STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCALS 2085, 2085-C, 2387 and 3363, AFSCME, AFL-CIO, Complainants, vs. RICHLAND COUNTY, Respondent.	Case 102 No. 49693 MP-2777 Decision No. 27856-C

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, on behalf of the Union.
Godfrey & Kahn, S.C., by Mr. Jon E. Anderson, on behalf of the County.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

Amedeo Greco, Hearing Examiner: Locals 2085, 2085-C, 2387, and 3363, AFSCME, AFL-CIO, herein "Union", filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein "Commission", on August 18, 1993, alleging that Richland County, herein "County", had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein "MERA", by unlawfully changing the health insurance benefits provided for in a health maintenance organization during a contractual hiatus. The Commission on April 21, 1994, substituted the undersigned as Examiner to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Sec. 111.07(5), Wis. Stats. The County filed its answer on January 7, 1994, and hearing was held in Richland Center, Wisconsin, on April 22, 1994. The parties thereafter filed post-hearing briefs which were received by October 3, 1994.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. The Union is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., and at all times material herein has maintained its principal office at 5 Odana Court, Madison, Wisconsin. At all times material herein, Staff Representatives Laurence S. Rodenstein and then David White - who took over in the Spring of 1991 - have served as the Union's bargaining representatives and have acted on its behalf.

2. The County is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and it maintains its principal office in the Richland County Courthouse, Richland Center, Wisconsin. At all times material herein, County Clerk Victor V. Vlasak and Attorney Jon E. Anderson have acted on its behalf.

3. The Union represents for collective bargaining purposes four separate bargaining units consisting of Sheriff's Department employes; professional social workers; Highway Department employes; and non-professional employes employed at the County's Pine Valley Manor nursing home. At all times material herein, each bargaining unit has been covered under its own separate contract.

4. The parties agreed to separate 1987-1988 contracts which provided for fee-for-service health insurance benefits, without any provision for a health maintenance organization ("HMO"). The health insurance carrier then named in the contracts was WPS-HMP. The health insurance language in those contracts was substantially similar to that provided for in the Sheriff Department's contract which stated:

> 10.01 For the term of this agreement the health and accident insurance policy presently provided by the Employer shall be continued. The policy now in effect may be modified or a new plan incorporated during the term of the agreement by mutual agreement of the Employer and Union. The Employer agrees to contribute ninety-two percent (92%) of the premium cost for the family and single plan. The Employer may change the insurance carrier, except to the extent that such a change involves a change in a mandatory subject of bargaining.

Hence, all contracts stated in effect that health insurance benefits could not be changed without mutual consent and/or that the County could not change the level of health insurance benefits unless they were equal to or better than those then being provided.

5. HMO's were first agreed to in the 1989-1990 Social Workers, Highway Department, and Sheriff's Department contracts as a result of a settlement mediated by Arbitrator Joseph B.

Kerkman in interest-arbitration proceedings who subsequently issued consent awards for those contracts running from 1989-1990. Neither party in those contract negotiations initially proposed HMO coverage. It appears that the HMO language ultimately agreed to came about because of the parties' mutual interest in holding down health care insurance costs and the Union's willingness to agree to that concept in exchange for certain County concessions.

6. The County's attorney at that time was Jack D. Walker who on February 20, 1989, sent separate letters to Wisconsin Employment Relations Commission Staff Mediator William C. Houlihan, with a copy to Rodenstein, which stated, inter alia:

. . .

> This is the county's final offer in the highway department matter. The county is constrained, in arbitration, to pursue only the premium increase sharing proposals, not the change in plan design proposals, for at least two reasons. First, changing plan design effectively requires the consent of the Union because there are four interrelated units, one of which already has a contract for 1989 without a change in plan design, but with a premium increase sharing arrangement. Second, a change in plan design cannot effectively be made retroactively, and under WERC decisions the Employer may not unilaterally implement.
>
> We expect, nonetheless, to further pursue changes in plan design with the Union as the process proceeds, pursuant to our discussions of January 13, 1989, and the offers made on and before January 13, 1989.

. . .

7. Attorney Walker's letter regarding the Highway Department negotiations, which he copied to Rodenstein, also stated:

> "17.03 The health insurance now in effect may be modified or a new plan incorporated during the term of the Agreement by mutual agreement of the Employer and Union."

8. Attorney Walker's February 20, 1989, letter to Mediator Houlihan, which he copied to Rodenstein, for the companion Sheriff's Department negotiations repeated the aforementioned language in Finding of Fact No. 6 and added, inter alia:

> "10.01 For the term of this agreement the health and accident

> insurance policy presently provided by the Employer shall be continued. The policy now in effect may be modified or a new plan implemented during the term of this agreement by mutual agreement of the Employer and Union,."

. . .

