STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant, vs. JEFFERSON COUNTY, Respondent.	Case 56 No. 45179 MP-2435 Decision No. 26845-A

Appearances:
Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, WI 53719.
Mr. Victor Moyer, Corporation Counsel, Jefferson County, Jefferson County Courthouse, 320 South Main Street, Jefferson, WI 53549.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, filed a complaint on January 22, 1991, with the Wisconsin Employment Relations Commission alleging that Jefferson County had violated Secs. 111.70(3)(a)1, 3, and 4 by unilaterally changing the status quo in refusing to pay to Bonnie Spoke the contingent rates established by the County's Personnel Policy and by discriminating against the chairperson of the Union's bargaining committee. The Union filed an amended complaint on May 30, 1991, alleging the same violations with respect to another employe in a different bargaining unit, Barbara Frank. The Commission appointed Karen J. Mawhinney to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing in the matter was held on June 12, 1991, in Jefferson, Wisconsin, and the parties completed their briefing schedule by October 7, 1991. The Examiner has considered the evidence and arguments of the parties, and now issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, called the Complainant or the Union after this, is a labor organization with its principal offices at 5 Odana Court, Madison, WI 53719.

2. Jefferson County, called the County or the Respondent after this, is a municipal employer with its office located at the Jefferson County Courthouse, 320 South Main Street, Jefferson, WI 53549.

3. The Union was certified as the bargaining representative of Courthouse employes on February 12, 1990, and was certified as the bargaining representative of professional employes of the Health Agency on May 24, 1990. The Union was also certified as the bargaining representative of Human Services employes in March of 1991. Although the parties have been engaged in negotiations for the initial collective bargaining agreements for the new bargaining units, there were no bargaining agreements for the newly organized units in effect at the time of the hearing in this matter. The County has three other bargaining units -- Highway Department employes, sworn officers in the Sheriff's Department, and employes at Countryside, the County's nursing

home -- and these three bargaining units were organized before 1990 and have had various collective bargaining agreements in place for several years.

4. In a County Board meeting on January 13, 1981, Resolution No. 80-114 was adopted. It states in part:

> WHEREAS, after careful review and appraisal of the personnel salary and classification studies made by independent survey for the nonrepresented employees, the Personnel Committee recommends the following changes be made effective February 8, 1891 . . . 3/
>
> . . .
>
> WHEREAS, in the Personnel Study completed in October, 1978, it was recommended by the Community Research and Management Co. that a contingency rate be prescribed for extreme and unusual cases of longevity and merit, and
>
> WHEREAS, the Personnel Committee recommends that the Personnel Policy contain a provision for a contingency rate of $250 at the 10 year level and an additional $250 at the 15 year level, based on merit with the approval of both the Department Head and the Personnel Committee be established.

The resolution passed in 1981 was later incorporated into Ordinance No. 6 and adopted at the March 9, 1982, session of the Jefferson County Board.

5. The Personnel Policy and Salary Plan for Officers and Employees of Jefferson County includes, among other things, the following statements:

> 6.04. CLASSIFICATION OF POSITIONS. (a) The provisions of this ordinance pertaining to classification and pay plan shall apply to all County employees except those in unclassified service and those covered by union contracts. The provisions of this ordinance pertaining to vacation, holidays, sick leave, retirement, death benefits, hours of work, overtime, discipline, equal opportunity, and personnel records shall apply to all employees of Jefferson County. Employees represented by labor unions shall be covered by this ordinance only to the extent that this ordinance does not conflict with the pertinent labor contract. In the event of conflict between the labor contract and this ordinance, the labor contract shall control. (Am. Ord. 84-16, 12-11-84 and Ord. 85-10, 7-9-85).
>
> 6.12. APPLICATION OF PAY PLAN TO POSITIONS.
>
> . . .
>
> (c) (7) Noncontract employees who are at Step "E" and who are not represented by a bargaining unit shall be

3/ The parties agree that the year 1891 had numbers transposed and should be 1981.

> eligible for contingent rates, as set by the Jefferson County Board, upon completion of 10 and 15 years of continuous service. . .
>
> (d) Except the automatic increase from Step "A" to Step "B", no advance in pay shall be automatic upon completion of the periods of service outlined hereinbefore and all increases shall be made on the basis of merit as established by the employee's work performance and after written recommendation of the department head and approval by the Personnel Committee.

