STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME LOCAL 556, PIERCE COUNTY COURTHOUSE EMPLOYEES, Complainant,

vs.

PIERCE COUNTY, Respondent.

Case 112
No. 53214
MP-3082

Decision No. 28670-A

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, by **Mr. Stephen L. Weld**, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AFSCME Local 556, Pierce County Courthouse Employees, hereafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission on October 5, 1995, alleging that Pierce County had committed prohibited practices in violation of Sec. 111.70(3)(a)1, 3 and 5, Stats., by engaging in a course of harassing and retaliatory conduct against JoAnn Manor. Hearing in the matter was held in Ellsworth, Wisconsin, on April 30 and November 13, 1996. The record was closed on May 27, 1997, upon receipt of post-hearing written argument. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following

FINDINGS OF FACT

1. Pierce County, hereafter Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices located at 414 West Main Street, Ellsworth, Wisconsin.

2. AFSCME Local 556, Pierce County Courthouse Employees, hereafter Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices located at Menomonie, Wisconsin.

3. At all times relevant hereto, JoAnn Manor has been a municipal employe within the meaning of Sec. 111.70(1)(i), Stats. At all times relevant hereto, Complainant has been the exclusive collective bargaining representative of a collective bargaining unit consisting of all Pierce County Courthouse employes and Recycling workers other than manager, except professional, confidential and supervisory employes and JoAnn Manor has been a member of this collective bargaining unit. On or about September 27, 1994, the parties executed a collective bargaining agreement which, by its terms, was effective from January 1, 1994 through December 31, 1995. This collective bargaining agreement contains a grievance procedure which provides for the final and binding arbitration of any dispute between the Complainant and the Respondent concerning the interpretation or application of the collective bargaining agreement. This agreement does not contain express language stating that final and binding arbitration is not the exclusive remedy for a breach of the collective bargaining agreement.

4. JoAnn Manor began employment with the County as a temporary employe in 1988 and worked as a temporary employe until May 15, 1992, at which time she was hired to fill the regular part-time secretarial position which had been vacated by Extension Office employe Beverly Bierbrauer. At the time that Manor was interviewed for the regular part-time position, Resource Agent Edward Hass, the head of the Extension Office, advised Manor that the position was a two days per week position, but that Manor would not always work the same two days each week and that Manor would be expected to work additional hours as needed to fill in for vacationing employes and to assist with the County Fair. From the time that Manor began her employment as a regular part-time employe in the Extension Office until September of 1994, Manor regularly worked two days per week and also worked additional hours to fill in for absent employes and to assist with the County Fair. In 1992, Manor worked the following hours per month as a regular part-time employe: May - 27.3; June - 91; July - 83.3; August - 101.57; September - 86.8; October - 155; November and December - 89.6. In 1993, Manor worked the following hours per month: January - 70.7; February - 79.8; March - 63.0; April 102.9; May -74.5; June - 79.8; July - 93.8; August - 116.6; September - 60.6; October - 105; November - 89.6; and December - 68.6. In 1994, Manor worked the following hours per month: January -70.7; February - 56; March - 72.8; April - 83.3; May - 56; June - 79.8; July - 114.8; August -96.75; September - 86.8; October - 56; November - 56; and December 58. In 1993 and 1994, in addition to the part-time secretarial position occupied by Manor, the Extension was staffed by the following regular full-time employes: Hass, three extension agents, and two secretaries, i.e., Gayle Nelson and Barbara Fritz. During the summer, the Extension also employed one 4-H youth agent. At the time that Manor assumed her regular part-time position, the County Board had established her position as a .4 FTE. Prior to September, 1994, the Extension Office's six year plan included a request to increase the hours of the position occupied by Manor.

5. On November 13, 1992, the County Finance Committee issued the following:

FINANCE COMMITTEE DIRECTIVE

TO: All Administrators, department supervisors and County Board Supervisors

RE: Budget appropriations and expenditures

At the October 19 meeting of the Finance Committee the following directive was issued. Compliance assures the Committee that the budgets are proposed and expended consistently in all departments, providing an accurate financial statement. This directive is further clarification of existing policy.

