STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY PROFESSIONAL EMPLOYEES, LOCAL 1901-E, AFSCME, AFL-CIO, Complainant, vs. BROWN COUNTY, Respondent.	Case 507 No. 49765 MP-2787 Decision No. 28158-E
BROWN COUNTY PROFESSIONAL EMPLOYEES LOCAL 1901-E, AFSCME, AFL-CIO, Complainant, vs. BROWN COUNTY, Respondent.	Case 535 No. 51103 MP-2901 Decision No. 28159-E

Appearances:

Mr. Bruce Ehlke, Shneidman, Myers, Dowling & Blumenfield, P.O. Box 2155, Madison, Wisconsin 53701, on behalf of Local 1901-E.

Mr. John C. Jacques, Assistant Corporation Counsel, Brown County, Brown County Courthouse, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO filed the complaint in Case 507 on September 13, 1993. That case was held in abeyance pending the Wisconsin Employment Relations Commission's decision in a Unit Clarification case between the parties (Case 66, No. 46062, ME-109) regarding whether the incumbents of the five Nursing Supervisor positions at the Brown County Mental Health Care Center (MHCC) should properly be included in an existing collective bargaining unit represented by Complainant covering all professional registered nurses

employed at the Brown County MHCC. On September 21, 1994, the Commission issued its decision in Case 66 finding, inter alia, that the Nursing Supervisors are not supervisory employes within the meaning of Sec. 111.70(1)(o)1, Stats. On June 7, 1994, Complainant filed the complaint in Case 535. On August 11, 1994, Respondent filed a Motion to Consolidate these complaints. In addition, a first amended complaint was filed in Case 535 on August 24, 1994. The Commission granted Respondent's Motion to Consolidate on September 7, 1994. On October 13, 1994, Respondent filed a Motion to Dismiss the Consolidated Complaints. On October 31, 1994, Examiner Gallagher received Complainant's written opposition to Respondent's Motion to Dismiss, postmarked October 28, 1994. On November 4, 1994, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in these Consolidated Complaint cases as provided in Sec. 111.07 and 111.70, Stats. On November 14, 1994, the Examiner issued her Order Denying Motion to Dismiss. On November 18, 1994, Respondent filed a Petition for Review with the Wisconsin Employment Relations Commission asking that the Commission review the Examiner's decision denying Respondent's Motion to Dismiss. On November 21, 1994, the Commission dismissed the Respondent's Petition for Review. On November 29 and 30, 1994, hearings were held in these matters in Green Bay, Wisconsin, and the parties completed their briefing schedule by March 13, 1995. The Examiner has considered the evidence and arguments of the parties, and now issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, and its Local 1901-E, herein called Complainant or the Union, are labor organizations within the meaning of Sec. 111.70(1)(h), Stats., with principal offices at 583 D'Onofrio Drive, Madison, Wisconsin 53719. Staff Representative James E. Miller has, at all times material, represented Local 1901-E employes including RN, LPN and Nursing Supervisors employed at the Brown County Mental Health Center.

2. Brown County, herein called County or the Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., with its office located at Brown County Courthouse, P.O. Box 23600, Green Bay, Wisconsin 54305-3600. At all times material to this case, Wayne Pankratz has been the Human Resources Director for the County and Chief spokesman for the County in contract negotiations with Local 1901-E.

3. The Union was certified as the exclusive bargaining representative of all regular full-time and regular part-time professional registered nurses employed at the MHCC, excluding the Director, supervisors, managerial and confidential employes, and all other employes of Brown County, by the Wisconsin Employment Relations Commission on March 3, 1980. On May 20, 1991, the Union filed a Petition to Clarify Bargaining Unit asking that the five positions of "Nursing Supervisor" be included in the bargaining unit of professional registered nurses already represented by the Union. WERC Examiner Karen J. Mawhinney, a member of the Commission's staff, scheduled a hearing for October 14, 1991, which was postponed to November 19, 1991. On October 25, 1991, the County filed a Motion to Dismiss the Petition

with the Commission. On November 11, 1991, the Commission advised the County that it would not rule on the Motion to Dismiss until after the November 19, 1991, hearing in the matter and the completion of post-hearing briefs. On November 13, 1991, Brown County Circuit Court Judge Richard Greenwood issued an alternative writ of prohibition which temporarily prohibited the Commission from taking further action on the Union's petition. The Commission then moved to quash the alternative writ and to dismiss the County's petition for a writ of prohibition absolute. On May 12, 1992, Judge Greenwood quashed the alternative writ of prohibition and dismissed the petition for a writ of prohibition absolute. The County appealed that decision to the Court of Appeals, District 3, which affirmed Judge Greenwood on November 17, 1992. (Decision No. 92-1538, unpublished). Hearings in the Unit Clarification petition were held on September 17, November 2, 1992, and January 12, 1993 in Green Bay, Wisconsin before Examiner Mawhinney. The parties completed their filing of post-hearing briefs on May 24, 1993. On September 21, 1993, the Commission issued its Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit. In that decision, the Commission held that the incumbents of the position of Nursing Supervisor do not possess supervisory duties and responsibilities in sufficient combination and degree to be supervisory employes within the meaning of the Municipal Employment Relations Act, and that they do not exercise sufficient control and authority over the County's resources or have sufficient involvement at a high level of responsibility in the formulation, determination and implementation of management policies so as to be managerial employes within the Act. The Commission therefore included the Nursing Supervisor positions in the bargaining unit represented by Brown County Professional Employees Local 1901-E, AFSCME, AFL-CIO, which includes Staff RN's.

4. The County has operated its MHCC for many years. In the early 1980's, when the Union organized the professional registered nurses' unit, the County employed approximately 22 Staff Registered Nurses (Staff RN's). At that time, the County also employed Head Nurses who were not included in the Union's collective bargaining unit of Registered Nurses. For many years, the Union has also represented approximately 300 Nurses Aides employed at the MHCC in a different local union (Local 1901). Currently, the MHCC employs approximately 30 staff RN's and five Nursing Supervisors. The MHCC also employs on its management team, Unit Coordinators who supervise the nursing employes during normal business hours at the MHCC. There are no Unit Coordinators on duty on the night shift or on the weekends, and Nursing Supervisors are utilized to oversee nursing operations at the MHCC on these particular shifts. The incumbents of the five Nursing Supervisor positions during all relevant times have been Dawn Shaefer, Diane Pivonka, Ann Eiler, Edie Riegert and Carol Gilsdorf. Ms. Pivonka and Ms. Shaefer are employed as Nursing Supervisors every weekend on the 24/40 shift. ("24/40" means that each Nursing Supervisor works 24 hours straight each weekend but is paid for a 40-hour week).

