STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OUTAGAMIE COUNTY PROFESSIONAL POLICE ASSOCIATION, Complainant, vs. OUTAGAMIE COUNTY, Respondent.	Case 224 No. 49691 MP-2776 Decision No. 27861-A

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Outagamie County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Outagamie County Professional Police Association filed a complaint on August 23, 1993, with the Wisconsin Employment Relations Commission alleging that Outagamie County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act. On November 4, 1993, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on said complaint was held on December 9, 1993, in Appleton, Wisconsin, during which the Association amended its complaint to allege a violation of Sec. 111.70(3)(a)4, Stats. The parties filed briefs, the last of which was received on February 7, 1994. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Outagamie County Professional Police Association, hereinafter referred to as the Association, is a labor organization and the exclusive collective bargaining representative for all regular permanent full-time and regular permanent part-time employes within the Sheriff's Department having the power of arrest, excluding confidential, supervisory and managerial employes. Its offices are located c/o Frederick J. Mohr, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305.

2. Outagamie County, hereinafter referred to as the County, is a municipal employer with its offices located at the Outagamie County Courthouse, 410 South Walnut Street, Appleton, Wisconsin 54911.

3. The Association and the County were parties to a collective bargaining agreement which by its terms was effective from January 1, 1990 through December 31, 1992. The agreement contained a grievance procedure which provided for the final and binding arbitration of disputes arising thereunder. The agreement also contained the following provisions:

ARTICLE VIII - HOURS

8.01 - A normal workday for full-time employees, except clerical employees, shall consist of an eight (8) hour shift. The normal work week schedule for full-time Patrolmen will be 6 on - 2 off, 6 on - 2 off and 5 on -3 off, and in addition, each such Patrolman will receive one (1) personal day off to be taken at a time mutually agreed upon between the department head and the employee. The normal work week for other full-time employees, except clerical employees, shall average forty (40) hours based on a fifty-two (52) week year.

Effective January 1, 1991, this Section 8.01 will be revised to read as follows:

8.01 - Work Week.

A. The normal work week for full-time employees classified as Patrolman, Telecommunicator I and II, Correctional Officer/Cook, Correctional Officer, Head Cook, Cook, and Jail Booking Clerk will be 5 on - 2 off, 5 on - 3 off, and the normal work day for such employees shall consist of an eight and one-third (8.33) hour shift. Three groups in each classification will rotate working the various shifts every thirty (30) days. (Note: There is to be no loss or gain or overtime incurred because of the transition to this new work schedule.)

B. The normal workweek (sic) for full-time employees, classified as Investigator, Sergeant, Deputy Investigator, Process Server, Assistant Process Server, Prisoner Transporter and Floating Deputy shall average forty (40) hours based on a fifty-two (52) week year. The normal workday for such employees shall consist of an eight (8) hour shift. Such employees shall receive an additional two (2) floating holidays each calendar year, said floating holidays to be scheduled as time off

at a time mutually agreed upon between the department head and the employee. Effective at the end of the work day on December 31, 1992, such employees who are scheduled to work a 5 on - 2 off, 5 on - 2 off, 6 on -2 off, 4 on - 2 off work schedule will receive an additional five (5) floating holidays each calendar year instead of an additional two (2) floating holidays each calendar year, (provided, however, that such employees who have at least fifteen (15) years of service in the Outagamie County Sheriff's Department as of January 1, 1991, will receive an additional six (6) floating holidays each calendar year instead of an additional two (2) floating holidays each calendar year), said floating holidays to be scheduled as time off at a time mutually agreed upon between the department head and the employee. (Note: the first year these employees will receive the five (5) or six (6) additional floating holidays instead of the two (2) additional floating holidays will be 1993).

. . .

ARTICLE XI - PAID HOLIDAYS

11.01 - Paid holidays included in this Agreement are:

New Year's Day	Labor day (sic)
Good Friday	Thanksgiving
Decoration Day	Afternoon of December 24
Independence Day	Christmas Day
	Afternoon of December 31

11.02 - All permanent employees, except those working on a 5-2 work schedule, Monday through Friday, will receive one (1) day's pay for each of the above described holidays that are not worked as part of such employee's regular work schedule in addition to the employee's regular pay. Any such employee working any of the above described holidays as a part of the employee's regular work schedule shall receive time and one-half for the holidays worked in addition to the employee's regular pay. Payment as herein described shall be paid on the first pay period following the holiday and shall be paid in addition to the regular monthly salary. Such employees, except those working in the Jail, Huber and Radio, shall in addition to the above described holidays, receive two (2) floating holidays per calendar year, such holidays to be scheduled as time off at a time mutually agreed upon

between the department head and the employee. Such employees working in the Jail, Huber and Radio will have full day holidays on December 24, December 31, and Easter Sunday.

Employees hired on or after July 1 of a calendar year are not eligible for the two (2) floating holidays during the remainder of that first calendar year of employment. In the event any employee terminates employment without having taken a floating holiday(s) during the calendar year, such floating holiday(s) shall be canceled and may not be reinstated or paid for. An employee will not be allowed to use a floating holiday(s) after having given a notice of termination.

11.03 - Employees working a 5-2 work schedule, Monday through Friday, shall receive time off with pay for the above holidays, provided however, that for such employees December 24th and December 31st will be full day holidays. In the event any of such holidays falls on a Saturday, the preceding Friday shall be considered the holiday and in the event any of the above holidays falls on a Sunday, the following Monday will be considered the holiday provided, however, that if December 24th and December 31st falls on a Friday or a Sunday, an additional day off for each holiday will be granted such employees at a time mutually agreed upon between the department head and the employee. In the event a holiday occurs on a floating deputy's off day, another day off will be granted at a time mutually agreed upon between the employee and the Division Head, provided, however, that it will not be granted on the 11:00 p.m. to 7:00 a.m. shift nor on a day which would result in the payment of overtime to cover the granting of the day off. Such employee shall, in addition to the above described holidays, receive one (1) floating holiday per calendar year, such holiday to be scheduled as time off at a time mutually agreed upon between the department head and the employee, provided, however, that for a floating deputy, the floating holiday will not be granted on the 11:00 P.M. to 7:00 A.M. shift, nor on a day which would result in the payment of overtime to cover the granting of the day off. Employees hired on or after July 1 of a calendar year are not eligible for the floating holiday during the remainder of that first calendar year of employment. In the event any employee terminates employment without having taken the floating holiday during the calendar year, such floating holiday shall be canceled and may not be reinstated or paid for. An employee will not be allowed to use a floating holiday after having given a notice of termination.

4. Prior to 1991, Investigators worked a 5-2, 5-2, 6-2, 4-2 work schedule. Sometime in 1991, the County requested that the Investigators go to a 5-2 work schedule, Monday through Friday. The Investigators agreed to do so as the change meant having the weekends off. After this change, the Investigators continued to receive four floating holidays in 1991 and 1992 and they also worked holidays that fell within their regularly scheduled work days. In other words, the County applied Sec. 11.02 and did not apply Sec. 11.03 to the Investigators.

5. Early in 1993, Investigators were informed that they had three, not four floating holidays, two under Sec. 8.01 and one under Sec. 11.03 with full holidays on December 24 and 31, 1993. On or about February 9, 1993, the Association filed a grievance alleging a violation of the 1990-92 collective bargaining agreement regarding the floating holidays. Commencing on Good Friday, April 9, 1993, Investigators were directed not to work on holidays and this became part of the grievance. The grievance was processed through the grievance procedure and appealed to arbitration. The County refused to proceed to arbitration on the grounds that the contract had expired and the grievance related only to matters that arose after the contract expired, so it had no obligation to proceed to arbitration.

6. On June 15, 1992, the Association filed a Notice of Commencement of Contract Negotiations with the Commission with a copy to the County. The parties met in negotiations over a successor agreement, and on November 23, 1992, the Association filed a Petition for Final and Binding Arbitration pursuant to Sec. 111.77, Stats. The parties submitted final offers and after an investigation, the Commission ordered final and binding arbitration.

7. The Association filed the instant complaint alleging that the County's change in floating holidays and directing Investigators not to work holidays in 1993 was a unilateral change in the status quo and amended its complaint to allege the change in status quo was a violation of Sec. 111.70(3)(a)4, Stats.

8. The County maintained the status quo with respect to holidays by the application of Sec. 11.03 to Investigators in 1993.

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

CONCLUSION OF LAW

The County did not violate Secs. 111.70(3)(a)4 or 1, Stats., when in 1993 it applied the provisions of Sec. 11.03 of the parties' expired collective bargaining agreement to Investigators.

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

ORDER 1/

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

The Outagamie County Professional Police Association's complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 22nd day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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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).

OUTAGAMIE COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, as amended, the Association alleged that the County had violated Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally changing the status quo with respect to floating holidays and working on holidays that fell within the Investigators regularly scheduled days. The County denied that it had committed any prohibited practices.

Association's Position

The Association contends that the County failed to maintain the status quo after the expiration of the parties' collective bargaining agreement. It submits that the County unilaterally changed two benefits of the Investigators: 1) Effective Good Friday, 1993, Investigators were no longer allowed to work holidays which fell during their normal work schedule; 2) The number of floating holidays under Article XI was reduced from two days to one day. It notes that the County's defense is Investigators are 5-2 employes and thus Sec. 11.03 applies. It argues that this interpretation is not supported by its actions prior to the expiration of the contract. It maintains that the County had requested a change in schedule whereby Investigators swapped a working Saturday for their off Monday and never indicated that this change would result in a reduction of benefits, and in fact, no change in benefits occurred until the contract expired.

The Association takes the position that refusing to schedule Investigators on holidays in 1993 is a change in status quo as they each lost 7 days' pay at time and one-half, a significant change. It also notes the change from two to one floating holiday is a change in the status quo because the County is now applying Sec. 11.03 to the Investigator but had applied Sec. 11.02 before the contract expired. The Association recognizes two limited exceptions to the requirement to maintain the status quo; wavier and necessity, and neither apply to the instant case.

The Association further asserts that the County's conduct violates Sec. 111.77, Stats. The Association refers to Sec. 111.77(1), Stats., which sets forth certain requirements before a contract can be modified or terminated. It submits that the County did not give the notice of proposed termination or modification 180 days prior to the contract expiration and the County did not notify the Commission that the parties were at impasse.

The Association submits that a change in the status quo prior to the issuance of an arbitrator's award is a per se violation of the duty to bargain. The Association notes that the change in work on a holiday is reflected in the County's final offer, and it is attempting to implement its final offer contrary to the past practice and the status quo. It concludes that the County's conduct constitutes a per se violation of its duty to bargain.

County's Position

The County contends that it did not alter the status quo when it provided holidays to Investigators in 1993 pursuant to the specific provisions of Sec. 11.03 of the parties' expired 1990-92 contract. The County states that an employer must maintain the status quo as to mandatory subjects of bargaining during the hiatus period where the bargaining dispute is subject to final and binding arbitration and adherence to the terms of the expired agreement

maintains the status quo. It claims that the terms of the 1990-92 agreement are very clear with regard to the floating holiday and holiday pay for Investigators.

The County refers to Sec. 8.01B of the agreement and alleges that Investigators do not have a contractual right to work a 5-2, 5-2, 6-2, 4-2 schedule, so that Sec. 11.02 would be applicable. It submits that Sec. 11.02 specifically states that all employes except those working a 5-2 schedule, Monday through Friday, will receive certain holiday benefits. It notes that Sec. 11.02 does not guarantee that Investigators even assigned a 5-2, 5-2, 6-2, 4-2 schedule would be assigned to work holidays that fell on their work days in that work schedule. Section 11.03, according to the County, applies to all employes assigned a 5-2 schedule and allows one floating holiday and full days on December 24 and 31.

The County insists that it is undisputed that since 1991, Investigators have been working a 5-2 work schedule and are not covered under the plain language of Sec. 11.02. The County maintains that it has not altered the status quo because it has applied what is demanded by Sec. 11.03 of the contract. The County submits that except for the New Year's Day holiday in 1993, it has followed the specific terms of the 1990-92 agreement.

The County does not dispute that after the Investigators changed to a 5-2 work schedule in 1991 for the rest of 1991 and all of 1992, they continued to work holidays that fell in their 5-2 schedule and received two floating holidays. It argues that this was the result of administrative oversight possibly due to the change in work schedule for employes on January 1. 1991, the Sheriff was newly elected and a split in the bargaining unit occurred in 1991. The County submits that shortly after the 1993 New Year's Day holiday, it realized it was misconstruing the contract provisions and that it then applied the proper provisions maintaining the status quo under the 1990-92 contract.

The County takes the position that the status quo is defined by the language of the expired contract, the manner in which the language has been implemented and the bargaining history related to the language. It maintains that the language of the contract is clear and unambiguous and the practice, which was an oversight in 1991 and 1992 cannot be used to change the clear and unambiguous language of the contract. The County further points out that the language of the agreement, on its face, specifically deals with the holiday provisions for Investigators. The County further asserts that it had the authority to change the Investigators' schedule at any time, including the hiatus period and thereafter provide holiday benefits pursuant to Sec. 11.03. The County insists that it has not changed the status quo but merely applied the clear and unambiguous language of the expired agreement.

The County contends that it did not violate Sec. 111.77(1), Stats., as it does not apply to the instant case. It notes that the Association ignored the first sentence of Sec. 111.77(1), Stats., which shows that the preconditions apply only while the contract at issue is in effect. The County refers to the Association's admission that the contract expired on December 31, 1992. It submits that because the issues raised in this case did not arise until after the contract expired, the notice and other preconditions listed in Sec. 111.77(1), Stats., have no application to this dispute.

The County denied any unlawful conduct but argues that if a remedy is appropriate, it should not include payment for holiday hours not worked and it should not include an additional floating holiday because Investigators were given ten holidays with pay and an extra day would exceed the number authorized by the contract.

The County requests a finding that it maintained the status quo and did not violate its duty to bargain under Sec. 111.70(3)(a)4, Stats., and did not violate Sec. 111.77(1), Stats. It requests dismissal of the complaint as well as attorneys' fees.

Association's Reply

The Association contends that the County's defense can be reduced to two arguments:

1. Maintaining the status quo only requires adherence to the contract terms; and

2. Section 111.77(1), Stats., applies only while a contract is in effect.

The Association asserts that the County's argument cannot be sustained. It argues that maintaining the status quo is not limited to strict adherence to contractual terms, but the dynamic status quo doctrine requires the parties to continue in effect the wages, hours and conditions of employment in effect at the time the contract expired. It points out that as of the expiration of the contract, the Investigators were treated as 5-2, 5-2, 6-2, 4-2 employes. The Association submits that there was no change of Investigators to a 5-2 schedule, but rather, there was a switch of a Monday for a Saturday without any change in benefit levels for individuals. It claims that the County's intention is clear by its actions and a departure from these actions by withholding benefits otherwise expected is a violation of the status quo. It further alleges that the Investigators were not 5-2 employes; rather, they were treated as 5-2, 5-2, 6-2, 4-2 employes even after the contract had expired and the County had to maintain this status quo. With respect to Sec. 111.77(1), Stats., the Association asserts that it does apply after a contract has expired and the County's argument cannot be sustained.

As for remedy, the Association asserts that the employes must be made whole and a prospective remedy would not address the employes' loss and would allow the County to have its cake and eat it too. It asserts that the employes are entitled to the holiday pay they legally expected to earn.

Discussion

The essential facts underlying the complaint are not in dispute. Prior to 1991, the Investigators worked a 5-2, 5-2, 6-2, 4-2 work schedule with the beginning of the cycle commencing on Monday. During 1991, the County asked the Investigators to change to a 5-2 work cycle and the Investigators agreed. During the balance of 1991 and 1992, and for New Year's Day 1993, the County applied Sec. 11.02 to Investigators, and they worked holidays falling during their work schedule and received their regular pay and time and one-half for hours worked on the holiday. Commencing on Good Friday, 1993, Investigators were given the holiday off and received their regular pay for the holiday and each holiday thereafter. The Association claims that by not allowing the Investigators to work on holidays falling during their normal work schedule, the County violated the status quo. The duty to bargain in good faith requires that the dynamic status quo be maintained until the parties reach agreement or an interest arbitration award is issued. 2/

The main issue in this matter is determining what the status quo is. In determining the status quo in the context of a contract hiatus, consideration is given to the relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 3/ In this case, only the relevant language of the contract is applicable. The question is whether Sec. 11.03 applies by its plain meaning or should Sec. 11.02 apply because of a past practice of applying Sec. 11.02 to Investigators during the term of the contract? The answer is that the plain language of the contract applies over a contrary past practice. First, because the change in work schedules for Investigators occurred mid-term, there is no past practice during any hiatus period with which to determine the status quo. 4/ Secondly, it is noted that Sec. 8.01 does not specify a work schedule for Investigators as all that is required is an average of 40 hours for 52 weeks. An assignment of a 5-2 schedule does not violate that section. The Association's claim that Investigators were not on a 5-2 schedule is not supported by the facts and the claim is a legal fiction. Secs. 11.02 and 11.03 clearly provide that Sec. 11.02 does not apply to 5-2, Monday through Friday employes. Thirdly, Sec. 11.03 clearly applies to 5-2, Monday through Friday employes. It is undisputed that during the term of the contract, the County applied Sec. 11.02 to the 5-2 Monday through Friday Investigators but this past practice is clearly contrary to the express language of the contract. An employer may abrogate a past practice at the end of a contract term by giving notice that it will apply the express language of the contract and not apply a contrary past practice. 5/ In this case, in early 1993, the County gave notice that it was

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2/ Green County, Dec. No. 20308-B (WERC, 11/84).

3/ Racine Unified School District, Dec. Nos. 26816-C, 16817-C (WERC, 3/93) citing Mayville School District, Dec. No. 25144-D (WERC, 5/92) and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

4/ Sun Prairie Jt. School Dist. No. 2, Dec. No. 22660-B (WERC, 7/87) aff'd 87-CV-4883 (CirCt Dane, 11/88).

5/ See Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985 at p. 448).

applying the terms of the parties' agreement and abrogating any past practice. 6/ The County was not obligated to continue such a past practice which was contrary to the contractual language during a hiatus period after notice of its abrogation. Otherwise, an employer could ignore plain contract language and if no grievance was filed during the term of the contract, it could maintain that the status quo was the past practice and not the plain language of the contract, an absurd result. Therefore, the plain language of the expired contract was the status quo and the County's application of Sec. 11.03 to Investigators was in accordance with the status quo and the County did not violate Sec. 111.70(3)(a)4 or 1, Stats.

6/ Ex. 3E.

The Association claimed a violation of Sec. 111.77(1), Stats. However, the County never changed any term of the contract, 7/ but applied the express terms of the contract to Investigators. Additionally, the contract was not in effect and a petition for final and binding arbitration had been filed on November 23, 1992, wherein the petitioner stated that it met the requirements of Sec. 111.77, Stats. Where one party gives the notice under Sec. 111.77(1), the other party does not also have to give notice, otherwise the party not giving notice would be precluded from making proposals to take effect upon expiration of the contract. In short, where a party gives notice as required under Sec. 111.77(1), Stats., the other party does not also have to give notice to propose modifications. Thus, the alleged violation of Sec. 111.77(1), Stats., has been dismissed.

The County's request for attorneys' fees is denied because these are awarded only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 8/ Here, the allegations are clearly debatable and are not frivolous.

Dated at Madison, Wisconsin, this 22nd day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

7/ See Green County, Dec. No. 20308-B (WERC, 11/84) at footnote 13.

8/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).