Services employes were not going to get on-call pay anymore; that at a Union meeting on April 2, 1986, members indicated they had received on-call pay on the previous payday; that on April 11, 1986, Goettner received a telephone call from a Union member indicating that these employes would receive on-call pay on April 11, 1986, but that they would not be paid beyond that; that on April 18, 1986, Goettner sent a memo to Personnel Committee Chairman Robert Ness and Corporation Counsel William G. Weiland regarding on-call pay for Unified Services employes; that said memo read as follows:

> In our recent negotiations, we solely bargained wages for the accreted Unified Services positions. Local #2486 believes that this was the sole subject of bargaining since neither side proposed any changes to the status quo. To unilateraly

(sic) change the status quo or to reduce compensation is clearly a violation of the status quo. The Local requests that the status quo remain unchanged, and that the on-call status remain as it has been.

If the County desires to change the status quo, Local #2486 is more than willing to sit down with the County to negotiate these changes.

Whenever, and until such changes are bargained, we expect that the status quo that was in effect as of our last bargaining date, February 18, 1986, should be maintained. Please respond in writing by May 2, 1986.

that on April 24, 1986, Weiland wrote a letter to Goettner; and that said letter read as follows:

I am writing in response to your letter of April 18, 1986 concerning on-call pay for Unified Services staff.

It was the desire of the Courthouse Union to represent the Unified Services staff with respect to their terms and conditions of employment and therefore the Courthouse Union requested that they be accreted into the Courthouse Union. It was the position of Wood County that the Unified Services staff had a community of interest with the members of the Courthouse Union and therefore the Courthouse Union should represent the Unified Services staff in negotiating terms and conditions of employment. It is the position of Wood County that when it was tentatively agreed that the Unified Services staff would be accreted into the Courthouse Union, that Local 2486 become (sic) the representative of those people with respect to negotiating all terms and conditions of employment, not just their wages. The Courthouse Union can not choose which terms and conditions of employment they will negotiate (i.e. wages) and neglect other terms and conditions of employment which might be relevant to the people they now represent. That the Courthouse Union failed to negotiate a term and condition of employment pertaining to the on-call pay of Unified Services staff is a responsibility that the Courthouse Union must assume. It is the responsibility of the Courthouse Union to be aware of the interest of the people it represents.

If you really believe that only wages were negotiated, are you suggesting that only their wages be governed by the Collective Bargaining Agreement and that all other benefits be governed by the Personnel Policy? It appears that the Courthouse Union would like the best of both yet is unwilling to give the County the discretion it enjoys in unilaterally changing the terms and conditions of employment of employees who are governed by the Personnel Policy.

If you are suggesting that the benefits that the Unified Services staff had under the Personnel Policy are now part of the Courthouse Union contract then that is clearly erroneous because you state in your letter that only wages were negotiated.

You suggest that neither side proposed any change on the status quo. I have two responses to that assertion. The first response is; "What status quo?" No status quo existed between Wood County and the Courthouse Union concerning the terms and conditions of employment of the accreted staff. My second response is that the Courthouse Union proposed a change in the status quo when it proposed accreting the Unified Services staff. The Courthouse Union did not expect that the accreted Unified Services staff would continue to be governed by the Personnel Policy but in fact desired and anticipated that the accreted staff would be governed by the Collective Bargaining Agreement. Wood County has applied and will

> continue to apply the Collective Bargaining Agreement to the accreted Unified Services staff as was desired by the Courthouse Union when it requested accretion of that staff. The Collective Bargaining Agreement does not contain on-call pay for Unified Services staff and therefore, it will not be paid. Had the Union desired on-call pay for Unified Services staff it should have proposed and negotiated it at the recently conducted negotiations. The Union had ample opportunity to do so. Only those items negotiated are placed into the contract. The County will apply the contract as it was negotiated, not as you wish it had been negotiated.

that by this letter the County informed the Union that on-call pay for Unified Services staff would not be paid; that by this letter the County rejected the Union's request to negotiate the subject of on-call pay; and that the Union filed the complaint in this matter on April 24, 1987.