5. On June 17, 1992, the County Board approved a pay plan for Nursing Supervisors. This pay plan approval came during the pendency of and over one year after the Union filed its unit clarification request seeking to include the Nursing Supervisors in the unit represented by Local 1901-E. Thus, at the time of the pay plan's approval, the Nursing Supervisors remained unrepresented by any labor organization. In relevant part, that resolution read as follows:

. . .

AUTHORITY TO EXECUTE AN AGREEMENT WITH NURSING SUPERVISORS BROWN COUNTY MENTAL HEALTH CENTER

WHEREAS, the Nursing Supervisors at the Brown County Mental Health Center were removed from the classification and compensation study conducted by Slavin and Nevins, and therefore, are not in the current Brown County Classification and Compensation Plan; and

WHEREAS, the history of compensation of the Nursing Supervisors has paralleled those of represented Registered Nurses and administrative employees; and

WHEREAS, it is the intent to compensate the Nursing Supervisors in a fair and equitable manner.

THEREFORE, BE IT RESOLVED by the Brown County Board of Supervisors that the following agreement is hereby adopted for the Nursing Supervisors for 1991-1992, effective January 1, 1991.

1. Wages

a) 19.2% differential over Local 1901E, Staff Nurse classification.

b) Retention bonus shall be paid at a rate of $800 per year.

c) Overtime paid at time and one-half in the same manner as Local 1901E Registered Nurses.

d) Recruitment bonus of $1,000 to be paid in the same manner as Local 1901E Registered Nurses.

e) Shift differential of $.70 per hour for PM shift and $1.00 per hour for night shift for hours worked outside of the 24/40 schedule as a Nursing

Supervisor.

2. Utilized as Staff RN's

When Supervisors are utilized as Staff RN's, RN Coordinators or Unit Managers, whether by choice or scheduled as such, they will receive the Nursing Supervisor hourly pay. If utilized as Staff RN they will receive the Staff RN shift differential. There is no shift differential for Unit Coordinator or Unit Manager.

3. Longevity

To be paid in same manner as Local 1901E Registered Nurses.

4. Holidays

To be administered and paid in the same manner as Local 1901E Registered Nurses.

5. Personal Holidays

To be administered and paid in the same manner as Local 1901E Registered Nurses.

6. Wisconsin Retirement Credit

To be administered in the same manner as Brown County administrative employees.

7. Disability Leave (Sick Leave), Health Insurance, Dental Insurance, Life Insurance, Funeral Leave, Vacation, and Tuition Assistance Program (TAP)

To be administered in the same manner as Brown County administrative employees.

8. 24/40 Nursing Supervisors

To be administered in accordance with the 1901E Registered

Nurses memorandum of understanding for 24/40.

9. Part-time Employees

To receive prorated benefits according to hours worked (average hours worked of previous 6 months).

10. If any of the preceding items are to be changed, each Nursing Supervisor shall be notified. Discussions between Nursing Supervisors, administration and Personnel will take place to explain any changes as they arise.

. . .

Pursuant to the above-quoted resolution, Nursing Supervisors at the MHCC received pay increases in 1991 and 1992 which maintained the 19.2 percent differential between their wages and those of Local 1901E Staff RN's in the bargaining unit described above in Finding No. 1. Thus, the Nursing Supervisors received the same across-the-board percentage increases in wages which the bargaining unit RN's received in both 1991 and 1992 so that the pay differential between the two groups (19.2 percent) was maintained. On June 10, 1993, the Union sent the following letter to the County's Human Resources Director, Wayne Pankratz. That letter read in relevant part as follows:

. . .

I have been informed Brown County has failed and otherwise refuses to grant Nursing Supervisors their annual wage increase retroactive to January 1, 1993, during the pendency of the above-pending case. The increase should be granted, retroactively to January 1, 1993.

This is not the first time this question has arisen, this case has been pending for quite some time. The January 1, 1992 increase was granted and other adjustments in employees' compensation have been made. Please advise as to the County's position in this matter and confirm the payment of the January 1, 1993, increases.

It is my understanding that unit clarification and election proceedings are not governed by identical rules, in any event, the Union has no objection to implementing said wage increases. . . .

On June 30, 1993, County Corporation Counsel Kenneth J. Bukowski responded to the Union's letter of June 10 as follows:

. . .

> After again reviewing this matter, from an employer/management point of view, we must reject your request to grant the nursing supervisors a wage increase retroactive to January 1, 1993. First of all, it has been determined that these individuals are (sic) union members and, therefore, are not at this point represented by Wisconsin Local 40. Secondly, and more importantly, if these nursing supervisors are accreted to an AFSCME unit, then we will be required to bargain with them at that point in time. If they are found to be union members, then they would apparently not be supervisory and should not be receiving the salaries they now receive, but in fact should be paid significantly less because of their nonsupervisory nature. Granting a pay increase at this point in time would only exacerbate this situation. On the other hand if these supervisors are found to be supervisory/management/ confidential, then the County will certainly treat them accordingly with regard to retroactive pay and benefit matters. . . .

The Union did not make any requests to bargain after sending the above-quoted letter until October 13, 1993. Its letter of that date read as follows:

. . .

> In accordance with Decision No. 17585-A of the Wisconsin Employment Relations Commission, which included the Brown County Mental Health Center Supervisory Registered Nurses in the AFSCME professional bargaining unit at the Mental Health Center, Local 1901-E hereby notifies Brown County that it wishes to enter into collective bargaining with the Employer over the terms and conditions of these nurse's employment beginning September 21, 1993.
>
> Please contact the undersigned to make arrangements for an initial meeting. . . .