9. Attorney Walker's February 20, 1989, letter to Mediator Houlihan, which he copied to Rodenstein, regarding the Social Service negotiations repeated the language stated in Finding of Fact No. 6 and added, inter alia:

. . .

> 15.01 Health Insurance. "The existing group health insurance plan or a plan that is equal to or better than the existing plan shall remain in force for the life of the Agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage."

. . .

10. The parties' 1989-1990 contract for the Sheriff Department - which was in the form of Arbitrator Kerkman's Consent Award - stated in pertinent part:

. . .

> 10.01 The WPS-HIP Group Health Insurance Plan with a $100 deductible or a plan that is equal to or better than the WPS-HIP plan shall be implemented and remain in effect for the term of this agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employes to participate in a health maintenance organization. The Employer agrees to contribute $294.20 a month toward the cost of the premium of the family plan and $121.28 a month toward the cost of the premium for the single plan.

. . .

11. The parties' 1989-1990 Highway Department contract - also the product of Arbitrator Kerkman's Consent Award - provided in pertinent part:

. . .

17.01 Health Insurance: All regular employees on the first of the month following thirty (30) days of employment in the bargaining unit shall be eligible for a group hospitalization, surgical care or major medical insurance plan. The County will offer eligible employees the WPS-HIP group health insurance plan with a $100 deductible or a plan that is equal to or better than the WPS-HIP plan. The County will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. The employer agrees to contribute $294.20 a month toward the cost of the premium of the family plan and $121.28 a month toward the cost of the premium for the single plan. If the cost of a plan is less than the amount the County has agreed to contribute to the basic plan, the County's contribution will not exceed the actual cost of the premium.

. . .

17.03 The County has the right to change the insurance carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage.

. . .

12. The parties' 1989-1990 contract for the professional Social Workers - also the result of Arbitrator Kerkman's Consent Award - provided in pertinent part:

. . .

15.01 Health Insurance. The WPS-HIP Group Health Insurance Plan with a $100 deductible or a plan that is equal to or better than the WPS-HIP plan shall be implemented and remain in effect for the life of this agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. The Employer agrees to contribute $294.20 a month toward the cost of the premium of the family plan and $121.28 a month toward the cost of the premium for the single plan. The employee shall pay any additional amount by payroll deduction. If the cost of a plan is less

than the amount the Employer has agreed to contribute to the basic plan, the Employer's contribution will not exceed the actual cost of the premium.

. . .

13. The Pine Manor Nursing Home contract was not on this 1989-1990 bargaining cycle because its employes had agreed to a concessionary contract. Its subsequent January 1, 1990 - December 31, 1990, contract provided in pertinent part:

> 18.01 Health Insurance: The WPS-HIP Group Health Insurance Plan with a $100 deductible or a plan that is equal to or better than the WPS-HIP plan shall be implemented and remain in effect for the life of this agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. The Employer agrees to contribute up to $341.36 a month toward the cost of the premium of the family plan and up to $142.36 a month toward the cost of the premium for the single plan. The employee shall pay any additional amount by payroll deduction, or otherwise by the due date, or the Employer need not pay its share. The County contribution for regular part-time employees is $170.68 a month toward the cost of the premium of the family plan and $71.18 a month toward the cost of the premium for the single plan. If the cost of a plan is less than the amount the Employer has agreed to contribute to the basic plan, the Employer's contribution will not exceed the actual cost of the premium.

14. It is unclear whether the parties in negotiations for the aforementioned contracts ever expressly agreed that the County could, or could not, unilaterally alter the HMO benefit levels provided by the two HMO's agreed to in the contracts: HMO of Wisconsin and Physicians' Plus HMO. The Union in those negotiations proposed dental insurance and wanted the County to pay 100 percent of the health insurance premiums. The parties ultimately agreed to go from the then-existing WPS-HMP plan to a WPS-HIP plan; to increase the County's health premium contribution from 92% to 97.5%; to trim the County's health insurance contribution towards the HMO plans to a percentage of what it paid under the fee-for-service plan; and to provide dental coverage as part of an HMO option which provided for a $2.00 drug co-pay; and that two HMO plans be made available to employes: one by HMO of Wisconsin and the other by Physicians Plus HMO which was then administered by WPS.

15. After these contracts came into effect, employes were provided with an enrollment brochure detailing the HMO of Wisconsin benefits. HMO of Wisconsin was subsequently deleted as an HMO following that carrier's decision that it no longer wanted that business. At that time, Attorney Walker informed WPS in a November 22, 1989, letter, which was copied to Rodenstein, that, inter alia:

. . .

