STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION 579, Complainant, vs. CITY OF WHITEWATER, Respondent.	Case 37 No. 39832 MP-2046 Decision No. 26099-B

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Teamsters Local Union 579.

Mr. James R. Scott, Lindner & Marsack, S.C., Attorneys at Law, Suite 1000, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Whitewater.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Teamsters Local Union 579 (hereinafter Complainant or Union), having filed a complaint of prohibited practices on December 1, 1987, with the Wisconsin Employment Relations Commission (hereinafter Commission), alleging that the City of Whitewater (hereinafter Respondent or City) had committed prohibited practices within the meaning of Sec. 111.70, Stats., by reducing the wages of a bargaining unit member; and the parties having agreed on January 27, 1988, to hold scheduling of the hearing concerning the aforesaid complaint of prohibited practices in abeyance pending an informal attempt to resolve said dispute; and the Complainant having advised the Commission on May 5, 1989, that it wished to proceed to hearing on the complaint; and the Commission having appointed James W. Engmann, a member of its staff, on July 26, 1989, to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and the Respondent having filed a motion to dismiss the complaint or, in the alternative, to require a more definite statement of claim on July 25, 1989; and the Examiner having issued a Notice of Hearing on Complaint on July 26, 1989, scheduling said hearing for August 30, 1989; and the Complainant having filed an amended complaint on August 15, 1989, alleging that the Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by reducing a bargaining unit members wages for the purpose of discouraging concerted activities and membership in a labor organization, and Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally changing working conditions without negotiating with the Union; and the Respondent having on August 22, 1989, filed a motion to dismiss based upon res judicata and a motion to hold hearing in abeyance pending resolution of the motion to dismiss; and the Complainant having on August 23, 1989, filed a letter in opposition to the motion to dismiss and the motion to hold hearing in abeyance; and the Examiner having issued an Order on August 25, 1989, denying the motion to hold the hearing in abeyance and scheduling hearing on the motion to dismiss in concert with the hearing on complaint; and hearing on said complaint and motion having been held on August 30, 1989, in Whitewater, Wisconsin, at which time the parties were afforded the opportunity to enter evidence and make arguments as the wished; and said hearing having been transcribed; and a transcription of said hearing having been received on September 8, 1989; and the parties having filed briefs, the last of which was received on January 9, 1990; 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 Teamsters Local Union 579 (hereinafter Complainant or Union) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and maintains its offices at 2214 Center Avenue, Janesville, Wisconsin.

2. That the City of Whitewater (hereinafter Respondent or City) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its offices at 312 West Whitewater Street, Whitewater, Wisconsin.

3. That on or about October 7, 1986, the Union filed a petition with the Wisconsin Employment Relations Commission (hereinafter the Commission) to represent certain employes of the City; that at hearing on the petition, the Union argued that the position of Treasurer was occupied by a municipal employe

and should be included in the bargaining unit; that at hearing the City argued that the position of Treasurer was occupied by a managerial employe and should be excluded from the bargaining unit; that on March 30, 1987, the Commission determined that the Treasurer was a municipal employe and was included in the bargaining unit; and that, as a result of the election in May 1987, the Union was certified as the exclusive bargaining representative.

4. That City Manager Paul Webber (hereinafter City Manager) was appointed to his position in August 1984; that during 1984, he determined that some City employes worked a 35 hour week and others worked a 40 hour week; that on December 31, 1984, he issued Policy Memorandum 2-85, which read in part as follows:

> 1. Purpose. The purpose of this Policy is to establish rules and guidelines for employee work schedules and managing the payment of over-time or accumulation of compensatory time.
>
> 2. Applicability. This policy pertains to all non-union classified employees of the city. Employees represented by a union shall be governed by the current Labor Agreement.
>
> 3. Workweek. The normal workweek for full-time employees shall be 40 hours per week not including lunch break, but including one fifteen minute coffee break. Time allocated for coffee breaks cannot be saved to shorten the work day. All new full-time employees shall be hired on this basis.
>
> 4. Exceptions to Workweek:
>
> (a) Hourly wage employees. Those full-time employees who have been paid 40 hours per week which included a paid lunch hour each day shall have their scale increased to reflect the same amount of pay each week based on working 35 hours per week. . . . Full-time hourly wage employees who work 40 hours per week will be considered for higher cost of living increases than those who work 35 hours per week, in consideration for the additional time they are available. Employees who currently work 35 hours per week will be given the opportunity to work 40 hours per week starting January 1, 1986. They must indicate an agreement to do so by August 1, 1985.
>
> (b) Salaried Employees (Full-time). These are key positions of high responsibility, which are not paid by the hour. They are normally expected to work 40 hours a week, on the average. Some full-time, salaried employees have been allowed to work 35 hours per week. Those employees will be given the opportunity to agree to a normal schedule of 40 hours per week starting January 1, 1986. They must indicate an agree-ment to do so by August 1, 1985. Full-time salaried employees who work 40 hours per week, as a normal schedule, will be considered for higher cost of living increases than those who work 35 hours per week, in consideration for the additional time they are available. . . .

that on July 26, 1985, the City Manager issued a memorandum regarding work schedules to all employes working a 35 hour week; that said memorandum read in part as follows:

> 1. Policy memorandum of 2-85, dated December 31, 1984, indicated full-time employees currently working a 35-hour per week schedule shall, by August 1, 1985, indicate whether or not they will agree to work a 40-hour schedule starting in 1986.
>
> 2. Those employees who choose to continue to work a 35-hour per week schedule will not be considered for cost-of-living increases in 1986 and 1987. I have decided to take this action in order to correct disparities in the standard work week for city employees. Hourly wage employees would be compensated for the five extra hours they work. Employees who are paid an annual salary would work the additional five hours with no additional compensation, other than cost-of-living increases.
>
> 3. Please indicate your decision by signing one of

the following statements.