8. That at hearing the County and the Union offered the following stipulation of facts: (1.) eight professionals in the Unified Services were receiving on-call pay prior to April 5, 1986; (2.) the paycheck of April 25, 1986, was the first paycheck the eight professional positions in the Unified Services did not receive on-call pay; (3.) said employes continued to be required to be on-call after April 5, 1986, through the present; (4.) the actual record will be reviewed and employes compensated based on the record should the Union prevail; (5.) certain non-bargaining unit employes in each of the programs identified in Joint Exhibit 5 continued to receive on-call pay as described in Joint Exhibit 5; (6.) during negotiations for the 1986-87 collective bargaining agreement, neither party raised the issue of on-call pay as it relates specifically to the Unified Services professionals in question; and (7.) that Mary Rossmeier, Marc Cross and Mike Christner, three bargaining unit members employed in Unified Services, initiated a visit to Mr. Weiland's office on April 4 to question him regarding the status of on-call pay.

9. That the collective bargaining agreements in effect during the time pertinent to this matter provided in Article IV for a grievance procedure which culminates in binding arbitration; that no evidence was presented that the Complainant filed or attempted to file a grievance or grievances relating to the application of the contract to the accreted employes in the areas of vacation, workweek, holidays or health insurance contributions; and that no evidence was presented that the Complainant filed or attempted to file a grievance relating to the payment of on-call pay to the eight professional employes of Unified Services.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the complaint in this matter was filed within one year from the date of the specific act or prohibited practice alleged and, therefore, was timely filed.

2. That the Complainant did not exhaust or attempt to exhaust the grievance and arbitration procedure established by the collective bargaining agreement with respect to its claim of breach of contract and, therefore, the Examiner will not assert the jurisdiction of the Commission to determine whether or not the Respondent committed prohibited practices within the meaning of Section 111.70(3)(a)5 of MERA.

3. That the Complainant did not present a clear and satisfactory preponderance of the evidence that the Respondent commited a prohibited practice within the meaning of Section 111.70(3)(a)3 of MERA.

4. That the Complainant did not present a clear and satisfactory preponderance of the evidence that the Respondent independently committed a prohibited practice within the meaning of Section 111.70 (3)(a)1 of MERA.

5. That the Respondent had fulfilled its duty to bargain collectively with the Complainant within the meaning of Section 111.70(1)(a) of MERA with respect to its action regarding on-call pay for Unified Services employes accreted into the bargaining unit because the issue of on-call pay is included in the collective bargaining agreement between the parties and the issue of on-call pay has been

waived in bargaining the collective bargaining agreement and that, therefore, the Respondent did not violate Section 111.70(3)(a)4 and, derivatively, Section 111.70(3)(a)1 of MERA by its refusal to bargain with the Union.

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

ORDER 1/

IT IS ORDERED

1. That the Respondent's motion to dismiss complaint is denied.

2. That the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
James W. Engmann, Examiner

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

Section 111.07(5), Stats.

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

WOOD COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

Complainant

As to the Respondent's motion to dismiss, the Complainant asserts that the complaint was timely filed; that April 4, 1986 should not be considered the date of the alleged prohibited practice; that the earliest date the prohibited practice can be said to have occurred is April 24, 1986; that the complaint was filed on April 24, 1987; that rules are to be liberally construed to effectuate the purposes and provisions of the law; and that, therefore, the Respondent's motion to dismiss complaint should be denied.

As to the merits, the complainant argues that the Respondent's unilateral change in on-call pay for Unified Services professional staff was in violation of Sec. 111.70(3)(a)4, Stats., and derivately Sec. 111.70(3)(a)(1), Stats.; that on-call pay for Unified Services professionals is a mandatory subject of bargaining; that the County is obligated to bargain mandatory subjects prior to implementing changes, absent any waiver; that on-call pay for Unified Services professionals is arguably not embodied in the provisions of the contract; and that the Complainant has not waived its right to bargain on-all pay for Unified Services professionals.

In addition the Complainant argues that if on-call pay for Unified Services professional staff is found to be embodied in the collective bargaining agreement, then the Respondent violated Sec. 111.70(3)(a)(5), Stats.; that nothing in the provisions of Article XII provides a basis for excluding Unified Services staff from the on-call language; that the assignment of on-call status for Unified Services staff is similar to the assignment of such status for Social Services staff; and that other provisions of the contract that were not specifically bargained for Unified Services employes were applied to them.