6. Sometime during January, 1994, the Union requested again that the County meet with it regarding negotiations for the Nursing Supervisors pursuant to the WERC's decision to accrete them into the RN bargaining unit. A meeting was held on February 17, 1994 by agreement of the parties. The Union, represented by James E. Miller, Staff Representative, Wisconsin Council 40, came prepared to exchange initial proposals regarding the Nursing Supervisors. At this meeting, the spokesman for the County was Human Resources Director Pankratz. Pankratz stated that the Nursing Supervisors' job descriptions were being changed so that they would be statutory

supervisors. Union Representative Miller responded that it was his opinion that the County could not unilaterally change the Nursing Supervisors' job descriptions. At this point, Mr. Miller requested to bargain with the County regarding any changes in the Nursing Supervisors' job descriptions. No bargaining occurred that day, however, and the Union did not present the County with its initial proposals because Mr. Miller felt that the circumstances were not conducive to collective bargaining. Mr. Miller also requested to bargain regarding the impact of the changes in the Nursing Supervisors' job descriptions. Mr. Pankratz replied that he did not believe he was required to bargain regarding the changes made in the Nursing Supervisors' job descriptions. At the February 17, 1994 meeting, the County gave the Union an amended position description for Nursing Supervisors. The parties did not discuss wages, hours or working conditions of Nursing Supervisors, the Employer made no proposals regarding working conditions of Nursing Supervisors or of Registered Nurses in the Local 1901-E unit. The amended job description read in pertinent part as follows:

. . .

POSITION PURPOSE:

Responsible for providing administrative leadership and supervision of total nursing care and nursing staff for entire Mental Health Center on assigned shift, functions as a nursing specialist, consultant, educator, and resource person to the total needs of the Mental Health Center.

POSITION IN ORGANIZATION:

Reports to: ~~Assistant~~ Nursing Services Administrator-Hospital. ~~Receives direction from the Nursing Services Administrator - Nursing Facility and ICF/MR on matters related directly to the long-term care section.~~ Informs Nursing Services Administrator - Nursing Facility/ICF-MR on matters related directly to the long-term care section.

Supervises: Direct and indirect supervision of Brown County Mental Health Center employees on assigned shift.

RESPONSIBILITIES:

The following responsibilities comprise the principal functions of this position and shall not be considered a detailed description of all the work that may be required in this position:

1. Assigns staff to provide adequate nursing coverage.

2. Supervises ~~nursing care that~~ staff on assigned shift to ensure that nursing care delivered maintains a well-functioning Center which meets local, state and federal standards.

3. Screens and admits all clients to Brown County Mental Health Center.

4. Directs/supervises personnel during all medical and psychiatric emergencies within the Center.

5. Maintains responsibility for safe client care through the use of appropriate planning, implementation, and evaluation procedures as performed by subordinates.

6. ~~Assists Unit Managers/Unit Coordinators in completing position appraisals on appropriate staff.~~ Completes evaluation for staff assigned to their shift. The Unit Coordinator/Manager will be asked for input.

7. Issues disciplinary action as supervisor, including the recommendation to the County Human Resources Department to terminate County employees, according to established policy and procedure of Brown County.

8. Participates in hiring and promotion of employees as one of the hiring panels administrative representatives.

9. Determines actions relating to proper patient care and procedures and staff duties on assigned shift as supervisory nurse. May direct unit supervisory nurses if questions of authority arise.

10. Serves as a role model, consultant, educator, and resource person for the nursing staff of Brown County

Mental Health Center.

11. Serves as the focal point for all questions and telephone calls from within and outside the facility requiring policy, procedure, or patient care direction.

12. Maintains continuity of care through appropriate exchange of information.

13. Maintains the confidentiality of all client and business records, documents, and information per departmental standards and State/Federal Confidentiality Laws.

14. Provides consultative services to all departments and Brown County Mental Health Center, community agencies, and contract counties as needed.

15. Interprets and transmits administrative policies and procedures, as necessary.

16. Maintains documentation in accordance with departmental and facility standards and requirements of regulatory bodies such as JCAHO.

17. Establishes and maintains cooperative, effective working relationships with other departments, service areas, and personnel within the facility.

18. Demonstrates awareness of Center and departmental objectives and priorities and complies with all applicable departmental and Center policies and procedures.

19. Complies with departmental Quality Assurance standards and participation in Quality Assurance monitoring.

20. Serves as administrative and supervisory representative in the absence of the Nursing Services Administrators and Mental Health Center/ Health Care Administrators during assigned shift.

21. Implements in-service programs for the Educational

Services Department, when appropriate.

22. Attends in-service training, departmental and other committee meetings as required and necessary to carry out the responsibilities of the position.

23. Assumes responsibility for professional growth and development by attending conferences and seminars.

24. Performs additional position-related duties as necessary within scope of position responsibilities.

25. Participates in policy and procedure development.

AUTHORITY:

Provides ~~supervision of total nursing care for clients on assigned staff~~ administrative leadership and supervision of staff on assigned shift to ensure that nursing care delivered meets Center standards. Serves as administrative representative along with or in the absence of other administration; disciplines in accordance with Center policies and procedures.

KNOWLEDGE, SKILLS, AND ABILITIES:

1. Knowledge and understanding of general nursing and psychiatric theory and practices including those basic knowledge related to nursing such as biological, physical, social and medical sciences and their applications to the client care programs.

2. Ability to plan, organize, implement and evaluate total nursing care of subordinate staff.

3. Ability to plan and direct the work activities of the entire Mental Health Center/Health Care Center nursing staff.

4. Ability to use initiative and good judgment in adapting, devising and evaluating procedures and techniques on a day-to-day basis as well as in emergency situations.

5. Ability to maintain accurate records.

7. On February 18, 1994 Union Representative Miller sent Human Services Director Pankratz the following letter which reads in relevant part as follows:

. . .