(a) I agree to a normal work schedule of 40 hours per week starting in January, 1986.

_____ _____
Signature Date

(b) I wish to continue my normal work schedule of 35 hours per week and understand that I will not be considered for cost-of-living increases in 1986 and 1987.

_____ _____
Signature Date

and that all employes then working a 35 hour week agreed to work a 40 hour week effective January 1986 except City Treasurer Theresa Graham.

5. That Theresa Graham (hereinafter Treasurer) has been employed by the City for over 17 years; that she has worked as Treasurer since the summer of 1982; that she was hired for and worked a 35 hour week; that on or about December 31, 1984, she received Policy Memorandum 2-85, quoted in Finding of Fact 4, from the City Manager; that on or about July 26, 1985, she received the memorandum regarding work schedules, quoted in Finding of Fact 4, from the City Manager; that in a memorandum to the City Manager dated July 31, 1985, the Treasurer wrote in part as follows:

> I am unable, at this time, to sign the agreement that is attached.
>
> On October 23, 1985, a decision will be made as to whether my husband or myself will have custody of our children. Should I be given custody, my youngest daughter will need me at home until she leaves for school at 8:30 A.M. It would not pay for me to have to take her to a sitter at 8:00 and turn around at 8:30 to go and get her and drive her to school. It has worked out very well with my starting work at 8:30, then I just drop her off at school on my way to work.
>
> If I should not receive custody, the hours I work will make no difference to me. I would, however, expect to be compensated for an additional five hours per week.
>
> I do feel, though, that I was hired to work 35 hours per week over fifteen years ago. I have never taken advantage of overtime pay or compensatory time. I have always taken pride in my work and have done the best job that I can. I feel having to make concessions at this point in my career is somewhat unfair.

that at that time she was a salaried employe in pay range four earning $20,246 per year; and that she did not receive the yearly wage increase in January 1986 or January 1987.

6. That City Clerk/Controller Wava Jean Nelson (hereinafter City Clerk) received Policy Memorandum 2-85, quoted in Finding of Fact 4, from the City Manager on or about December 31, 1984; that during 1985, she was a salaried employe in pay range three earning $24,960 a year for a 35 hour work week; that on or about July 26, 1985, she received the memorandum regarding work schedules, quoted in Finding of Fact 4, from the City Manager; that on August 1, 1985, she signed the memorandum, agreeing to work a normal work schedule of 40 hours per week starting in January 1986; that she wrote on the memorandum that said work schedule was "including meetings"; that in January 1986, she received a 4.5 percent cost-of-living increase in her yearly salary; that she did not receive extra compensation for the longer work week; that her salary in 1986 was $26,083 a year; that in January 1987, she received a 2.5 percent cost-of-living increase in her yearly salary; and that her salary was $26,686 in 1987.

7. That Building Inspector/Zoning Administrator Bruce R. Parker (hereinafter Building Inspector) was a salaried employe in pay range four in 1985, receiving $19,814 a year for a 35 hour week; that on or about July 26, 1985, he received the memorandum regarding work schedules, quoted in Finding of Fact 4, from the City Manager; that he attached a memorandum of his own, dated July 30, 1985, to the City Manager's memorandum; that in his memorandum

the Building Inspector wrote in part as follows: "Again, I have no problems with working 40 hours per week but why can't we be paid for the 5 extra hours like you are going to pay the hourly wage employees?"; that in January 1986, he received a 4.5 percent cost-of-living increase in his yearly salary; that in addition he received a catch-up increase for a previously withheld increase; that he did not receive extra compensation for the longer work week; that his salary in 1986 was $21,157; that in 1987 he received a 2.5 percent cost-of-living increase in his yearly salary; and that his salary was $21,686 a year in 1987.

8. That in 1984 the following employes were paid based on a yearly salary: Administrative Assistant Kathy Schoenke, Administrative Clerks Jean Krebs and Barb Collings, and Secretary Audrey Route; that in 1984, each of these employes worked a 35 hour week in pay ranges five and six; that to determine a 1984 hourly rate from the 1984 yearly salary, the City Clerk divided the yearly salary by 52 weeks and the resulting weekly salary by 35 hours to arrive at an hourly salary; that in 1985 each of these employes was changed to an hourly employe; that in 1985 each of these employes worked a 35 hour week; that on or about July 26, 1985, each of these employes received the City Manager's memorandum regarding work schedule, quoted in Finding of Fact 4; that on or about August 1, 1985, each of these employes agreed to work a 40 hour week effective January 1, 1986; that effective January 1, 1986, each of these employes received a 4.5 percent cost-of-living increase on their hourly rate of pay; that effective January 1, 1986, each of these employes worked 40 hours per week at the 1986 wage rate; that these employes were compensated for the extra five hours because they were hourly employes working five more hours; that on or about January 1, 1987, each of these employes received a 2.5 percent cost-of-living increase on their hourly rate of pay.

