STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant, vs. GREEN COUNTY, Respondent.	Case 111 No. 45199 MP-2439 Decision No. 26798-A

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Complainant.

DeWitt, Porter, Huggett, Schumacher & Morgan, S.C., Attorneys at Law, by Mr. Howard Goldberg, Two East Mifflin Street, Suite 600, Madison, Wisconsin, 53703, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, filed a complaint on January 25, 1991 with the Wisconsin Employment Relations Commission alleging that Green County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, herein MERA. On February 21, 1991, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On March 25, 1991, Complainant filed an amended complaint. The hearing on said complaint as amended was held in Monroe, Wisconsin on April 9, 1991. The parties filed briefs and reply briefs, the last of which were exchanged on July 23, 1991. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices at 5 Odana Court, Madison, Wisconsin 53719. Mr. Jack Bernfeld has been the Union's representative and has acted on its behalf.

2. Green County, hereinafter referred to as the County, is a municipal employer and its offices are located at the Courthouse, Monroe, Wisconsin 53566. Mr. Robert M. Hoesly is Chairman of the County Board, Mr. Michael J. Doyle is the County's Administrative Coordinator as well as the elected County Clerk, Mr. James Wyss is the County's Corporation Counsel and Mr. Howard Goldberg is the County's Labor Counsel and these named individuals have acted on behalf of the County.

3. On May 15, 1990, the County's Personnel and Labor Relations Committee voted to propose to the full County Board the following wage proposal for non-represented employes:

1. 4.25% effective 1-1-90
2. 6.0% effective 1-1-91
3. Implementation of the WPS Care Share Insurance with $150.00 deductible per person to a maximum of three persons per family and an increase of drug co-payment from $2.00 to $5.00.

4. On June 12, 1990, the County Board adopted Resolution 6-8-90 which provided as follows:

1. Hourly wage increase of 4.25% of current wage for unrepresented Green County employees, effective January 1, 1990, with the exception of the Constitutional Officers.

2. In addition, an hourly wage increase of 6% of the January 1, 1990 wage for unrepresented Green County employees, effective January 1, 1991, with the exception of the Constitutional Officers.

3. Implementation of the WPS Care Share Plan to replace the current WPS Health Maintenance Program for all unrepresented Green County employees, and for those subscribers in the Continuation, Retiree and County Board groups. The Care Share Plan is to include $150.00 deductible per person per year with a maximum of three people per family. The drug co-pay plan to be increased from the current $2.00 per prescription charge to $5.00 per prescription. The change in insurance is to become effective October 1, 1990.

5. The County in the past has approved resolutions at various times increasing the wages of non-represented employes. For example, in December, 1981, the County passed Resolution 12-4-81 granting a 3% raise effective 1-1-82. In October, 1982, Resolution 10-2-82 was passed granting an 8% raise effective 1-1-83. In October, 1983, the County passed Resolution 10-4-83 providing a 2% + $.10/hour increase effective 1-1-84. In December, 1984, the County passed Resolution 12-4-84 providing a $.25/hour increase effective 1-1-85. In February, 1986, the County passed Resolution 2-2-86 approving an increase of $.22/hour retroactive to 1-1-86. In May, 1987, the County passed Ordinance 87-610 which established a longevity policy and froze base wage rates for 1987 and 1988. In October, 1988, the County passed Resolution 10-1-88 granting a 3.5% increase in wages effective January 1, 1989.

6. On June 29, 1990, non-represented employes received their paychecks which included the 4.25% wage increase. Subsequently, the non-represented employes were given retroactive payments to January 1, 1990 reflecting the

4.25% pay increase.

7. The County by a letter dated June 12, 1990 addressed to all County employes informed them that an informational meeting would be held on June 19, 1990 to explain the change in the employe's insurance plan from the WPS-HMP program to the Care Share Plan and said meeting took place on June 19, 1990. The effective date of the change was October 1, 1990.

8. Sometime prior to August 15, 1990, the following notice was posted at the Pleasant View Nursing facility:

> Informational Meeting for Non-Representative Employees
>
> There will be an (sic) meeting for any non-uion (sic) employee interested in talking to a union representative on Wednesday, August 15th, at 5:15 in the First National Bank Community Room.
>
> This meeting is being held to discuss the possibility of forming a union for those employees not currently represented by one of the bargaining units. Further information as a result of this meeting will be furnished to non-union employees at a later date.