6. The County has implemented the contingency pay by adding 12 cents per hour to the basic wage rate of employes at Step E with 10 years of service and with the required recommendation and approval based on merit or performance, and by adding 24 cents per hour to the wage rate of employes at Step E with 15 years of service with approval based on merit. There have been instances where contingency pay has been denied due to unsatisfactory job evaluations. Since the contingency rates went into effect, the first groups of employes to become organized were the courthouse employes and the health agency employes. The County has paid the contingency rates only to those employes who have not been represented by a union, except it continued to pay contingency rates to those employes who were already receiving those rates when they recently became represented by the Union.

7. Bonnie Spoke is employed by the County as a public health nurse at the health agency. She started her employment with the County in October of 1980 at the County nursing home, Countryside, and transferred into the health agency in 1983. She was not represented by a union until 1990. Since the bargaining unit at the health agency was certified, she has taken part in negotiations and serves as chairman of the bargaining unit. At the conclusion of a bargaining session on October 30, 1990, Spoke's supervisor, Gail Chamberlain, told her that the County Administrator, Willard Hausen, wanted to see her in his office. Hausen and County Corporation Counsel Victor Moyer told Spoke that although she had reached the 10-year level of employment, she would not receive contingency pay because she was represented by a union. Spoke left Hausen's office and spoke with Union representative Jack Bernfeld who was still there after the bargaining session. Bernfeld and Spoke went back to Hausen's office, where Bernfeld asked the County not to change its practices at this time.

8. On November 1, 1990, Bernfeld sent Hausen the following letter:

> Bonnie Spoke has been employed by Jefferson County as a Nurse since October 13, 1980. According to the County's "Personnel Policy and Salary Plan", Ms. Spoke is entitled to receive "contingency pay" after ten (10) years of employment.
>
> On October 30, 1990, Ms. Spoke was informed that she would not receive said pay. Ms. Spoke and I met with you and Mr. Moyer shortly thereafter on October 30 to discuss this problem. We were informed that Ms. Spoke would not receive "contingency pay" because she was represented by the Union in a bargaining unit.
>
> I met with you on October 31 about several matters. You again indicated that Ms. Spoke would not receive "contingency pay" because she was a represented

employee.

> On both days, I strongly advised that we considered this denial to be improper and illegal. We urge the County to reconsider its position and make all proper "contingency payments" to Ms. Spoke and all other eligible employees represented by the Union in this and the Courthouse bargaining units. Failure to do so will force us to take appropriate steps.

9. Chamberlain had given approval for Spoke to receive contingency pay based on her length of service and satisfactory evaluations. The department head and director of nursing, Julie Patefield, concurred in the approval for the contingency pay for Spoke. The approval was dated on January 2, 1990, before the Union was certified as a representative of the bargaining unit and while Spoke was a nonrepresented employe.

10. Barbara Frank has been employed by the County since March 30, 1981. She is a member of the Union's bargaining committee for the Courthouse unit. Upon reaching the 10-year level at the end of March of 1991, she was advised that she would not receive contingency pay because she was represented by the Union. During the hearing in this matter, another person -- Janet Kreklow -- was similarly identified as a Courthouse employe with 15 years of service who did not receive the 15 year contingency rate upon attaining that time of service, because she was represented by the Union. Kreklow's anniversary date was February 10th, but because pay is received two weeks after it is earned and because the Union became certified as the bargaining representative on February 12th, Kreklow was not given the 15 year rate. Louis Weisensel is employed at the Human Services department, and was not given contingency pay because he is represented by the Union.

11. Spoke and Frank were not given contingency pay and Kreklow was not given an increase in contingency rates because they were represented by a Union. The decision to not implement contingency pay and/or increases in contingency pay was not based on their job performances.

12. Employes who have become recently represented by the Union continued to receive increased vacation benefits in accordance with the County's policy, they continue to receive longevity pay based on months of service with the County, and they continue to earn sick days in accordance with County policy. Vacation benefits, longevity pay, and earned sick time is applied in the same manner to employes newly represented as it is to unrepresented employes.

13. Moyer, Hausen, Wendell Wilson of the Personnel Committee, and Administrative Secretary Joyce Fischer discussed the situation of contingency pay as it arose. No one discussed punishing employes based on union membership. The decision not to implement contingency pay rates and/or increases in those rates was not for purposes of retaliation, but was made in accordance with the County's interpretation of the resolution and ordinance granting contingency pay. The County interpreted the status quo to mean that employes who were receiving contingency pay but who were recently represented by the Union were to retain the contingency pay, but those who had not received it were not to start receiving it.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent's decision not to initiate contingency pay and/or increases in contingency pay to employes who had become represented by the

Union but who were not covered by a collective bargaining agreement does not constitute a unilateral change of conditions of employment or a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats.