The Complainant also alleged that the Respondent violated Secs. 111.70(3)(a)1 and 3, Stats., when it unilaterally discontinued the on-call pay system for Unified Services professionals.

On reply brief, the Complainant asserts that the Respondent has not proven its case that the complaint was not timely filed; that the Respondent's argument regarding bargaining practice is seriously flawed in that the argument is inconsistent with case law and in that the bargaining practice with regard to the assistant nutritionist and the dispatchers, jailer, and motions is dissimilar to the instant case; that the Complainant is not attempting, after the fact, to choose which contractual benefits apply and which status quo benefits should be maintained; that the Respondent has not merely enforced the contract as was desired by the parties; and that, if the Respondent is found to have had no duty to bargain the on-call pay issue, its argument that the on-all pay provisions of the agreement do not apply are not persuasive.

Respondent

The Respondent moves to dismiss the complaint as untimely in that Sec. 111.07(14), Stats., provides that the right of any person to proceed shall not extend beyond one year from the date of the specific act or unfair labor practice alleged; that three members of the bargaining unit were informed by the County on April 4, 1986, that on-call pay for Unified Services personnel had not been included in the collective bargaining agreement and that, therefore, these personnel would not receive on-call pay; that the date of the alleged act or unfair labor practice should be viewed as occurring on this date; that the complaint was filed on April 24, 1987; and that the complaint should be dismissed for failure of the Union to file said complaint within the statutorily required time limitations.

As to the merits, the Respondent argues that the County took no action which was intended or had the affect of encouraging or discouraging employes from

membership in any labor organization; that the County did not violate the collective bargaining agreement; that the on-call pay for the accreted employes was discontinued because the 1986-87 contract did not provide for on-call pay for these employes; that the County is not required by law to compensate represented and unrepresented employes the same; that the County applied the contract as it was written and intended; and that, therefore, the County did not violate Sec. 111.70(3)(a)1, 3 or 5, Stats.

In addition, the Respondent argues that the terms to be applied to accreted employes depend on the results of collective bargaining between the parties; that the duty of the employes to bargain said terms must be addressed in the context of the bargaining history of the parties to determine whether the employer has fulfilled its duty to bargain; that the bargaining history shows that the benefits of the contract apply to accreted employes unless the Union advances specific proposals different from the contract; that the intent of the Union was for the terms of the 1986-87 contract to apply to the accreted employes; and that, therefore, the County did not violate Sec. 111.70(3)(a)4, Stats.

On reply brief, the Respondent argues the County fulfilled it obligation to bargain with the Union as to the terms and conditions of employment that would apply to the accreted employes; that Article XII of the collective bargaining agreement does not expressly include the accreted employes and therefore they are not entitled to on-call pay; and that the arguments presented by the Complainant do not provide substantiation for its allegation that the County violated Sec. 111.70(3)(a) 1, 3, 4 or 5, Stats.

DISCUSSION

1. Respondent's Motion to Dismiss

Section 111.07(14), Stats., states as follows:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The Respondent notes that on April 4, 1986, it advised three members of the bargaining unit that Unified Services personnel would no longer receive on-call pay. The Respondent argues that this is the specific act or unfair labor practice alleged in the complaint, and that, as the complaint was not filed until April 24, 1987, the complaint is untimely. Therefore, the Respondent moves to dismiss the complaint. The Complainant argues that the Union was not officially advised of the Respondent's position regarding on-call pay until it received the letter from the Corporation Counsel dated April 24, 1986.

While the Respondent advised these bargaining unit members on April 4, 1986, that Unified Services personnel would no longer receive on-call pay, by doing so the Respondent did not advise the Complainant. While these three employes were members of the bargaining unit as a result of the agreed upon accretion, they had not officially joined the Union. They were not on the Union's bargaining team, nor were they officers in the Union. They were not authorized to act on behalf of the Union and their interaction with the Respondent could not bind the Union. If the Respondent had advised the Complainant at the meeting between the Corporation Counsel and the Union President on April 2, 1986, that may very well have tolled the statute of limitations. No evidence was presented that this issue was discussed at that meeting.