9. That Administrative Assistant Sue Burkhardt was paid a yearly salary in pay range five during 1984 and 1985; that during these two years she worked a 35 hour week; that on or about July 26, 1985, she received the City Manager's memorandum regarding work schedules, quoted in Finding of Fact 4; that on or about August 1, 1985, she agreed to work a 40 hour week effective on or about January 1, 1986; that she was paid a yearly salary of $18,762 in 1985; that to determine her hourly rate for 1985, the City Clerk divided her 1985 yearly salary by 52 weeks and divided her weekly salary by 35 hours; that to determine her hourly salary in 1986, the City Clerk added the 4.5 percent cost-of-living increase to her 1985 hourly rate; that effective January 1, 1986, she worked a 40 hour work week; that the Administrative Assistant was compensated for the additional five hours she worked a week in 1986 because she was an hourly employe working five more hours; and that on or about January 1, 1987, she was given a 2.5 percent cost-of-living increase or her hourly rate of pay.

10. That in April 1987 the Treasurer advised the City Manager that she would work a 40 hour week; that the City Manager advised the City Clerk to increase the Treasurer's salary by seven percent to compensate her for the 4.5 percent cost-of-living increase in 1986 and the 2.5 percent cost-of-living increase in 1987; that the Treasurer's salary at that time was $20,246 a year; that the City Clerk did not implement the seven percent increase by adding seven percent to the yearly salary, as had been done when the City Clerk and the Building Inspector had changed from 35 to 40 hours per week; that the City Clerk implemented the seven percent increase by dividing the yearly salary by 52 weeks and divided her weekly salary be 35 hours, which equals $11.12 an hour; that the City Clerk then added seven percent to the hourly rate to arrive at a new hourly rate of $11.90; that effective on April 13, 1987, the Treasurer was paid this rate for 40 hours a week; that, therefore, the Treasurer was compensated for the extra hours worked, as had the Administrative Assistant; that this amounted to a yearly salary of $24,758; and that this was $1758 over the pay range authorized by the City Council.

11. That the City and the Union commenced negotiations for an initial collective bargaining agreement on or about July 16, 1987; that Marvin Lewis, President of Teamsters Local 579 (hereinafter Union President), was the chief spokesperson for the Union; that the Treasurer had been active in the organizing campaign on behalf of the Union; that the Treasurer was elected Chief Steward by the bargaining unit; that the Chief Steward is the top ranking Union representative in the bargaining unit; that the City was advised that the Treasurer was a Steward in June 1987; that the Treasurer participated in negotiations for the initial collective bargaining agreement; that in its proposal to the Union, the City proposed reducing the hourly rate of the Treasurer from $11.90 to $10.50 an hour; that the City's proposal included other proposals, including reducing the salary of Administrative Assistant Jean Krebs; and that in mid-October, the Union President advised the City Manager that the Union objected to any pay cuts for bargaining unit members during negotiations.

12. That on November 19, 1987, the City Manager sent a memorandum to the City Clerk, which reads in part as follows:

> 1. On November 17, I had an occasion to check on

> the comparative salaries of all employees in the Group 4 range. It was then that I first realized that my instructions to adjust Theresa's salary seven percent in return for her agreement to start working a 40 hour work week was misinterpreted by you. My intention was to grant her the cost of living adjustment that was withheld in 1986 and 1987 when she chose not to accept a request to work a 40 hour week. That would have brought her salary back up to the level of the Building Inspector and Park and Recreation Director's salary of $21,686.
>
> 2. In fact her salary was increased to show additional compensation for the five extra hours which increased her annual salary to $24,758. This is a 22 percent increase and, as you know, exceeds the limit authorized in the Council Salary Resolution of $18,000 to $23,000 for a Group 4 employee. The increase given to Theresa also exceeds the amount earned by the Librarian and Chemist who traditionally made more than the Treasurer.
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> 3. I regret this error has happened, but see no recourse but to require the salary be corrected to $21,686 provided Theresa continued to work a 40 hour work week. If she wishes to revert back to a 35 hour work week, her salary would revert back to $20,246. In consideration of the City's error, I do not feel it would be fair to require her to pay back the amount she has been over paid. Please make this adjustment immediately.

that the City Clerk reduced the Treasurer's salary from $11.90 to $10.43 an hour or from $24,758 to $21,686 a year effective on or about November 19, 1987; and that the Union filed this complaint of prohibited practices on December 1, 1987.

13. That on February 16, 1988, the Union filed a petition to initiate arbitration regarding the initial collective bargaining agreement with the City; that in its final offer, the Union proposed that the Treasurer's salary be established at $11.90 an hour for 1987, and that she receive $12.42 an hour in 1988; that in its final offer, the City proposed that the Treasurer's salary be established at $10.43 an hour for 1987 and that she receive $10.74 an hour in 1988; that in support of its position regarding the Treasurer's salary, the Union argued that the City had committed a prohibited practice by changing the Treasurer's salary in 1987; that the City argued that it had not committed a prohibited practice by changing the Treasurer's salary in 1987; that both parties offered other arguments in support of its position regarding the Treasurer's salary; and that the Arbitrator in the Interest Arbitration case, Robert J. Mueller, accepted the final offer of the City.