2. The Respondent's compensation plan inherently discriminates against employes by conditioning employes' eligibility for contingency rates based on the absence of union representation, and therefore violates Sec. 111.70(3)(a)3, Stats.

3. The Respondent's compensation plan which bases the eligibility for contingency rates upon the absence of union representation has a reasonable tendency to interfere with employes' exercise of their rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER 2/

It is hereby ordered that:

1. The Respondent, Jefferson County, its officers and agents, shall immediately cease and desist from discriminating against employes based on their union representation and from interfering with employes' exercise of their rights to join or assist a labor organization by conditioning eligibility for contingency rates and/or increases in contingency rates on the absence of union representation.

2. The Respondent, Jefferson County, shall cease and desist from maintaining a compensation plan which discriminates against employes based on their representation status and from interfering with employes' exercise of their rights to join or assist a labor organization by conditioning eligibility for contingency rates and/or increases in contingency rates on the absence of union representation.

3. The Respondent, Jefferson County, shall take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Make Bonnie Spoke, Barbara Frank, Janet Kreklow, and any other employes similarly situated whole by paying the appropriate contingency rates to them, based on their years of employment from the date of their eligibility for contingency rates up until the effective date of the initial collective bargaining agreements between the parties, together with interest at the rate of 12 percent. 3/

b. Notify all employes in the bargaining units 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." That Notice shall be signed by an authorized representative of the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to ensure that said Notice is not altered, defaced or covered by other material.

(See Footnotes 2 and 3 on Page 7)

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

Section 111.07(5), Stats.

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

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 Commission on January 24, 1991.

c. 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 4th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

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 discriminate against employes based on union representation or interfere with their rights to assist or join a labor organization by conditioning eligibility for contingency rates and/or increases in contingency rates on the absence of union representation.

2. We will immediately make Bonnie Spoke, Barbara Frank, Janet Kreklow, and any other employes similarly situated whole for contingency rates lost from the date of their eligibility for contingency rates based on their length of service, together with 12 interest on said amounts, to the effective date of our first collective bargaining agreements with Wisconsin Council 40, AFSCME, AFL-CIO.

By _____
Jefferson County

JEFFERSON COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This issue in this case is whether the County unilaterally altered the status quo when it refused to implement contingency rates and increases in those rates in its pay plan to employes who became eligible for those rates

based on their length of service and satisfactory performance after the Union was certified as the bargaining representative for those employes and during the negotiations for their first collective bargaining agreements, or whether the refusal to implement contingency rates and/or the increases in such rates discriminated against employes who became represented or otherwise interfered with their rights.

POSITIONS OF THE PARTIES:

The Union contends that the County must continue to pay contingency rates in the same manner it did before the Union was certified as the representative of employes until collective bargaining agreements are negotiated, and that the County's action constitutes a unilateral change in the status quo and therefore a refusal to bargain in violation of Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats. The County's action is based solely upon the representation status of employes, and discriminates against employes because of their representation status. It discriminates against Spoke and Frank because of their union activity and is coercive and intimidating, and thus also constitutes a violation of Sec. 111.70(3)(a)1 and 3.

The Commission has adopted the dynamic view of the status quo, and the Union notes that the County generally accepts such a notion, as it has continued to advance employes through the steps of the pay plan, as well as continued to give employes advanced vacation benefits and increasing amounts of longevity pay. The Union views the County's interpretation of its pay plan as faulty, and it builds in a penalty for voting for representation.

The County asserts that it has maintained the status quo by paying every individual the same rate as before the Union became certified, pending ratification of new contracts which will establish new rates. The County ordinance requires that in order for employes to be eligible for contingency pay, they must be at the top step of his or her class, non-contract employes, and not represented in a bargaining unit. Once employes became represented in a bargaining unit, they were no longer eligible for contingency rates according to the express language of the ordinance. There is no allegation that the County has refused to discuss contingency rates, and there is no evidence in the record to support a charge of bad faith bargaining.

While the Union alleges discrimination because the contingency pay is unavailable to bargaining unit members, the County claims that the Union has not proved its case by a clear and satisfactory preponderance of the evidence. The three pre-existing unions have not complained although they never received the contingency rates, and there is no evidence of an exodus from these unions to positions where contingency rates are available. The logical inference is that the availability of contingency pay has not discouraged membership in those unions. The contingency rates have been administered consistently since their inception and have not discouraged membership in the three new unions. There is no evidence that anyone has been discouraged from union membership by either the presence or the absence of this benefit.