The Complainant made its request to bargain on-call pay for Unified Services in a letter dated April 18, 1986. The Respondent denied said request in a letter dated April 24, 1986. I find this to be the date of the specific act in this complaint. (The date the Complainant received this letter is not in the record.) The Complainant filed this complaint with the Commission on April 24, 1987. Wis. Adm. Code Section ERB 10.08(1) states as follows:

> COMPUTATION OF TIME. In computing any period of time prescribed by or allowed by these rules or by order of the Commission or individual conducting the proceeding, the day of the act, event or default after which the designated period of time begins to run, shall not be included.

Applying ERB 10.08(1) to this situation, April 24, 1986, is not counted and the one year limit begins on April 25, 1986, and ends on April 24, 1987, the day the Complainant filed its complaint. Therefore the complaint is timely filed and the motion to dismiss is denied.

2. Alleged violation of Sec. 111.70(3)(a)5, Stats.

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

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

The Commission has held that, generally, a party must exhaust any grievances and arbitration procedure in the parties' collective bargaining agreement as a condition precedent to the Commission's assertion of jurisdiction to determine the merits of an alleged contract violation. 2/ The Complainant presented no evidence that it attempted to or did exhaust the grievance and arbitration procedure available to it under the parties' collective bargaining agreement. Therefore this Examiner declines to assert the Commission's jurisdiction to determine the merits of this allegation, and hereby dismisses it.

3. Alleged violation of Sec. 111.70(3)(a)3, Stats.

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

> To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other conditions of employment; . . .

The Union's evidence as to this allegation is in two parts. First, the Union asserts that while the on-call program was continued, only the unrepresented employes in the on-call program continued to receive on-call pay. This is not accurate as the employes covered by Article XII continued to receive on-call pay; in fact, they received a raise; and the emergency government employes began to receive on-call pay. In any case, the Respondent is under no obligation to pay represented and non-represented employes the same rate of pay. Thus, the salary of the unrepresented employes appears irrelevant. The Union also argues that this suggests there was no good business reason to eliminate on-call pay for the represented employes. But the Respondent had what it believed to be the best reason it could have - the collective bargaining agreement did not provide for it.

Second, the Complainant alleged that the Corporation Counsel became vitriolic in his explanation of the reasoning behind the Respondent's position. In support the Complainant quotes from the Corporation Counsel's letter to the Union President dated Aprl 24, 1986 as follows:

> You suggest that neither side proposed any change in the status quo. I have two responses to that assertion. The first is: "What status quo?" No status quo existed between Wood County and the Courthouse Union concerning the terms and conditions of employment of the accreted staff. My second response is that the Courthouse Union proposed a change in the status quo when it proposed accreting the Unified Services staff.

(Emphasis added in Complainant's brief). According to the Complainant, the implication is clear that the Union wanted to accrete the Unified Services staff and the Corporation Counsel found what he believed to be an opportunity for retaliation.

2/ West Allis - West Milwaukee School District, Dec. No. 23805-B (Buffett, 6/87), Aff'd Dec. No. 23805-C (WERC 11/87); Winter Jt. School District No. 1, Dec. No. 17867-C (WERC, 5/81).

The problem with this argument is that nothing seems further from the truth. The Union did propose accretion of the Unified Services staff, and the Respondent voluntarily and readily agreed. The parties negotiated an agreement which both parties believed applied to these accreted individuals. The only evidence of any anti-union animus presented by the Complainant is the one sentence emphasized above. I fail to see it and, for that reason, the Complainant has not met its burden of proving this allegation by a clear and satisfactory preponderance of the evidence. 3/ Therefore, I dismiss this allegation.

4. Alleged violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1 states in part that it is a prohibited practice for a municipal employer

> To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

The Complainant argues that the County's actions in this case were clearly designed to punish the Union and that the Corporation Counsel's actions were retaliatory in nature, thus violating this section. Other than the one sentence emphasized above, the Complainant presented no evidence to support this allegation. Therefore, the Complainant has failed to meet its burden of proving this allegation by a clear and satisfactory preponderance of the evidence. 4/ For this reason I dismiss this allegation.