14. That the parties to this action are the same as those before Arbitrator Mueller in the interest arbitration; that the issue before Arbitrator Mueller involved interest arbitration under Sec. 111.70(4)(cm), Stats.; that the issue before this Examiner involves complaints of prohibited practices under Secs. 11.70(3)(a)1, 3 and 4, Stats.; that none of the facts at issue here were ultimate facts determined by Arbitrator Mueller; that, therefore, the present case does not share an identity of parties, issues and material facts with the interest arbitration case before Arbitrator Mueller; and that the present case is not identical in all respects with that decided by Arbitrator Mueller.

15. That during this time period, the Treasurer was engaged in lawful and concerted activities of which the City was aware; that the City was not shown to be hostile to these activities; and that it was not shown that the City's action in reducing the Treasurer's salary was based, even in part, on hostility toward those activities.

16. That wage rates are a mandatory subject of bargaining; that the Treasurer was paid $11.90 an hour from on or about April 13, 1989, through on or about November 19, 1989; that this was the status quo; that on or about November 19, 1989, the City unilaterally changed the wage rate of the Treasurer to $10.43 an hour; and that the City did so without negotiating the change with the Union.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the Complainant in this matter is not barred by the doctrines of res judicata and collateral estoppel.

2. That by reducing the Treasurer's wage rate, the Respondent did not discriminate against the Treasurer for the purpose of discouraging concerted activities and membership in a labor organization in violation of Sec. 111.70(3)(a)1 and 3, Stats.

3. That the Respondent, by its reduction of the wage rate of the Treasurer in November 1987 noted in Finding of Fact 12 above:

a. committed a unilateral change of conditions of employment and a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats.; and

b. derivatively interfered with employes' exercise of their right to bargain collectively through a representative under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

1. IT IS ORDERED that the Respondent's Motion to Dismiss the complaint on the basis of res judicata and collateral estoppel is denied.

2. IT IS FURTHER ORDERED that the Complainant's allegation of a violation of Secs. 111.70(3)(a)1 and 3, Stats., is dismissed.

3. IT IS FURTHER ORDERED that the Respondent City of Whitewater, its officers and agent, shall immediately:

a. Cease and desist from implementing unlawful unilateral changes in wages of employes represented by the Union and from refusing to bargain changes in wages of employes with the Union in violation of Secs. 111.70(3)(a)1 and 4, Stats.

b. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.

1. Make the Treasurer whole for any loss of wages occasioned by the above-noted change in her wage rate from the date of the wage rate change to the effective date of the initial collective bar-gaining agreement between the parties, with interest 1/ on the monetary losses experienced.

2. Notify its employes in the bargaining unit repre-sented by the Union 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". That Notice shall be signed by an authorized represent-ative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith. 2/

1/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission.

2/ Any party may file a petition for review with the Commission by following

Dated at Madison, Wisconsin this 11th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

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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.

APPENDIX "A"

NOTICE TO EMPLOYES

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

1. We will not commit unilateral changes in wage rates of bargaining unit employes represented by Teamsters Local Union 579.

2. To the extent that we have not already done so, we will make Theresa Graham, a bargaining unit employe represented by Teamster Local Union 579, whole for wages lost by our unilateral change in her wage rate on or about November 19, 1987, from said unilateral change to the effective date of our first collective bargaining agreement with Teamsters Local Union 579, and we will pay Theresa Graham interest on any monetary loss experienced.

Date at _____, Wisconsin this _____ day of _____, 1990.

City of Whitewater

By _____

CITY OF WHITEWATER

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

On brief, the Complainant argues that the City's reduction of the Treasurer's wage rate violated Secs. 111.70(3)(a)1 and 3, Stats.; that said action by the City constitutes discrimination for the purpose of discouraging concerted activity; that the Treasurer was engaged in concerted activity by voicing her position regarding the Union, by being selected as a Union steward and by her participation in negotiations with the City; that there is no dispute that the City was aware of her concerted activity; that the City felt animus toward such activity, shown by the City's opposition to the Treasurer's inclusion in the bargaining unit initially and by the City Manager's proposal to make her a supervisor so as to exclude her from the bargaining unit; that the City's action in reducing her salary shows that the City felt animus toward the Treasurer's concerted activity and that the City's action to reduce her salary was motivated, at least in part, by the City's animus toward that concerted activity; that the City's defense to this allegation of discrimination is that the reduction in the Treasurer's salary was solely for the purpose of correcting an error in calculation; that all of the evidence indicates that this assertion is pretextual; that the evidence indicates that it was the Treasurer's desire for inclusion in the bargaining unit and her active participation in it which was the motivating force behind her wage reduction, not the claimed arithmetic calculation; and that, therefore, the reduction is in direct violation of Secs. 111.70(3)(a)1 and 3, Stats.