> "The County has three bargaining agreements in effect through the end of 1990, which arguably require the County to provide the HIP plan level of benefits. Those contracts also require the County to allow employees to choose an HMO alternative.
>
> "It may well be unwise for any employer to commit to a particular set of benefits by contract, particularly where the employer does not control the price or the availability of the benefit. Under Wisconsin's Interest-Arbitration law, however, municipal government employers at present have little choice in these matters, because they do not have the right to say 'no'."

. . .

The Union in subsequent negotiations with the County and carrier over this issue convinced the HMO carrier to continue the $2.00 drug co-pay which had been part of the original HMO plan.

16. The County over the years made several unilateral changes in its HMO plans without consulting the Union. There is no evidence that the Union was ever notified of these changes ahead of time. These changes in 1991 included designating a primary care physician; providing for state-mandated benefits relating to mammograms, dependent students, and HIV drugs; pre-admission certification for selected outpatient services; and durable medical equipment, medical supplies and prosthetic devices. The changes in 1992 added state-mandated benefits relating to nervous and mental disorders and alcoholism and drug abuse. The changes in 1993 involved adding and subtracting individual chiropractors under the plan, with no change in benefit levels.

17. The parties in 1990-1991 engaged in negotiations for a successor contract wherein they agreed to delete Physicians Plus HMO; to restore HMO Wisconsin; and to also drop WPS as the named health insurance carrier by replacing it with a self-funded plan offered by the Wisconsin Counties Association ("WCA"), which was to be identical to the former WPS-HIP plan. The contracts for each of the aforementioned four bargaining units ran from January 1, 1991, to December 30, 1992, and lowered the County's contribution for health insurance premiums from 97.5% to 96.2%. The parties also agreed that the HMO drug co-pay would remain at $2.00 in spite of County efforts in these negotiations to raise it.

18. In those negotiations, the County unsuccessfully proposed contract language giving it the right to unilaterally change the insurance carrier without the Union's consent. Said language stated: "Change of Carrier. The County may, from time to time, change the insurance carrier or self-fund health care benefits if it elects to do so." At the same time, it secured contract language giving it the right to self-fund health care benefits. The Union at that time unsuccessfully proposed contract language for the Highway Department bargaining unit which sought to delete Section 17.03 therein and to replace it with language stating: "The health insurance programs now in effect may be modified or a new plan incorporated by mutual agreement of the Employer and the Union."

19. The Sheriff Department's 1991-1992 contract provided, inter alia:

ARTICLE X - INSURANCE

> 10.01 Effective July 1, 1991, the WCA Group Health Insurance Plan with a $100 deductible or a plan that is equal to or better than said plan shall be implemented and remain in effect for the term of this agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. Effective July 1, 1991, the Employer agrees to contribute $401.64 a month toward the cost of the premium of the family plan and $154.64 a month toward the cost of the premium for the single plan. All lawfully required State of Wisconsin health-mandated benefits will be part of the WCA health insurance program."

. . .

20. The Social Workers' 1991-1992 contract provided:

ARTICLE XV - INSURANCE

> 15.01 Health Insurance: Effective July 1, 1991, the WCA Group Health Insurance Plan with a one hundred dollar ($100) deductible or a plan that is equal or better than said plan shall be implemented and remain in effect for the term of this Agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employees to participate in a health

maintenance organization. Effective July 1, 1991, the Employer agrees to contribute $401.64 a month toward the cost of the premium of the family plan and $154.64 a month toward the cost of the premium for the single plan. The employee shall pay any additional amount by payroll deduction, or otherwise by the due date, or the Employer need not pay its share. If the cost of a plan is less than the amount the Employer has agreed to contribute to the basic plan, the Employer's contribution will not exceed the actual cost of the premium. . .

. . .

21. The Highway Department's 1991-1992 contract provided:

ARTICLE XVII - INSURANCE

17.01 Effective July 1, 1991, the WCA Group Health Trust (WCA Plan) with a $100.00 deductible or a plan that is equal to or better than said plan shall be implemented and remain in effect for the term of this agreement. The employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The employer will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. Effective July 1, 1991, the employer agrees to contribute $401.64 a month toward the cost of the premium of the family plan and $154.64 a month toward the cost of the premium for the single plan."

22. The Pine Valley Manor Nursing Home 1991-1992 contract provided:

Article 18 - Insurance

18.01 Health Insurance: Effective July 1, 1991, the WCA Group Health Insurance Plan with a one hundred dollar ($100) deductible or a plan that is equal or better than said plan shall be implemented and remain in effect for the term of this Agreement. The Employer has the right to change the carrier, provided the level of benefits and coverage is equal to or better than the existing level of benefits and coverage. The Employer will also offer, as an alternative, the opportunity for employees to participate in a health maintenance organization. The Employer agrees to contribute $401.64 a month toward the cost of the premium of the family plan

and $154.64 a month toward the cost of the premium for the single plan. The employee shall pay any additional amount by payroll deduction, or otherwise by the due date, or the Employer need not pay its share. The County contribution for regular part-time employees is $200.82 a month toward the cost of the premium for the family plan and $77.32 a month toward the cost of the premium for the single plan. If the cost of a plan is less than the amount the Employer has agreed to contribute to the basic plan, the Employer's contribution will not exceed the actual cost of the premium."

