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-B

Appearances:

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

Hesslink Law Offices, S.C., by Mr. Robert M. Hesslink, Jr., 6200 Gisholt Drive, Madison, Wisconsin 53713, appearing on behalf of the Respondent.

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

On December 4, 1991, Examiner Karen J. Mawhinney issued Findings of Fact, Conclusions of Law and Order in the above matter wherein she concluded that Jefferson County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by conditioning eligibility for initial contingency wage payments or for increases in contingency wage payments on the absence of union representation. The Examiner dismissed the allegation that the County thereby also violated Sec. 111.70(3)(a)4, Stats. To remedy the violations found, the Examiner ordered the County to make certain employes whole, post a notice, and cease and desist from its illegal conduct.

On December 23, 1991, the County filed a petition with the Wisconsin Employment Relations Commission seeking review of portions of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on April 27, 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 1-10 are affirmed.

(See footnote 1/ on pages 2 and 3)

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 therefore 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 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.

1/ Continued

(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 Examiner's Finding of Fact 11-13 are modified to read as follows:

11. Spoke, Frank, and Weisensel were not given contingency pay and Kreklow was not given an increase in contingency pay because they were represented for the purposes of collective bargaining by the Union. The decision not to implement contingency pay and/or increases in contingency pay was not based upon their job performance.

12. Employes who have become recently represented by the Union continue to be eligible for increased vacation benefits and longevity pay and continue to earn sick leave all in accordance with County Ordinance 6. Thus, vacation benefits, longevity pay, and sick leave under Ordinance 6 are being earned in the same manner by employes newly represented by the Union as by employes who remain unrepresented.

13. The County's decision regarding denial of contingency pay or contingency pay increases was not based in whole or in part upon hostility toward the Union or the employes selection of the Union as their collective bargaining representative. Rather, the County's decision was based on its understanding of its obligation to maintain the wage status quo while the parties bargained the initial collective bargaining agreements.

C. The Examiner's Conclusions of Law 1 and 2 are reversed to read as follows:

1. Jefferson County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

2. Jefferson County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

D. The Examiner's Conclusion of Law 3 is modified to read as follows:

> Jefferson County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

E. The Examiner's Order is modified in part and reversed in part to read as follows:

> 1. Those portions of the complaint alleging violations of Sec. 111.70(3)(a)3, Stats., are dismissed.
>
> 2. Jefferson County, its officers and agents, shall immediately:
>
> a. Cease and desist from violating its duty to bargain modifying the wage status quo.
>
> b. Cease and desist from interfering with employes' exercise of rights established by Sec. 111.70(2), Stats.
>
> c. Take the following affirmative action which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act.
>
> 1. Until the effective date of the initial collective bargaining agreements between the County and Wisconsin Council 40, grant the contingency wage payments/increases to all employes represented by Wisconsin Council 40 under the eligibility standards set forth in County Ordinance 6.
>
> 2. Make whole with interest 2/ all employes represented by Wisconsin Council 40 for contingency wage

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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 22, 1991, when the Sec. 814.04(4) rate was "12 percent per yeaer." 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 263 (CtApp IV, 1983).

> payments/increases which were denied said employes because they had become represented for the purposes of collective bargaining.
>
> 3. Notify all employes in the bargaining units 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." 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.

4. 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, Chairperson

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

"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 violate our duty to bargain with Wisconsin Council 40 or interfere with employes' exercise of rights established by Sec. 111.70(2), Stats.

2. We will make whole with interest all otherwise eligible employes represented for the purposes of collective bargaining by Wisconsin Council 40 for contingency wage payments/increases which they were denied.

Dated at Jefferson, Wisconsin this ____ day of _____, 1992.

JEFFERSON 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.

JEFFERSON COUNTY

MEMORANDUM ACCOMPANYING ORDER

AFFIRMING AND

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

The Pleadings

The Union alleged that the County's failure to make contingency wage payments or increase contingency wage payments to eligible County employes constituted a unilateral change in the status quo and therefore violated Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats. The Union also asserted that the County's action had the effect of and was intended to discriminate against employes generally for selecting the Union as their bargaining representative and to discriminate specifically against two employes, Spoke and Frank, because of their activity on behalf of the Union. The Union therefore contends that the County's actions also violated Secs. 111.70(3)(a)1 and 3, Stats.

The County denied that it committed any prohibited practices asserting that it maintained the status quo by its conduct and did not intend to and did not in fact retaliate against employes based on their support of the Union.

Examiner's Decision

Looking first at the question of whether the County had improperly modified the status quo by its conduct, the Examiner determined that no alteration of the status quo had occurred and thus dismissed the Sec. 111.70(3)(a)4, Stats., allegation. In this regard, the Examiner concluded that the payments in question were established by the County pay plan which applied only to employes who were not represented by a labor organization. From this conclusion, the Examiner determined that the status quo did not provide for payment of contingency wage increases to the employes in question because they had become represented by a labor organization.