The Complainant also argues that the City's unilateral reduction of the Treasurer's wage rate violates Secs. 111.70(3)(1)1 and 4, Stats.; that the City's action constitutes a unilateral action in violation of its obligation to bargain with the exclusive representative of its employes; that it is well recognized that an employer may not unilaterally alter wages, hours or working conditions which are mandatory subject of bargaining without first negotiating with the Union either during negotiations for a first agreement or during a hiatus between agreements; that such a unilateral change constitutes a per se violation of the duty to bargain; that there can be no doubt that alteration of a wage rate constitutes a mandatory subject of bargaining; that, therefore, the wage rate of the Treasurer is not susceptible to unilateral change; that the City's violation is willful since the Union told the City during negotiations of the necessity of maintaining wages at the status quo during negotiations; that the City's defense is that its intention in reducing the Treasurer's wage rate was only to correct a calculation error; that this is not a valid defense to a claim for refusal to bargain; and that, regardless of whether the reduction was made in good faith, it constitutes a unilateral change in violation of Sec. 111.70, Stats., which can only be remedied by returning to the status quo ante.

On reply brief, the Complainant argues that the present complaint is not barred by the doctrine of collateral estoppel; that while the parties are the same in this case as in the arbitration before Arbitrator Mueller, the issues in the case differ greatly; that in the interest arbitration before Arbitrator Mueller, the issue was which final offer package was more reasonable under the statutory criteria found in Sec. 111.70(4)(cm)7, Stats.; that by contrast the issue in the present proceeding is whether the Respondent committed prohibited practices within the meanings of Secs. 111.70(3)(a)1, 3 and 4, Stats.; that the time periods covered by the two proceedings are different; that the interest arbitration established terms and conditions of employment commencing January 1, 1988; that the present case involves an action taken by the City in November 1987; that under these circumstances, the decision of Arbitrator Mueller can not bar the present prohibited practice proceeding; that the doctrine of collateral estoppel does not apply; that there was a general agreement by the parties that the present prohibited practice case would be held in abeyance pending the outcome of the interest arbitration; that the Union did not forfeit its right to pursue the prohibited practice by going forward with the interest arbitration case; that while the award makes passing reference to the issue of discrim-inatory motive, there is absolutely no suggestion that the arbitrator addressed the issue of unilateral change in working conditions in violation of its obligation to bargain in god faith; and that, therefore, the doctrine of waiver or estoppel are inapplicable in this case and the Union's complaint must be addressed on the merits.

The Complainant also argues that the evidence in the record establishes that the City's reduction of the Treasurer's wage rate in November 1987 was discriminatory; that the City's justification for reducing the Treasurer's wage rate is based on contradictory rationale; that whatever the City's justification for its action, it was always applied to the Treasurer's

disadvantage since she became a Union supporter; and that the admissions of the City Manager and the disparate treatment which she received in relation to others lead to the unavoidable conclusion that the City discriminated against the Treasurer because of her Union activity.

In addition the Complainant argues that the City's conduct constituted a unilateral change of working conditions in violation of Sec. 111.70(3)(a)1 and 4, Stats.; that the City was obligated to negotiate with the Union concerning the proposed treatment of the Treasurer and its failure to do so constituted a prohibited practice; that the City's argument that the Union waived its right to bargain over Treasurer's reduced compensation is ridiculous; that the Union opposed the reduction and immediately protested the reduction when it occurred; that the present complaint is not moot on the basis of the subsequent arbitration; that the prohibited practice occurred months before the effective period of the labor agreement; that, therefore, the complaint is not moot; that the interest arbitration hearing does not waive the Treasurer's right to back pay; that the parties agreed that the present action would be held in abeyance during the interest arbitration proceeding; and that, therefore, since the dispute was not remedied by the arbitration award, the Union can pursue a make whole remedy for the Treasurer.

Respondent

On brief, the Respondent argues that the doctrine of collateral estoppel requires dismissal of the complaint; that the Respondent did not waive the right to assert that collateral estoppel demands dismissal of the complaint; that it is an accepted principle that for a waiver to be effective, it must be express in nature and knowingly undertaken in a clear and specific manner; that general and implied waivers will not be enforced under normal circumstances; that it is evident from the record that there was no express waiver of the right to assert the preclusive effect of either res judicata or collateral estoppel during these proceedings; that the Complainant's complaint of prohibited practice should be dismissed upon the application of the doctrine of collateral estoppel; that the Wisconsin Employment Relations Commission has not found it inappropriate to apply the principles of res judicata to arbitration awards where there is an identity of parties, issue and remedy and no material discrepancies of fact; that there is no question that the parties in the interest arbitration case before Arbitrator Robert J. Mueller are identical to the parties in this matter; that the question of whether the readjustment of the Treasurer's wage rate constituted discrimination within the meaning of Sec. 111.70(3)(a)3, Stats., and/or a unilateral act which constituted a refusal to bargain within the meaning of Sec. 111.70(3)(a)1 and 4, Stats., was fully and fairly litigated and decided in the proceedings before Arbitrator Mueller; that the Union raised the issues regarding the readjustment of the Treasurer's wage rate before Arbitrator Mueller; that Arbitrator Mueller rejected the Union's allegation of prohibited practice; and that, therefore, the City requests that the complaint be dismissed in its entirety.