5. Alleged violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

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

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

A violation of Sec. 111.70(3)(a)4, Stats., constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats., which, as quoted above, states that it is a prohibited practice for a municipal employer "to interfere with, restrain or coerce municipal employes in the exercise of their rights" guaranteed in Sec. 111.70(2), Stats. The rights guaranteed in Sec. 111.70(2), Stats., include:

> the right of self organization, the right to form, join or assist labor organizations, to bargain collectively with representatives of their own choosing, and to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection, . . .

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters has been clearly and unmistakenly waived. 5/

A review of the collective bargaining agreement and bargaining history leads to the conclusion that the Respondent had fulfilled its duty to bargain with the Complainant with respect to on-call pay for Unified Services employes.

3/ Section 111.07(3), Stats.

4/ Ibid.

5/ City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), Affd. Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

First, bargaining history shows that the parties intended for the agreement to be applied to the accreted employes. The parties accreted into this unit the positions of dispatchers, matron, jailer and assistant nutritionist effective with the 1984-85 agreement. In doing so the parties agreed that the terms of the previous agreement as modified through negotiations would apply to those positions except where the parties agreed to terms for these employes different from the previous contract. The Union sought no terms different from the main contract for the position of assistant nutritionist so the previous contract as modified was applied as is. The Union did seek and the County did agree to some terms unique to the positions of dispatcher, matron and jailer. These terms were adopted into the agreement and the total agreement was then applied to them.

In this case, the Union did not propose to negotiate the accretion of the Unified Services employes in a manner different from how the parties accreted employes in 1984-85. The Union proposed placement of the Unified Services employes on the salary schedule. Otherwise, the Union made no proposals unique to these employes. The intent of the parties at the negotiation table was to apply the agreement to the accreted employes unless modified through negotiations. Union President Goeltner testified on cross examination as follows:

> Q: . . . you had the intent that the contract as - was going to be bargained would be applied to the accreted individuals; isn't that correct?
>
> A: Correct
>
> . . .
>
> Q: So what you were saying is that because the Unified Services individuals are similar to people who were already - portions already listed in the contract, you felt that the contract would just be applied to those individuals and -.
>
> A: That's correct.
>
> Q: It was the intent of the Union during bargaining that it would be applied to those individuals?
>
> A: That's correct. 6/

So the Union errs when it alleges that the parties only bargained wages for the accreted employes and that neither side proposed any changes in the status quo. The County proposed the status quo of the contract unless modified through negotiations for these accreted employes, and the Union accepted that proposal.

Second, the parties did negotiate concerning on-call pay. But, the Complainant argues, the parties never bargained on-call pay specifically for Unified Service employes. Nonetheless, the parties did agree to two major changes in the on-call system. First, the parties agreed to raise the daily rate for being on-call and added holidays to the premium rate section. Second, and more importantly, the parties agreed to add the emergency government employes to the on-call system. This is not a case where the topic was never discussed. It was not only discussed, but the very type of modification now desired by the Union - the addition of a group of employes to the coverage of the clause - was agreed to by the parties. In cases where the parties have bargained over a matter and reached an agreement which is sufficiently detailed and comprehensive, the Union is deemed to have waived bargaining over other details concerning the same matter. 7/ Although the contractual language does not specifically and expressly address

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6/ Transcript, p. 48, lines 1-5, lines 11-25, p. 49, line 1.

7/ Menominee Indian School District, Dec. No. 23849-A (Buffett, 8/87), Affd. by operation of law, Dec. No. 23849-B (WERC, 9/87).

all the on-call concerns of the Union, the parties could have negotiated and included such items. The agreement is not silent on the issue of on-call; it simply does not address all the aspects the Union now seeks to negotiate. The fact that all aspects of on-call pay were not included in the agreement is not a basis for finding that these items were not waived; this is true even though the Union was unaware of this aspect of on-call pay. 8/ The Union knew or should have known the benefits being received by its accreted members and it knew or should have known of the ramifications of what it was agreeing to. But agree it did and, therefore, renegotiation is not permitted.

Since the issue of on-call pay is included in the collective bargaining agreement between the parties and since the Complainant waived its right to negotiate this issue, I find that the Respondent did not violate Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., when it refused on April 24, 1988 to negotiate this issue with the Complainant. For this reason, this allegation is dismissed.

As there is no finding of merit to any of the Complainant's allegations, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann
James W. Engmann, Examiner

8/ Washington County, Dec. No. 23770-B (Crowley, 3/87).