In response to the County, the Union argues that the County's application of its ordinance violates the law, and it considers the County's action at least a misinterpretation and misapplication of the County's personnel policy. The County has no historical practice of denying newly represented, pre-contract employes contingency pay, and the identification of non-contract, unrepresented employes in the policy is intended to state the obvious, that existing represented groups under contract were not included in the contingency pay plan for unrepresented employes. The Union asserts that movement to a step of the pay plan based solely upon the representation status of employes discriminates against employes because of their representation status.

The Union's position is that the County must continue to apply the pay plan including the contingency rates both pre and post-certification until collective bargaining agreements are negotiated, just as the County has continued to apply all other requirements of the policy. The County's view that the contingency pay provisions of its ordinance operate as a poison pill, something unavailable to union members, cannot be condoned nor sanctioned by the Commission. Acceptance of that position would allow an employer to create conditions of employment that would evaporate with the certification of a union, without negotiations, and cuts in wages and fringe benefits or changes in working conditions could occur simply because employes chose union representation.

In responding to the Union, the County asserts that since March 9, 1982, the County Personnel Ordinance has removed union employes entirely from the classification and pay plan in the ordinance. By implication, this establishes a five-step plan for pre-contract union employes, effective only for the limited period of time while a contractual pay plan is negotiated, and then the collective bargaining agreement will control. Employes in the bargaining units previously receiving contingency pay have not suffered any monetary loss during the negotiation period, and the status quo has been maintained.

The County notes that while the Union characterized the bargaining session on October 30, 1990, as "rough," this is a subjective evaluation of a three-hour session. The County asserts that of four employes arguably eligible for but denied contingency pay, two were active in the Union and two were not, and this does not support the Union claims of hostility to union activity or discriminatory action by management. It is conceded that Frank and Spoke were active in the Union, and the County knew of their activity, but there is no evidence of union activity by Kreklow and Weisensel. There is no evidence of employer animosity against any of the individuals who were denied contingency pay. Further, there is no relationship between the County's actions in adopting its ordinance in 1982 and the current organizing campaign.

The County asserts that where a pre-existing compensation plan provides that there is to be no advancement on a schedule, the employer is prohibited by its duty to bargain from granting such an advancement. The contingency rate, by its terms, is unavailable to union members and has been so administered since its inception in 1981. The County is prohibited by law from granting contingency rates to Spoke, Frank, Kreklow and Weisensel, and it could be subject to a prohibited practice it if unilaterally granted such a change in pay.

DISCUSSION:

The Legal Framework:

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)." 4/

4/ Section 111.70(2), Stats., states in part: "Municipal employees 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, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . . ."

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. 5/ In order to prevail on a 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 have a reasonable tendency to interfere with the exercise of employes' rights. 6/ It is not necessary to prove that an employer intended to interfere with employes or that there was actual interference. 7/ Interference may be proved by a showing of a threat of reprisal or a promise of benefit which would reasonably tend to interfere with employes' rights to join or assist labor organizations or bargain collectively through representatives of their choice. 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; but the prohibition shall not apply to a fair-share agreement."

In order to prove a violation of Sec. 111.70(3)(a)3, the Complainant must prove by a clear and satisfactory preponderance of the evidence that:

(1) the employes were 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, upon said hostility. 9/

Proof of anti-union motivation is not necessary in cases where the employer's conduct is inherently destructive of important employe rights which include participation in protected concerted activities. 10/

Section 111.70(3)(a)4 provides in relevant part that it is a prohibited practice for a municipal employer:

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

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

6/ Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 8/81), aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81).

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

8/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

9/ 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).