The City also argues that it has not committed prohibited practices within the meaning of Sec. 111.70(3)(a)3, Stats.; that the Complainant has failed to establish a prima facie violation of said section; that the Complainant Union has the burden of demonstrating by a clear and satisfactory preponderance of the evidence that the Respondent's actions were based at least in part on anti-union consideration; that the City's opposition to the inclusion of the Treasurer's job classification in the bargaining unit was not a hostile act motivated by anti-union animus but an assertion of rights granted under Sec. 111.70, Stats.; that the reduction proposed in Treasurer's wage rate during negotiations was not an act of retribution but was based upon evidence provided during the represent-ation hearing and the City's analysis of the actual work performed in the classification compared with other classifications in the wage range; and that while there is indication that the City had knowledge that the Treasurer was engaged in concerted activity on behalf of the Union, there is no indication that the City harbored any animosity toward the Treasurer as a result of activities and there is no evidence that the City acted against the Treasurer as a result of Union activity. In addition, the City argues that the Respondent has articulated legitimate non-discriminatory reasons for the Treasurer's wage adjustment; that it has established by clear and convincing evidence that the adjustment in the Treasurer's compensation was not motivated by discriminatory intent; that a mistake was made in the computation of the Treasurer's compensation when she elected to adjust her schedule from 35 to 40 hours per work; that it is the correction of the mistake which gives rise to this dispute; and that nothing in the record indicates that the computation adjustment was motivated in any way by animosity toward the Treasurer as a result of her activity in and involvement on behalf of the Union. The City also argues that the Complainant has not demonstrated that the reasons articulated by the Respondent were a pretext for discriminatory conduct; that the Respondent has demonstrated a legitimate non-discriminatory reason for adjusting the Treasurer's compensation; that the Complainant must prove that the reason advanced is merely camouflage for a reduction in compensation which was predicated on the Treasurer's Union activity; that the record shows that the Complainant has failed to offer any proof which conclusively demonstrates that the reasons given for the wage adjustment were a

cover up for illegal conduct; and that, therefore, the Complainant's allegations should be found to be totally lacking in merit.

As to the alleged violation of Sec. 111.70(3)(a)1 and 4, Stats., the City argues that it did not violate said sections; that while it recognizes the obligation to bargain prior to any change in wages and benefits it does not believe that this obligation applies in this case; that when the Treasurer accepted the compensation adjustment during the campaign, the new wage rate had to be computed according to guidelines previously established and the method which was used when the Respondent made the adjustment for the other employes; that any correction of a computational mistake was an integral part of maintaining the status quo and not a unilateral refusal to bargain; that the correction of a computational mistake has not and should not be subject to a bargaining obligation; that this is especially true where the adjustment conforms with existing pay practices and does not place the employe in any worse position that she would have been had the mistake not occurred; that in any case the Complainant has waived the right to negotiate; that in the alternative the obligation to bargain concerning the Treasurer's wage rate has been merged into the interest arbitration proceedings; and that, therefore, the Respondent requests that a finding be made that it has not violated Sec. 111.70(3)(a)1 and 4, Stats.

Finally, the Respondent argues that the remedy requested by the Complainant is inappropriate; that the Complainant's request that the order include a make whole remedy for the Treasurer which would restore the money lost as a result of the November 1987 adjustment up to and through the 1988-89 contract would violate the final and binding nature of interest arbitration awards; that such a decision would run counter to established Commission precedent; that Arbitrator Mueller has established the Treasurer's compensation for the 1988-89 contract; and that, therefore, any remedy established in this matter should cover only the period from the date of the occurrence to the retroactive date of the collective bargaining agreement.

DISCUSSION

1. Motion to Dismiss

On August 22, 1989, the Respondent filed a Motion to Dismiss based upon res judicata. On August 23, 1989, the Complainant filed a letter in opposition to said Motion. On August 25, 1989, the Examiner issued an Order Scheduling Hearing on the Motion to Dismiss in concert with the hearing on the merits scheduled for August 30, 1989.

The Commission recognizes the doctrine of res judicata where the subsequent litigation is shown to share an identity of parties, issues and material facts. 3/ The Respondent argues that the present case share an identity of parties, issues and material facts with the interest arbitration case before Arbitrator Mueller. The Complainant disagrees.

The record is clear that the parties that appeared before Arbitrator Mueller are the parties here present. The record is also clear that some of the facts involved in the allegation of discrimination based on concerted activities were presented to the Arbitrator. But it is also clear that the issues facing this Examiner were not before Arbitrator Mueller in the interest arbitration case.

The issue before the Arbitrator was which party's final offer should be adopted and incorporated into a written collective bargaining agreement 4/ based upon statutorily stated factors. 5/ As such he received evidence and heard arguments regarding the alleged discrimination based on concerted activity at issue in this case. However, the issue of whether the Respondent violated Secs. 111.70(3)(a)1, 3 and 4, Stats., was not before the Arbitrator. Arbitrator Mueller's authority was limited to selecting a final offer; therefore, he had no authority to remedy any prohibited practice if he had found one.

The Respondent also argues that the doctrine of collateral estoppel requires dismissal of this complaint of prohibited practices. As cited by the Respondent, the Wisconsin Supreme Court has ruled that collateral estoppel precludes "relitigation of an issue of ultimate fact previously determined by a

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3/ Moraine Park VTAE District, Dec. No. 22009-B (WERC, 11/85), citing State of Wisconsin, Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83); and State of Wisconsin, Dec. No. 20910-B, Footnote 8, (WERC, 3/85).