Budget appropriations are made for each department on the basis of line item expenditures requested. Each line item request is reviewed and approved based upon justifiable need, to be expended only for the purpose for which it was approved as a part of the complete budget request. The Finance Committee advises and directs all departments that this policy will be strictly adhered to, effective immediately. Any departmental budget activity which requires any variation in the expenditure of funds (line item transfer, budget transfer or revenue increase) must, upon recommendation of the standing committee, be presented to the Finance Committee for their review. Only the Finance Committee has the authority, to approve a variation in expenditure. The Office of the County Clerk has been directed to reject any vouchers which violate this policy.

Specific issues to be addressed in the body of this directive.

1) **LINE ITEM EXPENDITURE:** Vouchers will be charged to the appropriate line item. Standing committees are advised to review vouchers carefully, approving only authorized expenditure as presented in the budget appropriation. All vouchers for salaries must reflect the applicable status of the employee. The 1993 Budget line item #111 Salaries, permanent, along with applicable fringe benefits line items, contain only the sum necessary to compensate the budgets permanent employees at their established number of hours. Line item #115 Salaries, temporary is appropriated only for employees who will not be eligible for any fringe benefits. #112 Salaries, overtime is appropriated only for hours in excess of 35 hours per week. Misuse of the appropriate salary line items will affect the fringe benefits line items. The Payroll Clerk has been directed to charge the vouchers to the correct line item.

2) **BUDGET TRANSFER:** The transfer of funds from one budget to another requires approval of the Finance Committee prior to expenditure. The department administrator must contact the County Bookkeeper and complete a Budget Transfer Request Form. The form, available through the office of the County Clerk, discloses all information necessary for the Finance Committee to make a decision regarding authorization.

3) **REVENUE TRANSFER:** Revenues are not transferred out of revenue accounts into expenditure accounts. If a department takes in revenues in excess of what was in the approved budget, with the Finance Committee's approval, they could apply the existing surplus to increase a particular budget line item. Such a request requires justification for the Finance Committee's consideration.

The Office of the County Clerk is prepared to assist all standing committees and departments in complying with this directive.

The February 24, 1993 minutes of the Finance Committee include the following:

Meeting called to order by Chair Wilhelm with Berggren, Truax, Anderson and Schoeder present.

. . .

Treasurer informed the committee that, due to a new employee in her office, she would like authorization to increase the number of hours authorized for the 3/5 time employee in that office. Committee suggested the scheduling be modified but took no action to increase hours of employee.

. . .

The March 12, 1993 minutes of the Finance Committee include the following:

. . .

Requested authorization for two extra days for Accounts Clerk so that employee can assist during a vacation for the Treasurer. Discrepancy exists with computer reports for tax settlements. Auditor states lottery credit has created some problems for other counties and has required some adjustments. Auditor will review with Treasurer to proof tax settlements. Motion by Truax and seconded by Berggren to authorize Auditor to assist Treasurer to review tax settlements to ascertain discrepancy and make necessary adjustments. Motion carried. Auditor will not be available until April 1, Treasurer will begin vacation on 3/31. Auditor will work with Accounts Clerk.

Olson discussed the need for additional hours for Accounts Clerk. Extra time required to assist new employee along with tax settlements. Treasurer to maintain records for hours worked and projection for yearly spending and report to committee when funds begin to deplete.

. . .

On or about April 21, 1993, the Finance Committee sent the following to the County Board Supervisors:

> This memo is directed to the Pierce County Board of Supervisors with a sense of urgency as it relates to the budgeting process and budget considerations and projections for the 1994 fiscal year. Certainly we are all aware that the Governor, in his message to the State Senate and Assembly, proposes a property tax rate freeze. This recommendation, if adopted, will impose severe restrictions on county government as it relates to revenues available to support costs of services and administration of county government.
>
> We are very fortunate in Pierce County to have a group of employees who have been very supportive of budgetary restraints in the past. This was most recently demonstrated in their acceptance of the necessary freeze on new equipment purchases and hiring of new personnel. Continuing support and cooperation of our employees is essential to the budgeting process during these next few months and well into following years.
>
> We in Pierce County have compounded the fiscal problems we will face in 1994 by certain steps we took in budgeting in recent years. For the 1992 budget the county board took $100,000 from the carry-over funds for Developmental Disabilities and also "used" $200,000 of projected timber sales to offset the county tax levy. For the 1993 budget the Board transferred $126,000 out of the Solid Waste Facility Development Fund, $39,671 from the Building Bond Reserve Fund and, $6,682 from the Land Records Modernization Fund for a total of $172,353 of carry-over funds.
>
> If the governor's proposal wins legislative approval, which seems likely at the moment, it will leave Pierce County in deep financial trouble. The only source of additional revenues will have to come from an increase in the county's equalized valuation. Last year this amounted to $121,221 which didn't quite cover the increased cost of health insurance premiums. There is no reason to expect a greater increase in the county's equalized valuation this year which means that anticipated increased revenues will not even cover increased hospitalization insurance costs, let alone the offset of $172,353, derived from fund transfers to the 1993 budget.
>
> May we refer your attention to the report enclosed on New Hires by Pierce County in the past four years. It would appear that the County government has been growing while the taxpayers (sic) ability to support them has not kept pace. If we interpret the information correctly, we will spend about $139,946 in salary and benefits in 1993 for those New Hires we employed in 1991. Thank goodness we adopted a moratorium on new personnel for 1993.

Even if the Governor's proposed property tax rate freeze should not become law we still will be in very serious trouble as it relates to budgeting for 1994. We believe we have exhausted "ghost" revenue resources and that our only hope for carry-over resources may be some modest balance in the Contingency Fund.

With a freeze in the county tax levy there will be no money for increases in operating budgets, new equipment, additional personnel or increases in wages and salaries for our county employees.

In view of the uncertainties facing us as it relates to our ability to meet our financial obligations during fiscal 1994, the Finance Committee submits this for your consideration: The Pierce County Board of Supervisors go on record at this time recommending a freeze on all hiring of additional personnel and equipment purchases for 1993 as well as all wage and salary considerations for the fiscal period beginning January 1, 1994.

The Board of Supervisors further recommends that we advise all unions who represent any of our employees of our intent regarding wage and salary consideration and that we urge their cooperation in this matter, and advise them that any deviation from the freeze policy must necessarily be proportionately offset by a reduction in staff.

We further propose, within the framework of what the law will allow, that we advise the unions that in the event this is not a satisfactory approach from their standpoint, we would be left with no alternative and we stand prepared to contract for many of the services presently provided by employees of the County.

We also advise the union leadership that we bring our position to them at this time so that they may have ample time to determine the desire of their members as to the options available to us, i.e. wage and salary freezes versus reductions in staff, prior to any discussions of contract renewals. The unions should be further advised that economic conditions absolutely necessitate substantial modifications in employee participation in contributions in the health insurance plan to offset the anticipated 15 percent increase in costs.

At the same time, we advise department heads of our position and intent and that we direct them to immediately begin to prioritize all programs and positions in their respective departments, delineating from least essential to most essential those programs and positions under their supervision.

The Finance Committee will begin to analyze and review all departments and functions and to evaluate those services which might lend themselves to contractual arrangements. We suggest that we then begin to explore the feasibility and possibility of providing services in this manner.

Preliminary consideration given this matter by the Finance Committee indicates program activity in nearly every department which could be provided by contractual arrangements. As stated, we think this should be done and implemented as soon as is possible after the legal ramifications have been reviewed and resolved.

In view of the seriousness of the problem, the Finance Committee will propose a series of public hearings to avail ourselves of the sentiments, knowledge and insights of our employees, constituents and clients of county services. These could conceivably be held at several locations in Pierce County.

The May 5, 1993 minutes of the Finance Committee, as amended on May 26, 1993, include the following:

Meeting called to order by Chair Wilhelm with Truax, Anderson, Berggren and Administrative Coordinator Sorenson present. Department supervisors present were Baier, Cink, J. Olson, Hass, Kratt, Hulbert, Gulbranson, C. Olson, Weinberg, Sullivan, Paulson, Melstrom, Huppert and Shoemaker.

Chair announced it was an informational meeting. Inquired as to whether anyone was familiar with the governor's proposed budget and what effect it may have on the county. Turned floor over to Truax, who spoke on behalf of the Finance Committee. Truax suggested two reasons the committee was concerned: 1) if proposal to freeze property tax rate is enacted into law, we are in financial trouble; 2) if the proposal to freeze tax rates is not enacted into law, we are still in financial trouble. The committee had agreed it was time to address some of the issues. While document may seem harsh or severe, purpose is to try to put together a coalition of all forces that will impact on budget for 1994. This is to insure future financial health for Pierce County. Committee does intend to meet with people from unions, to meet with public, and to relate to all employees because employees may have more familiarity than committee members and be able (sic) offer suggestions regarding budget considerations. Anything we can do to involve all of our people will be tremendously helpful.