23. Pursuant to these contract provisions, the County from January 1, 1991, to July 1, 1993, offered employes in the four bargaining units fee-for-service health insurance provided for by WCA, as well as insurance provided for by HMO-Wis. The benefits provided for by the HMO-W were spelled out in its Group's Master Contract with the County.

24. None of these four contracts contained a so-called "Evergreen" or continuation clauses to the effect that all contract provisions would remain in effect after the contracts terminated on December 31, 1992, and until successor collective bargaining agreements were reached.

25. The parties in 1992-1993 bargained for successor contracts covering all four units. The Union petitioned for interest-arbitration for all four units in March-May, 1993, and filed preliminary final offers for each one. The County responded by filing preliminary final offers for all four units. None of those Union or County offers proposed any benefit changes in the HMO-W group health maintenance plan then being offered to County employes.

26. Union and County representatives met in negotiations on or about May 13, 1993, in the presence of Commission staff mediator Coleen A. Burns, who was then acting as an investigator for the purpose of negotiating a successor contract covering the Highway Department employes. Prior thereto, and in an effort to contain health care costs, the County was notified by HMO Wis. about proposed non-mandated benefit level changes in the HMO then being offered to County employes. The County on May 13, 1993, presented Union Staff Representative White with a letter from HMO-Wis. which read:

. . .

Current Benefits

Eligible Dependents	Eligible dependents are covered to the end of the calendar YEAR which they turn 19, or 25 if full time student.
Emergency Care Services	100% coverage for Emergency

	Treatment
Therapy Services	Physical, speech, occupational, and cardiac rehabilitative therapy are covered for up to three consecutive months beginning on the date of the initial visit. No more than 60 days of such therapy is covered on an inpatient basis. This benefit is per condition.
Drugs & Biologicals	Legend drugs are covered after a $2.00 drug copay. Member may get a brand name drug if doctor prescribes "no substitute".
Medical Supplies & Durable Medical Equipment	Covered at 100%.
Home Care Services	Covered at 100%.
Skilled Nursing Care	Covered at 100%.
MISCELLANEOUS	Nicotine gum, patches, and other drugs for smoking cessation are covered. Penile implants are covered. Cochlear implants are covered. Treatment of growth retardation is covered at 100%.

** This is a brief summary of the benefits. The Group Master Contract is the controlling document which represents a complete definition of coverage terms.

. . .

New Benefits

Eligible Dependents	Eligible dependents are covered to the end of the calendar MONTH when they turn 19, or 25 if full time student.
Emergency Care Services	100% coverage after a $25.00 deductible for Emergency Treatment
Therapy Services	Physical, speech, occupational, and cardiac rehabilitative therapy are covered for up to 40 visits per benefit year. Inpatient services are covered up to a maximum of 60 days per condition.
Drugs & Biologicals	Legend drugs are covered after a $7.00 drug copay. Member is responsible for cost difference between brand and generic drugs if generic equivalent is available.
Medical Supplies & Durable Medical Equipment	Covered at 80%. Member is responsible for 20%.
Home Care Services	Home Care is limited to 50 visits per benefit year.
Skilled Nursing Care	Skilled Nursing is limited to 90 days per

	confinement.
MISCELLANEOUS	Nicotine gum, patches, and other drugs for smoking cessation are NOT covered.
	Penile implants are NOT covered.
	Cochlear implants are NOT covered.
	Treatment of growth retardation is covered for 80% of the first $25,000 of treatment.

** This is a brief summary of the benefits. The Group Master Contract is the controlling document which represents a complete definition of coverage terms.

. . .

27. Said document also contained an "Appendix 'B'" which stated:

SUMMARY OF CHANGES EFFECTIVE 1/1/93

1. Mental Health and AODA Services

   * Inpatient care is limited to the first $6300 or the first 30 days inpatient in a hospital per benefit year.

   * Outpatient care is limited to the first $1800 per benefit year.

   * Transitional treatment services such as day hospitalization is limited to the first $2700 per benefit year.

   * The maximum combined benefit for Mental Health and AODA Services (inpatient, outpatient, and transitional services) is limited to $6300 per benefit year.

2. Transplants

* Heart, liver, pancreas, bone marrow except for treatment of breast cancer.

* Services must be performed at an HMO OF WISCONSIN designated transplant center.

* All transplants must be pre-authorized.

* Benefit period is five days prior to the transplant procedure and 365 days after the procedure, assuming member has not terminated HMO-W coverage.