However, the Examiner concluded that the status quo she found to exist was inherently discriminatory because eligibility for contingency rates was conditioned on the absence of union representation. Therefore, she determined that the nonrepresented employe pay plan itself constituted a threat of reprisal for union representation and thus interfered with and discriminated against those who chose representation, in violation of Secs. 111.70(3)(a)1 and 3, Stats. The Examiner determined that although the County may maintain a pay plan for its unrepresented employes, the County in this case was improperly conditioning pay increases on the absence of union representation.

In reaching her conclusion, the Examiner determined that the County did not intend to and was not motivated by a desire to retaliate or punish any employe for the exercise of statutorily protected rights. However, citing NLRB v. Great Dane Trailers, 388 US 26 (1967), the Examiner concluded that because the County's conduct was inherently destructive of protected employe rights and because the County did not present any legitimate business reasons to justify its action, a violation of Sec. 111.70(3)(a)3, Stats., occurred despite the absence of hostility on the County's part.

POSITIONS OF THE PARTIES

The County

The County urges affirmance of the Examiner's determinations that the denial of contingency wage payments/increases following Union certification did not improperly alter the status quo and was not based upon anti-Union animus. However, the County urges the Commission to reverse the Examiner's conclusion

that the application of the County pay plan constituted inherently threatening and discriminatory conduct in violation of Secs. 111.70(3)(a)1 and 3, Stats.

More specifically, the County asserts that had it made the disputed wage payments, it would have violated its obligation to maintain the status quo and thereby violated Sec. 111.70(3)(a)4, Stats. The County contends that the Examiner erred by in effect concluding that the County's failure to violate Sec. 111.70(3)(a)4, Stats., was itself violative of Sec. 111.70(3)(a)1 and 3, Stats. The County asserts that it was the pendency of contract negotiations with the newly elected collective bargaining representative which caused it to conclude that it was obligated not to pay the discretionary increases. The County contends that it was honoring its obligation to bargain with the Union over employer exercises of discretionary wage authority when it failed to grant the increases in question. Given the foregoing and the absence of any finding of hostility by the County, the County asserts that no violation of Sec. 111.70(3)(a)3, Stats., can be found.

The County contends that the Examiner's reliance on the holding in Great Dane Trailers to find a violation of Sec. 111.70(3)(a)3, Stats., was in error. In this regard, the County argues that the Wisconsin Supreme Court in State Department of Employment Relations v. WERC 122 Wis. 2d. 132 (1985) rejected reliance on federal law for the purpose of determining whether discriminatory conduct had occurred. Further, the County argues that even if it is permissible to find a violation of Sec. 111.70(3)(a)3, Stats., in the absence of hostility by the County, the Great Dane standard does not compel the result that the Examiner reached.

The County further asserts that its conduct did not violate Sec. 111.70(3)(a)1, Stats. The County contends that the Examiner's reliance on NLRB v. Exchange Parts Co., 375 US 405 (1964) was erroneous because the Examiner misread that decision and also misapplied the holding of that case to the facts herein. The County argues that the record here does not support a conclusion that the language of the pay plan itself has a reasonable tendency to interfere with protected rights.

To the extent that the Union asks that the Commission find a violation of Sec. 111.70(3)(a)4, Stats. and additional violations of Sec. 111.70(3)(a)3,

Stats., the County asserts that because the Union did not file a petition for review, the Commission lacks statutory authority to consider the Union's assertions.

If the Commission chooses to address these Union claims of Examiner error, the County contends that the Examiner should be affirmed in those regards. As to the refusal to bargain allegation, the County asserts that the compensation plan in question expired by its own terms once the employes selected union representation. The County contends that given the discretionary nature of the contingency pay increases, it acted in compliance with the status quo when it suspended the discretionary granting, denying and reviewing of employe eligibility for these payments. The County argues that it appropriately left all employes in their personal status quo at the time of the certification. Thus, the County notes, many employes already receiving contingency pay continued to receive same pending the outcome of collective bargaining, regardless of their performance.

As to the alleged discrimination, the County contends that not only is there no evidence that it bore general animus toward union activity by employes, there is no evidence that it specifically sought to retaliate against employes Frank and Spoke.

Given the foregoing, the County asks that the Examiner's decision be reversed as to the finding of violations of Secs. 111.70(3)(a)1 and 3, Stats., and that the Union's complaint be dismissed in its entirety.

The Union

The Union asserts that the Examiner erred when she concluded that the County had not unlawfully altered the status quo. Applying the principles of School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85), the Union contends that the County was obligated to continue to apply the unrepresented employe pay plan to all newly represented employes. The Union argues that the pay plan in question did not involve substantial exercise of employer discretion and thus that the continued application of the pay plan is mandated by Sec. 111.70(3)(a)4, Stats.