10/ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

An employer's duty to bargain with a bargaining representative arises upon the union's certification as a bargaining representative following an election, and until the union is certified, the employer has no duty to bargaining with the union. 11/ Unilateral changes in wages, hours or working conditions by an employer can violate Sec. 111.70(3)(a)4 only where a labor organization is already the exclusive representative of the employes affected. 12/ Upon the selection of a bargaining representative, any subsequent changes in wages, hour and working conditions would be subject to the duty to bargain. 13/

The Commission has held that, absent a valid defense, a unilateral change in the status quo of wages, hours or conditions of employment -- either during the negotiation of a first agreement or during a hiatus after a previous agreement has expired -- is a per se violation of Sec. 111.70(3)(a)4, Stats. The Commission has concluded that such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining and evidence a disregard for the role and the status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 14/

During an organizing campaign, an employer is required to continue to grant discretionary increases in the same general manner as before the organizing campaign began, even where such would involve substantial employer discretion. Once a union attains exclusive representative status, the employer is required to fulfill its duty to bargain before making any further changes that would involve substantial employer discretion. 15/

Application of the Legal Framework to the Case:

The parties agree that the status quo is to be maintained following certification of the Union and during negotiations for the first collective bargaining agreements for the newly organized bargaining units. They disagree on what the status quo means. The County relies on its resolution adopted in 1981 which provided for contingency rates only for nonrepresented employes at the 10 and 15 year levels of service, based on merit, and the resolution which was adopted by ordinance in 1982 as Chapter 6, Personnel Ordinance.

In the Personnel Policy and Salary Plan for Officers and Employees of Jefferson County (County Exhibit #4), Section 6.04 states:

> The provisions of this ordinance pertaining to classification and pay plan shall apply to all County employees except those in unclassified service and those covered by union contracts.

11/ New Richmond Joint School District No. 1, Dec. No. 15172-A (7/77), aff'd, Dec. No. 15172-B (WERC, 5/78).

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

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

14/ Id.

15/ Id.

Unclassified service is defined in Section 6.02(p) as elected officials and those specifically designed by the Board of Supervisors to be exempt from the classification plan. The contingency rates at issue here are stated in Section 6.12(c)(7) as follows:

> Noncontract employees who are at Step "E" and who are not represented by a bargaining unit shall be eligible for contingent rates, as set by the Jefferson County Board, upon completion of 10 and 15 years of continuous service. For purposes of this section, continuous service means there have been no intervening terminations. Part-time employees are eligible for 50 percent of the contingent rate.

It is undisputed that Spoke, Frank, and Kreklow met the eligibility of time in service to qualify for contingency rates, and County's decision not to implement those contingency rates and/or increases in those rates was not based on merit but rather because they had become represented by the Union at the time they would have otherwise qualified for them.

The County was maintaining the status quo by not implementing the contingency rates and/or increase in contingency rates to employes who became eligible for them on the basis of time in service and merit but who became represented by the Union. The status quo that existed in the County's pay plan was that noncontract employes at Step E and who were not represented by a bargaining unit were eligible for contingency rates. This was the status quo that had existed since the resolution providing for contingency rates was incorporated into the County's personnel ordinance as of March 9, 1982. The County asserts that its pre-existing compensation plan provides that the contingency rate is unavailable to union members and has been administered as such since its inception. While there was no union organizing activity going on in the County from the time the contingency rate was established until the present, the County's compensation plan exempted two groups of employes -- those under union contracts and those represented by a union -- from the availability of contingency rates. The County made no unilateral change in its compensation plan during the period after the Union became certified. It continued to enforce its pay plan as the plan had existed before the Union started organizing and after the Union became certified as the bargaining representative of employes. It was the County's first opportunity to apply the part of the pay plan which disqualified employes from receiving contingency rates if they were represented by a union.

Therefore, the County's refusal to initiate contingency rates and/or increases in those rates to employes who became represented by the Union did not constitute a unilateral change of the status quo and it did not violate Sec. 111.70(3)(a)4.

However, the status quo itself is unlawful, in that it is inherently discriminatory. As Examiner Crowley recently stated in Green County, Dec. No. 26798-A (9/91), "Conditioning the promise of a wage increase on the absence of union organization would itself be a prohibited practice." The County's compensation plan, as it existed before the Union started organizing, conditioned the eligibility for contingency rates on the absence of union representation. The existing pay plan itself held the threat of reprisal for union representation and discriminated against those who chose representation, and as such, violated both Secs. 111.70(3)(a)1 and 3.

In this case, employes who participated in an election and became represented by the Union were not given the contingency rates and/or increases in those rates, while those contingency rates remain available to other

employes who have no representation. This discrimination is inherently destructive of the right of employes to join or assist a labor organization.

Two of the employes denied contingency rates were actively involved in negotiations for the first contracts. Spoke served as the chair of the bargaining unit for the health agency employes, and it was at the end of a bargaining session on October 30, 1990, when the County informed her that although she reached the 10-year level of employment, she would not receive contingency pay because she was represented by the Union. Frank served as a member of the bargaining committee for the courthouse unit, and was also advised that although she reached the 10-year level at the end of March, 1991, she would not receive contingency pay because she was represented by the Union. Kreklow was a courthouse employe with 15 years of service who was denied the increase in contingency rates because she was represented by the Union. Louis Weisensel, employed at the Human Services department, was denied contingency pay because he was represented by the Union.