> As a follow up to our meeting yesterday I would like to make the position of Wisconsin Council 40 and Local 1901-E very clear in respect to the five RN Supervisory positions at the Brown County Mental Health Center. At that meeting you made it very clear that you were telling the Union what Brown County anticipated changing in the RN Supervisor job description. It is AFSCME's position that Brown County may not make any significant unilateral changes in the job position descriptions of the RN Supervisors which have an impact on their wages, hours and/or conditions of employment. Any such changes must be bargained with the Union and failure to do so will be considered to be a prohibited practice under the Municipal Employment Relations Act.
>
> I believe that the proper place for these matters to be discussed would be bilateral negotiations. On June 25, 1993 I wrote to you reopening the labor agreement for Local 1901-E for 1994. On October 13, 1993, I wrote requesting bargaining with the RN Supervisors which had been accreted by the WERC into the Local 1901-E bargaining unit. The Union continues to be prepared to begin such negotiations.
>
> Please contact me within the next few weeks to discuss meeting dates for such negotiations with Local 1901-E including the accreted RN Supervisors. If on the other hand Brown County goes ahead and makes unilateral changes in these jobs then the Union will take appropriate action.

. . .

On February 25, 1994, Human Resources Director Wayne Pankratz wrote to Union Representative Miller as follows:

. . .

> I would like to thank you for your letter of February 18, which I received on February 22. I also believe it is necessary to clearly explain the position of Brown County with respect to the five (5) RN Supervisory positions. We believe the following to be true.

1. We had five (5) supervisors who were acting in a supervisory capacity both to meet the WERC requirements and the HSS requirements.

2. Those individuals, because they were acting in a "supervisory" position, received additional compensation over and above the members in the 1901E bargaining unit, namely 19.2 percent.

3. Management at the Mental Health Center indicated the individuals in these positions were performing supervisory duties and that they were providing information with respect to evaluations on those individuals they were supervising.

4. Under the previous Mental Health Center system and now under the Human Services system, Brown County management believes we need to have individuals serving as true supervisors in the WERC sense of the word as well as the HSS definition.

5. We believe the individuals were and are serving in that capacity irrespective of the WERC decision; consequently, we have appealed the WERC decision.

6. However, it was clear from the hearing held on January 20, 1994 that Judge Dilweg indicated that if the County wanted to make these individuals true supervisors and give them the authority, which the County has indicated we clearly believe they have always possessed, all the County has to do is change their job descriptions to conform with the WERC decision. (Please see attached transcript pages). That quite succinctly is what we are doing.

In summation, we believe that we had supervisors serving in these positions, we compensated these individuals for their supervisory duties, we still maintain they are and were supervisors, and to more clearly specify our position we are exercising the option outlined by Judge Dilweg, namely to clarify the job duties and

> descriptions. That was the intent of the discussion we had at the meeting which was held on February 17, 1994. This is the position of Brown County. We are required only to bargain the impact of management policy decisions not decisions as to job duties and descriptions while the WERC decision is being appealed. . . .

The comments referred to in Mr. Pankratz letter of January 25, 1994, which Judge Dilweg had made on the record during the appeal of the Unit Clarification case by the County:

> . . .
>
> Judge Dilweg:
>
> And there's no way the County could with changes in their -- in their authority to these people make them supervisors and exempt them from the union. That's clear from the caselaw. What isn't clear is whether they have done that, and perhaps the County has to change these job descriptions. I don't know. That may be the result of this, but I don't see where I have any authority to bring HSS into this. . . . What the County wants to do is retain control in certain management people not give it to the nursing supervisors and call them nursing supervisors. I think you can do that, I agree, as I read what I have here. I think you can do that as far as the HSS is concerned, but you may not be able to do it as far as the -- the WERC is concerned, but if you can't, all you have to do is change their job descriptions and give them a little more authority. . . . I said all the County has to do is change their job descriptions, and you've got a different case, so you have -- you have a remedy without a stay from this Court. . . .

The Court of Appeals (District III) affirmed the judgment of Circuit Court Judge Dilweg, finding that the WERC's decision accreting the "Nursing Supervisors" into the Staff Nurse bargaining unit should be affirmed. The Court of Appeals opinion (No. 94-2261 issued 3/21/94), read in relevant part as follows:

> . . .
>
> First, WERC found that the nursing supervisors did not have authority to effectively recommend hiring, promotion, transfer, discipline or discharge of employes. This finding was supported by evidence that no nursing supervisor had ever disciplined a staff nurse, nor did the nursing supervisors participate in hiring decisions or staff nurses' evaluations.
>
> Second, WERC found that the nursing supervisors do not exercise independent judgment in assigning and directing the work force. This finding is based on evidence that the nursing supervisors

merely applied hospital policies and procedures when reassigning employes and did not supervise the employes, but rather the activity they performed.

Third, WERC found that the nursing supervisors oversaw twenty to sixty employes, but that there are several layers of management above nursing supervisors. A high level administrator was on call for nursing supervisors to contact for certain situations and problems. WERC also found that the nursing supervisors needed to contact superiors to begin investigations and disciplinary actions.

Fourth, WERC found that nursing supervisors were paid nineteen percent more than staff nurses, but that the higher level of pay was for the nursing supervisors' higher level of professional responsibility. This finding was based on evidence that nursing supervisors must have more experience than staff nurses, but they are paid on an hourly basis with overtime and shift differentials just like the staff nurses. This hourly pay is in contrast to the administrative pay scale according to which all other hospital employes with supervisory responsibilities are paid.

Fifth, WERC determined that nursing supervisors oversee an activity rather than supervising employes. Nursing supervisors carry out almost all of the same tasks as staff nurses and take over staff nurses' duties when there is an absence. Nursing supervisors are primarily responsible for patient care and oversight of the institution as a whole and do not significantly participate in supervisory functions such as hiring, evaluations and discipline.

Sixth, WERC found that nursing supervisors spend a minority of their time performing supervisory functions. This finding is supported by evidence that nursing supervisors spend up to twenty-five percent of their time providing direct patient care and much of the remaining time admitting patients and performing other tasks of a clerical nature.

Seventh, WERC found that nursing supervisors exercise independent judgment but not as supervisors of other employes. Administrators, not nursing supervisors, dictate when investigations and disciplinary actions will be carried out.