* The lifetime maximum for the recipient is $1,000,000.

* Non-covered transplants are: heart/lung; lung; and bone marrow for the treatment of breast cancer.

28. The County at the May 13, 1993, meeting handed Union Representative White said letter without any explanation. Furthermore, it did not then ask him to reply, and he did not do so. Up to then, there had not been any discussion between the parties over whether HMO benefit levels should be changed.

29. Attorney Anderson by letter dated June 3, 1993, informed White:

> Dear Mr. White:
>
> It has been several weeks since we provided you with the changes applicable to the HMO of Wisconsin Plan effective on July 1, 1993. HMO of Wisconsin will be communicating these changes directly to employees in the next few weeks.
>
> Please be advised that no changes are being made to the WCA Insurance Plan at this time. Benefit levels will be maintained under the WCA Plan at the levels guaranteed by the labor contract.
>
> Please contact me if you have questions.

White did not immediately respond to that letter.

30. The County on or about July 1, 1993, implemented all of the aforementioned

changes set forth in Finding of Fact 27, ante, without waiting for White's reply.

31. White by letter dated July 8, 1993, informed Anderson:

> I have reviewed the documents that you have provided me regarding the changes in the HMO benefits, and I have had the opportunity to find out some additional information from representatives of HMO of Wisconsin. Contrary to my initial belief, it is not the case that these changes were mandated by HMO of Wisconsin. In fact, the County was offered the opportunity to continue the same level of benefits as has previously existed, but that it was the County that had requested that the changes be made.
>
> As you know, the County never made a proposal during negotiations to reduce these benefits, nor did the Union agree to any such reduction. When the County implemented these changes effective July 1, 1993, it would appear that the County's decision to unilaterally implement these changes violates the status quo with respect to the health insurance benefit. Accordingly, the Unions representing the employees of the Sheriffs Department, the Professional Employees, the Highway Department and Pine Valley Manor hereby demand that the County restore the status quo ante by restoring the level of benefits under the HMO-Wisconsin plan as such benefits existed prior to July 1, 1993, and further, that the County make whole any and all represented employees who suffered any losses attributable to the County's decision to reduce the benefits under the HMO-Wisconsin plan.
>
> Please let me know what position the County takes in this regard.

32. Anderson by letter dated August 9, 1993, informed White:

> This letter responds to your letter of July 8, 1993 concerning the changes made to the HMO program offered to employees of Richland County.
>
> You are correct in your statement that HMO of Wisconsin did not mandate the changes in benefits. The changes were, however, strongly recommended by HMO of Wisconsin as cost containment initiatives. Accordingly, the County did not request the changes, but did indeed endorse the changes that had been recommended by the carrier.

> The County does not share your view that it has violated the status quo. In fact, the County believes that the status quo permits the County to determine the level of HMO benefits based on the current contract language.
>
> The contractual obligation is for the County to provide an insurance plan meeting the standard of the WCA Group Health Trust. The current plan satisfying this requirement is the WCA plan. In addition, the County is obligated to provide its employees an HMO as an alternative. The HMO of Wisconsin is the current alternative provided by the County. There is no language in the contract that mandates any particular HMO or level of benefits.
>
> The County, upon appropriate demand from the Union, is prepared to negotiate concerning the impact of this change.
>
> I trust this clarifies the position of the County in this matter. Please contact me if you have any questions.

33. The Union by letter dated July 7, 1993, proposed contract language for the Highway Department bargaining unit stating, inter alia:

> "b.) Create a new Section 17.06 to provide as follows:
>
> > The benefit levels under any insurance plan provided for in this Article shall not be reduced during the term of this Agreement without mutual, written agreement between the County and Union."
>
> . . .

The County never agreed to this proposal and it was subsequently dropped.

34. The Union at an August 16, 1993, bargaining session over the Sheriff's Department contract proposed that HMO benefits be restored to pre-July 1, 1993, levels and that a proviso be added to the contract stating: "Insurance shall not be reduced without written agreement of the parties." The County rejected those proposals and they were then dropped.

35. As of the date of the instant April 22, 1994, hearing, the parties had not reached agreement on any successor contracts for the aforementioned four bargaining units and they similarly did not reach mutual agreement regarding what level of HMO benefits should be offered

to bargaining unit employes.

Upon the basis of the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondent Richland County violated Section 111.70(3)(a)4, Stats., and, derivatively, Section 111.70(3)(a)1, of the Municipal Employment Relations Act when it unilaterally altered HMO benefit levels in July, 1993.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that Richland County, its officers, agents, and officials immediately:

1. Cease and desist from unilaterally altering HMO benefit levels for any employes in the aforementioned four bargaining units.