4/ Sec. 111.70(4)(cm)6.d., Stats.

5/ Sec. 111.70(4)(cm)7, Stats.

valid final judgment in an action between the same parties". 6/ The Court also stated that the doctrine applies "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged". 7/

As stated above, some of the facts involving the allegation of discrimination based on concerted activities were presented before the arbitrator; however, said facts were not ultimate facts upon which the Arbitrator based his decision. Indeed, the matter raised in this case is not identical in all respects with that decided in the first proceeding.

For these reasons, the doctrines of res judicata and collateral estoppel do not apply to this case; therefore, the Motion to Dismiss based upon these doctrines is denied.

2. Alleged Violations of Secs. 111.70(3)(a)1 and 3, Stats.

The Complainant alleges that the action of the City in reducing the wages of the Treasurer constitutes discrimination for the purpose of discouraging concerted activity in violation of Sec. 111.70(3)(a)1 and 3, Stats.

Section 111.70(3)(a) states that it is a prohibited practice for a municipal employer:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair share agreement.

In order to prevail on a complaint alleging a violation of Sec. 111.70(3)(a)3, Stats., the Union must prove by a clear and satisfactory preponderance of the evidence that the Treasurer was engaged in lawful and concerted activities, that the City was hostile toward those activities, and that the City's action was based, at least in part, on hostility toward those activities. 8/

The record shows that the Treasurer was active in the Union's organizing campaign, that she was selected as a Union steward and that she served on the Union's bargaining team for the initial collective bargaining agreement. These are certainly concerted activities protected by Sec. 111.70(1)(a), Stats. By the nature of these activities and based on the record in this case, it is clear that the City was aware of the Treasurer's concerted activities. The question remains whether the City was hostile toward those activities and whether the City's action was based, at least in part, on hostility toward those activities.

In terms of showing that the City was hostile to the Treasurer's concerted activity, the Union first argues that the City's animus is shown by its opposition to the Treasurer inclusion in the bargaining unit. While it is true that the City argued before the Commission that the Treasurer should be excluded from the bargaining unit, this does not show hostility to her protected activity but a question regarding representation, specifically whether the Treasurer was a municipal employe or a managerial employe.

The Union also asserts that the City's discussion with the Treasurer in which the City Manager suggested that she be made a supervisor shows animus toward the Treasurer's concerted activity. Again, this goes to the City's belief that the position of Treasurer should be excluded from the bargaining unit, not anti-union animus toward the Treasurer.

Finally, the Union argues that the City's action in reducing the Treasurer's salary shows that the City felt animus toward the Treasurer's concerted activity. This action, by itself, does not show anti-union hostility; the Union must show that this action was based, at least in part, on hostility. The action, in and of itself, does not prove the motivation.

The City asserts that it took the action it did for the sole purpose of correcting an error in calculation. The Union argues that this assertion is pretextual, that it was the Treasurer's desire for inclusion in the bargaining unit and her active participation in it which was the motivating force behind the wage reduction. The proof of this, according to the Union, is that the

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6/ State ex rel. Flowers v. H&SS Department, 81 Wis.2d 376, 260 N.M.2d 727 (1978).

7/ Id.

8/ Village of Maple Bluff, Dec. No. 25718-A (Buffett, 4/89), aff'd by operation of law, Dec. No. 25718-B (WERC, 5/89).

City treated the Treasurer differently than it treated other's who changed from 35 to 40 hours. The City admits to this, up to a point, in that it admits it treated the Treasurer differently than it treated some other employes, but the City alleges it treated her similarly to those similarly situated.

Any support the Union seeks from the situations of Administrative Assistant Schoenke, Administrative Clerks Krebs and Collings and Secretary Route is misplaced. These employes had been converted to hourly employes prior to the change from 35 to 40 hour work week. Thus, the increase in hours worked resulted in their being compensated for those hours.

The Union also seeks support from the situation of Administrative Assistant Burkhardt (hereinafter the Administrative Assistant). The record is clear that when she changed from working a 35 hour week to a 40 hour week, she was compensated for the five additional hours, in addition to receiving the yearly raises of 4.5 percent and 2.5 percent. The City counters with the situations of the City Clerk and the Building Inspector. The Union asserts there is no proof that the Building Inspector worked more hours as a result of the change over to a 40 hour work week. The Union is in error. The Building Inspector's memorandum to the City, noted in Finding of Fact 7, specifically notes that he is willing to work the five extra hours. While it is true that he had worked weeks longer than 35 hours in the past, it was as a salaried employe; nonetheless, his normal work week was 35 hours. That was changed by this action of the City. His normal work week became 40 hours per week. The situation of the City Clerk is less clear. While she was given and she signed the City Manager's memorandum quoted in Finding of Fact 4, the record also suggests that her work schedule did not change since she attended night meetings.

The Union therefore argues that because the City treated the Treasurer differently than it treated the Administrative Assistant, the City discriminated against the Treasurer because of concerted activity. The City asserts, however, that it treated the Treasurer just as it treated the Building Inspector, that it treated her like him because these were traditionally salaried positions in pay range 4, and that the Administrative Assistant was traditionally a hourly employe in pay range 5.

There is much in the record that suggests that a mistake was made in computing the Treasurer's salary. The fact that the computation as done by the City Clerk gave the Treasurer a salary above the range as authorized by the City Council supports the City's contention. In any case, the City has articulated a business reason for its action, one supported by the situation of the Building Inspector and the exceeding of the approved salary range. The Union's only evidence to support an allegation of discrimination was the act itself and the situation of the Administrative Assistant. This is not enough to sustain a charge of discrimination.

3. Alleged Violations of Secs. 111.70(3)(a)1 and 4, Stats.

The Complainant argues that the City violated Secs. 111.70(3)(a)1 and 4, Stats., when it unilaterally reduced the wage rate of the Treasurer without bargaining with the exclusive bargaining representative. The City argues that it was correcting a computational error and, therefore, was not unilaterally changing the status quo.

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during negotiations of a first collective bargaining agreement is a per se violation of the duty to bargain under Sec. 111.70(3)(a)4, Stats. 9/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 10/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 11/

No dispute exists that the City reduced the wage rate of the Treasurer from $11.90 an hour to $10.43 an hour without negotiating said reduction with the Union. As a defense, the City alleges that when the Treasurer accepted the compensation adjustment during the Union campaign, she accepted the guidelines previously established to make the adjustment, and that, as a computational mistake was made, correcting the mistake was integral part of maintaining the

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9/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

10/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) and Green County, Dec. No. 20308-B (WERC, 11/84).

11/ School District of Wisconsin Rapids, supra.

status quo.

But the mistake at issue here is not one of computation in which someone added or subtracted incorrectly. The City Manager does not say that the City Clerk hit the wrong button on the calculator. In fact, the City Clerk did not make that type of error at all. She hit all the right buttons on the calculator; at least, right to her way of thinking. The mistake that the City allegedly corrected is not one of the calculation, but one of the method of calculation, the process used to determine the Treasurer's wage rate. The City Clerk took the Treasurer's yearly salary, divided by 52 weeks and then 35 hours per week to determine the hourly rate, and then the City Clerk added the seven percent. The City Manager would have either divided the Treasurer's yearly salary by 52 weeks and then 40 hours per week and then added the seven percent or he would have added seven percent to her yearly salary and then divided by 52 and 40.

If the City Clerk was in error, it was not an error in calculation but in procedure. A neutral person armed with a calculator or even a pencil and paper can find and correct an error in calculation, but a neutral person cannot deter-mine if the procedure is incorrect because the procedure is a policy decision. If it is an error, it is an error because someone determined that the calcul-ation should have been done in a different manner. Here, the City Manager made that determination. The Union argues that the City should have negotiated that determination.

As the reduction in the wage rate of the Treasurer's wage rate involves a mandatory subject of bargaining, the City was obliged by Sec. 111.70(3)(a)4, Stats., to negotiate the change in the Treasurer's wage rate. Even assuming that the dispute over the calculation of the Treasurer's wage rate was an honest disagreement over how the rate should be calculated and that the City believe in good faith that it did not need to bargain over the correction of what it saw as a calculation error, the City is not relieved of its obligation to have bargained the change in the Treasurer's wage rate. 12/

4. Remedy for Violation of Secs. 111.70(3)(a)1 and 4, Stats.

As to remedy, the Union seeks to have the Treasurer's wage rate established at $11.90 an hour from the date the City unilaterally changed the wage rate in November 1987 until March 31, 1989, the day the Arbitration Award was implemented. The Union argues that the City must make the Treasurer whole for losses from the inception of the prohibited practice until the date the parties implemented their first collective bargaining agreement, citing School District of Wisconsin Rapids. 13/ In Wisconsin Rapids the Commission found that the District unilaterally altered the wages, terms and conditions of employment when it failed to grant wage and vacation increases granted in expired wage and vacation schedules. The Commission ordered a make whole remedy for any losses of wages and vacation benefits from the date of the Board's action through the date of the implementation of the initial agreement.

In general, the make-whole remedy is meant to put the aggrieved party where that person would have been but for the illegal action. In Wisconsin Rapids the District had withheld wages and vacation time rightfully owed to the affected employes, wages and vacation time they had lost by the employer's illegal action.

In the case at hand, the City argues that if a violation is found, the remedy should be limited to the period from the date of the City's action in November 1987, to the effective date of the contract established by the Arbitrator's award. The City is correct; to do otherwise would exceed a make whole remedy, for if the City had not changed the wage rate of the Treasurer in November 1987, the arbitration award would have changed it, back to the effective date of the award. In Wisconsin Rapids, the employes suffered losses up to the date of the implementation of the initial contract. Here the Treasurer suffered no such loss; her right to a salary of $11.90 ended with the effective date of the initial collective bargaining agreement between the parties. Thus the remedy is fashioned to compensate the Treasurer only for the wages she would have received but for the City's unilateral change in her wage rate in violation of Secs. 111.70(3)(a)1 and 4, Stats.

Dated at Madison, Wisconsin this 11th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

12/ City of Brookfield, supra.

13/ Dec. No. 19084-C (WERC, 3/85).

James W. Engmann, Examiner