Michael Doyle was informed by the Nursing Home Director that Janet Pensinger was responsible for the notice. Janet Pensinger is the Lead Computer Operator/Fiscal Clerk who works in the accounting office which is part of the County Clerk's office. Doyle then spoke to Pensinger indicating that he was upset about the notice and that not everyone who might be eligible to be in the bargaining unit was informed of the meeting. Pensinger told Doyle that it was none of his business. Doyle responded that if the notice was done on County paper and on County time, then it was his business.

9. The August 15, 1990 meeting occurred as scheduled. On September 18, 1990, the Union field a petition for election among employes not then represented by a labor union and the County was informed of this fact by a letter to Michael Doyle dated September 18, 1990.

10. On October 1, 1990, the County implemented the change in health insurance pursuant to the Resolution passed on June 12, 1990.

11. That on an unspecified date in October, 1990, Michael Doyle, James Wyss and Al Zulke, Head of the County's Accounting Department in the Clerk's office, had a conversation in Zulke's office. The door was open and Doyle was in the doorway during the conversation. Janet Pensinger's desk is one to two feet from the doorway as Zulke is Pensinger's supervisor. Doyle said to Zulke and Wyss that if the vote favored the Union the six percent raise would be out the window. Pensinger informed the Union what she had overheard.

12. That the Union sent employes an "Organizing update dated October 23, 1990 which stated, in part, as follows:

> THE 6% QUESTION...Some employees have expressed concern over whether or not the County will honor the 6% wage increase that is scheduled to take effect 1/1/91. State law requires the County to maintain the "status quo" with respect to wages, hours, and conditions of employment which (sic) an election petition is pending. That means that the County **MUST** honor the 6% across the board wage increase for 1991 that was included in

> the salary resolution adopted by the County Board in June of this year. A copy of that resolution is attached for your reference. Any attempt to rescind or modify the 1991 wage increase would be a "prohibited practice" under Wisconsin law. If AFSCME wins the representation election, then the County must **NEGOTIATE** with the union over any changes in wages, hours, and conditions of employment. If the Union loses the election, then the County will once again have a free hand in determining your wages and fringes.

14. On November 19, 1990, the parties stipulated to an election in the bargaining unit and the election was scheduled for December 19, 1990. On December 7, 1990, Pensinger, at Zulke's direction, prepared a draft of a document addressed to Department heads and Bookkeepers indicating that formerly unrepresented employes (those eligible to vote in the election) would not receive the salary adjustment on January 1, 1991. This memo was kept on the computer and was not sent until the day after the election, December 20, 1990, when it was dated and sent to Department Heads and Bookkeepers.

15. On December 13, 1990, Chairman Hoesly sent a letter to all bargaining unit employes urging them to vote "No" in the election scheduled by the Commission for December 19, 1990, which stated in part, as follows:

> In the last couple of weeks, I have been asked many questions about how Green County's relationship with you could change if the Union gets elected. I have been asked whether, if the Union won, the employees would receive more or less benefits. I cannot tell you what your wages or benefits will be because I do not know. However, I do know that all of your existing wages, hours and other conditions of employment are negotiable. This means that you could end up with more or less than what you currently have.

16. On December 19, 1990, the Commission held the election in the bargaining unit and the Union prevailed. No objections to the election were filed within the time period for filing objections.

17. The County's Personnel and Labor Relations Committee was scheduled to meet on December 26, 1990 to discuss various items including the implementation of the 6% increase. The Union, by a letter dated December 21, 1990 addressed to the Committee Chairman, indicated that its position was that the failure to grant the 6% increase would be a prohibited practice and that a Union representative would be at the Courthouse on December 26, 1990 to discuss the matter.

18. On December 26, 1990, Mr. Bernfeld telephoned Mr. Goldberg inquiring about the 6% increase and Mr. Goldberg indicated he would call back later. Goldberg did so indicating that the County would grant the 6% increase on 1-1-91 if the Union agreed not to seek any other improvement in wages or other monetary compensation paid to these employes for the 1991 calendar year. Mr. Goldberg indicated that as a result of the election, the employes changed status from unrepresented to represented and the June, 1990 Resolution no longer applied to them.

19. By a letter dated December 26, 1990, from Mr. Goldberg to Mr. Bernfeld, the same proposal was given. By a letter dated December 28, 1990 from Mr. Bernfeld to Mr. Goldberg, the Union rejected the proposal made by Mr. Goldberg and reiterated its position that the County was obligated to give the employes the 6% increase previously authorized on June 12, 1990.

20. The County did not give the employes in the bargaining unit set forth below the 6% wage increase on or after 1-1-91 to be effective 1-1-91.

21. On January 8, 1991, the Union was certified by the Commission (Dec. No. 26700-A) as the exclusive collective bargaining representative of all employes in a bargaining unit described as follows:

> All regular full-time and regular part-time employes of Green County, excluding elected officials, professional employes, managerial employes, supervisory employes, confidential employes, and employes in previously certified or recognized bargaining units.

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

CONCLUSIONS OF LAW

1. Green County by its unilateral refusal and failure to grant bargaining unit employes the 6% wage adjustment in accordance with its Resolution 6-8-90 effective 1-1-91, discriminated against said employes to discourage and in reprisal for the exercise of the right of employes to engage in concerted activity and has engaged in and is engaging in prohibited practices within the meaning of Secs. 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

2. The Union has failed to demonstrate by a clear and satisfactory preponderance of the evidence that representatives of the County threatened to withhold payment of the 6% increase effective 1-1-91 for employes of the bargaining unit if said employes voted to be represented by the Union, and therefore, the evidence fails to demonstrate that Green County violated Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

3. The Union has failed to demonstrate by a clear and satisfactory

preponderance of the evidence that Green County has refused to bargain with it in violation of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 2/

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

Section 111.07(5), Stats.

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

IT IS HEREBY ORDERED

1. That those portions of the Complaint alleging independent violations of Sec. 111.70(3)(a)1 and (3)(a)4, Stats., are hereby dismissed.

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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.

2. That Green County, its officers and agents shall immediately:

A. Cease and desist from discriminating against employes regarding the exercise of rights protected by Sec. 111.70(2), Stats., by implementing unlawful unilateral changes in wages for employes in the bargaining unit.

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

1. Immediately implement the 6% wage increase and make all employes in the bargaining unit whole for the loss of wages due to the refusal to implement the 6% raise effective 1-1-91, pursuant to Resolution 6-8-90, with interest at the statutory rate 3/ on monetary losses experienced.

2. Notify all employes in the bargaining unit represented 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". The notice shall be signed by an authorized representative of the County and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to insure that said notices are not altered, defaced or covered by other material.

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.

Dated at Madison, Wisconsin this 20th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

"APPENDIX A"

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on Jan. 25, 1991, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

NOTICE TO ALL EMPLOYES

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employes that:

1. We will not discriminate against employes for the exercise of rights protected by Sec. 111.70(2), Stats., by implementing unlawful unilateral changes in wages.

2. We will immediately implement the 6% wage increase and we will make whole present and former bargaining unit employes now represented by Council 40, AFSCME, AFL-CIO for wage losses experienced by our failure to implement the six percent (6%) wage increase effective 1-1-91 pursuant to Resolution 6-8-90 and we will pay affected employes interest on the monetary losses experienced.

Dated at Monroe, Wisconsin this ____ day of September, 1991.

Green County

By _____

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

GREEN COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint as amended, the Union alleged that the County violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by threatening to withhold a six percent 6% pay increase it had previously announced if employes voted to be represented by the Union, by withholding implementation of said six percent

wage increase on and after 1-1-91, and alternatively, by changing the health insurance policy for employes effective 10-1-90. The County answered the complaint denying that it had committed any prohibited practices and affirmatively asserting that as a result of the election held on December 19, 1990, bargaining unit employes became represented and thus were excluded form the provision of the Resolution providing for the six percent (6%) increase.

Union's Position

The Union contends that the County by its failure to implement the 6% wage increase effective 1-1-91, as well as its continuing failure to implement it for employes eligible to vote in the representation election and now represented by the Union, has and is committing prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, Stats. Alternatively, the Union asserts that the County has violated and continues to violate Chapter 111.70 by its change in insurance benefits for employes during the pendency of the representation question. The Union submits that the County has historically granted wage increases to unrepresented employes, annually or bi-annually, effective January 1 of each year, and on June 12, 1990, the County approved a wage increase of 4.25% effective January 1, 1990, a reduction in the health insurance program effective October 1, 1990 and a 6% wage increase effective January 1, 1991. It points out that the County took this action two months before the first employe contact with the Union and three months before the Union notified the County of its interest in organizing certain unrepresented employes. It argues that the County's action on June 12, 1990 was clearly a package and the County's arguments that these were independent events is simply not true. It insists that employes expected the entire package would be implemented as approved and the package became the status quo. It notes that the County complied with parts 1 and 2, even though the change in insurance occurred during the Union's organizing drive, but then the County unlawfully changed the status quo with respect to part 3 of the package by refusing to implement the 6% increase, thereby engaging in pre- and post-certification misconduct. It maintains that the County cannot claim that it maintained the status quo when it implemented the change in the health insurance program and when it refused to implement the 6% wage increase as it is trying to have it both ways. The Union takes the position that the County has interfered with employes and discriminated against them because of their concerted activity. It claims that the County's refusal to restore the status quo by unconditionally implementing the 6% wage increase constitutes a refusal to bargain in good faith.

The Union, referring to the Commission's decision in Grant County, Dec. No. 21567-B (WERC, 1/85), asserts that unilateral changes in wages, hours and working conditions which are unlawfully motivated or likely to have an unlawful impact on the exercise of employe rights are prohibited, but where they are based on neutral factors unrelated to the organizing campaign, then such a change is lawful. The Union also cites School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85), wherein the Commission adopted the dynamic view of the status quo. It contends that the County's reliance on Wisconsin Rapids, supra, misses the point as the 6% increase was no longer discretionary because of the June 12, 1990 County Board Resolution and the dynamic status quo required that it be implemented just like sick leave, vacation, holiday or other benefits that had been adopted at a prior time at the County's discretion, and thus the denial of the wage increase was a unilateral change in the status quo. It argues that the County's decision to deny the newly formed bargaining unit the 6% wage increase was directly related to the organizing campaign and the election.

The Union submits that the County interfered with and coerced employes in the exercise of their rights. It avers that the conversation between Doyle,

Wyss and Zulke to the effect that the County would withhold the 6% increase which took place within earshot of Pensinger, a known Union contact person, was calculated to intimidate and threaten employes. It also alleges that the memo to departments that Pensinger was instructed to type concerning the withholding of the increase was to obstruct employe rights. It also argues that the December 13, 1990 letter by the County Chairman constituted interference. The Union claims that the County's "proposal" of December 26, 1990 is blatant interference with the rights of employes as it sought employes to give up their right to bargain or the 6% would be held hostage and negotiations would be futile as 6% is all the County would offer.

The Union maintains that the denial of the 6% increase is discriminatory and violates Sec. 111.70(3)(a)3 Stats., because it was withheld by the County because of its hostility to the employes' concerted activity and was in retaliation for the vote for representation on December 19, 1990.

The Union disputes the County's claim that the employes were no longer "unrepresented" and therefore, the County was not obligated to grant them the 6% increase. The Union asserts that neither the date of the election nor the date of certification is material as the 6% was part of the status quo which was unlawfully changed. However, the Union notes that the employes were not represented until January 8, 1991 but were unrepresented on the effective date of the 6% increase. The Union notes that there was no duty to bargain before January 8, 1991 and the fact that the actual pay date occurred after the date of implementation made no difference. The Union argues that the County's refusal to grant the 6% after January 8, 1991 constituted a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. It claims that the County's demand of December 26, 1990 has not been withdrawn and is patently unreasonable and evidences bad faith bargaining.

Alternatively, the Union argues that if no violation of MERA is found due to the County's failure to grant the 6% wage increase, then the County should be ordered to restore the health insurance benefits to the pre-October 1, 1990 level because both were part and parcel of a package of changes implemented on June 12, 1990 whereby health benefits were decreased for an increased wage, and

if one is not granted, then the status quo includes the pre-October insurance benefit levels.

The Union asks that the County be directed to implement the 6% wage increase retroactive to 1-1-91 with interest as well as all other appropriate relief, or alternatively, restoration of the pre-October 1, 1990 insurance benefits and a make whole order as well as all other appropriate relief.

County's Position

The County contends that the implementation of the 6% raise on 1-1-91 would have been a unilateral change in the dynamic status quo and a violation of MERA. It further asserts that the June 12, 1990 Resolution applied only to employes who were unrepresented on 1-1-91 and as these employes were represented prior to that time, the Resolution no longer applied to them. With respect to the implementation of the insurance changes in October, 1990, the County argues that these were neutral and appropriate. The County insists that its actions were consistent with the dynamic status quo. Citing Wisconsin Rapids, supra, the County alleges that the policy behind the dynamic status quo doctrine is to continue the conditions of employment which existed at the time immediately preceding the new bargaining relationship and which change over time consistent with an employer's past and planned practices as well as the employes' reasonable expectations. It notes that the dynamic status quo requires employers to continue wage adjustments which are non-discretionary and automatic while prohibiting the granting of discretionary adjustments. It insists that the dynamic status quo requires continuation of those benefits and compensation arrangements which by clear terms or historical application should be continued during the initial bargaining process. The County claims that it followed the dynamic status quo by granting discretionary benefits and wages to employes prior to their electing the Union as their representative as well as automatic nondiscretionary benefits. It points out that it granted the 4.25% wage increase and made the health insurance changes when employes were still unrepresented. The County argues that by its clear terms, the June 12, 1990 Resolution was limited to unrepresented employes and as of 1-1-91, the employes were represented, so the 6% pay increase would have violated the status quo. It claims that the pay plan and benefits cannot be viewed or frozen as of the date the Resolution was passed because it would be impossible for an employer to respond to the need for legitimate changes once an organizing campaign began and would lead to absurd results. It insists that had an employe gone to a different bargaining unit, that employe could not expect the 6% increase and here too a change from unrepresented to represented status is no different and therefore these employes are not eligible for the increase. It takes the position that employes were represented as of 1-1-91 so any increase was discretionary, and historically the wage increase was subject to bargaining with the newly elected union. It contends that there was no reasonable expectation by the employes that they would get the 6% raise as evidenced by the Union's "Organizing Update" dated October 23, 1990. The County summarizes that the withholding of the 6% increase was consistent with the County's June 12, 1990 Resolution, its past practice, the reasonable expectation of employes and the rationale in Wisconsin Rapids, supra.

The County claims that its actions were neutral on their face as well as on the underlying intent. It notes that it is not a violation of the status quo doctrine to take unilateral actions during the pendency of an election unless the actions are motivated by anti-union animus or have a coercive effect on the exercise of employes' rights. It points out that the actions taken by it pre-date the unionization campaign and were carried out according to the Resolution's requirements. The County insists that the Resolution cannot be viewed as a package but each element is separate. It submits that the employes changed their status from nonrepresented to represented, thereby removing themselves voluntarily from the application of the Resolution.

The County argues that the Union must bargain the 1991 pay increase just like all other represented units. The County denies that it has refused to bargain in violation of Sec. 111.70(3)(a)4, Stats., because it had no obligation to bargain with the Union until after it was certified and the evidence failed to show any refusal to bargain after certification. The County indicates that its offer to grant the increase with the Union refraining to ask for more during 1991 was a reasonable and responsible way to handle the situation. It notes that the Union's arguments on bad faith bargaining deal with actions from late December, 1990 and through January 4, 1991 which was prior to the date of certification. The County insists the Union has failed to prove any actions by the County had a chilling effect on the election or bargaining process. It alleges that a union organizer's eavesdropping on a conversation of three supervisors does not create a violation. It concludes that the evidence establishes that the County wants to bargain over the wage raise for 1991 the same as all other bargaining units and the Union wants a unilateral raise. It asks that the complaint be dismissed.

DISCUSSION

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

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed in sub. 2. Section 111.70(2), Stats., provides as follows:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

A violation of Sec. 111.70(3)(a)1, Stats., occurs when a municipal employer's conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 4/ In order to prevail on its complaint of interference, the Union must demonstrate, by a clear and satisfactory preponderance of the evidence, that the County's conduct contained a threat of reprisal or promise of benefit which would tend to interfere with the exercise of the employes' Sec. 111.70(2) rights. 5/ It is

4/ WERC v. Evansville, 62 Wis.2d 140 (1975).

5/ Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 6/81) aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Drummond Jt. School District No. 1, Dec. No. 15909-A (Davis, 3/78) aff'd by operation of law, Dec. No. 15909-B (WERC, 4/78); Ashwaubenon School District, Dec.

not necessary to prove that an employer intended to interfere with employes or that there was actual interference. 6/

The Union claims an independent violation of Sec. 111.70(3)(a)1, Stats. from the conversation of Doyle, Wyss and Zulke overheard by Pensinger with respect to the withholding of the 6% increase should the Union prevail in the petition for election. The conversation occurred sometime in October, 1990. 7/ At that time, the petition for election had been filed 8/ but no stipulation for an election had been reached 9/ and no election had been directed. The evidence shows that the conversation was not directed to Pensinger nor was it apparent that the election would take place in the immediate future as it appears that other bargaining representatives might be involved and a hearing required. 10/ This incident is insufficient to establish any threat of reprisal or promise of benefit. The Union further points to Pensinger's being instructed to type up a document to be distributed to departments which listed employes who would not get the 6% increase. Pensinger typed this on the computer on December 7, 1990 and it was not sent until December 20, 1990. 11/ This again was not a direct communication to Pensinger and appears to be part of her normally assigned duties. The document was not addressed to and was not sent to bargaining unit employes. It is concluded that this does not come within the proscribed conduct so as to constitute interference. The Union also points to the January 4, 1991 memo from the County Clerk to Department Heads. 12/ The record failed to prove that employes were ever sent this document or had notice of it. 13/ The Union also asserts that the December 13, 1990 letter sent to potential voters constituted interference. 14/ It is generally recognized that an employer has free speech rights and remarks are generally not violative of Sec. 111.70(3)(a)1 Stats., unless they contain implicit or express threats of reprisal or promises of benefit. 15/ A review of the letter indicates that it is ambiguous and viewed in its entire context fails to establish any implicit or express threats of reprisal or promise of benefits. Pensinger testified that she felt threatened as follows:

> A I felt threatened, and the employees might not have been told this directly by Mike Doyle or some

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No. 14774-A (WERC, 10/77).

6/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

7/ TR-111.

8/ Ex-2.

9/ Ex-26.

10/ Id.

11/ TR-112-113, Ex-20.

12/ Ex-33.

13/ TR-277.

14/ EX-32.

15/ Cedar Grove - Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

other member of the County Board or their department head, but the feeling always existed that we may not get the six percent if the Union was voted in. It was always there, something we talked about on break and at the Union meetings, and was always a factor and something that we definitely wondered what they would do.

(By Mr. Goldberg)

Q And the basis for that is because the pay increase applied only to nonrepresented employees?

A No. we didn't feel that it should be a threat, but we knew the County's past history that if they could do something like this, they would. The County's past history has been to give pay increases to nonrepresented employees, and then when they become members of a bargaining unit, they take them away. 16/

The mere feeling of what might happen is not sufficient to demonstrate interference. The Union also insists that the County's proposal of December 26, 1990 17/ constitutes interference. The record establishes that the letter was in response to the Union's inquiry to the County as to implementation of the 6% wage increase. 18/ The County's response was to confirm that it would be withholding the 6% wage increase based on its interpretation of the Resolution but it would grant the 6% wage increase if agreement could be reached on waiving bargaining on economic items for 1991. This offer to resolve the parties' respective positions was not a threat of reprisal or promise of benefits but

16/ TR-135.

17/ Ex-24.

18/ TR-217-219, 224-226.

rather an offer of settlement to resolve a legal dispute and potential litigation between the parties. Thus, the "proposal" did not constitute interference.

It is a violation under Sec. 111.70(3)(a)1, Stats., for a municipal employer to make a unilateral change in the wages, hours and conditions of employment during the pendency of an election that would be likely to interfere with the employes' free choice in that election. 19/ A unilateral change denying the pendency of an election is not a per se violation and no violation can be established where the change pre-dates the Union's organizational campaign and was based on neutral factors. 20/ The change in health insurance benefits falls squarely within this rule, and thus, the insurance benefits change on October 1, 1990 did not violate Sec. 111.70(3)(a)1, Stats. It is the general rule that the granting of a wage increase during a union organizing campaign or a pending election, where the purpose is to interfere with the employes' rights to organize, constitutes interference. 21/ The rationale for this is stated as follows:

> The danger in well timed increases in benefits is the suggestion of a fist inside the velvet glove. Employes are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and may dry up if it is not obliged. 22/

It has also been held that the granting of benefits after an election has been held but before the time for filing objections has passed or while objections are pending also violates this principle. 23/ In those cases an employer unilaterally granted wage increases after the Union lost the election which would discourage union support in a subsequent election.

Likewise, it has been held that the withholding of normal wage increases which would have been granted except for the presence of the union during the pendency of an election also constitutes interference because employes could not miss the fact that no increase was given because of the presence of the union which interferes with the free choice of employes. 24/

Here the six percent (6%) wage increase which was to be effective 1-1-91 was withheld. This occurred after the election was held and the time for appeal had run. Assuming that the six percent (6%) increase was a condition of employment, the withholding did not interfere with the right of employes to organize or their choice of representation because those events had already taken place and all that remained was a ministerial act of issuing the certification by the Commission. Thus, there was no independent violation of

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19/ Grant County, Dec. No. 21567-A (Honeyman, 8/84) aff'd Dec. No. 21567-B (WERC, 1/85).

20/ Id.

21/ NLRB v. Exchange Parts Co., 375 U.S. 405 55 LRRM 2098 (1964).

22/ Id.

23/ Village of Clinton, Dec. No. 14141-B (Greco 6/76) aff'd by operation of law, Dec. No. 14141-C (WERC, 7/76).

24/ NLRB v. Dothan Eagle, Inc., 434 F.2d 92, 75 LRRM 2531 (5th Cir., 1970).

Sec. 111.70(3)(a)1, Stats., because there was no threat or promise which tended to interfere with the exercise of employes' free choice, that choice having already been exercised.

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

Both parties have relied on Wisconsin Rapids 25/ with the Union asserting the County violated the status quo and the County insisting it maintained the status quo. The Commission stated the principles underlying the maintenance of the status quo as follows:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment--either during negotiations of a first agreement or during a hiatus after a previous agreement has expired--is a per se violation of the MERA duty to bargain. 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. 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. (Citation omitted).

It must be noted that these principles of maintaining the status quo are related to the duty to bargain. Section 111.70(3)(a)4, Stats., provides in part, as follows:

> An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the Commission.

The Commission has held that an employer's duty to bargain commences as of the date of certification. 26/ Here, the Union was not certified until January 8, 1991. 27/ This occurred after January 1, 1991, and there was no duty to bargain prior to January 8, 1991, so that the status quo requirement set forth in Wisconsin Rapids, did not apply to January 1, 1991 wage increase. The Commission in Wisconsin Rapids recognized that different principles applied prior to certification than after as stated as follows:

> There is a difference between the statutory requirements applicable prior to the attachment of a duty to bargain but during an organizing campaign and the statutory requirements applicable after a labor organization has attained exclusive representative status. As an example, during an organizing campaign, an employer would be required to continue to grant discretionary increases in the same general manner as

25/ Decision No. 19084-C (WERC, 3/85).

26/ Amery School District, Dec. No. 25827 (WERC, 12/88).

27/ Ex-31.

> before the organizing campaign began, even where such would involve substantial employer discretion. Once a union attains exclusive representative status, however, the employer is required to fulfill its duty to bargain before making any further changes that would involve substantial employer discretion. (Citation omitted).

The undersigned finds that no duty to bargain had attached as of 1-1-91 so the status quo principles set forth in Wisconsin Rapids were not applicable. Rather the statutory requirements applicable during the organizing campaign applied to the withholding of the January 1, 1991 increase. Although the County continued to withhold granting the 6% increase after January 8, 1991 when the duty to bargain was applicable, this did not bring the withholding of it within the duty to bargain status quo and thus, no violation of Sec. 111.70(3)(a)4, Stats., has been established.

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

Section 111.70(3)(a)3, Stats., provides that it is a prohibitive practice for a municipal employer:

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

To establish discrimination, it must be shown by a clear and satisfactory preponderance of the evidence that:

1) The employe was engaged in protected, concerted activity;
2) The employer was aware of said activity;
3) The employer was hostile to such activity;
4) The employer's action was based at least in part on said hostility. 28/

In certain cases, proof of anti-union motivation is unnecessary. In these cases, the employer's conduct is inherently destructive of important employe rights which includes participation in protected concerted activities. 29/

In the instant case, the employes participated in an election, a clearly protected activity and the County was obviously aware of such activity, therefore the first two elements have been established. The employes were not granted the six percent wage increase while others were. This would clearly be discrimination in regard to terms and conditions of employment provided that the 6% wage increase was a condition of employment. This discrimination would be inherently destructive of the right of employes to select a bargaining representative and is no different than unilaterally reducing wages because employes selected the Union as their bargaining representative. The County has

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28/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

29/ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967).

asserted that the six percent increase was not a condition of employment. The Commission has stated that where there has been a clear unequivocal employer commitment to grant a wage increase prior to the start of union organization activity, then the withholding of such increase during the pendency of an election would violate Sec. 111.70, Stats. 30/ Here, the promise of a wage increase of a definite size which was to be put into effect on a definite date, which promise was made some six months prior to that date and two months before the hint of any union organization falls within the rule that conditions of employment include what an employer has announced it clearly intends to grant. 31/ The court in NLRB v. United Aircraft Corp. 32/ stated as follows:

> "..., it is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employes of their rights to engage in concerted activities that the refusal to put a scheduled wage increase into effect because the employes, four days before, selected a union as bargaining representative."

The employer's legal duty is to proceed in these matters as if the union had not been on the scene. 33/ Thus, it must be concluded that the six percent wage increase was a condition of employment and the withholding of it discriminated against the employes' right to select a bargaining representative in violation of Sec. 111.70(3)(a)3, Stats.

The County has asserted certain defenses to support its position even if the six percent was a condition of employment. The first is that the Resolution specifically applied to nonrepresented employes and these employes removed themselves from coverage by selecting the Union to represent them. Putting aside the fact that the Union was not certified until January 8, 1991 so the argument of when the employes are represented or not need not be answered, the argument made by the County, if accepted would mean that the six percent wage increase was conditioned on the absence of a union organization and election. Conditioning the promise of a wage increase on the absence of union organization would itself be a prohibited practice. Essentially the County is arguing that the Resolution was stating that it would give employes a six percent raise provided they would not vote for union representation. This would clearly be interference and a violation of Sec. 111.70, Stats. Thus, this argument must be rejected as its acceptance would result in a finding of interference.

The County has also argued that it is required to walk a very narrow line to successfully meet its responsibilities to its employes. It submits that it is a prohibited practice to grant pay increases during campaign and bargaining periods and also a prohibited practice to refuse to grant wage increase during the same period. It submits that the Union wants the six percent increase without bargaining and still more through bargaining. Clearly, the granting of

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30/ Washington County, Dec. No. 7694-C (WERC, 9/67).

31/ Armstrong Cork Co. v. NLRB, 211 F.2 843, 33 LRRM 2789 (5th Cir., 1954; NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 75 LRRM 2531 (5th Cir. 1970); NLRB v. United Aircraft Corp., Hamilton Standard Div., 490 F.2d 1105, 1109, 85 LRRM 2263 (2d Cir. 1973); Pacific Southwest Airlines, 201 NLRB 647, 82 LRRM 1298 (1973).

32/ 490 F.2d 1105, 85 LRRM 2263 (2nd Cir., 1973).

33/ Dan Howard Mfg. Co., 158 NLRB 805 (1966).

a wage increase if it is not a condition of employment and the withholding of a wage increase if it is a condition of employment can subject the County to prohibited practice charges for unilaterally altering a condition of employment. The County would be put on the horns of dilemma and as it has asserted, "the Union can't have its cake and eat it too." Where an employer is placed in a damned if you do and damned if you don't position, it has been held that there is no violation if the conduct is not illegally motivated but rather a "good faith effort to conform to the requirements of the law." 34/ Here, however, there was no dilemma. The Union informed the County that it was required to grant the six percent increase. 35/ While the County may not unilaterally take certain action, the emphasis is on unilateral. Here, it was clear beyond any doubt that the Union concurred on the six percent wage increase and insisted that it be given. Thus, there was no dilemma because granting it was what the Union requested and the County would no longer be "damned if it did." Thus, the withholding was not based on any fear of violating the law by granting the six

34/ NLRB v. Dorn's Transportation Co., 405 F.2d 706, 70 LRRM 2295 (2nd Cir., 1969).

35/ Exs. 27 and 30.

percent increase because the Union was not asserting any violation by the County's granting it but rather was asserting just the opposite.

It appears that the reason for the withholding of the six percent raise was to enhance the County's bargaining position prior to the Union's becoming certified. Acceptance of this position would logically allow an employer to alter all conditions of employment after the objection period but prior to union certification to improve the Employer's bargaining position. In short, the employer could cut all wages, fringes and change working conditions just before certification. This clearly would be destructive of the employes' right to select a representative of its choosing to bargain with their employer. Therefore, it must be concluded that the County's withholding of the six percent (6%) wage increase on 1-1-91 was because the employes selected the Union as its representative. The six percent was a condition of employment which the County could not unilaterally withhold and its unilateral failure to implement it was inherently destruction of important employe rights. Thus, the County thereby violated Sec. 111.70(3)(a)3 and derivatively, Sec. 111.70(3)(a)1, Stats. Accordingly, the County has been ordered to immediately implement the 6% wage increase effective 1-1-91 and make employes whole for their losses together with interest at the statutory rate as well as the standard cease and desist order and posting.

Dated at Madison, Wisconsin this 20th day of September, 1991.

By _____
Lionel L. Crowley, Examiner