Brown County argues that the subject nurses are supervisors within the meaning of MERA, as a matter of law, because they are

> considered supervisors under Wis. Adm. Code sub section HSS 124. There is no evidence that the department in promulgating its rules or the legislature in passing MERA intended that supervisors for purposes of hospital safety are also supervisors for purposes of collective bargaining. The record does not contain any basis for believing that inclusion of the nurse supervisors in the collective bargaining unit will have any effect on the regulations set out in subsection HSS 124.
>
> Brown County argues that WERC failed to consider the conflict of interest created when a supervisor is in the same collective bargaining unit as the person he or she oversees. This argument is based on the County's assertions regarding the nurses' duties. In light of WERC's finding that these employes do not have real supervisory power, no actual conflict of interest exists.
>
> . . .

8. The Union did not request to meet with the County or to bargain further regarding the changes in the job description for Nursing Supervisors, or terms and conditions of employment for either the Nursing Supervisors or the Staff RN's after the February 17, 1994 meeting, until sometime in September, 1994.

9. By memo dated May 6, 1994, MHCC manager Maureen Ackerman notified the Nursing Supervisors regarding a change in their ability to work extra shifts, as follows:

> . . .
>
> I was notified on May 5, 1994, that because of the change in your job description, hours that you are able to accept as staff nurses (units 1, 3, 4, 5, 6, 7, 8, and 9) would be looked at in the same manner as the unit coordinators/unit managers.
>
> Char would contact the on-call RN's and then complete the RN overtime list. The unit manager/coordinator <u>of the unit needing coverage</u>, would be contacted next for the hours. If that person does not want the time, the RN Supervisors would be contacted next, followed by the other unit managers/ coordinators. . . .

As a result of the above-quoted memo, Diane Pivonka and Dawn Shaefer (the 24/40 Nursing Supervisors) were not allowed to sign up in advance for extra work hours beyond the 24-hour shift that they normally worked each weekend. In this regard prior to the May 6, 1994 memo, both Shaefer and Pivonka had regularly worked hours beyond their 24-hour shifts in the following manner. As 24/40 nurses, Pivonka and Shaefer had traditionally been allowed to pick up

two eight-hour shifts at straight time pay by signing for the hours on "purple sheets", circulated several weeks in advance of the open shifts that are available. MHCC employe Char Bode regularly sent these purple sheets to both Pivonka and Shaefer, two to three weeks prior to the occurrence of the open work shifts. Each purple sheet covered approximately one month of open shifts created by vacation, sick leave and other needs of employes. Both Pivonka and Shaefer regularly signed up for at least two eight-hour shifts at straight time pay per pay period prior to May 6, 1944. After May 6, 1994, neither Pivonka nor Shaefer was allowed to sign up in advance for any shifts and the hours were offered first to Unit Managers/Coordinators of the unit(s) needing coverage in each instance. The Union never objected to or requested to bargain regarding the decision to implement the May 6, 1994 memo or the impact of that memo. Ms. Shaefer estimated that because she can no longer select two eight-hour straight time shifts in advance (so that she can arrange for child care for her child), she has lost approximately $299 per bi-weekly pay from May 6, 1994 to date. No management representative ever stated that the reason that the 24/40 shift Nursing Supervisors had lost their first preference for available straight time shifts was because of the advent of the Union or because of Nursing Supervisors' Union activity. Nursing Supervisor Pivonka stated that she worked 2,974 hours in 1993 for the MHCC. Pivonka, as a 24/40 Nurse, would therefore have worked 894 hours beyond a regular 40 hour work week during the 1993 work year. In 1994, Ms. Pivonka worked at least as many extra hours up to May 6, 1994 as she had in 1993. After the issuance of the May 6, 1994 memo, Pivonka stated that she was able to pick up 43 extra eight-hour shifts from May, 1994 to the end of November, 1994. All of these shifts were beyond her regular 24 hour Nursing Supervisor work week. Ms. Pivonka stated that it was more difficult for her to get extra shifts after May 6, 1994. There was no evidence to indicate that Pivonka had actually lost pay due to the issuance of the May 6, 1994 memo.

10. Sometime in late September, 1994 Union Representative Miller approached Mr. Pankratz asking that the parties meet regarding negotiations for the Staff RN's. Mr. Miller stated that the parties should agree to disagree regarding the Nursing Supervisor dispute and Mr. Miller agreed not to discuss Nursing Supervisors at the October 17, 1994 meeting that later occurred. At the October 17, 1994 meeting, the Union submitted the following proposals to the County regarding a two-year contract for the RN Supervisors:

1. Two year contract

2. Wage increase each year, maintaining 19.2 percent additional wage differential between RN Supervisors and Staff RN's.

3. Incorporate the memorandums of understanding on staffing into the contract and maintain the 24/40 weekend Staff RN positions.

4. Increase shift differential to 50 cents per hour on PM shift and 75 cents per hour on night shift.

5. Choice of sick leave or casual days. Disability insurance for all employees.

6. RN Supervisors to continue on their current system of casual days and short/long term disability policy.

7. Give RN Supervisors four percent wage increase retroactive to January 1, 1993 in addition to any other increases.

8. Reinstate AM RN Supervisor 50 cents per hour differential which was eliminated in June of 1992.

9. Pay RN Supervisors overtime for the 20 minutes lunch period.

10. RN Supervisors to be eligible for the same health insurance and dental insurance benefits as the Staff RN's.

11. Increase longevity pay -- twenty dollars for each step and change to five, ten, fifteen and twenty year steps.

12. Increase vacation accrual to two weeks after one year of service and adjust each eligibility level by one step from the current contract.

13. Establish a system similar to Local 1901 which puts on-call employees in the Union after a set number of hours works (sic).

14. Increase educational (tuition) assistance and include course work towards a Master's degree.

11. None of the Nursing Supervisors received a pay increase when the Staff RN's received across the board increases, per their labor agreement in 1993 and 1994. Thus, the 19.2 percent pay differential between the Staff RNs' pay and that of the Nursing Supervisors has been diminished.

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

CONCLUSIONS OF LAW

1. The Respondent's decision not to maintain the 19.2 percent pay differential between

Nursing Supervisors' pay and that of Staff RN's after September 21, 1993 does not constitute a unilateral change of wages or conditions of employment or a refusal to bargain in violation of Section 111.70(3)(a)4, Stats.