Administrative Secretary Joyce Fischer testified without contradiction that the decision to not pay contingency rates and/or increases in those rates was not for purposes of retaliation, but was made in accordance with the County's interpretation of its resolution and ordinance granting the contingency rates. In fact, Fischer's testimony indicates that in any discussion regarding contingency pay, the County's position was to maintain the status quo and not to retaliate or punish anyone. 16/

It has been held that if an employer's discriminatory conduct is inherently destructive of important employe rights, no proof of antiunion motivation is needed, and an unfair labor practice can be found even if the employer shows that its conduct was motivated by business considerations. If the discriminatory conduct on employe rights is comparatively slight, an antiunion motivation must be proved to sustain the charge of discrimination if the employer has come forward with evidence of legitimate and substantial business justifications. 17/ In Great Dane Trailers, the U.S. Supreme Court stated:

> The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity. 18/

In this case, the County has not presented any legitimate business reasons for its decision not to implement contingency rates and increases in those rates, and has extinguished that portion of its pay plan only to those who engaged in protected concerted activity.

Even though it does not appear that the County was hostile to the union activity, the County's pay plan -- as the County itself interprets it -- is inherently discriminatory in regard to conditions of employment, and thus violates Sec. 111.70(3)(a)3, Stats. The employes at issue here would have been

---

16/ TR. - 57-60.

17/ NLRB v. Great Dane Trailers, 388 U.S. 26 (1967).

18/ Id.

paid the contingency rates but for their union representation. The County admits that the employes who became eligible for contingency rates based on length of service had satisfactory performance on the job and that the only reason it refused to implement the contingency rates and/or increases was because they had become represented by the Union.

The County did not retain substantial discretion which would have required it to fulfill its duty to bargain before making any changes. The rates were already determined, and had been for years past. The County retained limited discretion, in that employes' eligibility was also based on merit as well as length of service. In this case, the County had already exercised the limited discretion, where supervisors had approved of contingency rate increases for employes based on satisfactory performance evaluations.

Accordingly, the County's pay plan, which does not retain substantial employer discretion over contingency rates, and which conditions the receipt of those conditions of employment upon the absence of union representation, inherently discriminates against employes based on union representation and may discourage membership in the Union, in violation of Sec. 111.70(3)(a)3, Stats. The Union correctly notes that the County has created a "poison pill," one which allows it to create conditions of employment that evaporate with the certification of a union, and one which cannot be sanctioned under Sec. 111.70, Stats.

The contingency rates continued to be given during the pendency of the election, and it was only after the Union was certified as the bargaining representative that the contingency rates were denied by the County. While the County appears to have been trying to comply with the law both during the organizational phase and after certification, the pay plan itself contains the threat of reprisal to employes after the Union became the exclusive representative, in that employes who chose union representation would be denied a benefit available to employes who remained unrepresented, and it contains the promise of a benefit for remaining nonrepresented. Employes nearing the 10 or 15 year level of service would be those most affected in the exercise of their free choice, because if they voted for the Union, they would be denied the extra pay of the contingency rates.

Thus, the pay plan violates Sec. 111.70(3)(a)1, because it contains a threat of reprisal and a promise of a benefit which has a reasonable tendency to interfere with the exercise of employes' free choice. It is unnecessary to for the Union to prove that there was actual interference. Conditioning pay increases on the absence of union representation by itself constitutes interference. 19/ The County may maintain a pay plan for its unrepresented employes and distinguish between nonrepresented employes and employes working under union contracts. However, the County may not lawfully condition certain pay increases or conditions of employment on the absence of union representation.

In conclusion, the Examiner has found no violation of Sec. 111.70(3)(a)4, as the County maintained the status quo without a unilateral change after the Union became certified as the bargaining representative of certain employes. However, the Examiner has concluded that the status quo in the form of the County's compensation plan has a reasonable tendency to interfere with employes' exercise of their rights guaranteed in Sec. 111.70(2), Stats., and has inherently discriminated against employes based on their representation

19/ NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

status, and the County has therefore violated both Secs. 111.70(3)(a)1 and 111.70(3)(a)3, Stats.

Dated at Madison, Wisconsin this 4th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner