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

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by Mr. Bruce F. Ehlke, P.O. Box 2155, Madison, Wisconsin 53701, on behalf of Complainant.

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

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

On May 19, 1995, Examiner Sharon A. Gallagher issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matters wherein she concluded that Respondent Brown County had committed prohibited practices within the meaning

of Secs. 111.70(3)(a)1 and 4, Stats. She therefore ordered Respondent Brown County to take certain affirmative action. In her decision, the Examiner rejected other allegations that the County had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 3 and 4, Stats.

On May 30, 1995 and May 31, 1995, Respondent Brown County and Complainant Brown County Professional Employees, Local 1901-E, AFSCME, AFL-CIO, respectively, filed petitions with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written arguments in support of and in opposition to the petitions, the last of which was received July 18, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner Findings of Fact 1-2 are affirmed.

B. Examiner Finding of Fact 3 is affirmed as modified through the addition of the underlined words:

> 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. The position of Nursing Supervisor did not exist in 1980 and was created in 1988 when the MHCC was substantially reorganized. 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

(Footnote 1/ appears on page 6).

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.

C. Examiner's Findings of Fact 4-8 are affirmed.

D. Examiner Finding of Fact 9 is affirmed as modified through deletion of the boldfaced words:

> 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 of the unit needing coverage, 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.

E. Examiner Findings of Fact 10-11 are affirmed.

F. Examiner Conclusion of Law 1 is affirmed.

G. Examiner Conclusion of Law 2 is reversed and the following Conclusion of Law is made:

> 2. Respondent Brown County's failure to maintain the Nursing Supervisors' wage differential did not violate Secs. 111.70(3)(a)1 or 3, Stats.

H. Examiner Conclusion of Law 3 is modified to read:

> 3. Respondent Brown County's unilateral modification of the Nursing Supervisors' job description did not violate Secs. 111.70(3)(a)1, 3 or 4, Stats.

I. Examiner Conclusions of Law 4 and 5 are combined and modified to read:

> Respondent County's May, 1994 reduction of the access Nursing Supervisors had to additional hours of work violated Secs. 111.70(3)(a)4 and 1, Stats., but not Sec. 111.70(3)(a)3, Stats.

J. The Examiner Order is affirmed in part and reversed in part and modified to read:

ORDER 1/

IT IS ORDERED that Brown County, its officers and agents, shall immediately:

1. Cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by changing the status quo as to wages and hours while the Respondent County and Complainant Union are bargaining a first contract.

2. Take the following affirmative action which the Commission finds will effectuate the policies and purposes of the Municipal Employment Relations Act:

   a. If the parties have not yet reached agreement on a first contract applicable to the Nursing Supervisors, immediately restore the status quo as it existed prior to May 6, 1994 as to the availability of additional hours of work to Nursing Supervisors.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial

review thereof as provided in this chapter.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> (a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.
>
> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
>
> . . .
>
> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this

decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

b. Make all Nursing Supervisors whole with interest 2/ for all wages and benefits lost between May 6, 1994 and the date on which the terms of any contract between the parties first becomes effective as to allocation of vacant shifts among bargaining unit employes.

c. Notify all of its employes by posting, in conspicuous places on its premises where employes are employed, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by an official 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 to ensure that said notices are not altered, defaced or covered by other material.

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

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaints were filed on September 13, 1993 and June 7, 1994, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis. 2d 245, 258-9 (1983) and Madison Teachers, Inc. v. WERC, 115 Wis. 2d 623 (CtApp IV, 1983).

IT IS FURTHER ORDERED that all complaint allegations as to the wage differential and the change in job description and the Sec. 111.70(3)(a)3, Stats. allegation as to the modification of the vacant shift allocation procedure are hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL immediately make Nursing Supervisors whole with interest for all losses in wages and benefits which resulted from the May 6, 1994 change in the allocation of vacant shifts at the Brown County Mental Health Center.

2. WE WILL NOT commit unlawful changes in the *status quo*.

3. WE WILL NOT in any like or related manner interfere with, restrain or coerce employes in the exercise of their rights assured by the Municipal Employment Relations Act.

_____ _____

Brown County Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

BROWN COUNTY

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING AND MODIFYING THE EXAMINER'S
FINDINGS OF FACT AND AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S CONCLUSIONS OF LAW AND ORDER

The Pleadings

In Case 507, filed September 13, 1993, the Complainant asserted that Respondent Brown County had violated Secs. 111.70(3)(a)1 and 3, Stats. by failing to maintain the Nursing Supervisor's wage differential during the pendency of a unit clarification proceeding seeking the Supervisor's inclusion in Complainant's unit. In Case 535, filed June 7, 1994, the Complainant contended that the Respondent violated Secs. 111.70(3)(a)1, 3 and 4, Stats. by modifying the job duties of Nursing Supervisors.

At the commencement of the hearing, Complainant asserted that once the Nursing Supervisors were included in the unit, pursuant to a Commission unit clarification decision, Respondent's decision not to maintain the wage differential also constituted a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. Following the hearing, Complainant filed a Motion to Conform Complaint to Evidence which asked that the previously-filed complaints be amended to include an allegation that Respondent Brown County unilaterally modified the existing practice with regard to the availability of overtime hours to Nursing Supervisors and thereby violated Secs. 111.70(3)(a)1, 3 and 4, Stats.

Respondent Brown County denied that it committed any prohibited practices.

The Examiner's Decision

Although not pled as an alleged violation, the Examiner concluded the Respondent County's decision not to maintain the wage differential between Nursing Supervisors and Registered Nurses did not violate Sec. 111.70(3)(a)4, Stats. prior to the Supervisors' inclusion in the unit because Complainant did not yet represent the Nursing Supervisors. She did determine that once the Complainant became the Nursing Supervisors' bargaining representative, Respondent was obligated to maintain the wage differential while the parties bargained their first contract for Nursing Supervisors. However, her Conclusion of Law determines that Respondent's failure to maintain the differential after unit inclusion did not violate Sec. 111.70(3)(a)4, Stats.

The Examiner concluded that the County's conduct as to the wage differential did violate Sec. 111.70(3)(a)1, Stats. because the differential would have been maintained but for the unit clarification proceeding. Citing Jefferson County, Dec. No. 26845-B (WERC, 7/92), the Examiner

concluded that the County's conduct would create hostility among employes later accreted to the bargaining unit and discourage membership and/or support of the Complainant.

The Examiner did not resolve Complainant's allegation that the Respondent's conduct as to the wage differential violated Sec. 111.70(3)(a)3, Stats.

Turning to the allegation that the County committed certain prohibited practices by changing the availability of overtime hours to the Nursing Supervisors, the Examiner concluded that the change occurred without notice to the Complainant and without any evidence that the change was motivated by "business considerations". The Examiner concluded that this change unilaterally modified the *status quo* as to wages, hours and conditions of employment and thereby violated Sec. 111.70(3)(a)4, Stats. and derivatively, Sec. 111.70(3)(a)1, Stats. The Examiner rejected the allegation that this change also violated Sec. 111.70(3)(a)3, Stats. based on her determination that there was no evidence that the Respondent County was hostile toward the Nursing Supervisors' interest in union representation.

Lastly, as to the allegation of the Secs. 111.70(3)(a)1 and 4, Stats. violations surrounding the change in job duties, the Examiner concluded that the changes in question were permissive subjects of bargaining as to which the County had no obligation to bargain. She therefore dismissed this portion of the complaint.

The Examiner did not resolve Complainant's allegation that the change in job duties violated Sec. 111.70(3)(a)3, Stats.

POSITIONS OF THE PARTIES

Respondent's Petition for Review

The Respondent urges the Commission to reverse the Examiner's determination that the County committed certain prohibited practices.

The Respondent County generally contends that the Commission lacks the jurisdiction to find that any County conduct prior to September 21, 1993 violated municipal employe rights because the Nursing Supervisors were not "municipal employes" prior to their September 21, 1993 inclusion in a bargaining unit. The Respondent County argues that by the Complainant's 1980 Stipulation for Election and the Commission's 1980 Order, the Nursing Supervisors were determined to be supervisors, not municipal employes. Thus, the Respondent County asserts that the Examiner erred when she concluded the County's pre-September, 1993 termination of an existing wage differential interfered with municipal employe rights and violated Sec. 111.70(3)(a)1, Stats.

The Respondent County also argues the Examiner erred when she concluded the County

violated its duty to bargain by changing the procedure by which Nursing Supervisors could bid for open shifts. The Respondent County asserts this shift assignment change was caused by a change in the Nursing Supervisors' job duties which, in turn, was prompted by the County's need to provide adequate supervision of employes. The Respondent County claims that it was "logically inconsistent" for the Examiner to correctly conclude that the change in job duties was a permissive subject of bargaining, but that the resultant change in assignment procedures was a mandatory subject of bargaining. The Respondent County asserts the shift assignment procedure is a permissive subject of bargaining which the County unilaterally modified to provide better supervision of the facility. Thus, contrary to the Examiner, the County claims it did have a "business consideration" for the change. The Respondent County further contends the Examiner erred when she failed to find that Complainant waived any right to bargain over the change in assignment procedures by failing to object to the change or to demand bargaining over same. Lastly, the Respondent County argues the Examiner should have dismissed this portion of the complaint because the proper forum for litigation of the assignment procedure/duty to bargain issue was not a complaint proceeding but rather was the declaratory ruling procedure under Sec. 111.70(4)(b), Stats.

The Respondent County next argues that the Union's exclusive remedy for the end of the wage differential is the collective bargaining and interest arbitration process. The Respondent County claims that prohibited practice proceedings were never intended to subvert collective bargaining or to be utilized in addition to interest arbitration.

The Respondent County alleges the Examiner misapplied the holding of Jefferson County, Dec. No. 26845-B (WERC, 7/92) to the wage differential issue by: (1) giving the pendency of the unit clarification petition filed by the Complainant the same legal effect as an election petition filed by employes; and (2) by failing to analyze the distinction between automatic and discretionary wage increases. The Respondent County additionally argues that because it did not reduce the Nursing Supervisors' actual wage rates and because the wage differential was created by a County Board resolution which expired December 31, 1992, the Examiner erred when she concluded that the County illegally "diminished" the Nursing Supervisors' wages.

The Respondent County alleges the Examiner erred by finding that the County interfered with employe rights. The County asserts that no management official made any remarks which could be construed as interfering with employes' right to organize, and that no employes ever advised management that they wished to organize. The Respondent County claims the Examiner erred when she concluded the County knew employes supported the unit clarification petition.

Given all of the foregoing, the Respondent County's petition asks that the complaint be dismissed in its entirety.

Complainant's Response

Complainant urges the Commission to reject the Respondent's arguments on review which the Complainant characterizes as being:

> . . .difficult to follow, repetitive, for the most part based on conclusionary assertions rather than on an application of the law to the facts of this case, and substantially frivolous.

The Complainant contends the County's modification of the *status quo* as to wages during the pendency of a unit clarification petition necessarily interferes with the rights of the employes who are subject to the petition. Complainant argues the County is incorrect when it asserts the Nursing Supervisors were not "municipal employes" until the Commission included them in Complainant's bargaining unit. Complainant alleges the parties' 1980 Stipulation and the Commission's Certification reflect only that the parties agreed the Nursing Supervisors were not to be included in the unit at that point in time.

Complainant argues there is no statutory or other support for Respondent's contention that interest arbitration or the declaratory ruling process were the exclusive remedies for Complainant to pursue.

As to Respondent's claim that the Union waived any right to bargain over the change in hours of work available to Nursing Supervisors, Complainant asserts a finding of waiver is inappropriate because Complainant had no notice of the change until after it had been implemented.

Complainant also contends the change in overtime hours was clearly retaliation against the Supervisors for their support of the effort to gain inclusion in the unit. Complainant argues the timing of the change and its economically disadvantageous impact on the County establish the County had no legitimate reason for the change.

Complainant's brief concludes as follows:

> Brown County's unilateral departure from the dynamic status quo in 1993, when it refused to maintain the previously established wage differential between the wages paid the Nursing Supervisors and those paid the Staff Nurses constituted an independent interference with the rights of municipal employes that are guaranteed at Sec. 111.70(2), Wis. Stat., and prohibited practices in violation of Secs. 111.70(3)(a) 1 and 3, Wis. Stats. The County's refusal to maintain that differential in 1994, after its obligation to bargain with AFSCME Local 1901-E regarding the Nursing Supervisors' wages, hours and conditions of employment had been

established, constituted a failure to bargain and prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Wis. Stat. Brown County should be ordered to pay the Nursing Supervisors the wage differential in question for 1993 and 1994, and to date; and it should be ordered to desist from making any further changes in the bargaining unit employees' wages, hours, and conditions of employment, without bargaining the same with AFSCME Local 1901-E.

Brown County's unilateral change in the potential overtime hours available to Nursing Supervisors in May, 1994 constituted prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, Wis. Stat. The County should be ordered to pay to the affected Nursing Supervisors the additional straight time pay and overtime pay that they would have earned, but for the County's unlawful actions; and the County should be ordered to desist from making such unlawful, unilateral changes in the future.

Brown County's unilateral changes in the job descriptions of the Nursing Supervisors constituted prohibited practices in violation of Sec. 111.70(3)(a)4, Wis. Stat., or, in the alternative, Secs. 111.70(3)(a)1 and 3, Wis. Stat. The County should be ordered to cease and desist from such conduct in the future, and should be required to post the appropriate notices.

The Findings of Fact, Conclusions of Law and Order issued by the Commission's Examiner on May 19, 1995 should be modified to reflect the foregoing conclusions. Such is compelled by the evidence of record in this proceeding.

Complainant's Petition for Review

Complainant asserts that the Examiner erred by failing to conclude that subsequent to September 21, 1993, the County's refusal to maintain the long-established wage differential between the Staff Nurses and Nursing Supervisors did not constitute a breach of the *status quo* and thus, a violation of Sec. 111.70(3)(a)4, Stats. Complainant asserts that the holding of the Court in Jefferson County v. WERC, 187 Wis. 2d 646 (1994) supports its argument. Complainant contends that the County erroneously reads the Jefferson County decision as holding that only "automatic" pay increases must be granted under the dynamic *status quo*.

Complainant further asserts that the Examiner erred by failing find that Respondent violated

Sec. 111.70(3)(a)3, Stats. as to the modification of the wage differential. Complainant argues the record clearly establishes that the County's conduct was in retaliation for the Nursing Supervisors' union activity.

Lastly, Complainant asserts the Examiner erred by failing to conclude that the unilateral changes in job duties imposed by the County on the Nursing Supervisors violated Secs. 111.70(3)(a)1, 3 and 4, Stats. Complainant argues that changes in job descriptions that add duties not fairly within the scope of an employe's existing responsibilities are mandatory subjects of bargaining. Complainant further asserts that unilateral changes in job descriptions made for the purpose of removing employes from the bargaining unit violate Secs. 111.70(3)(a)1 and 3, Stats. Thus, even if it is erroneously concluded that the change in job duties constituted a permissive subject of bargaining, Complainant nonetheless asserts that Respondent violated the provisions of Sec. 111.70(3)(a)3 and 1, Stats., because the Respondent was illegally retaliating against employes.

Given all of the foregoing, Complainant asks that the Commission modify the Examiner's decision to find the foregoing violations.

Respondent's Response

Respondent urges the Commission to affirm the Examiner's conclusion that Respondent did not violate Sec. 111.70(3)(a)4, Stats. by maintaining the wage rate paid to Nursing Supervisors that was in effect on December 31, 1992. Respondent contends that it had no obligation to "automatically adjust" that wage rate inasmuch as it was established by a County Board resolution which expired December 31, 1992. Thus, Respondent argues that there were no "automatic" increases which the County was obligated to pay after 1992 and that under the Court's decision in Jefferson County, only "automatic" pay increases must be granted under a duty to maintain the *status quo*.

Respondent asserts the Examiner properly found no violation of Sec. 111.70(3)(a)3, Stats. when Respondent modified the Nursing Supervisors' job description. Respondent asserts the Complainant failed to meet its burden of proof as to this allegation inasmuch as there is no competent evidence in the record that any management representative was aware of the Nursing Supervisors' support for the unit clarification petition.

Respondent alleges the Examiner correctly found the content of the job descriptions modified by the County to be permissive subjects of bargaining. The County urges the Commission to reject the contrary federal decisions cited by Complainant which are in conflict with Wisconsin law. Respondent maintains that under Sec. 111.70(1)(a), Stats., it is clear that the

County maintains the management prerogative to determine the duties to be performed by employes.

Given the foregoing, Respondent urges the Commission to reject the Complainant's request for modification of the Examiner's decision.

DISCUSSION

Jurisdictional Issues

Respondent County raises certain jurisdictional issues which it asserts preclude the Commission from determining that its conduct violated the Municipal Employment Relations Act.

The Examiner failed to resolve the merits of these arguments in her decision. We proceed to do so.

Respondent first contends that because Complainant Union did not represent the Nursing Supervisors until September 21, 1993 when the Supervisors were first included in the Complainant's unit, it could not have committed any prohibited practices by any conduct relative to the Supervisors prior to that date. Thus, Respondent argues that we must dismiss Complainant Union's allegation that the County's pre-September 21, 1993 failure to grant wage increases to the Supervisors violated Sec. 111.70(3)(a)1 and 3, Stats.

Section 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer:

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats. describes the rights protected by Sec. 111.70(3)(a)1, Stats., as:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

In January, 1980, Complainant and Respondent stipulated to an election in a bargaining unit which they agreed should be described as follows:

> All regular full-time and regular part-time professional registered nurses employed at the Brown County Mental Health Center excluding the Director, supervisory, managerial and confidential employes and all other employes of Brown County

They further agreed that the fifteen employes in the position of Staff Nurse and the five employes in the position of Head Nurse were all eligible to vote but that the two Head Nurse/A.M.

Supervisors, the three Night Supervisors and the two P.M. Supervisors were ineligible to vote.

From the foregoing facts, Respondent argues the parties had agreed that the position of Nursing Supervisor was supervisory and that this agreement excluded the Nursing Supervisors from "municipal employe" status until September 21, 1993 when the Commission issued its decision concluding the Nursing Supervisors were not supervisory or managerial employes and placed the Supervisors in Complainant's bargaining unit.

We reject the County's argument for several reasons. First, as is apparent from the job titles listed above, the position of Nursing Supervisor did not exist in 1980. Testimony before the Examiner indicates the position was not created until 1988, when there was a substantial reorganization at the Mental Health Center which, among other things, eliminated the position of Head Nurse. Given these facts, we conclude there was no agreement in 1980 that Nursing Supervisors were "supervisors". Second, even if an agreement existed, we have held that an individual's rights (or lack thereof) under the Municipal Employment Relations Act are determined by their actual duties and responsibilities at any given time. 3/ If an individual's duties and responsibilities are such that they are not "municipal employes" because of supervisory, confidential, managerial, executive or independent contractor status, 4/ then they lack rights under Sec. 111.70(2), Stats. On the other hand, if individuals are "municipal employes", they possess the rights identified in Sec. 111.70(2), Stats and the protection of Sec. 111.70(3)(a)1, Stats.

Given the foregoing, the "municipal employe" rights of Nursing Supervisors are determined by their actual duties and responsibilities at given points in time relevant to this litigation. Thus, contrary to Respondent County's argument, it is appropriate to examine Sec. 111.70(3)(a)1, Stats. complaint allegations as to pre-September 21, 1993, conduct. 5/

Section 111.70(3)(a)3, Stats. makes it a prohibited practice for municipal employes to:

3/ Cudahy Public Library, Dec. No. 26931-B (Gratz, 5/92), aff'd Dec. No. 26931-C (WERC, 10/92); City of Greenfield, Dec. No. 27606-B (McLaughlin, 8/94), aff'd by operation of law, Dec. No. 27606-C (WERC, 9/94). See also State of Wisconsin, Dec. No. 18696 (WERC, 5/81).

4/ Section 111.70(1)(i), Stats. defines a "municipal employe" as "any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe."

5/ As discussed more fully later herein, it is also possible for employer conduct to violate Sec. 111.70(3)(a)1, Stats., even if the individuals directly impacted are not "municipal employes". See, Winnebago County, Dec. No. 16930-A (Davis, 8/79), aff'd by operation of law, Dec. No. 16930-B (WERC, 9/79).

> . . .encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. . .

A violation of Sec. 111.70(3)(a)3, Stats. is established where municipal employes engage in protected concerted activity, the municipal employer is aware of and hostile to that activity, and the municipal employer takes action motivated at least in part by its hostility toward the activity. 6/ If Respondent County denied a wage increase to the Nursing Supervisors prior to September 21, 1993 in part because it was hostile to the interest of the Complainant Union and/or the Nursing Supervisors to gain inclusion in the bargaining unit and the opportunity to become a member of Complainant Union, there can be little doubt that Respondent County would thereby have "discouraged membership in a labor organization" and violated the literal prohibition of Sec. 111.70(3)(a)3, Stats.

Thus, contrary to Respondent County's argument, the Sec. 111.70(3)(a)3, Stats. allegation as to pre-September 21, 1993 conduct is also appropriately before us for resolution.

Respondent County next argues that the interest-arbitration provisions of Sec. 111.70(4)(cm) Stats. are the exclusive means by which the Nursing Supervisors can obtain a wage increase once Complainant became their representative and that the Commission therefore lacks jurisdiction over any alleged prohibited practices related to the wage increase issue. We disagree.

Collective bargaining and interest arbitration provide the means by which parties reach agreement on a contract. The contract establishes employe compensation during its term. However, employes enjoy the protection of the *status quo* as to wages while a contract is being bargained and/or arbitrated. If the *status quo* entitles employes to a wage increase while a contract is being bargained, employer failure to grant that increase violates Sec. 111.70(3)(a)4, Stats. 7/ Failure to grant a *status quo* wage increase also violates Sec. 111.70(3)(a)1, Stats. and can violate Sec. 111.70(3)(a)3, Stats. if motivated by illicit hostility. Thus, we reject this jurisdictional contention of Respondent County.

Turning to the Complainant Union's allegation that the addition of supervisory job duties

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6/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (1967); Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

7/ Jefferson County v. WERC, 187 Wis. 2d 646 (1994); St. Croix Falls School District v. WERC, 186 Wis. 2d 671 (1994); School District of Wisconsin Rapids, Dec. No. 19084-C (WERC,3/85).

violated Sec. 111.70(3)(a)4, Stats., Respondent argues that Complainant's "sole and exclusive" remedy is to seek a declaratory ruling under Sec. 111.70(4)(b), Stats. We disagree.

Sec. 111.70(4)(b), Stats. provides:

> (b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

Section 111.70(4)(b), Stats. is an option for resolution of duty to bargain disputes. However, by its own terms, Sec. 111.70(4)(b), Stats. clearly does not exclude the option of resolving the dispute through a Sec. 111.70(3)(a)4, Stats. complaint. The only restriction on the availability of Sec. 111.70(3)(a)4, Stats. as a dispute resolution forum is where a petition under Sec. 111.70(4)(b), Stats. has been filed and then a complaint is filed as to the same dispute. Therefore, we reject this argument by Respondent.

Respondent County next contends that it could not have committed prohibited practices by giving additional supervisory duties to the Nursing Supervisors because the Commission and the Court concluded in the unit clarification proceeding that the Respondent County simply needed to add responsibilities if it wanted the employes in question to be statutory supervisors. As indicated in our later discussion of the allegations surrounding the added responsibilities, the County correctly asserts that it does not violate the Municipal Employment Relations Act if it acts based on legitimate operational needs. However, if the Respondent County was motivated in part by illegitimate considerations, violations of the Municipal Employment Relations Act would occur. Because resolution of the issue of "legitimate operational needs/illegitimate considerations" is a factual determination, an evidentiary hearing on the question was appropriate.

In summary, none of the jurisdictional arguments raised by Respondent County warranted pre-hearing dismissal of any of Complainant Union's allegations.

We proceed to review the merits of those allegations.

The Wage Differential

The record establishes that when the Nursing Supervisor position was created in 1988, the wages for the Supervisors were set at a rate 19.2% higher than the wages of the Staff Nurses in Complainant's bargaining unit. This differential was maintained through December 31, 1990.

As of May 20, 1991, when Complainant filed its unit clarification petition, Respondent had not taken action as to the differential issue for the period of time beginning January 1, 1991. Ultimately, on June 17, 1992, the County Board passed a resolution which retained the 19.2% wage differential for the period January 1, 1991-December 31, 1992 and stated in part:

> 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.

The reason for the delay of the decision to maintain the wage differential is not clearly established by the record. The above-quoted language about a compensation study may provide the explanation. In addition, the 1991-1992 contract for Complainant's Registered Nurses bargaining unit was not settled until mid-1992. However, it is clear that Respondent knew of the May 20, 1991 unit clarification petition when it acted in June, 1992 on the wage differential issue. There is nothing in the record to indicate that the unit clarification petition was a factor in the timing of the County's action or in the decision itself.

In the Spring of 1993, Respondent considered the issue of the wage differential increase for the period beginning January 1, 1993. The following memo from the Acting Director of the Mental Health Center to the Center Administrator reflects the County's decision to deny the differential increase and some internal disagreement within County management as to how the issue was resolved:

BROWN COUNTY MENTAL HEALTH CENTER

M E M O R A N D U M

TO: Rob Cole

FROM: Maureen Ackerman

DATE: June 10, 1993

RE: Pay Raise for the Supervisors

This memo is in regards to the four percent pay raise for the RN Supervisors. I am asking you to again discuss this matter with the Management Team next Monday.

The supervisors have remained hard-working, loyal employees of Brown County throughout this stressful ordeal. At no time have they done less than their best in regards to their responsibilities as house supervisors. (Nor have they called in sick.)

Both Administration and 1901-E have received their raises and back pay. In the past, the supervisor raises had been on a parallel with one or the other of these groups.

In the agreement that was made and signed on June 23, 1992, it was stated that if changes were to be made regarding the supervisors that they would be notified. As you know, this did not happen. It was only through chance that they found out that their raises were not to be granted when the Union (sic) and 1901-E had settled their contract.

At this time, I feel withholding their raises is unfair and could be looked at as a punitive response to the supervisors' request to organize. Please bring these concerns to the Management Team.

Thank you.

MA/mak

pc: Dorothy Riley
Jim Deprez
Lee Ann Sachs
RN Supervisors' Office
Bonnie LaRose

By the following letter dated June 10, 1993, Complainant raised the differential issue with Respondent for the period of time beginning January 1, 1993:

> 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 me 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. . .

Respondent responded with the following June 30, 1993 letter:

> 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 to be found 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. . .

Complainant alleges Respondent's denial of the wage differential increase violated Secs. 111.70(3)(a)1 and 3, Stats. at all times relevant herein and Sec. 111.70(3)(a)4, Stats. for the period after September 21, 1993. The Examiner found a violation of Sec. 111.70(3)(a)1, Stats. but not of Secs. 111.70(3)(a) 4, Stats. She did not resolve the alleged violation of Sec. 111.70(3)(a)3,

Stats. Her treatment of all three alleged violations is before us through the parties' respective petitions for review.

Section 111.70(3)(a)1, Stats. -- Interference

Respondent's June 30, 1993 letter establishes a general nexus between the denial of the wage differential increase and the unit clarification proceeding.

In Winnebago County, Dec. No. 16930-A (Davis, 8/79), aff'd by operation of law, 8/ Dec. No. 16930-B (WERC, 9/79), the question of whether a municipal employer violates Sec. 111.70(3)(a)1, Stats. when it takes adverse action toward individuals based on the filing of a unit clarification petition was discussed as follows:

> The record clearly reveals that Respondent eliminated four CETA positions to insure that said positions could not be placed within the confines of Complainant's bargaining unit via a Commission unit clarification proceeding. Complainant alleges and Respondent denies that said action violated Section 111.70(3)(a)1, 2 and 3, Stats.
>
> INTERFERENCE
>
> Section 111.70(2), Stats., states:

8/ Although the Examiner's decision became the Commission's decision by operation of law, the Commission subsequently declined to dismiss the complaint on the merits when the parties ultimately settled their dispute and stated:

> The Commission is gratified that the parties were able to resolve their dispute with respect to compliance of the Order issued in this complaint case. However, since the matter did go to hearing and since the Examiner issued a comprehensive decision and order, and further since the Commission issued a Notice indicating that the Examiner's decision had become the Commission's decision, the Commission will not dismiss the matter on the merits since all issues were fully litigated and considered not only by the Examiner, but by the Commission.

In Kewaunee County, Dec. No. 21624-B (WERC, 5/85), the Commission explicitly endorsed Winnebago County.

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "to interfere with, restrain or coerce" municipal employes in the exercise of the foregoing rights. It is noteworthy that an employer need not intend to interfere with protected rights for a violation of Section 111.70(3)(a)1, Stats., to occur. Nor is it necessary that the employer conduct actually interfere or coerce employes. Rather, the question raised when interference is alleged, is whether the employer's conduct had a reasonable tendency to interfere with employe rights protected by Section 111.70(2), Stats.

Turning to the application of the foregoing principles to the instant dispute, there can be no doubt that one of the rights protected by Sec. 111.70(2), Stats., is the ability of municipal employes to pursue the expansion and/or clarification of their bargaining unit through the procedures of the Wisconsin Employment Relations Commission. When the Respondent attempted to render the exercise of this right a nullity by simply eliminating the disputed CETA positions, it engaged in conduct which at the very least had a "reasonable tendency" to interfere with bargaining unit employes' exercise of this Section 111.70(2) right. Clearly employes would "tend" to be less likely to engage in such protected concerted activity if it could result in loss of employment for four individuals. Thus the Examiner must find Respondent's action to be violative of Sec. 111.70(3)(a)1, Stats.

A second finding of illegal interference is warranted by the Respondent's action. Although the CETA employes' bargaining unit status is as yet unresolved, they are clearly "municipal employes" within the meaning of Sec. 111.70(1)(b), Stats., and as such enjoy the protection afforded by Sec. 111.70(3)(a)1, Stats. Although the CETA employes did not themselves engage in any protected concerted activity, it is concluded that their awareness of the linkage

> of unit members protected concerted activity with their loss of employment had a reasonable tendency to make said employes less likely to engage concerted activity protected by Section 111.70(2), Stats., and thus it is found that Respondent's action constituted interference with said employes' rights in violation of Section 111.70(3)(a)1, Stats.

Under Winnebago, there are two ways in which a violation of Sec. 111.70(3)(a)1, Stats. could have occurred here. First, Respondent's conduct could interfere with the Sec. 111.70(2), rights of employes in the unit to pursue expansion thereof through the Commission's unit clarification processes. Second, Respondent's conduct could interfere with the rights of the Nursing Supervisors if they were municipal employes at the time of the County's conduct. We proceed to consider each of these possible violations.

Respondent's conduct in this case differs substantially from the conduct in Winnebago. The County here in effect decided that it would delay a decision on the wage differential issue until it knew the outcome of the unit clarification. As expressed in Respondent's June 30, 1993, letter to Complainant, if the Nursing Supervisors continued to be excluded from the unit as "supervisory/management/confidential", then the differential would continue and the Supervisors would be made whole retroactively. On the other hand, if the Nursing Supervisors were found to be "municipal employes" under Sec. 111.70(1)(i), Stats. and included in the unit, then the differential would be discontinued because the basis for the differential (i.e., non-unit supervisory status) would have ended.

We view Respondent's position to be a logical and permissible response to the wage differential issue. The differential was premised upon non-unit supervisory status. The ongoing validity of that premise was being litigated in the unit clarification proceeding. Under these circumstances, to hinge the future of the wage differential on the outcome of the unit clarification is a far cry from the conduct found illegal in Winnebago.

Nonetheless, it can still reasonably be argued that the negative impact of a delayed and ultimately denied wage increase had a reasonable tendency to deter resort to the Commission's processes. However, we have held that where a valid business reason exists for conduct which nonetheless has such a tendency, no violation will be found. 9/ The business reason discussed above for the County's conduct is sufficient to warrant a finding that Sec. 111.70(3)(a)1, Stats. was not violated as to employes in the unit or as to the Nursing Supervisors once they became part of the unit. 10/ Thus, we have reversed the Examiner's determination to the contrary.

9/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84), footnote 4/.

10/ Given our holding, we need not determine whether the Nursing Supervisors were also

Section 111.70(3)(a)3 -- Discrimination

The Examiner failed to resolve Complainant's allegation that Respondent County's conduct as to the wage differential violated Sec. 111.70(3)(a)3, Stats.

As set forth more fully earlier in this decision, a Sec. 111.70(3)(a)3, Stats. violation occurs when a municipal employer takes action at least in part because of employer hostility toward employes' exercise of rights granted by Sec. 111.70(2), Stats.

We are satisfied that no violation of Sec. 111.70(3)(a)3, Stats. is present here because the record does not establish the requisite employer hostility.

Complainant is correct when it asserts that the County's decision to delay the wage differential was in response to the presence of the unit clarification proceeding. However, that nexus does not establish hostility. Rather, as discussed earlier in the context of the alleged violation of Sec. 111.70(3)(a)1, Stats., the record persuades us that the County was responding to the ongoing unit clarification proceeding on a rational and permissible basis. Therefore, we have found no violation of Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)4 -- Refusal to Bargain

Complainant asserts that once it became the collective bargaining representative of the Nursing Supervisors on September 21, 1993, Respondent's refusal to maintain the wage differential existent on December 31, 1992, constituted a breach of the wage *status quo* the County was obligated to maintain while the parties were bargaining their first contract. As indicated in our discussion of the alleged violation of Sec. 111.70(3)(a)1, Stats., it did not violate the Municipal Employment Relations Act for the County to defer a decision on the wage differential until a decision in the unit clarification proceeding was issued. Prior to the issuance of that decision, the Nursing Supervisors were not receiving the wage differential. Given the foregoing, Respondent's wage *status quo* obligation as to the Nursing Supervisors was simply to maintain the wages received by those employes effective September 21, 1993. The County met that obligation and thus did not violate Sec. 111.70(3)(a)4, Stats. by refusing to increase the wages of the Nursing Supervisors to the wage differential level.

The Change In Job Description

Complainant asserts the Examiner erred by failing to conclude that the unilateral changes in

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"municipal employes" prior to September 21, 1993.

job duties imposed by Respondent on the Nursing Supervisors violated Secs. 111.70(3)(a)1, 3 and 4, Stats.

Looking first at the alleged violation of Sec. 111.70(3)(a)4, Stats., Complainant's contention is that the addition of supervisory duties to a municipal employes' job description is a mandatory subject of bargaining because such duties are not fairly within the scope of existing responsibilities. Complainant has correctly recited the general principle of the law applicable to adding responsibilities to a municipal employes' job. However, that principle has never been applied to a situation in which the municipal employer is adding responsibilities for the express and legitimate purpose of seeking to exclude an employe from the bargaining unit as a supervisory, confidential, managerial or executive employe. We decline to apply that doctrine to such circumstances. In effect, Complainant is asserting that the municipal employer cannot unilaterally determine that its operational needs require that existing employes receive responsibilities which may remove the employe from the bargaining unit. We conclude that such a decision, where premised upon legitimate operational needs, primarily relates to the management and direction of the employer operation rather than to employe wages, hours and conditions of employment. Here, we are satisfied that Respondent could and did legitimately react to the loss of the unit clarification proceeding by seeking to give the employes in question sufficient additional responsibilities to accomplish Respondent's goal of having statutory supervisors in place in the disputed positions. The record clearly establishes a legitimate operational need for the presence of such supervisors and we therefore conclude Respondent County had no duty to bargain with Complainant over the imposition of these additional responsibilities.

Given the legitimacy of the County's conduct and the absence of any persuasive evidence of impermissible hostility, we further conclude that the County's action in this regard did not violate Sec. 111.70(3)(a)1 or 3, Stats.

Alteration of Scheduling Procedure

In May, 1994, more than seven months after the Complainant had become the Nursing Supervisors' bargaining representative, the Respondent County modified the manner in which it filled vacant RN shifts and thereby reduced the access of Nursing Supervisors to additional hours of work.

It is well-settled that, absent a valid defense, a unilateral change in the *status quo* wages, hours or conditions of employment during a contractual hiatus or while the parties are bargaining a first contract is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to

bargain in good faith. 11/ In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 12/

In defense of its unilateral modification of the *status quo* of Nursing Supervisors' wages and hours, the County argues that the change was appropriate given the Nursing Supervisors' new job description and the need for a greater supervisory presence during the hours which needed to be filled. "Necessity" is an available defense to a unilateral modification of the *status quo* 13/ and we would understand the County to be seeking to use that defense herein.

The record here falls far short of establishing a persuasive necessity defense. The County modified the Nursing Supervisors' job description in an effort to give them greater supervisory responsibility. If the County was seeking greater supervisory presence, it would seem counterproductive to lessen the opportunity of Nursing Supervisors to fill vacant shifts. In addition, even under the revised May, 1994 procedure, on-call RNs had first access to the vacant shifts. Such employes did not provide an additional supervisory presence. Given the foregoing, we reject the County's necessity defense.

The Respondent County has also argued that the Complainant Union was obligated to, but did not, demand to bargain over the May, 1994 change and thereby waived its right to bargain over the issue. We also reject this County argument.

As evidenced by our holding in St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93), aff'd 180 Wis. 2d 671 (1994), and Village of Saukville, Dec. No. 28032-B (WERC, 3/96), we think it well understood that the *status quo* doctrine entitles the parties to retain those rights and privileges which are primarily related to wages, hours and conditions of employment while they bargain over what rights they will have under their first or next contract. The employer is entitled to force the union to bargain over provisions in an agreement which retroactively change the employer's rights and obligations as to mandatory subjects of bargaining. But **during** any such employer effort, the union **is not** obligated to bargain over loss of existing *status quo* protections. Thus, the Complainant Union was entitled to retain the existing availability of additional hours for Nursing Supervisors while the parties bargained a contract and was not obligated to bargain with the Respondent County over retention of *status quo* protection.

11/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12; Green County, Dec. No. 20308-B (WERC, 11/84) at 18-19; and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) at 14.

12/ School District of Wisconsin Rapids, supra, at 14.

13/ Village of Saukville, Dec. No. 28032-B (WERC, 3/96).

Given the foregoing, the Respondent County has not presented any valid defense for its unilateral modification of the *status quo* and therefore we find that the County therefore violated Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Complainant Union also alleged that the May, 1994 change in work opportunities for Nursing Supervisors was motivated by anti union hostility and that the Respondent County therefore also violated Sec. 111.70(3)(a)3, Stats. The Examiner failed to resolve the merits of this allegation.

Our prior discussion of the County's necessity defense establishes that the explanations offered by the County as justifications for the change are not particularly persuasive. Complainant Union also argues that the new assignment sequence had the potential to increase the County's costs. The absence of a plausible basis for the change creates an inference that hostility toward the Nursing Supervisors represented status played a role in the County's motivation. However, on balance, we are not persuaded that this inference is of sufficient strength to establish a Sec. 111.70(3)(a)3, Stats. violation. Therefore, we have dismissed this portion of the complaint.

We have set aside the portion of Examiner Finding of Fact 9 which addresses the financial impact of the change in hours availability on individual Nursing Supervisors. If the parties are unable to reach agreement on the extent of the County's financial liability, if any, under our make whole Order, we will make whatever findings are appropriate following a compliance hearing during which the relevant facts can be fully litigated.

Dated at Madison, Wisconsin this 27th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/