2. The Respondent's failure to maintain the 19.2 percent pay differential between Nursing Supervisors' pay and that of Staff RN's from January 1, 1993 through September 21, 1993 interfered with employe's exercise of their rights under Section 111.70(2), Stats., and therefore violated Section 111.70(3)(a)1, Stats.

3. The Respondent's decision on February 17, 1994, to change the job descriptions of the Nursing Supervisors is a permissive subject of bargaining and does not constitute a unilateral change of conditions of employment or a refusal to bargain in violation of Section 111.70(3)(a)4, Stats.

4. The Respondent's decision on or about May 6, 1994, to change the procedure used by Nursing Supervisors to select extra work shifts in advance, constitutes a unilateral change of wages and conditions of employment and is a refusal to bargain in violation of Section 111.70(3)(a)4, Stats.

5. Respondent's change in Nursing Supervisors' procedure for selection of extra shifts has a reasonable tendency to interfere with employes' exercise of their rights under Section 111.70(2), Stats., in violation of Section 111.70(3)(a)1, Stats.

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

ORDER 3/

1. The Respondent, Brown County, its officers and agents, shall immediately cease and desist from interfering with Nursing Supervisor employes' exercise of their rights to join or assist a labor organization by failing to maintain the 19.2 percent pay differential from January 1, 1993 through September 21, 1993 and by changing the procedure for such employes to sign up for extra shifts in advance.

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

3/ Found on page 20.

2/ Found on page 21.

a. Reinstate the former procedure used before May 6, 1994, for Nursing Supervisors to sign up for extra shifts in advance.

b. Make all Nursing Supervisors whole by paying them the difference between what their pay would have been from January 1, 1993 through September 21, 1993 had Respondent maintained the 19.2 percent pay differential and the pay they received for that time period, together with interest at the rate of 12 percent. 2/

c. Maintain the pay procedures and rates which were applicable to Nursing Supervisors as of September 21, 1993 up until the effective date of the initial collective bargaining agreement between the parties.

d. Make Diane Pivonka and Dawn Shaefer and any other employes similarly situated whole by paying them for extra shifts they were denied because the County changed the procedure by which Nursing Supervisors were allowed to sign up for extra shifts on and after May 6, 1994, together with interest at the rate of 12 percent.

e. Notify all employes in the bargaining units represented by the Union by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." That Notice shall be signed by an authorized representative of the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to ensure that said Notice is not altered, defaced or covered by other material.

f. 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. 3/

Dated at Oshkosh, Wisconsin this 19th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, 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).

3/ Found on page 21.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the first complaint was initially filed with the Commission on September 13, 1993.

3/ Complainant's February 13, 1995 Motion to Conform is hereby granted. Respondent's November 29, 1994 Motion in Limine is hereby denied.

APPENDIX "A"

NOTICE TO EMPLOYES

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

1. We will not interfere with our employes' rights to assist or join a labor organization by failing and refusing to maintain the 19.2 percent pay differential between Nursing Supervisors and Staff RN's for the period January 1, 1993 through September 21, 1993.

2. We will maintain the pay rates and procedures in effect on September 21, 1993 applicable to Nursing Supervisors to the effective date of our first collective bargaining agreement with Wisconsin Council 40, AFSCME, AFL-CIO and its Local 1901-E.

3. We will immediately make all Nursing Supervisors whole for any pay lost due to our failure to maintain the 19.2 percent pay differential for the period January 1, 1993 through September 21, 1993 together with 12 percent interest on said amounts.

4. We will not interfere with employes' rights to assist or join a labor organization by unilaterally changing the procedure that Nursing Supervisors may select extra shifts in advance, without bargaining with Wisconsin Council 40, AFSCME, AFL-CIO and its Local 1901-E.

5. We will maintain the extra shift sign-up procedure in effect prior to May 6, 1994 to the effective date of our first collective bargaining agremenet with Wisconsin Council 40, AFSCME, AFL-CIO and its Local 1901-E.

6. We will immediately make Diane Pivonka and Dawn Shaefer and any other employes similarly situated whole for pay lost from the May 6, 1994 pay period forward due to their being denied extra shift work because we unilaterally changed the procedure for requesting extra shifts in advance, together with 12 percent interest on said amounts, to the effective date of our first collective bargaining agreement with Wisconsin Council 40, AFSCME, AFL-CIO and its Local 1901-E.

By _____

Brown County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issues in this case involve whether the County was obliged to maintain a 19.2 percent pay differential between Nursing Supervisors and Staff RN's prior to and after the September 21, 1993 WERC determination that the Nursing Supervisors should be accreted into the existing bargaining unit of Staff RN's, pursuant to the "dynamic status quo" approach. Also at issue, is whether the County's change in the procedure used by 24/40 Nursing Supervisors to select extra shifts in advance and whether the County's change in Nursing Supervisors' job descriptions, both of which actions occurred after September 21, 1993, violated MERA under the "dynamic status quo" concept and/or restrained and coerced Nursing Supervisors.

Positions of the Parties:

On February 13, 1995, the Complainant filed a Motion to conform the complaint to the evidence. Particularly, the Complainant sought to assert as a violation of Sec. 111.70(3)(a)1 and 3, Stats., the County's unilateral change in May, 1994, regarding 24/40 Nursing Supervisors' access to and ability to sign up in advance to work extra hours as Staff Nurses. The Complainant observed that it submitted sufficient evidence to prove this violation at the hearing and that the County did not object to its proffer of such evidence at hearing.

Complainant:

The Complainant urged that the case law in Wisconsin fully supports the application of the "dynamic status quo" in labor relations: Any regular, consistent, previously established pattern of changes in employe status must be maintained whether based on contract, ordinance or employer policy. Any change in such status without bargaining constitutes an unlawful refusal to bargain.

The Complainant conceded, however, that the specific issue raised in this case is one of first impression at the Wisconsin Employment Relations Commission -- whether the "dynamic status quo" concept applies to the maintenance of a 19.2 percent pay differential between Nursing Supervisors and Staff Nurses during the prolonged pendency of a unit clarification petition filed by Complainant and resisted by Respondent. The Complainant further conceded that technically, there can be no unlawful failure to bargain prior to the Commission's issuance of its decision to accrete the Nursing Supervisors into the Local 1901-E bargaining unit. However, the Complainant asserted, the County's failure to maintain the 19.2 percent pay differential after the Complainant filed its unit clarification petition necessarily interfered with the Nursing Supervisors' rights under Sec. 111.70(2), as it punished these employes solely because of the fact that they were the subject of a unit clarification petition, which they had openly approved of and supported with the knowledge of their supervisors. The maintenance
of the 19.2 percent differential had been reasonably anticipated and relied upon by the Nursing Supervisors before Complainant filed the unit clarification petition on May 20, 1991. County

Corporation Counsel made it clear that the County's refusal to maintain the dynamic status quo (the 19.2 percent pay differential) was directly linked to the Nursing Supervisors' interest in union affiliation, in violation of Secs. 111.70(3)(a)4 and 1, Stats.

Furthermore, the Complainant contended, the County's unilateral change of procedure used by 24/40 Nursing Supervisors to sign up in advance for extra shifts was in retaliation for their exercise of their MERA rights and also violated Sec. 111.70(3)(a)4 and 1, Stats. The Complainant observed that the circumstances surrounding this unilateral change support a conclusion that the County intended its actions to be retaliatory. In this regard, the Complainant noted that the County's decision to change the Nursing Supervisors' job descriptions and its offer of time and one-half work to unit coordinators before the same work was offered at straight time to 24/40 Nursing Supervisors supported a retaliatory motive.

Finally, the Complainant urged that the County's change to the Nursing Supervisors' job descriptions violated Sec. 111.70(3)(a)1, 3, and 4 because such a change should be considered a mandatory subject of bargaining because the duties added were not fairly within the scope of the class of Nursing Supervisors' existing job responsibilities. The Complainant noted that in the private sector a unilateral change in job descriptions made for the purpose of removing employes from a bargaining unit, constitutes an unlawful refusal to bargain. In the instant case, the Complainant urged, the County changed the Nursing Supervisors' job descriptions for the purpose of assuring their removal from the bargaining unit.

County:

The County moved to dismiss the consolidated complaints both before and after the instant hearing, on the ground that there can be no status quo in a newly organized, accreted unit which has not been previously covered by a labor agreement. The County therefore asserted that the sole remedy for the Union should be to pursue an interest arbitration petition under the Wausau School District case (157 Wis. 2d 315 (App. 1990). In these circumstances, the existing wage rate is not necessarily the wage rate that will be set through negotiations so that the concept of automatic, non-discretionary increases cannot logically be applicable.

The employer's choice to set and assign job duties (extra shift work) and to set job descriptions have traditionally been deemed permissive subjects of bargaining. Therefore, the County urged, only a declaratory ruling petition would lie to determine whether the County must bargain regarding position descriptions and duty assignments made to Nursing Supervisors. The Circuit Court's ruling, per Judge Dilweg, is res judicata of this issue and the basis for the County's decision to change job duties and the position description for Nursing Supervisors.

Reply Briefs:

County:

The County contended that it has committed no violations of MERA as there is no valid "status quo" claim as to wages that can be made prior to the Commission's issuance of its UC

decision. The County noted that it has bargained with the Complainant for an initial wage rate to cover Nursing Supervisors upon request, after the Nursing Supervisors were accreted into the Staff Nurse unit by the WERC. The County further asserted that its change of Nursing Supervisors' job descriptions could not violate MERA, as the content of job descriptions is a permissive subject of bargaining.

Complainant's Reply:

The Examiner sent Complainant a copy of Respondent's reply brief and on March 13, 1995, Complainant filed its reply thereto. The Complainant essentially re-asserted its major arguments from its initial brief, sought to distinguish one case cited by the County and urged a full remedy on each complaint allegation.

Discussion:

It is a prohibited practice under Sec. 111.70(3)(a)1, Stats., for a municipal employer "to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." The Complainant must show by a clear and satisfactory preponderance of the evidence that the employer's conduct contained a threat of reprisal or promise of benefit which would have a reasonable tendency to interfere with the employes' exercise of their rights protected by MERA. 4/ No evidence of actual intent to interfere with employe rights and no evidence that employes actually felt their rights were being interfered with are required. 5/

Section 111.70(3)(a)3, Stats., makes it a prohibited practice "To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . . ." In order to prove a Section 111.70(3)(a)3, Stats., violation the Complainant must show by a clear and satisfactory preponderance of the evidence that the employes engaged in protected concerted activities of which the employer was aware, that the employer was hostile to employes' protected concerted activity and the employer's reaction which affected the employes was based, at least in part, upon the employer's hostility toward the employes' exercise of their protected rights. 6/

4/ Section 111.70(2), Stats., states in part: "Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . . ."

5/ See e.g., WERC v. Evansville, 62 Wis. 2d 140 (1975); Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 8/81), aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

6/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by

Pursuant to Section 111.70(3)(a)4, Stats., it is a prohibited practice for a municipal employer,

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . . An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. . . .

Significantly, an employer's duty to bargain arises upon the union's attaining exclusive collective bargaining representative status on behalf of the employes. In tandem with this concept is the notion that fair play and a level playing field should be maintained during the time between the start of an initial union organizing campaign and the moment of union certification or other attainment of exclusive bargaining representative status. As the Commission stated in School District of Wisconsin Rapids, Dec. No. 19084-C (WERC 3/85),

> . . . there is a difference between the statutory requirements applicable prior to the attachment of a duty to bargain but during an organizing campaign and the statutory requirements applicable after a labor organization has attained exclusive representative status. As an example, during an organizing campaign, an employer would be required to continue to grant discretionary increases in the same general manner as before the organizing campaign began, even where such would involve substantial employer discretion. Once a union attains exclusive representative status, however, the employer is required to fulfill its duty to bargain before making any further changes that would involve substantial employer discretion (slip. op. p. 18).

The WERC has held that, absent a valid defense, a unilateral change in the status quo of wages, hours or conditions of employment, either during negotiation of a first contract or during a contract hiatus after the expiration of a previous labor agreement, is a per se violation of Sec. 111.70(3)(a)4, Stats. As the Commission observed in School District of Wisconsin Rapids, supra,

> Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining (slip op. at p. 14) (footnotes omitted).

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operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

Application of Precedent to the Instant Case:

It is in this legal context that the instant case must be determined. It is undisputed that the 19.2 percent pay differential existed for years before the UC petition was filed in May, 1991. The precise question raised in this case regarding whether the County's refusal to maintain the 19.2 percent pay differential prior to the Union's attaining representative status violated the Municipal Employment Relations Act has not been previously addressed by the

Commission. There appears to be no precedent to require the application of the "dynamic status quo" concept to any time prior to a union's official attainment of exclusive representative status. Thus, it appears clear that there is no precedent directing the application of the "dynamic status quo" to the period of time before the September 21, 1993 issuance of the UC decision.

The Complainant has argued that the County's refusal to maintain the 19.2 percent pay differential necessarily interfered with, restrained and coerced Nursing Supervisors' exercise of their MERA rights. I agree. This pay differential had been automatically maintained over a period of years; and it was reasonably relied upon by the Nursing Supervisors. I note that in 1991, the County officially decided to define and maintain the 19.2 percent pay differential.

The Examiner notes that since 1991, the Respondent has consistently argued that the Nursing Supervisors are true supervisors within the meaning of the Act. Yet, the County chose to begin diminishing the "supervisory" pay differential flowing to Nursing Supervisors after January 1, 1993. It does not make logical sense to this Examiner that the County should so vigorously argue for the "supervisory" status of Nursing Supervisors while choosing to diminish their pay, which had previously been set by the County, allegedly because of their supervisory duties. 7/ But for the fact that the Union filed a UC petition seeking to include Nursing Supervisors in the extant Staff Nurse unit, the County would have continued to maintain the 19.2 percent differential.

The Commission's analysis and conclusions in Jefferson County, Dec. No. 26845-B (WERC, 7/92) are directly on point and wholly applicable to these cases:

. . .

7/ I note that by its letters dated June 30, 1993 and February 25, 1994, the County took the position that the 19.2 percent differential had been maintained in the past because the County believed the Nursing Supervisors to be employed as true supervisors. The County also took the position that if the Nursing Supervisors were found not to be true supervisors the differential should not, in fairness, be maintained.

> If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.
>
> 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. (footnote omitted, slip op. at 12-13)

. . .

If the County is allowed to essentially diminish the 19.2 percent pay differential due to the advent of the Complainant Union and the prolonged pendency of the UC case, such a result would create hostility among employes later accreted into the bargaining unit and discourage membership and/or support of the Union.

In all of the circumstances of this case, this Examiner finds that the Respondent violated Section 111.70(3)(a)1, Stats., when it failed and refused to maintain the 19.2 percent pay differential from January 1, 1993 through September 21, 1993 when the Complainant attained exclusive representative status for the Nursing Supervisors. I also find that the "dynamic status quo" did not attach until September 21, 1993 when the Complainant became the exclusive representative of the Nursing Supervisors. 8/ At that point, the wages of Nursing Supervisors constituted the status quo which should have been maintained from that point until negotiations conclude in a voluntary agreement or an interest arbitration award/settlement is issued. The County

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8/ If the Complainant wishes to seek full return of the 19.2 percent pay differential, it can bargain to impasse thereon and seek same in an interest arbitration proceeding. Wausau Schools, supra.

shall therefore be ordered to return to the above-described status quo herein.

In regard to the contentions concerning the May, 1994 changes made in the procedure used by Nursing Supervisors to sign up in advance for extra work hours, I note that the County made this change without notifying the Complainant or offering to bargain. It is significant that the County offered no evidence to show that the change in the procedure whereby Nursing Supervisors could sign up on the "purple sheet" in advance for extra shifts at either straight time or overtime rates was motivated by business considerations. Rather, the County's May 6, 1994 notice stated that the change in procedure was due to the recent change in the Nursing Supervisors' job descriptions. By first assigning this work to Unit Coordinators, the County was obliged to pay them at time and one-half for all hours worked, at greater expense to the County. 9/

9/ Previously under the old system, the County had had the opportunity to work the two 24/40 Nursing Supervisors (Shaefer and Pivonka), at straight time for 16 hours each pay period before paying them at the time and one-half overtime rate. It appeared from the record herein that only Pivonka and Shaefer's extra shift opportunities were affected by the County's actions.

There is no independent record evidence to show that County harbored any hostility or animus against the Nursing Supervisors for their interest in union representation. Therefore, there can be no violation of 111.70(3)(a)3, Stats. for discrimination based upon the County's change in the extra shift sign-up procedure. However, this does not mean that the County can change this portion of the Nursing Supervisors' status quo working conditions with impunity. Rather, after the UC decision issued on September 21, 1993, the County had a duty to bargain regarding proposed changes in the extra shift sign-up procedure for the Nursing Supervisors. The County was not privileged to unilaterally change the extra shift sign-up procedure even if predicated upon a "change" in the Nursing Supervisors' job descriptions. The County's actions, therefore violated Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats., as the County's actions had a reasonable tendency to interfere with Nursing Supervisors' rights guaranteed by Section 111.70(2), Stats. 10/ The County will therefore be ordered to return to the status quo in effect prior to May 6, 1994 in this area and to make Diane Pivonka and Dawn Shaefer and any other similarly situated employes whole to the extent of any shifts denied them due to the Respondent's unilateral change.

In regard to Complainant's contention that the Respondent violated Section 111.70(3)(a)4 and/or Section 111.70(3)(a)1, Stats., by changing the Nursing Supervisors' job descriptions, this Examiner agrees with the County that it was not obliged to bargain with Complainant even after September 21, 1993 regarding such changes. It is clear that no obligation to bargain exists regarding permissive subjects. The content of job descriptions is permissive. Therefore, this portion of the consolidated complaints shall be and is dismissed.

Dated at Oshkosh, Wisconsin this 19th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

10/ The record stands undisputed that the Nursing Supervisors approved of and supported the UC petition and that management was aware of these employes' sentiments.