2. Take the following affirmative action to rectify the County's prohibited practice:

   a. Immediately reinstate for employes in the aforementioned four bargaining units HMO benefit levels to what they were before July 1, 1993, when the County changed them without reaching mutual agreement with the Union.

   b. Make whole employes in the aforementioned four bargaining units by reimbursing them for any expenses they suffered as a result of the change in benefits effectuated on July 1, 1993, which they otherwise would not have suffered but for those changes.

c. Notify all employes in the aforementioned four bargaining units by posting in conspicuous places in its offices where employes are employed copies of the Notice attached hereto and marked "Appendix 'A'". That Notice shall be signed by the County and shall be posted immediately upon receipt of a copy of the 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.

(Footnote 1/ appears on the next page.)

d. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 20th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

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

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

APPENDIX "'A'"

NOTICE TO ALL 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 unilaterally alter HMO health benefit levels for any employes represented by Locals 2085, 2085-C, 2387 and 3363, AFSCME, AFL-CIO.

2. WE WILL immediately restore the status quo ante by restoring the HMO benefits which existed before July 1, 1993, for all employes represented by Locals 2085, 2085-C, 2387 and 3363, AFSCME, AFL-CIO.

3. WE WILL make employes in the four aforementioned bargaining units whole by reimbursing them for any losses suffered as a result of the unilateral HMO benefit changes effectuated on July 1, 1993, which they otherwise would not have suffered but for those changes.

Dated this _____ day of _____, 1995.

RICHLAND 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

POSITIONS OF THE PARTIES:

Both parties agree on the general legal principle governing this case; i.e., that employers generally must maintain the status quo during a contract hiatus. 2/ They disagree, however, over exactly what is the status quo in this case.

Thus, the Union primarily contends that the County violated Sections 111.70(3)(a)1, 4, and 5, Stats., when it unilaterally changed the HMO benefit levels effective July 1, 1993, because bargaining history establishes that the parties previously agreed to maintain certain HMO benefit levels. The Union also argues that a past practice supports its position because the County over the years never unilaterally changed benefit levels over its objections. As a remedy, the Union seeks a traditional make-whole remedy which includes restoration of the pre-existing HMO benefits; making all employes whole for any losses they have suffered as a result of the County's unilateral changes; ordering the County to cease and desist from making such unilateral changes in the future; ordering the County to bargain in good faith over health insurance and other matters; and ordering the County to post an appropriate notice.

The County, in turn, maintains that it had the right to implement unilateral changes to the HMO plan under "the plain meaning of the collective bargaining agreements"; that no past practice exists "that would warrant a different interpretation"; that the "Union presented no evidence of bargaining history that would alter the plain" contract language; and that even if the County had a duty to bargain over the HMO changes, "the Union waived its rights by inaction" when it did not immediately respond to the proposed changes. The County thus contends that it acted properly because "The key concept is that the status quo doctrine is dynamic; it strives to preserve the agreement between the parties, as opposed to requiring that each and every component of wages or benefits remain static." (Emphasis in original).

2/ See, e.g., School District of Plum City, Dec. No. 22264-B (WERC, 6/87); City of Brookfield, Decision No. 19822-C (WERC, 11/84); School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85); School District of Manitowoc, Dec. No. 24205-B (WERC, 3/88), affirmed, Case No. 88-CV-173 (Cir. Ct. Manitowoc, 1/89); Mayville School District, Dec. No. 25144-D (WERC, 5/92), affirmed, Case No. 92 CV 342 and No. 92 CV 341 (Cir. Ct. Dodge, 10/93.

DISCUSSION:

The first thing that must be determined is whether the contracts 3/ are clear and unambiguous on this question.

The County asserts that they are because there is no contract language expressly stating that HMO benefit levels cannot be changed. That is true. The County also points out that the key phrase here - i.e., "The Employer has the right to change the carrier provided that the level of benefits and coverage is equal to or better than the existing level of benefits and coverage" -only follows the contractual references to the WCA Group Health Insurance Plan and that no similar language follows the contracts' subsequent reference to a HMO. That, too, is true.

The County therefore argues that pre-existing benefit levels need only be maintained for the WCA Group Health Insurance Plan because the language quoted above - which mandates that coverage be "equal to or better than" - by its very terms only refers to the WCA plan, rather than to any existing HMO and that, as a result, we can infer that the County can change HMO benefit levels at will. In support of this position, the County cites Tomah Area School District, Dec. No. 26708-B (Crowley, 1991), affirmed by operation of law, Decision No. 26708-C (WERC, 6/91), in support of its position that the search for the status quo should begin with the collective bargaining agreement itself. This is not an unreasonable inference to draw, and in some cases it would be sufficient to prevail.

But, it presupposes that the parties deliberately agreed to freeze WCA benefit levels and not HMO benefit levels and that, moreover, the exact placement of the language just quoted, which freezes WCA benefits, was agreed to in negotiations to reflect this deliberate choice. The face of the contract, however, does not expressly state that, thereby making it necessary to look at parol evidence such as bargaining history and past practice to ascertain how this language came into being.

For in this connection, the Commission has ruled that questions relating to the status quo during contractual hiatuses must include all of the facts surrounding the parties' bargaining relationship. Hence, it stated in City of Brookfield, supra.:

> We agree with the City that the terms of the expired 1980-81 agreement ought not be viewed in isolation in determining what the status quo was regarding summer hours as of the beginning of the summer of 1982. On the other hand, the terms of that agreement

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3/ While there are four contracts in issue, the singular term "contract" sometimes has been used for simplicity's sake.

> cannot be entirely ignored in determining the status quo either. In addition to their expired overall agreement, the parties' practices and history of negotiation (including side agreements) on the subject in question can also have a bearing on what the status quo is on a given subject as of a given point in time. . ." 4/

Applying this principle here, it therefore follows that it is proper to go outside the face of the contract to determine exactly what constitutes the status quo.

As to that, the record establishes, as set forth in Finding of Fact No. 16, ante, that the County in the past unilaterally altered certain HMO benefits without notifying the Union. The County points to such changes in support of its position that a past practice shows that "it was free, under the contracts, to implement changes to the HMO".

Most of those changes, however, related to adding certain state-mandated benefits relating to mammograms, dependent students, HIV drugs, nervous and mental disorders, and alcohol and drug treatment. Since they were mandated by the State of Wisconsin, there was no need to bargain over such additional benefits. Other changes involved designating a primary care physician; pre-admission certification for certain services, requirements for receiving medical equipment and devices; and changing chiropractic providers. These latter changes seldom are bargained over at the bargaining table. But even if they are mandatory subjects of bargaining, a question I need not decide, the fact remains that the County never informed the Union about them at the time. Moreover, there is no independent evidence that the Union ever became aware of them. Since a past practice by definition requires acquiescence and knowledge of what is taking place, which are not present here, 5/ it follows that there was no past practice of allowing the County to unilaterally alter HMO benefit levels to the extent that it did on July 1, 1993, and in the manner described in Finding of Fact No. 27, ante.

Moreover, the record establishes that the parties in past negotiations bargained over changes in HMO benefit levels, particularly the question of co-pay for drugs which is one of the important benefits under the HMO plans.

In addition, the County itself in those negotiations acknowledged that it could not unilaterally alter HMO benefit levels. For as related in Finding of Fact No. 6, ante, Attorney Walker on behalf of the County in February, 1989, represented to Commission staff mediator Houlihan and Union Representative Rodenstein that "a change in plan design cannot effectively be made retroactive, and under W.E.R.C. decisions the Employer may not unilaterally implement."

4/ Decision No. 19822-C, at 7.

5/ See How Arbitration Works, Elkouri and Elkouri, p. 439, (BNA Books, 4th Ed., 1984).

Later that same year, Attorney Walker in a November 22, 1989, letter informed WPS and Rodenstein:

> "It may well be unwise for any employer to commit to a particular set of benefits by contract, particularly where the employer does not control the price or the availability of the benefit. Under Wisconsin's Interest-Arbitration law, however, municipal government employes at present have little choice in these matters because they do not have the right to say 'no'."

These admissions were accompanied by another important piece of bargaining history, perhaps the single most important piece of evidence in this record; i.e., the fact that the County in the 1989 negotiations leading up to the disputed HMO language never proposed any language giving it the right to unilaterally change HMO benefits levels, either during a contract's duration or during a contractual hiatus. Hence, there was no reason for the Union at the time to believe that the County was reserving its right to make such unilateral changes somewhere down the road.

Once this cardinal fact is understood, it becomes apparent as to why the sentence quoted above at p. 21 ante, which freezes WCA benefit levels, was not inserted after the newly-added HMO provision: the parties did not think to do so, thereby resulting in the sloppy draftsmanship which came about as a result of the consent arbitration awards then issued by Arbitrator Kerkman.

Given all of the foregoing - a record showing that the County never unilaterally altered HMO benefit levels in any significant way over the Union's objections; a bargaining history showing that the parties always bargained over such levels; admissions by the County's own representative that health care benefits could not be unilaterally changed; and the County's failure in the 1989 negotiations to even propose contract language giving it the right to unilaterally alter HMO benefit levels - it must be concluded that the Union prior to 1993 never waived its statutory right to bargain over such changes. 6/

It is true, as related in Finding of Fact No. 18, ante, that the Union unsuccessfully sought contract language stating, "The health insurance programs now in effect may be modified or a new plan incorporated by mutual agreement of the Employer and Union." This language on its face is broad enough to cover all plans, including HMOs, thereby raising the inference that the Union did not already possess that right before then. In some circumstances, the Union's failure to obtain such contract language would be fatal.

6/ This statutory right has been established in such cases as Mayville School District, supra, where the Commission ruled that health benefit levels constitute a mandatory subject of bargaining.

Here, though, the record is murky because Rodenstein testified that the parties never discussed HMOs within the context of that language and because County Clerk Vlasak testified to the contrary by saying that the County at that time assumed that the Union's proposal did cover HMO's. The record is also mixed because the County in negotiations unsuccessfully sought the contract language set forth in Finding of Fact No. 16, ante, giving it the right to unilaterally change the insurance carrier without the Union's consent. Again, its proposal, like the Union's, was broad enough to cover HMOs, thereby raising the inference that the County itself then believed that it could not unilaterally change HMO carriers or benefit levels.

Given these conflicting inferences and the fact that neither party then obtained the health insurance language it wanted, little weight can be given to this piece of bargaining history. Hence, it does not alter whatever rights the parties had going into these negotiations, which in this case means that the Union both before and after those negotiations had not waived its statutory right to bargain over HMO benefit levels.

The facts here therefore differ from those in Racine Unified School District, Dec. No. 26816-C and 26817-C (WERC, 3/93), which is cited by the County in support of its position that the contract here "simply required the County to offer an HMO - any HMO - as an alternative to the specified WCA plan." In Racine, the Commission found that the school district could change the third party administrator because, in its words, "The record does not contain any significant evidence of bargaining history as to the specific language before us" and because "Evidence of the manner in which the language in question has historically been applied is not analytically significant." Here, such bargaining history and past practice are significant and support the Union's case.

The County further relies on Joint School District No. 1 of Green Bay, Dec. No. 16753-B (WERC, 6/81), affirmed, Case No. 81 CV 1947 (Cir.Ct. Brown, 1983); City of Appleton, Dec. No. 27350-A (Yaeger, 1/93); and City of Wisconsin Rapids, supra, in support of its further claim that, "Even if the County had a duty to bargain over the changes to the HMO, the Union waived its rights by its inaction" when it did not immediately object to them.

The first two cases are inapposite, however, since the unions in Appleton and Green Bay, unlike here, never offered to bargain over the changes in issue. City of Wisconsin Rapids is not controlling because the parties there ultimately agreed to a contract, thereby making it difficult to restore the status quo ante. Here, on the other hand, the parties have not reached agreement on a successor contract, thereby making it much easier to restore the status quo ante.

The Union's delay in 1993 in not immediately responding to the County's proposed changes does not alter this result, even though the County complains, "It is somewhat curious that the Union, now, is so adamant in its demand that the parties should have bargained over the changes to the HMO" when it chose not to demand bargaining before these changes were made.

It, of course, would have been much better for all concerned if the Union responded more quickly to the County's proposed changes. But, White's testimony that no County representatives on May 13, 1993, asked him to respond to the proposed changes stands undisputed, and hence, must be credited. As a result, he was under no obligation to discuss them at that time.

His obligation to do so thus did not arise until after he received Attorney Anderson's June 3, 1993, letter set out in Finding of Fact 29, ante, which expressly stated that the HMO benefit changes would become effective on July 1, 1993. As to that, White spent some time investigating the proposed HMO changes, during which time he apparently learned, contrary to his initial impression, that the proposed changes were not mandated. Given the labyrinth surrounding health insurance and the difficulty oftentimes encountered in trying to determine benefit levels and the impact of proposed benefit changes, it was not unreasonable for White to have spent his time looking into that issue, particularly since the parties have not even discussed such changes at the bargaining table.

Because no such discussions were held prior to Anderson's June 3, 1993, letter, it therefore follows that no impasse was reached in negotiations up to that point. White's five-week delay in responding to the letter therefore was insufficient to constitute a waiver because he was not legally obligated to research this issue and respond to the County by July 1, 1993. Moreover, while the County claims that it could not undo the HMO benefit changes after it received White's July 8, 1993, letter, there is no proof in this record that that was the case. Hence, it is entirely possible that the County upon receipt of said letter could have restored the status quo ante by restoring the prior HMO benefit levels - which is something it apparently did not even attempt to do.

Given all this, I conclude that the Union's delay in responding to the proposed HMO changes did not constitute a waiver and that, as a result, the County acted unlawfully when it unilaterally imposed those changes effective July 1, 1993, even under a "dynamic" status quo theory which holds that some unilateral changes are not unlawful.

As a remedy, the County therefore shall make whole employes in the aforementioned four bargaining units and reinstate the prior HMO benefits pursuant to the remedial Order set forth above at p. 17-18.

Dated at Madison, Wisconsin this 20th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner