STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND AFFIRMING, IN PART, AND REVERSING, IN PART, EXAMINER'S CONCLUSIONS OF LAW AND ORDER

On September 20, 1991, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein he concluded that Green County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)3 and derivatively (3)(a)1, Stats., and wherein he dismissed other allegations that the County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats. The County timely filed a petition for review with the Wisconsin Employment Relations Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument, the last of which was received on March 16, 1992. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. The Examiner's Findings of Fact are affirmed.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are

(footnote continued on Page 3.)

1/ (footnote continued from Page 2.)

filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

B. The following additional Finding of Fact is made:

22. The County's actions herein were not based in whole or in part on hostility toward employes' exercise of rights established by Sec. 111.70(2), Stats.

C. The Examiner's Conclusion of Law 1 is reversed to read:

1. By its failure to grant a six percent wage adjustment to those employes who Wisconsin Council 40 successfully sought to represent for the purposes of collective bargaining, Green County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., but did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

D. The Examiner's Conclusion of Law 2 is modified to read:

2. Aside from its conduct referenced in Conclusion of Law 1, Green County did not engage in conduct which had a reasonable tendency to interfere with the exercise of Sec. 111.70(2), Stats., rights and thus did not commit any other prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

E. The Examiner's Conclusion of Law 3 is affirmed.

F. The Examiner's Order is affirmed in part and reversed in part to read:

1. Those portions of the complaint alleging violations of Secs. 111.70(3)(a)3 and 4, Stats., are dismissed.

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

a. Cease and desist from interfering with employes' exercise of rights established by Sec. 111.70(2), Stats.

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

1. Make whole with interest 2/ all employes in the bargaining unit represented by Wisconsin Council 40 for the loss of wages due to the County's refusal to implement the six percent wage increase effective 1-1-91.

2. Notify all employes in the bargaining unit represented by Wisconsin Council 40 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 of the date of this Order, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on January 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).

"APPENDIX A"

NOTICE TO EMPLOYES

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

1. We will not interfere with employes' exercise of rights established by Sec. 111.70(2), Stats.

2. We will make whole, with interest, bargaining unit employes represented by Wisconsin Council 40, AFSCME, AFL-CIO for wage losses experienced by our failure to implement the six percent wage increase effective 1-1-91.

Dated at Monroe, Wisconsin, this _____ day of July, 1992.

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
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND AFFIRMING,
IN PART, AND REVERSING, IN PART, EXAMINER'S
CONCLUSIONS OF LAW AND ORDER

The Pleadings

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 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 January 1, 1991, and alternatively, by changing the health insurance policy for employes effective October 1, 1990. 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 from the provisions of the County Resolution providing for the six percent increase.

The Examiner's Decision

As to the Union allegations that the County engaged in conduct which communicated a threat of reprisal or promise of benefit to employes, the Examiner concluded that the various County communications did not constitute any threat or promise. The Examiner further concluded that the County did not violate Sec. 111.70(3)(a)1, Stats., when it responded to the Union's proposal as to how the instant dispute could be resolved prior to the filing of the complaint.

As to the question of whether the County violated Sec. 111.70(3)(a)1, Stats., by withholding a six percent wage increase available to unrepresented employes, the Examiner concluded that because the increase became effective after the election had taken place, and after the time for the filing of objections thereto had expired, the withholding of the wage increase should not be found to violate Sec. 111.70(3)(a)1, Stats., because the employes had already exercised their free choice.

Turning to the question of whether denial of the wage increase violated Sec. 111.70(3)(a)4, Stats., the Examiner concluded that because the duty to bargain does not exist until the Union is certified by the Commission, and because the wage increase became effective prior to the Union's certification, the County could not be found to have breached its duty to bargain by its actions.

As to the allegation that the withholding of the wage increase violated Sec. 111.70(3)(a)3, Stats., the Examiner concluded that because the wage increase was denied solely because the employes had selected the Union as their collective bargaining representative, the County's action was inherently destructive of the employes' right to select a bargaining representative. Thus, the Examiner found the County to have committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats. When reaching this conclusion, the Examiner rejected the County's argument that it acted appropriately because the compensation increase applied only to non-represented employes and the employes in question had removed themselves from such status by selecting the Union to represent them. The Examiner reasoned that the County was essentially arguing that it was appropriate to condition a wage increase on the absence of a union and concluded that such a condition would clearly constitute illegal interference. As to the County's argument that it was attempting in good faith to meet its labor relations responsibilities to its employes and that it was in a "damned if it did and damned if it didn't" situation as to whether it should grant the wage increase in question, the Examiner concluded that the County had no such dilemma because the Union had advised the County that it should grant the wage increase.

To remedy the violation, the Examiner ordered the County to make the employes whole with interest for the improperly denied wage increase, to post a notice, and to cease and desist from such conduct.

Positions of the Parties

The County

The County urges the Commission to reverse the Examiner's conclusion that the County violated Sec. 111.70(3)(a)3, Stats., and derivatively (3)(a)1, Stats., by withholding a wage increase after the Union election had occurred but prior to the Union's certification as the bargaining representative. Should the Commission conclude otherwise, the County then argues that the Examiner improperly awarded interest on the back pay at a 12 percent rate provided under Sec. 814.04(4), Stats., rather than the five percent rate set forth in Sec. 138.04, Stats.

The County asserts that the Examiner applied an incorrect legal standard to the facts of the case. It contends in this regard that the Examiner found a violation of Sec. 111.70(3)(a)3, Stats., without concluding that the County was hostile toward the exercise of employe rights. The County argues that by eliminating hostility as a required part of the analysis, the Examiner has greatly and improperly expanded the law. The County contends that the Examiner reached his conclusion by relying upon federal precedent established in NLRB v. United Aircraft Corp. 400 F.2d 1105 (CA 7 1973). The County questions the propriety of applying federal precedent to the Municipal Employment Relations Act, particularly where the County's action was based upon its personnel code and ordinances. More importantly, the County asserts that the facts and rationale of United Aircraft Corp. are clearly distinguishable from the facts before the Examiner. The County argues in this regard that it withheld the wage increase for two legitimate reasons: (1) it believed that the express terms of the Green County Ordinance prohibited it from providing the increase to those employes who became represented; and (2) it believed that granting the increase

would itself constitute a failure to bargain with the Union over 1991 wages. Thus, the County argues that a finding of a violation is not warranted when the evidence establishes that the County was motivated exclusively by its attempt in good faith to comply with the law. The County also argues that there is no evidence in the record that the employes suffered any harm from the allegedly "inherently destructive" conduct. In this regard, the County notes that the Union won the election, the results have been certified, and the parties are now negotiating their first contract.

The County further argues that the Examiner's result places municipal employers in an unfair position because the unions are given an unfair bargaining advantage. The County asserts that the unique timing of events beyond the County's control is what placed the County in this unenviable predicament. It argues that the County had to decide whether or not to give one particular group of newly represented employes a pay increase which was only adopted for unrepresented employes. It contends that the employes clearly would have been entitled to the wage increase had it become effective prior to the election. However, in the County's view, once the Union won the election, it was thereafter obligated to bargain the matter of wages exclusively with the Union. The County argues that if the Examiner's decision is allowed to stand, the effect would be to establish the existing unrepresented employe pay plan as the floor for future bargaining. The County argues that such a result is grossly unfair.

The County contends that it had a true dilemma in this case--should it disregard, and thereby violate, the specific terms and limitations of its own Ordinance by paying a wage increase to those who are now represented by the Union, or should it withhold the raise and attempt to bargain with the Union? The County argues that the only lawful way for it to proceed was to offer to recommend that the newly represented employes receive the wage increase as part of a first contract settlement. Such a suggestion was made to the Union and rejected. Following this rejection, the County chose to follow the course of action which followed the recognition of the employes' bargaining rights. The County argues that it should not now be punished for taking such action.

The County further argues that the Examiner erred in setting the interest rate on back pay at the rate of 12 percent rather than five percent. The County acknowledges that the Examiner was relying on prior Commission precedent when setting the interest rate. However, the County argues that the prior Commission precedent is erroneous. In this regard, the County argues that the Commission has misinterpreted Anderson v. LIRC 111 Wis.2d 245 (1983) when it concluded that Sec. 814.04(4), Stats., applied to pre-judgment interest.

Lastly, the County asserts that the Union does not have the right to challenge the Examiner's dismissal of certain allegations because the Union failed to file its own petition for review. However, acknowledging that the Commission has the statutory authority and obligation to review the entire Examiner decision, the County asks that the Commission affirm the dismissal of these Union allegations.

The Union

The Union urges the Commission to affirm the Examiner's conclusion that the withholding of the wage increase violated Secs. 111.70(3)(a)3 and 1, Stats. It further argues that the Examiner properly concluded that a 12 percent interest rate should be applied to the back pay order.

The Union also asks that the Commission review the Examiner's erroneous dismissal of allegations that the County interfered with employe rights by various communications with employes during the election campaign.

Discussion

The Six Percent Increase

It is undisputed that in June 1990, prior to any knowledge of the Union organizing drive, the County established a 1990-1991 pay plan for those employes not represented by a labor organization. The pay plan provided:

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.

The January 1, 1990 four and one quarter percent wage increase and the October 1, 1990 insurance change were implemented by the County. The January 1, 1991 six percent wage increase was not.

It is the post-election but pre-certification timing of the six percent increase which removes this case from the ordinary. If the six percent wage increase was to have been implemented prior to the Commission election or after the Union was certified as the bargaining representative, it would be clear that the County was obligated to grant the increase. As the County correctly concedes, a pre-election denial of the increase would violate Sec. 111.70(3)(a)1, Stats., because it would

interfere with the employes' choice as to whether the Union should be their bargaining representative. 3/ Post-certification denial of the increase would have violated the County's Sec. 111.70(3)(a)4, Stats., duty to bargain obligation to maintain the status quo as to wages while the initial contract was being bargained. 4/

Given the pre-certification timing of the increase, the Examiner properly rejected the Union's Sec. 111.70(3)(a)4, Stats., duty to bargain allegation because Sec. 111.70(3)(a)4, Stats., itself makes clear that the duty to bargain commences with the date the Commission certifies the election results. 5/

3/ City of Brookfield, Dec. No. 19367-B, (WERC, 12/83).

4/ A municipal employer's status quo duty to bargain obligations require that it make changes in employe compensation during bargaining of an initial contract or during a hiatus between contracts which are dictated by language, practice and/or any bargaining history. School District of Wisconsin Rapids, Dec. No. 19084-C, (WERC, 3/85). Excluded from this obligation are changes which involve substantial employer discretion. Wisconsin Rapids. Here, because the language of the Ordinance clearly establishes the six percent increase and because implementation of the increase does not involve employer discretion, it is apparent that the payment of the six percent increase would be part of the County's status quo obligations. Thus, it is also clear that the County is incorrect when it argues that payment of the six percent increase would have been in conflict with the County's duty to bargain with the Union and placed the County in a "damned if it did, damned if it didn't" pay position.

5/ Section 111.70(3)(a)4, Stats., provides in pertinent part:

> 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.

See also Amery School District, Dec. No. 25827, (WERC, 12/88); New Richmond Joint School Dist. No. 1, Dec. No. 15172-B, (WERC, 5/78).

Given the timing of the increase, the Examiner also properly concluded that because the election occurred prior to the effective date of the increase, no interference with employe free choice election rights occurred. However, we nonetheless reverse the Examiner's dismissal of the Sec. 111.70(3)(a)1, Stats., allegation because his analysis is premised upon too narrow a view of the rights established and protected by Secs. 111.70(2) and 111.70(3)(a)1, Stats., respectively.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

> 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. . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 6/ If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 7/

As the text of Sec. 111.70(2), Stats., reflects, the employe rights established include ". . . the right to form, join or assist labor organizations. . . ." The scope of this right is broader than the decision to vote for or against a union in the context of a Commission election. As reflected by the language of Sec. 111.70(2), Stats., this right includes the decision to "join" the Union as a member and to generally support or "assist" the Union.

6/ WERC v. Evansville, 69 Wis.2d 140 (1975).

7/ Beaver Dam Unified School District, Dec. No. 20283-B, (WERC, 5/84); City of Brookfield, Dec. No. 20691-A, (WERC, 2/84); Juneau County, Dec. No. 12593-B, (WERC, 1/77).

In our view, there can be no doubt that the County's action had a reasonable tendency to make employes less supportive of the Union, less interested in exercising these statutory rights. The denial of the wage increase was based solely on the employes' decision to be represented by a union. The message to employes, whether intended or not, was that you have paid a price for your choice. Such messages and actions clearly violate Sec. 111.70(3)(a)1, Stats.

The County defends its action in part by asserting that pursuant to Ordinance, the pay increase was only available to "unrepresented" employes and that the employes in question had become "represented" once the election was conducted.

Through an Ordinance, the County cannot escape the obligations imposed on it by the Municipal Employment Relations Act (MERA). The terms of the County Ordinance in question did no more than establish the compensation changes over a two-year period for employes who were unrepresented at the time the Ordinance was passed. The Ordinance could only apply to "unrepresented" employes as they were the only employes whose wages could be unilaterally established. As indicated earlier herein, labor law imposes on the County the obligation to make the changes referenced in the Ordinance during any union organizing campaign and, if the campaign is successful, during the time when an initial contract is being bargained. Such action by the County is mandated by MERA because when an employer carries out compensation decisions it made prior to the appearance of a union, it neither promises or threatens nor punishes or rewards employes for exercising their statutory rights.

Further, as noted by the Examiner, the literal interpretation of Ordinance proposed by the County in effect places the County in the position of arguing that it can legitimately condition wage increases upon the absence of future union representation. Because conditioning wage increases upon the employes' decision not to elect union representation would clearly violate Sec. 111.70(3)(a)1, Stats., the County argument must be rejected.

The County also complains that if it is compelled to pay the six percent wage increase and also to bargain wages with the Union for the same period of time, the Union is unfairly given "two kicks at the cat." This argument seemingly presumes that the presence of the six percent wage increase will play no role in the collective bargaining process.

Our experience (and we suspect the County's) with the realities of collective bargaining indicates that such a presumption is inaccurate. Clearly, existing compensation levels and the size of any recent compensation increase play a major role in the bargaining over wages. Typically, employers seek to take full credit during bargaining for all prior compensation increases received by employes. Thus, while it is true that the Union has every right to seek additional wage increases above and beyond the six percent increase received pursuant to our Order herein, the County has every right to resist whatever Union demands are made inter alia through reference to the six percent increase already received.

Turning to the question of whether the denial of the six percent increase also violated Sec. 111.70(3)(a)3, Stats., 8/ the Examiner proceeded under a Sec. 111.70(3)(a)3, Stats., analysis premised in part on NLRB v. Great Dane Trailers, Inc., 388 US 26 (1967) where discrimination was found because the employer's conduct during a strike was "inherently destructive" of employe rights. Because we find the facts herein to be significantly distinct from those in Great Dane, we do not believe application of a Great Dane analysis would produce a violation of Sec. 111.70(3)(a)3, Stats., herein. Thus, we need not determine herein whether we find a Great Dane analysis to be available under MERA, and because we have determined that the County's action was not based in whole or in part on anti-union animus, we find that no Sec. 111.70(3)(a)3, Stats., violation occurred in this case.

Remaining Interference Allegations

The Examiner dismissed additional Union allegations of interference which were based upon various written and oral communications between County officials and employe(s) and/or the Union. While the Union did not file a petition for review as to the dismissal of these allegations, pursuant to Sec. 111.07(5), Stats., once any party files a petition for review, the entire Examiner decision is before us for affirmance, modification or reversal. We have reviewed the record before us as to these allegations and find the Examiner's dismissal thereof appropriate. We have thus affirmed him in this regard. 9/

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

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

Section 111.70(3)(a)3, Stats., is violated when it can 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 against the employe was based at least in part on said hostility. See Muskego-Norway v. WERB, 35 Wis.2d 540 (1967).

9/ We modified the Examiner's Conclusion of Law only to make clear that the scope of conduct which can violate Sec. 111.70(3)(a)1, Stats., is broader than "threats" and "promises."

Interest

On review, the County also challenges the propriety of ordering interest on monies owed at a 12 percent rate. It asserts that if any interest is appropriate, the correct rate is five percent.

In Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), we extensively discussed both the propriety of granting interest and the question of how interest should be calculated. We therein held:

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

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

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

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

interest on back pay awards has been accepted as an appropriate remedy under federal law" notwith-standing the absence of an express statutory provision for interest on back pay. 12/

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

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

Neither of the Courts' opinions specified in full the nature and derivation of the rate of interest that the Court was ordering. However, we are satisfied that an application of the Sec. 814.04(4), Stats., interest on verdict rate in effect at the time of the complaint was initially filed with the administrative agency is consistent with the outcome and rationale expressed in both of those cases, and is necessary and appropriate as an element in WERC money remedies under

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

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

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

Sec. 111.07(4), Stats., in order for our agency to comply with the requirements of those appellate decisions. 15/

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

In Anderson v. LIRC, the Supreme Court expressly concluded that the agency should have imposed pre- and post-decision interest at a rate of "seven per cent (sic) per annum." Although the Supreme Court did not specifically explain the derivation of that interest rate, specification of that particular rate conclusively establishes that the Supreme Court was not applying the statutory "legal rate of interest" provided for in Sec. 138.04, Stats., either to the full back pay period or to the pre-decision period since that rate has, from 1974 to the present, remained at $5.00 per $100 outstanding per year. 17/ Hence, although we have found no previous Wisconsin case in which pre-judgment interest was ordered at higher than the "legal rate of interest" specified in Sec. 138.04, Stats., Anderson v. LIRC provided for a higher rate in both the pre- and post-decision periods involved in that case. Finally, although the Sec. 814.04(4), Stats., rate

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

> (4) INTEREST ON VERDICT. Except as provided in s. 807.01(4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

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

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

was changed from "7% per annum" to "12% per annum" in Chapter 271, Laws of 1979, Sec. 3, effective May 11, 1980, that Act expressly made that change applicable only to legal actions initiated after the effective date of that legislation. 18/

Thus, the uniform seven percent per annum specified by the Supreme Court in its 1983 decision in Anderson v. LIRC is entirely consistent with the Sec. 814.04(4), Stats., rate of "7% per annum" in effect at the time the complaint in that matter was initially filed with the administrative agency on January 15, 1974. 19/

Accordingly, we conclude that the interest rate to be applied to monetary awards under Sec. 111.07(4), is the single and uniform rate provided for in Sec. 814.04(4), Stats., in effect when the complaint was filed with the agency. While the objective of making whole the affected party for the time value of money market conditions during the period a back pay amount is unpaid, the Supreme Court's order in Anderson v. LIRC mandated treatment of the applicable interest rate as singular and uniform through the period of its application. The Supreme Court's further comment in that case that it chose "... the alternative of awarding pre-judgment interest, rather than increasing the award to present value, because the calculation of pre-judgment interest is far less complicated and would not require expert testimony" 20/ suggests that the Court may have taken ease of application into account in deciding upon the appropriate interest rate

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

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

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

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

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

and mode of application thereof. In that regard, we note that the Sec. 814.04(4), Stats., rate is both readily known from the outset of the proceeding and unchanging after the complaint has been filed initiating the proceeding. Its use is therefore entirely consistent with ease of application considerations.

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

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

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

We continue to find our Wilmot analysis persuasive and believe it responsive to the County arguments herein. We thus affirm the Examiner's order of 12 percent interest.

Dated at Madison, Wisconsin this 8th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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