The Union urges the Commission to affirm the Examiner's conclusion that the County's actions violated Secs. 111.70(3)(a)1 and 3, Stats. Although it continues to argue that the County acted with anti-union animus at least as to employes Spoke and Frank, the Union asserts that the Examiner properly concluded that a violation of Sec. 111.70(3)(a)3, Stats., occurred under a Great Dane analysis.

The Union also urges the Commission to affirm the Examiner's determination that there was a violation of Sec. 111.70(3)(a)1, Stats. In this regard, the Union asserts that the Examiner properly applied NLRB v. Exchange Parts Co..

Given the foregoing, the Union asks that the Commission affirm the Examiner's determination that the County has violated Secs. 111.70(3)(a)1 and 3, Stats., and further determine that there was a violation of Sec. 111.70(3)(a)4, Stats.

DISCUSSION

The County has raised the initial question of whether, absent a Union petition for review, the Commission possesses jurisdiction to review those allegations which the Examiner dismissed. Reviewing Sec. 111.07(5), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., we

are satisfied that once a petition for review is filed by any party, the entire Examiner decision is before us for de novo consideration. Trans America Insurance Co. v. ILHR Department, 54 Wis. 2d. 252 (1971); State v. Industrial Commission, 233 Wis. 461 (1940). Thus, we proceed to consider the entire Examiner decision herein.

The basic facts are not in dispute. The County has a compensation plan for unrepresented employes which includes contingency wage supplements to employes based upon seniority and job performance. The amount of supplement, the timing of the supplement, and the qualifying standards are all established by the compensation plan. Once the Union became the collective bargaining representative for certain County employes, the County concluded that its obligation to maintain the status quo while first contracts were bargained included continuation of the contingency wage payments at the then existing levels to those employes receiving same. However, the County concluded that it was inappropriate under the status quo to add newly eligible employes to the contingency wage plan or to allow employes already receiving a contingency payment to progress to the higher payment level.

The Examiner concluded that the County's denial of contingency payments wage and contingency wage increases was consistent with the County's status quo obligation. She held that because the County compensation plan applied only to unrepresented employes and the employes in question had become represented, the status quo was not altered. We disagree.

In our view, a determination that the pay plan for unrepresented employes only applied to unrepresented employes does no more than state the obvious and is of no analytical consequence. As we held in Wisconsin Rapids, the wage status quo which must be maintained while the parties are bargaining a first contract is determined by examination of the language of the existing compensation plan for the previously unrepresented employes, as historically applied. Examination of the pay plan itself and its historical application indicates that each year employes with 10-14 years of service and satisfactory performance received a wage supplement of 12 cents per hour. Employes with 15 or more years of service and satisfactory performance received a wage supplement of 24 cents per hour. The wage status quo the County was obligated to maintain during bargaining over initial contracts included continued application of the wage supplement plan to employes now represented by the Union. The County's failure to maintain this aspect of the wage status quo violates Sec. 111.70(3)(a)4, Stats.

The County correctly argues that under Wisconsin Rapids, if the contingency wage plan involved the exercise of substantial employer discretion, then the County would be prohibited from unilaterally making the wage payments. However, as noted earlier, the timing, amounts, and eligibility standards are all established by the plan. Thus, there is no substantial exercise of employer discretion which precludes initiation of or increase in contingency payments to employes under the status quo. 2/

We now turn to the question of whether the Examiner properly determined that the County's action violated Sec. 111.70(3)(a)3, Stats. 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.

2/ See McClatchy Newspapers, 299 NLRB No. 156, 135 LRRM 1158 (1990); Colorado Lite Electric Assoc., 295 NLRB No. 67, 131 LRRM 1457 (1989); NLRB v. Allis Chalmers, 601 F. 2d. 870, 102 LRRM 2144 (1979); Oneita Knitting Mills, 205 NLRB 500, 83 LRRM 1670 (1973); NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962).

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 upon anti-union animus, we find no Sec. 111.70(3)(a)3, Stats., violation occurred in this case. Thus, we reverse the Examiner's conclusion in this regard.

Lastly, we turn to the question of whether a violation of Sec. 111.70(3)(a)1, Stats. occurred. 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. 3/ 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,

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

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. 4/

As the text of Sec. 111.70(2), Stats., reflects, the employe rights established include ". . . the right to form, join or assist labor organizations. . . ." As reflected by the language of Sec. 111.70(2), Stats., this right includes the decision to "join" the Union as a member and or to generally support or "assist" the Union.

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 increases 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 herein in part by asserting that pursuant to County Ordinance, the pay increases were only available to "unrepresented" employes and that the employes in question had become "represented."

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 plan 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 continue to apply the Ordinance 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, 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.

Given the foregoing, we have modified and reversed the appropriate portions of the Examiner's Conclusions of Law and Order. Our modification of Examiner Findings 11-13 seeks only to add more precision to the facts found by the Examiner.

4/ 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).

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