STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 778-D, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 90
	:	No. 43282
	:	MP-2301
vs.	:	Decision No. 26289-A
OCONTO COUNTY,	:	
Respondent.	:	

Appearances:

Mr. Steve Hartmann Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 676, Rhinelander, WI 54501, and and Mr. Phil Salamone, Staff Representative, appearing on behalf of the Complainant.

Mr. Robert W. Burns, Mulcahy & Wherry, S.C., 414 East Walnut Street, PO Box 1103, Green Bay, WI 54305-1103, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 30, 1989, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission (herein Commission) alleging that the above-named Respondent had committed and was committing prohibited practices within the meaning of the Secs. 111.70(3)(a)1, 4 and 5, Stats. On January 16, 1990, the Commission appointed the undersigned member of its professional staff, Marshall L. Gratz, to act as examiner in the matter and to make and issue findings of fact, conclusions of law and order.

Pursuant to notice, the Examiner conducted a hearing in the matter at the Oconto County Courthouse, Oconto, Wisconsin on February 12, 1990. Following distribution of the transcript, the parties submitted initial and a reply briefs. Briefing was completed on May 16, 1990.

The Examiner has considered the record evidence and the arguments submitted by the parties and hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 778-D, AFSCME, AFL-CIO, also referred to herein as Complainant or the Union, is a labor organization affiliated with AFSCME Council 40 which has its principal office at 5 Odana Court, Madison, Wisconsin 53719. At all material times, the AFSCME Council 40 Staff Representative servicing Complainant has been Steve Hartmann, PO Box 676, Rhinelander, Wisconsin 54501.

2. Oconto County, referred to herein as Respondent or the County, is a municipal employer with offices at Oconto County Courthouse, Oconto, Wisconsin. The business of the County is controlled by the Oconto County Board of Supervisors, referred to herein as the County Board. At all material times, the County Board's five-member Personnel and Wages Committee participated in the County's collective bargaining negotiations with Complainant, along with the heads of affected departments, Administrative Coordinator and Accountant Eugene Dolata, and outside labor relations counsel, Dennis Rader.

3. At all material times, the Union has been the exclusive collective bargaining representative of a bargaining unit of the County's employes consisting of all regular full-time and regular part-time professional Human Service employees, but excluding department heads, community services manager, director of administrative services, social work supervisor, income maintenance supervisor, director of Rehabilitation Center, and all managerial, supervisory and confidential employees.

4. On or about January 1, l989, the County voluntarily recognized AFSCME Council 40 as the exclusive collective bargaining representative for all professional Social Workers and Registered Nurses employed by the County. The Union and County agreed to merge those positions into the existing bargaining unit and collective bargaining agreement then in existence between the Union and the County.

5. At the time of the voluntary accretion, bargaining for the 1989-90 contract between the Union and the County had not been completed. During the course of bargaining the County requested that the Union agree to the Advantage cost containment program of Blue Cross/Blue Shield, referred to herein as the Advantage program.

6. By February 1, 1989 the County had reached agreement with the other three collective bargaining units of the County for 1989-90 including an agreement to implement the Advantage program. However, because of the voluntary accretion there were a number of issues left to be resolved in the Local 778-D bargain. Nonetheless, the County needed agreement from all units in order to implement the Advantage program.

7. On February 3, 1989, bargaining representatives of the Union and the County reached tentative agreement on some of the unresolved issues in the bargain. The February 3 tentative agreement terms, which had been pre-ratified by the Union membership, would, if ratified by the County Board, require and allow the County to immediately implement the Advantage program, 3.5% general wage increases in 1989 and 1990, and upgrades for Unified Services Board employes as proposed by the County in earlier bargaining and as defined in a January 12, 1989 letter from

Rader to Hartmann. The body of that January 12 letter read as follows:

> The language which I have in my notes regarding certain bumping restrictions under the layoff clause in the Courthouse Contract in Oconto County is the following:
>
> > A full time employee who is bumped in a department shall not be required to take part-time work in that department, but has the right to bump into the unit.
> >
> > Part-time employees shall not use bumping as a means to obtain a full-time job.
>
> With respect to the County's offer on the three year equalization of 51.42 contract persons with the social workers schedule, I have the following information. First, one-third of the adjustment would be made on January 1, 1989, the next third of the adjustment would be made on July 1, l990, and the final adjustment would be made on December 31, 1991. The top position in the 51.42 department would be paid at the; Social Worker III position, with the range going from $23,484 to $24,972, apparently over a four year period of time dependent upon the attainment of 6 or 12 graduate credits. (I am not sure about the exact number of the credits and the conditions under which they must be taken.)
>
> The middle 6 positions would be adjusted to the Social Worker II position which is slated at $23,472. Persons holding a degree would receive the $23,472 but nondegreed persons with a special certification would receive $22,000 instead. (Present personnel are grand-fathered.)
>
> The third group would be adjusted to the Social Worker I rate if in fact they are degreed and would receive $18,888. Non-degreed persons in the third group would be paid at the non-degree IMC rate in the Courthouse contract, namely $17,413.
>
> Thus far we have only talked about the general parameters of the social worker wage schedules and I would imagine that more specific information on the impact that education would have on compensation is subject to more clarification as we develop the details on this in our next negotiations session.
>
> If you have any questions regarding this matter, please feel free to contact me at your convenience.

The above-described upgrades are referred to herein as the January 12 upgrades or as the upgrades element of the February 3 tentative agreement.

8. The February 3 tentative agreement has not been reduced to a bilaterally-approved written form form on February 3 or since. The only document exchanged on the subject on February 3 was Rader's handwritten attempt to calculate the adjustments in detail, which by all accounts was a complicated undertaking. The Union stated that it was not willing to agree to the handwritten document prepared by Rader because it contained errors, but the parties nonetheless reached tentative agreement on the abovenoted terms including the upgrades as described in the January 12 letter. Among the Union's expressed concerns about Rader's handwritten document were the facts that a number that should have been 20,880 was written 20,000, and it identified the Union president as being red-lined rather than grandfathered regarding adjustment eligibility. On this latter point, the Union's bargaining representatives had expressed extreme dissatisfaction, prompting Rader to apologize for what he assured them had been an unintended mistake on his part and to note that he was physically ill that day as they could see.

9. On February 7, Rader sent Dolata a list of items for Dolata to use in preparing a County Board resolution concerning the February 3 tentative agreement. That document read as follows:

OCONTO COUNTY UNION LOCAL 778-D
WAGES AND INSURANCE, 1989

1. Introduce Advantage program, February 1, 1989 (5% premium reduction).

2. Adjust Clinical Social Worker rate by $.30 per hour.

3. Adjust the following positions' wage rate by $.18 per hour:
   Production Supervisor
   ADLS/Day Services Supervisor
   Social Worker
   Community Support Workers
   Chemical Dependency Counselor
   Developmental Disability Specialist

4. Increase all wage rates in Public Health, Social Services and Unified Services by 3.5%.

10. On February 8, 1989, Hartmann called Rader and requested that the upgrades element of the tentative agreement not be submitted to the County Board for ratification at its next meeting but that the Advantage program and general wage increases should proceed to County Board ratification and implementation. By way of explanation of his request, Hartmann told Rader that the Union was not trying to deviate from the January 12 upgrades agreed upon on February 3, but

that the Union was concerned about possible misunderstandings that could arise because the parties had not reduced the mathematics of the upgrades agreement to an agreed-upon written form. Hartmann's explanation also gave Rader the impression that the Union's request was not being made because of concerns on Hartmann's part but rather concerns on the part of some member or members of the bargaining unit. Rader expressed his disappointment with the Union's request but agreed to remove the upgrades from the agenda of matters presented for County Board approval at its next meeting. Rader and Hartmann both understood that the upgrades matter would be dealt with later, but neither specified during that conversation when or in what manner that was to be done.

11. Rader then contacted Dolata, told him about the phone call from Hartmann and that he should remove the upgrades element from the list of items being presented for County Board approval at its next meeting.

12. On or about February 15, a resolution signed by all five members of the Personnel and Wages Committee was adopted by the County Board concerning the February 3 tentative agreement. That resolution read as follows:

RESOLUTION # 15 -1989

TO: The Hon. Chairman and Members of the Oconto County Board Supervisors

RE: WORKING AGREEMENT BETWEEN OCONTO COUNTY AND OCONTO COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES LOCAL 778-D

WHEREAS, the professional employees in the social Services Department and Nurses Department have combined with the professional employees of the Unified Services Department as per Resolution #107 adopted December 15, 1988 with the consequence of having to create a new working agreement and,

WHEREAS, we and a committee of the Oconto County Human Services Professional employees Union, Local 778-D, AFSCME, AFL-CIO have been in negotiations on this new working agreement and,

WHEREAS, certain parts of a new working agreement for the period of January 1, 1989 to December 31, 1990 has been mutually agreed upon, and we have tentatively agreed to implement these parts retro-active to January 1, 1989 as per the attached summary. Now therefore be it,

RESOLVED, that said parts of a new working agreement as attached be approved and adopted.

Submitted this 15th day of February, 1989
BY: THE PERSONNEL & WAGES COMMITTEE

Robert Wegner Richard Scott
Donald Kanack Gerald Beekman
Beverly Kussow

The attached provisions referred to in the RESOLVED clause of that resolution consisted of numbered points 1 and 4 of Rader's February 7 listing for Dolata quoted in Finding of Fact 9, above, to wit, the adoption and implementation of the Advantage program and of a 3.5% general wage increase for 1989. There was no reference in the Resolution to a general wage increase for 1990.

13. Shortly thereafter, without any other communication to or from the Union, the County implemented the 3.5% general wage increase for 1989 and the Advantage program. The County and has not implemented the January 12 upgrades and has not presented or recommended ratification thereof to the County Board.

14. Some weeks later an interest arbitration petition was filed regarding the unresolved aspects of the parties' contract negotiation dispute. Investigator Amedeo Greco set May 2 as the first investigation meeting date.

15. On April 12, Rader called Dolata to schedule a meeting with the County bargaining team in preparation for the May 2 investigation meeting. During that conversation with Dolata, Rader learned for the first time that after the Union had removed the upgrades from the County Board's February 15 agenda, Dolata and the affected department heads had begun working on alternatives to the upgrades approach contained in the January 12 letter, i.e, on alternatives to the upgrades tentatively agreed upon on February 3.

16. There had been no communications between Hartmann and the County concerning the upgrades until an April 18 telephone conversation between Rader and Hartmann.

17. That April 18 phone conversation dealt primarily with pending grievances, but other matters were discussed including the status of the Local 778-D bargain. Hartmann told Rader that he had heard rumors that the County Board did not approve of the upgrades element of the February 3 tentative agreement. Rader responded that the County administrators were working on alternative approaches on that issue. That constituted the first notification from the County to the Union that the County did not consider the February 3 tentative agreement to have any continuing effect on the subject of the upgrades.

18. Hartmann responded by writing Rader on April 20, as follows:

> Enclosed you will find my calculations for the movement of various 51.42 positions into SWII and II positions over the next three years. When you compare the figures you presented to me and these I believe you will find that there is little if any differences in our overall numbers. In any event look it over and give me a call if you have any questions.
>
> I would also like to state for the record that the Union has at all times been in agreement with your letter of January 12, 1989. To the extent any dispute exists it has been over the calculations. There has been no attempt on the part of the Union to alter the agreement the parties have had on this matter for the last four months. I would hope you would see that any rumors to the contrary remain just that. I would point to our cooperation with the County to resolve the health insurance issues. We did not have to do that.
>
> Finally, neither party has dealt with the actual wage schedule as yet. We will have one for your review at the mediation that will hopefully reflect a codification of our present agreements.

Hartmann enclosed with that April 20 letter a set of detailed calculations showing the salaries at various times produced by applying the January 12 upgrades over the three years that they involved. Besides the above noted February 8 telephone call, the April 20 letter and enclosure constituted the only communication from Hartmann to the County on the subject of the tentative agreement since the conclusion of the February 3 meeting.

19. On April 25, Rader met with the County bargaining team in preparation for the May 2 investigation meeting. During that meeting, County administrators worked together to formulate bargaining proposals regarding upgrades that differed from the January 12 upgrades formulation.

20. The interest arbitration investigation, which remains open at present, has consisted to date of three or four meetings during May-September of 1989. At the outset of that investigation and at the present time, the Union's position has been that the upgrades be as tentatively agreed on February 3, i.e., the January 12 upgrades. The County, on the other hand, has insisted on different adjustment arrangements along the lines developed by the administrators. At one point in the investigation, the Union stated through the investigator that it would be willing to accept the County's upgrades proposal with certain modifications. The County was unwilling to accept the Union's modified version, and the upgrades issue stands as one of several unresolved issues in the investigation at the present time.

21. The Union did not object to or question the propriety of that the County's 1989 implementations noted in Finding of Fact 13, above, until the instant complaint was filed in this matter on November 30, 1989.

22. Notwithstanding the County's receipt of the Union's April 20 letter noted in Finding of Fact 18, above, the County's bargaining representatives have not presented the January 12 upgrades to the County Board. The January 12 upgrades have never been acted upon by the County Board and have not been implemented by the County to date.

23. The County implemented a 3.5% general wage increase effective at the beginning of 1990. The record does not indicate what County Board or committee action preceded that 1990 general wage increase implementation.

24. Hartmann's February 8 phone conversation with Rader resulted in Hartmann agreeing to separate the tentative agreement concerning upgrades from the tentative agreement concerning Advantage program and general wage increases and to delay County Board consideration of the tentative agreement regarding upgrades to a later time. As the Union's staff representative, Hartmann had apparent authority to enter into such an agreement regardless of whether the Union membership conferred actual authority upon him to so agree.

25. The County implemented the Advantage program and 1989 general wage increase in reasonable reliance on Hartmann's agreement that those items were to be addressed by the County Board separately from the upgrades element of the February 3 tentative agreement. Those implementations were consistent with the parties' now-separate tentative agreement concerning general wage increases and insurance, which agreement was not subject to any further conditions following the County Board's above noted ratification thereof.

26. Neither Hartmann's above noted February 8 agreement, nor the acts and omissions of the Union and its agents since February 3, nor those factors taken together, amount to a Union agreement relieving the County of its bargaining representatives' February 3 agreement to present and recommend County Board ratification of the now-separate tentative agreement consisting of the January 12 upgrades.

27. The January 12 upgrades tentatively agreed upon on February 3, as described in the January 12 letter, are susceptible to County Board consideration for ratification and implementation and to reduction to written agreement form if ratified by the County Board.

CONCLUSIONS OF LAW

1. Respondent Oconto County, by its failure to implement the January 12 upgrades tentatively agreed upon on February 3, has not violated the terms of a collective bargaining agreement and has not committed a prohibited practice within the meaning of Sec.111.70(3)(a)5 and/or 1, Stats.

2. Respondent Oconto County, by its implementation of the Advantage program and 1989 and 1990 general wage increases, has not committed a unilateral change refusal to bargain within the meaning of Sec.111.70(3)(a)4 and 1, Stats.

3. Respondent Oconto County, by its bargaining representatives' failure to present and recommend the January 12 upgrades tentatively agreed upon on February 3 for County Board ratification, has committed a refusal to bargain prohibited practice within the meaning of Sec.111.70(3)(a)4, and 1, Stats.

ORDER 1/

A. Respondent Oconto County, its officers and agents, shall immediately:

1. Cease and desist from failing to follow through on its representatives' agreements to present to the Oconto County Board of Supervisors and to recommend ratification of tentative agreements reached in collective bargaining with Complainant Local 778-D, AFSCME,AFL-CIO.

2. Take the following affirmative action which the Examiner finds will further the underlying purposes of the Municipal Employment Relations Act:

a. Cause the attached notice set forth in Appendix A to be signed by an authorized agent of the County and posted in conspicuous places where notices to employes represented by Complainant are usually posted for a period of not less than sixty (60) calendar days, taking reasonable steps to insure that said notice is not altered, defaced or covered by other material.

b. Cause its bargaining representatives to present and recommend ratification of the January 12 upgrades tentatively agreed upon on February 3, 1989 in collective bargaining with Complainant to the Oconto County Board of Supervisors at the next regular meeting of that body at which such matter can be presented consistent with applicable law concerning public notice of County Board business.

c. Notify the Wisconsin Employment Relations Commission within 20 days of the date of this decision what steps it has taken to comply with this Order.

B. Except as noted in A, above, the instant complaint is dismissed.

Dated at Shorewood, Wisconsin, this 16th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

by Marshall L. Gratz /s/

Marshall L. Gratz, 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.

Sec. 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 ALL EMPLOYES OF OCONTO COUNTY REPRESENTED BY LOCAL 778-D, AFSCME, AFL-CIO

Pursuant to an order of a Wisconsin Employment Relations Commission Examiner, and in order to further the purposes of the Municipal Employment Relations Act, Oconto County hereby notifies you that:

> The County will not fail to follow through on its representatives' agreements to present to the County Board of Supervisors and to recommend ratification of tentative agreements reached in collective bargaining with Complainant Local 778-D, AFSCME, AFL-CIO.

Dated this ___ day of _____, 19_.

OCONTO COUNTY

by_____
signature

_____
title

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

OCONTO COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL BACKGROUND

In its complaint filed on November 30, 1989, the Union alleges that the County violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by reason of the conduct generally described in Findings of Fact 4-7 and 13. The relief requested in the complaint is that the County be ordered to implement the January 12 upgrades tentatively agreed upon on February 3, with interest, and be ordered to cease and desist, post an appropriate notice, "and any other remedy the Commission believes to be in order."

In its answer as amended at the hearing, the County admits the facts alleged in the complaint; denies the propriety of the relief requested because no illegal activity has transpired; and affirmatively asserts that on February 8, 1989, the Union, by its representative Steve Hartmann, requested that the upgrades not be implemented.

The parties waived opening statements at the outset of the case. At the close of the Union's case in chief, the County moved for dismissal of the complaint on the grounds that the evidence theretofore adduced confirmed the County's contention that the Advantage program and general wage increase were implemented by mutual agreement of the parties and that the remainder of the tentative agreement was subject to County Board ratification, such that, as a matter of law, no prohibited practice has occurred. The Examiner took the County's motion under advisement and the parties made brief statements in support of their positions. The Union's stated position was that the Union had not backed off the agreement to do the upgrades as described in the January 12 letter, but rather had only asked to straighten out the associated mathematics that had been erroneously presented by the County during the February 3 meeting, such that ". . . the Board failed, and the personnel Committee never took it to the board to implement the agreement that was reached on February 3rd with the extension agreed to by the spokesman for the County on February 8th." (tr. 43).

POSITION OF THE COMPLAINANT UNION

Taken together, the Union's position as presented at the hearing and in its brief and reply brief is as follows.

The parties agreed on February 3 to a tentative agreement including Advantage program, general wage increases for 1989 and 1990 and the upgrades as stated in Rader's January 12 letter. The County has presented for County Board ratification and implemented only the first two of those elements but not the third. The Union membership never ratified those two elements alone without the upgrades, and the Union has never signed an agreement containing just those two elements. Hence, it must be that the County is either violating the terms of an agreement by failing to

implement the third element, or committing an unlawful unilateral change refusal to bargain by implementing the first two elements without Union agreement that those items could stand alone, or committing a refusal to bargain by refusing to present and recommend the upgrades for County Board ratification.

The Union has not, on February 8 or at any other time, deviated from its position that the parties remain bound to their February 3 tentative agreement including the January 12 upgrades. The Union has not relieved the County negotiators of their obligation to recommend the upgrades as tentatively agreed. Rader's testimony about his February 8 phone conversation with Hartmann shows clearly that Hartmann and Rader only agreed that the upgrades element would not be presented at the next meeting of the County Board. The Union chose to wait until the parties' next met in bargaining to work out the mathematics of the offer correctly, inasmuch as the County had admittedly presented a flawed calculation during the February 3 meeting itself. By postponing the presentation of the tentative agreement on the upgrades to the County Board until the parties had an opportunity to complete an accurate calculation of the salaries involved, the Union trying to avoid a possible misunderstanding that could arise if inaccurate figures were presented to the County Board for ratification--a concern that turned out to be well founded given the deficiencies of Rader's initial write-up of the tentative agreement as forwarded to Dolata. On April 20, the Union put the County on clear written notice that a tentative agreement remained in effect, in a prompt response to its first notification on April 18 that the County was preparing alternatives to the February 3 tentative agreement concerning the upgrades. The County cannot be permitted to defeat its commitment to the February 3 agreement regarding upgrades by citing the Union's good faith efforts to avoid misunderstandings, to consider alternatives to the tentative agreement terms at the urging of the Investigator, and to avoid litigation if at all possible.

In the circumstances, the County must either be ordered to implement the upgrades to complete the tentative agreement, or to rescind its implementation of the Advantage program and general wage increases and to bargain further on all elements of the tentative agreement.

POSITION OF THE RESPONDENT COUNTY

The County has not committed a refusal to bargain. The parties reached agreement on wages, insurance and upgrades, but then the Union, through Hartmann, proposed that the upgrades portion of the agreement be withdrawn such that the County Board would only be presented with the wages and insurance portions at its next meeting. Following the County Board's ratification of those items, there were no further conditions precedent to County implementation of those items. Hence, the implementation was not an unlawful unilateral change refusal to bargain.

It is undisputed that the February 3 tentative agreement was subject to County Board ratification. Because the County agreed at the Union's request to delete the portion of the tentative agreement dealing with upgrades, that subject was thereby returned to the bargaining process where it remains unresolved and subject to the interest arbitration process. Since the County Board has not ratified the upgrades element, there is no agreement on that item that the County is failing to implement.

The Union's contention that there remained a tentative agreement regarding upgrades is undercut by the facts that on February 6 Union president Rebecca Hobbs expressed dissatisfaction with more than just the mathematics of the upgrades element and said she was going to call Hartmann about her concerns; that the Union did not submit its upgrades calculations until April 20, which was after Rader informed Hartmann that the County was preparing alternative proposals on the upgrades subject; that the County's administrators proceeded to work on alternate proposals upon learning the upgrades item had been removed from those going to the County Board; and that the parties had mediation/investigation discussions concerning alternatives to the formerly tentatively agreed upgrades arrangements, which included a written Union counter proposal that differed materially from the tentative agreement terms. Only when those negotiations failed to produce a result satisfactory to the Union did the Union file the instant complaint. The Union cannot be allowed to resurrect a tentative agreement the Union itself previously withdrew and with which the County has not since agreed.

In any event, the Union's requests for an order requiring the upgrades to be implemented or the Advantage and wage increases to be rescinded is outside the law. "At best, the only relief available to the Union even if their position was upheld would be to have the issue submitted to the County Board for a ratification vote, but the parties never reached closure on the issue to the extent capable of submitting it for ratification. The prohibited practice provisions of Sec.111.70 do not encompass enforcing those matters never brought to closure by the parties." County brief at 5. The Union has failed to show that the upgrades element of the February 3 tentative agreement was defined sufficiently clearly to be subject to ratification without further agreement between the parties to flesh it out and clarify it. The parties' subsequent discussions have shown that they have not agreed on the modifications and clarifications necessary to make the upgrades element an appropriate subject for presentation to the County Board.

For those reasons, the complaint should be dismissed either for failure on its face to state a claim that would permit the relief requested, or because the record evidence does not establish that any prohibited practice has been committed by the County.

DISCUSSION

The Union's three alternative contentions in this case are dealt with in the Conclusions of Law, above, and are discussed separately in the same order, below.

Failure to Implement Upgrades as Alleged Violation of Agreement

It is undisputed that the February 3 agreement was subject to ratification by the County Board and the Union membership. The upgrades element of the tentative agreement has never been ratified by the County Board. Accordingly, there exists no unconditional agreement between the parties on the upgrades subject. Hence, the County's failure to date to implement the upgrades cannot and does not constitute a violation of a collective bargaining agreement and does not constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

Implementation of Advantage Program and General Wage Increases as Alleged Unilateral Change Refusal To Bargain

The February 3, 1989 tentative agreement was not presented in its entirety to the County Board because Hartmann called Rader and asked that the upgrades element not be presented at the next meeting. Rader agreed. However, they further agreed (or at least mutually understood) that the remainder of the February 3 tentative agreement would be presented to the County Board for ratification and subsequent implementation. Hartmann testified, for example, "We anticipated the Board would implement Advantage. We anticipated the Board would implement the 3.5% which is what we had agreed in our phone conversation of February 8." (tr.21) Indeed, the parties' very purpose in reaching a partial agreement as they did on February 3, and Rader and Hartmann's very purpose in agreeing to separate the upgrades from the Advantage and general wage increases was to permit the latter items to proceed to County Board ratification and implementation without delay.

The Union membership did not vote on the February 3 tentative agreement after it was reached. However, Hartmann explained that the Union membership had pre-ratified the terms of the February 3 tentative agreement (tr.17), and both parties conducted themselves consistent with an understanding that the Union had pre-ratified the February 3 tentative agreement terms.

The County Board ratified Advantage and the 1989 general wage increase. While the agreed-upon 1990 wage increase was inexplicably not presented to the County Board at that time, the County has implemented that increase consistent with Hartmann and Rader's understanding, as well. Thus, at the time the complaint was filed in November of 1989, the County had not failed to implement either the Advantage program or the 1989 wage increase which were then due for implementation under the items that Hartmann and Rader agreed on February 8 would go forward to the County Board without delay. Similarly, by the time this case was heard in February of 1990, the County had implemented the 1990 wage increase (apparently at the appropriate time), completing the implementation of the items Rader and Hartmann agreed on February 8 would be forwarded to the County Board without delay. As the County asserts, by implementing those elements when it did, the County was implementing an agreement that had been reached between the parties, that had been separated by mutual agreement from the tentative agreement concerning upgrades, and as to which there remained no further conditions.

The County's reasonable reliance on Hartmann's authority to bind the Union to his February 8 agreement to delay County Board consideration of upgrades while having the Advantage and general wage elements go without delay to the County Board at its next meeting is sufficient to bind the Local to that agreement whether Hartmann had in fact been authorized by the Local membership to so agree or not.

In sum, the County was implementing an agreement and not committing a unilateral change refusal to bargaining within the meaning of Secs.111.70(3)(a)4 and 1, Stats., by its implementation of the Advantage program and 1989 and 1990 general wage increases separate from the upgrades

element of the February 3 tentative agreement. While that agreement has not, to date, been reduced to writing and signed,it was nonetheless a binding agreement between the parties, and one which the County was obligated and authorized to implement as it has done.

Failure to Present and Recommend Upgrades to County Board as Refusal to Bargain.

It is a refusal to bargain prohibited practice within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., for a municipal employer's bargaining representatives to fail to follow through on agreements to present and recommend ratification of tentative agreements reached in collective bargaining to the municipal employer's governing body. E.g., Florence County, Dec. No. 13896-A (WERC, 4/76).

The record clearly establishes that the County's bargaining representatives agreed on February 3 to present and recommend County Board ratification of the January 12 letter upgrades as a part of the tentative agreement reached during the February 3 negotiation meeting. That shifts the burden to the County to establish that the County was subsequently relieved of its bargaining representatives' obligation in that regard.

As noted above, the evidence clearly establishes that Rader and Hartmann agreed on December 8 to separate the Advantage program and general wage elements from the upgrades element, with the former two being presented to the County Board for ratification at its next meeting and the upgrades not being presented to the County board for ratification at its next meeting. The County would have the Examiner further conclude on that basis and from the totality of the Union's conduct following the February 3 meeting that the parties agreed to return the upgrades to the status of the several items remaining unresolved in the bargaining. The Examiner is not persuaded that the evidence supports the County's contention in that regard.

It appears to the Examiner that the discussion that took place between Hartmann and Rader on February 8 did no more than separate the upgrades element from the other two and delay the time at which the tentative agreement on upgrades would be presented to the County Board for ratification. Significantly, in his testimony about the February 8 telephone conversation with Hartmann, Rader repeatedly and carefully specified that what was discussed and agreed about the upgrades element was that they would not be presented to the County Board at its next meeting. (tr.48 lines 12-14 and 21-22; 49 lines 17-19; 50 lines 11-15; and 69 lines 13-15.) While the representatives both understood the upgrades would be dealt with later, the evidence does not reveal a specification by either of them during the phone conversation as to when or in what manner that would be done. Hartmann testified that he indicated during the phone call that the Union was not trying to deviate from the agreement regarding upgrades that had been reached on February 3. (tr.15), and Rader did not assert otherwise in his testimony. Thus, Rader did not claim that during the phone conversation Hartmann expressly released the County from its bargaining representatives' agreement to recommend ratification of the upgrades element at a later date. While Rader recalled that neither he nor Hartmann used the term extend or postpone regarding the tentative agreement reached on February 3 regarding upgrades, Rader also acknowledged that Hartmann did not use the

term "rejecting the offer" (tr.69) and that Rader did not say to Hartmann that the tentative agreement regarding upgrades was withdrawn. (tr.63).

Rader admitted that his recollection of the February 8 conversation was not perfect. With regard to Hartmann's explanation for the Union's request, Rader recalled that Hartmann made reference to concerns about the mathematics of the offer, but that he also had the impression that Hartmann's request was coming from unit members rather than from Hartmann himself, and he expressed the opinion that mathematics alone could have been worked about between the two of them as they had worked out other matters in the past.

Rader's above noted testimony does not persuade the Examiner that the Union was attempting to withdraw or deviate from the January 12 upgrades, however. It is undisputed that the mathematical calculations of how the increases described in the January 12 letter were complicated. Moreover, a reference by Hartmann to unit members' concerns about whether the County Board would be presented with an accurate statement of the February 3 agreement concerning upgrades would also not have been surprising in the context of the Union's February 3 objections to Rader's unsuccessful handwritten effort at calculating the January 12 upgrades in detail, and especially to the mix-up on the Union president's pay status (red-lined vs. grandfathered).

The County also presented evidence to the effect that Union president Rebecca Hobbs had remained dissatisfied with more than just the mathematics of the upgrades as tentatively agreed on February 3. The County also sought to show that on February 6 she expressed those concerns to Director of Unified Health Services Dennis Tomchek, stated an intention to contact Hartmann to that effect, and appeared to have in fact contacted Hartmann or his office about those concerns. Hobbs acknowledged that she did not like the idea that her successors would receive less than she would as a grandfathered individual and further acknowledged that she had expressed herself to that effect following the February 3 meeting, but she denies telling Tomchek on February 6 that she was going to call Hartmann about it, and she and Hartmann deny that Hobbs in fact contacted Hartmann to that effect before Hartmann spoke with Rader on the 8th. The Examiner finds the record evidence in that regard insufficient as a basis on which to find as a fact that the disputed phone call took place.

What seems more important to the Examiner, however, is that the only agreement Hartmann reached on the telephone with Rader on February 8 was that the upgrades issue would be separated from the other two and not presented with them for ratification at the next county Board meeting. Rader's expression of disappointment "that it was not going to go" (tr.48) could have been disappointment that it was not going to be implemented without further delay rather than that the parties were back at square one on the subject. It can also be noted that it was County administrators and not Rader who initiated the development of alternatives to the January 12 upgrades. Rader testified that he first learned of that on April 12. He stated he had not considered the ball to be in his court on the issue after the February 8 conversation inasmuch as the Union had not forwarded any calculations and no one had asked him to do anything further on the subject until April. (tr.71).

Thus, while it is clear that the County administrators were proceeding on an understanding that the Union had withdrawn from the tentative agreement regarding upgrades, Rader, with whom Hartmann had the February 8 conversation, had done nothing to indicate that such was his understanding until after he learned on April 12 that the administrators had been working on alternative proposals.

The fact that Hartmann and the Union initially chose to wait until the parties' bargaining teams next met to discuss again the mathematics of the County's January 12 position (and hence of the February 3 tentative agreement as it related to upgrades) does not persuasively indicate that the Union had agreed to release the County's bargaining representatives from their prior agreement to present the upgrades element for County Board ratification. Hartmann testified that he was quite busy during that period and that he had no notification from the County that it was not committed to the upgrades portion of the tentative agreement until his discussion with Rader on April 18.

Significantly, as soon as he had that initial notification, Hartmann promptly put the County on written notice by his April 20 letter that the Union considered the tentative agreement to remain in effect as regards the upgrades element, and forwarded his detailed calculations of what the January 12 language would generate over the three year phase-in period it covered. While it would have been helpful for the Union to have forwarded those calculations earlier in time, the April 20 letter coming as it did immediately after the April 18 conversation supports the Union's contention that Hartmann and the Union understood the tentative agreement to remain in effect after February 8.

The negotiations that ensued between the parties in the investigation sessions on and after May 2 were in the context of the Union's April 20 written statement of position that the February 3 tentative agreement remained in existence. While the Union demonstrated a willingness to explore and to accept alternatives to the January 12 formulation during the course of those meetings and before filing the instant complaint, that does not constitute an abandonment of its written April 20 position that the County remained bound present and recommend to the County Board the February 3 tentative agreement concerning upgrades (unless of course the parties mutually agreed otherwise thereafter, which they have not done).

For the foregoing reasons, the Examiner concludes that the Union has not been shown to have relieved County's bargaining representatives of their commitment to present and recommend the January 12 upgrades to the County Board. The County entered into that tentative agreement despite the parties' inability in the time available on February 3 to produce a detailed calculation of their effect at various times throughout the three year phase-in period involved. Moreover, Rader and the County appear to have been prepared to include an upgrades element in the items the Personnel and Wage Committee recommended for County Board ratification without any further clarification or calculation. Accordingly, the Examiner is not persuaded that the County should now be relieved of that commitment because of claimed deficiencies in the precision or completeness of the February 3 tentative agreement as it related to upgrades.

The Examiner has therefore concluded that the County's failure to present to the County

Board and recommend ratification of the January 12 upgrades as tentatively agreed upon on February 3, 1989, constitutes a refusal to bargain prohibited practice violative of Sec. 111.70(3)(a)4, Stats. and derivatively violative of Sec. 111.70(3)(a)1, Stats.

Remedy

The Examiner has ordered the conventional remedy for a violation of this kind: cease and desist, notice posting and a specific order that the County's bargaining representatives present and recommend ratification of the January 12 upgrades to the County Board at its next regular meeting. As the County argues, neither an unconditional order that the County implement the January 12 upgrades nor an order that the County rescind the Advantage program and general wage increases and bargain further on those subjects would be proper or warranted in this case.

It should be noted that the affirmative action specified in paragraph A.2.b. of the Examiner's order requires only that the County's bargaining representatives present the January 12 upgrades tentatively agreed upon on February 3 and recommend ratification thereof by the County Board. The decision whether to ratify the January 12 upgrades will then rest with the County Board as a whole. If they are ratified, then the terms of the January 12 upgrades are to be implemented without further delay. If they are not ratified, then the upgrades issue will be one more unresolved issue in the interest arbitration proceeding now pending between the parties.

Dated at Shorewood, Wisconsin, this 16th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

by Marshall L. Gratz /s/
Marshall L. Gratz, Examiner