We funded $172,000 of the 1993 budget with fund transfers which means that we will need additional tax levy to offset those transfers. The Health insurance program has been costly and has been accelerating. Minimal projection is for a 15% increase in health insurance costs. This does not include the account deficits we have incurred in 1992, in the amount of approximately $162,000. We are projecting over $480,000 in increases for 1994 which we can't control.

The Governor's proposal is to freeze tax rates at 1992 levels. This allows increase based upon equalized valuations only. The maximal amount we have

seen for increase in tax rates suggest an 8.3% increase in equalized valuation revenues. Truax then detailed the critical nature of the County's financial posture and future. He noted that the following situation exists:
1) There is $172,353 in fund transfers which is supporting budget activity in 1993, which must be supported by additional tax levy in 1994.
2) The minimal projection for cost increases in the employees health insurance program is 15%. This is $145,614 additional cost which must be supported by additional tax levy in 1994.
3) There was a $162,932 shortfall in revenues to the health insurance program funded from the Contingency and General funds which must be reimbursed to those funds, which must be supported by additional tax levy in 1994.

These three items alone total $480,899 which must be funded by new tax levies. If we apply an anticipated $131,282 new revenues which we will be allowed to levy we are left with a balance of <$349,617> of budget activity which we cannot fund if the Governor's proposed tax rate freeze becomes law. And this is before any consideration of wage and salary increases and other perennial increases which have become routine.

Whether or not the Governor's proposal succeeds or fails, we have serious near insurmountable financial problems that necessitate reconsideration of our 1993 and 1994 budgets and immediate implementation of a freeze in certain areas of activity:
1) No new personnel are to be hired during the balance of 1993,
2) No new equipment is to be purchased except by approval of the Finance Committee,
3) No new personnel or new equipment for 1994 and a freeze on all wage and salary considerations for 1994, except that any wage and salary increases which might derive from negotiations must be offset by reductions in staff.

Truax urged cooperation of all department heads, employees and unions in meeting this challenge and suggested the feeling of the Finance Committee members that employees coming forth with their suggestions for cost savings measures will probably be the single most important factor in our meeting the challenge. He cited how one employee's suggestions implemented in December saved the County over $6,000 in the first three months in 1993 and should mean a savings of $25,000 for the year.

The Finance Committee had agreement from the county board that substantial modifications to health insurance plan are absolutely essential. We all know that health insurance costs have accelerated tremendously. Possibly governmental plans being drafted at this time may have a positive impact on our insurance costs.

Finance Committee members present asked departments to look at feasibility of contracting for services. They do intend to hold public hearings throughout the county to get the public's input on all aspects of the 1994 budget.

Truax suggested that he had recently reviewed overtime in county and gets feeling that some employees are "setting their own salaries". This was not meant to criticize but the county spent over $338,000 for 1993 overtime. In some instances board has approved increase in staff to control overtime but it has not appeared to be effective.

Discussion with Auditor Paulson suggested his concern that we have $1.7 million in the General Fund but $2.1 million is more appropriate.

. . .

The May 12, 1993 minutes of the Finance Committee include the following:

Vice Chairperson Anderson called meeting to order at 8:35 a.m. Present were Schoeder, Truax and Berggren. Wilhelm excused.

Purpose of the meeting was to meet with union representatives to discuss the financial impact of Governor Thompson's proposed tax rate freeze on the county budget. The fiscal problems that would result from such a freeze were outlined in the document adopted by the County Board of Supervisors on April 27. As a follow up to the board action, the Finance Committee met on May 5 with department heads (1) to explain the document in greater detail in order to clarify any misunderstanding in the position of the County Board," and (2) to ask for their help in suggesting ways in which the county could deal with a potential extremely serious financial crisis.

This meeting was designed to accomplish the same two objections with representatives of union employees. The committee believes that it is essential that we all work together as a team to try to avoid layoffs and cutbacks in program activity.

The committee waited 20 minutes and no representatives of union employees appeared. The Vice-Chair telephoned 3 representatives who informed him that they had decided in a meeting the previous evening not to attend the Finance Committee meeting. After the committee expressed concern that representatives of union employees boycotted the meeting without even having the courtesy to inform the committee that they did not plan to attend, Schoeder moved and Berggren seconded a motion to adjourn.

Motion carried.

On May 12, 1993, when Anderson was told by union representatives that they had decided to boycott the meeting, Anderson "blew up" and told these representatives that they could have had the courtesy to provide prior notice of the boycott. The July 21, 1993 minutes of the Finance Committee include the following:

> Meeting called to order by Chair Wilhelm with Schoeder, Anderson, Truax and Berggren present.
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> Motion by Anderson and seconded by Berggren to approve minutes of 7/12. Motion carried.
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> Scott Schoepp, Parks Manager, appeared to request replacement mower for the Park at a cost of $1,445.00. This is an emergency as, while the mower was old, there had been no money budgeted for replacement. There was money available in the Park Development Fund for the purchase. Motion by Schoeder and seconded by Berggren to approve purchase of a mower for the Park on an emergency basis with funds to be transferred from the Park Development Fund. Motion carried.
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> Truax questioned 6/11 Parks minutes which reflected the Parks Committee had authorized several purchases from the Park Development Fund, including a refrigerator and playground equipment. Schoepp indicated the Fund was designated only for developing and maintaining Park improvements. Schoeder suggested that Schoepp contact the Elmwood School System as they were removing playground equipment there. Discussed feasibility and liability of such a purchase.
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> Committee suggested contact with Land Management to inquire about increase in fees designated for Park Development. Also discussed the Emergency Government Department be contacted to discuss their use of the Snowmobile Club cellular phones for use during an emergency.
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> Schoepp stated the Comprehensive Land Use Plan, when adopted, will include an increase in fees from sales. Motion by Truax and seconded by Berggren for Land Management Department to review and increase fees for Park Land Dedication fees and report back to Finance within 30 days. Motion carried.
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> Discussed Parks proposal for prioritization of programs and spending.
>
> Request from Treasurer to transfer $232 from Contingency Fund into line item #115 for extra hours anticipated at settlement time. Motion by Anderson and seconded by Schoeder to transfer $232 from Contingency Fund into Treasurer's Account, 101-08-51520-115. Motion carried.

Data Processing Coordinator Weinberg requested authorization to purchase a printer for Register of Deeds. He stated the equipment installed in that office did not have a printer that would satisfy their needs for using the equipment as a word processor. He had money in his 1993 Equipment Fund. This is the fund which contains revenues from use. Motion by Berggren and . . .

The minutes of the August 13, 1993 Finance Committee include the following:

Meeting called to order by Chair Wilhelm, with Anderson, Truax present. Schoeder excused, Berggren arrived late.

Minutes of 7/21 and 7/28 reviewed. Motion by Anderson and seconded by Truax to approve. Motion carried.

Review of department vouchers with Wanda Kinneman. Voucher for $32.15, Register of Deeds reviewed. Motion by Truax and seconded by Anderson to approve department vouchers and advise Register of Deeds to purchase substitute, less expensive product for cleaning hands. Motion carried.

Review of general vouchers. DA subscription to Pierce County Herald will be referred back to Law Enforcement for justification for need since the County Clerk's office and Extension Office are the only subscriptions authorized. Motion by Truax and seconded by Anderson to approve vouchers in the amount of $197,749.40 with the exception of charges to Weld, Riley, Prenn & Ricci for telephone conversations regarding the West Central Regional Counties Group. Motion carried. Truax requested an update of the new telephone service costs for the second quarter and requested that the Administrative Coordinator and Administrative Assistant provide the Committee with periodic updates on ongoing projects or issues on which they have taken action.

June Olson presented Treasurer's report. She indicated the settlements were complete for 1992 taxes, with monies to be disbursed by August 20th. In follow-up to past discussion, Chair announced that he had talked with Auditor Paulson and the necessary papers had been received in regard to collateral with Banc One. This issue will be discussed in more detail at the next months meeting for information regarding possible increase in Banc One investments. Olson also presented a letter regarding the Local Government Investment Pool, including the Performance Summary and a recent report from State Treasurer Cathy Zeuske on the LGIP.

Monthly financial report reviewed. Fund balances as of 7/31/93 are $4,617,440.91. Motion by Anderson and seconded by Berggren to approve. Motion carried.

> Discussed request for overtime salaries in Treasurer's Office during tax settlement. Payroll Clerk Richardson explained system of comp time reimbursement for staff, with the invoice to verify the days of comp time being used. Olson informed committee that overtime and regular time salaries, plus fringes totaled $1,344.55 and that was the amount she requested. Motion by Truax and seconded by Berggren to approve transfer of that amount from Contingency Fund into appropriate line items. Motion carried.

At all times material hereto, Ray Anderson has been the Chair of the standing committee which oversees the Extension Office, i.e., the Ag Committee, as well as Vice-Chair of the County's Finance Committee and Personnel Committee. Three of the five members of the Finance Committee who issued the November 13, 1992 directive became members of the Finance Committee in April of 1992. One result of the change in the membership of the Finance Committee was that the Finance Committee more closely monitored budget transactions to ensure that funds were expended only for appropriated purposes. The County Finance Committee and the County Personnel Committee have the same membership.

6. On October 20, 1993, Manor, accompanied by a Union Steward, met with the County Personnel Committee and requested that the County prorate holiday pay for regular part-time employes based upon actual hours worked, rather than on the FTE of the position as established by the County Board. At this meeting, Manor told the Personnel Committee that she was not presenting a grievance, but rather, was asking the County Board to correct an error. On October 21, 1993, Anderson telephoned Hass and told Hass that Manor could only work two days per week; that the Extension would have to hire temporaries to work any extra time; and that $2,000 would be cut from the part-time budget. On October 21, 1993, Hass advised Manor that he had received a telephone call from Anderson and told Manor what Anderson had said during this telephone conversation, whereupon Manor concluded that retaliation is swift. On November 4, 1993, County Attorney Weld sent the following to Manor:

> RE: **Holiday Pay Dispute**
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> Dear Ms. Manor:
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> This is confirmation of the oral decision I presented to you at the October 20, 1993, Personnel Committee meeting. That Committee meeting followed your request that the County review the treatment of holidays for part time courthouse employees. Specifically, you asked that the Committee consider adjusting your pay and amending the current practice of prorating holiday pay for part timers on the basis of hours scheduled. You argue that the County's treatment of holidays for part timers in the courthouse unit is inconsistent with the way it treats vacations, sick leave and health insurance for this group of employees and inconsistent with the way the County treats holidays for part timers in the community health service group.

While you are correct that the County does use a different method for prorating holidays for part timers in the community health service unit, a review of the County's payroll records indicates that holidays have been prorated for part timers in the courthouse in this fashion for a minimum of 17 years. The present bookkeeper took over her tasks in 1990 and, at the time, was presented with a memo explaining how to prorate the holiday benefit for part timers in the courthouse unit. The practice has been consistently applied to all part timers in the courthouse unit. Accordingly, we believe that your request for an adjustment in the compensation method is inappropriate.

We have, by virtue of your request, become aware of this situation and intend to raise it at the bargaining table.

Secondly, you requested backpay for the period of time November, 1992, through July, 1993, utilizing actual hours worked as the basis for the proration of the back pay amount. The backpay request is for between $130 and $150 depending on which computation method is utilized. Once again, the County has consistently prorated vacation, sick leave and health insurance (not holiday) benefits by counting the number of work days in the three month period, multiplying that number by seven, arriving at the total number of hours in that three-month period available for a full time employee in this bargaining unit to work. That total is then divided into the number of hours actually worked by that part time employee in those three calendar months. This, too, is a practice that has been in place for as long as anyone can remember. We believe it is the proper interpretation of the contract.

Finally, you indicated that in response to your inquiry, your department switched your holiday compensation. You indicated that this change of practice occurred on or about July 1 and that, therefore, the July 4 holiday and the Labor Day holiday in 1993 were, in your opinion, applied correctly. The Committee disagrees as that is contrary to the treatment of other part timers in the unit and the practice for 17 years with part timers in the courthouse unit. The Committee explored briefly the concept of asking reimbursement of the excess monies paid to you for the Fourth of July and Labor Day of 1993 but decided that it would waive that request provided the Union and you agree that our payment for those two days cannot be used to demonstrate a practice in either future negotiations or grievance hearings.

Finally, you were very specific in indicating that you have not filed a grievance. If you do decide to file a grievance, it would seem appropriate that the matter go directly to arbitration.

If you have any questions regarding the County's position, please do not hesitate to contact Mr. Sorenson.

On November 19, 1993, Union Local 556, on behalf of Manor, filed two grievances. One grievance alleged that the County had violated Article 25, Section 1, by denying Manor three days wages at a higher rate. The other grievance alleged that the County had violated Article 19, Section 4, of the labor contract by not prorating holiday pay on amount of time worked. The two grievances were denied and, thereafter, submitted to arbitration. Arbitrator McLaughlin's Award of November 15, 1994, denied the grievance which alleged a violation of Article 25, Section 1. Arbitrator McLaughlin's Award dated November 11, 1994, stated as follows:

AWARD

> The Employer violated Article 19, Section 4 of the collective bargaining agreement when it prorated the Grievant's paid holidays consistent with her scheduled hours of work. Because the County had an established practice of prorating the Grievant's paid holidays consistent with her scheduled hours of work, the County is not obligated to prorate any holiday, preceding the filing of the grievance on November 19, 1993, based on time worked.
>
> As the remedy appropriate to the violation of Article 19, Section 4, the County shall prorate holidays covered by the collective bargaining agreement and following November 19, 1993, consistent with time worked. To address any uncertainty in the implementation of this remedy, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this arbitration award.

7. In the Fall of 1993, the County's Payroll Clerk advised Dave Sorenson, the County Clerk and Administrative Coordinator, that Manor had been inappropriately paid out of Budget Line 115. When Sorenson contacted Hass to discuss this matter, Hass requested a meeting, which meeting was held on October 27, 1993, and was attended by Sorenson, Hass and Extension Secretary Gayle Nelson. During this meeting, Hass explained that Manor's share of Budget Line 111 funds would be depleted before the end of the year. Nelson's typewritten notes of this meeting state as follows:

> Meeting with Dave Sorenson October 27, 1993
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> Ed and I met with Dave to discuss 1994 budget.
>
> In 1994 $3,000 will be appropriated to line item #125 and the Summer Agent salary should be charged here. $2,000 will be appropriated to line item #115 for part-time personnel. Dave mentioned that perhaps $2,000 that was taken from the Extension office budget for part-time help could be ear-marked in Contingency Fund in case we would run short.

> We were directed that JoAnn Manore (sic) should not be working any more than 2/5's time since she was hired for that time. However, we could hire Gwen Swanson, Kathy Sears or Patty Engnes. Dave thought that the Personnel Committee would be sending a directive to offices that part-time personnel should be non-union and paid at the County's part-time rate. Dave mentioned the possibility of hiring someone from Express Temporary Service of Red Wing when we are in need of some extra help. I told him that they would still probably charge about $8 a (sic) hour. He said that the county would not have to pay benefits and this would save the county money. Dave also mentioned that perhaps the Personnel Committee would be willing to change our permanent part-time position to be three days instead of two.
>
> Dave also mentioned that it is wrong to be paying JoAnn my hourly rate of pay when she is filling in for me. (Ed requested this in writing which Dave said would be forthcoming.) He mentioned that no one else does this. (Article 25 - Wages. Section 1. All employees shall be paid for their classified rate of pay at all times, except when working in a higher classification, for which they shall receive the higher rate of pay.)

While Nelson's notes are accurate, they do not provide a complete record of the meeting. Nelson's notes do not record the fact that Nelson raised the issue of out of classification pay for Manor by requesting clarification on the rate of pay that Manor should receive when filling in for Nelson; the fact that Sorenson had indicated that "times were changing" and the County would no longer permit the Extension Office to transfer monies from Budget Line 115 to Budget Line 111 without obtaining approval from the Finance Committee; or the fact that Sorenson made a statement that the Extension Office could hire anybody else but JoAnn immediately prior to mentioning Gwen Swanson, Kathy Sears and Patty Engnes. On October 27, 1993, Swanson, Sears and Engnes were regular part-time switchboard operators who were also used to fill in for and assist secretaries in other Departments. When Swanson, Sears and Engnes were used to fill in for or assist employes in other Departments, they were paid out of the other Department's Budget Line 111. On October 27, 1993, Hass could not have used any of the switchboard operators to work in the Extension Office because he did not have any available, i.e., unappropriated, Budget Line 111 funds. After the meeting of October 27, 1993, Nelson and Manor met with Hass to express a shared concern that it would not be possible to complete necessary work if Manor could not work extra days. Hass responded that he would continue to use Manor to work extra days until such time as he received something in writing.

8. At the time that Manor was hired as a regular full-time employe, the Extension Office budget contained a Budget Line 111, which was appropriated for and used to pay the wages of regular full-time employes; a Budget Line 115 which was used to pay a summer agent and to pay Manor for her .4 FTE hours; and a Budget Line 125 which was used to pay Manor for hours worked in excess of her .4 FTE. No other County Department had a Budget Line 125. Hass understood that the November 13, 1992 directive required the Extension Office to pay all

permanent employes, including Manor, out of Budget Line 111 and to only use Budget

Line 115 to pay temporary employes. Budget Line 111 funds are appropriated for regular employes and have matching fringe benefit appropriations. Budget Line 115 funds are appropriated for temporary employes and do not have matching fringe benefit appropriations because temporary employes do not receive fringe benefits. Manor received fringe benefits for all hours worked, regardless of which budget line was charged for those hours. In 1993 and 1994, Hass expended funds from Budget Line 115 to pay Manor for hours worked in excess of her .4 FTE. In 1993 and 1994, the County Board appropriated funds to pay Manor as a .4 FTE and placed this appropriation in Extension Office Budget Line 111. Other County Departments used regular part-time employes to work more than the FTE which had been established by the County Board. At times, the extra hours were funded from Budget Line 111 and with appropriations which became available due to staff turnover or leaves of absences. At other times, Departments expended more money than had been appropriated in Budget Line 111. No regular part-time County employe, other than Manor, has been paid out of Budget Line 115 funds. Prior to September, 1994, Hass, who is employed by the State of Wisconsin, ignored the November 13, 1992 directive because he did not believe that he could follow the directive and meet the needs of his department and he was hopeful that the County would increase Manor's hours so that he would be in compliance with the directive.

9. In 1993 and 1994, budgets administered by Sorenson exceeded their Budget Line 111 appropriations and Sorenson did not seek additional appropriations from the Finance Committee. In 1995, Sorenson requested and received an increase in Budget Line 111 appropriations for the County Clerk's Office. In 1994 and 1995, the County Treasurer's Office exceeded its Budget Line 111 appropriations. In September of 1995, the County Treasurer requested and received additional Budget Line 111 appropriations. In 1994 and 1995, the Emergency Government Office exceeded Budget Line 111 appropriations. The Extension Office could run a deficit in Budget Line 111 and be in compliance with the directive of November 13, 1992. The Extension Office's internal documents, which are not given to the Finance Committee or the County's Bookkeeper, indicate that, in 1992, the Extension Office had a year end deficit in Budget Lines 125 (Part-time) and 141 (Per Diem) of less than $200 each; that in, 1993, the Extension Office had a year end deficit in Budget Line 141 of less than $200, but had a surplus of over $5,000 in Total Salaries; and, in 1994, the Extension Office had a year end deficit in Budget Lines 111 and 141 and that a significant portion of the Budget Line 111 deficit was due to payments made to Manor. Budget documents reviewed by the Finance Committee, unlike the Extension Office's internal documents, do not identify Budget Line 111 appropriations by individual or employe classification. Prior to October 20, 1993, when establishing the 1994 budget, the Finance Committee reduced the Extension Office's Budget Line 115 by $2,000 because the Finance Committee understood that there had been a surplus in that Budget Line. Anderson opposed this reduction. The Extension Office prepares the following year's budget in August; and, in September and/or October, the budget is reviewed by the Finance Committee and acted upon by the County Board.

10. In March of 1994, Hass wrote a letter to the Finance Committee requesting authority to purchase a computer for the Extension and indicating that salary saved in the Family Living Agent position would cover the cost of the computer. In March of 1994, the Finance Committee approved the purchase and transferred $2,974 from the Extension Office's Budget

Line 111 to pay for this purchase. In July of 1994, while Hass was preparing the 1995 Extension budget, it became obvious to Anderson that Hass was using Manor to work more than two days per week and, thus, was depleting the Budget Line 111 funds which had been appropriated for Manor's position. Understanding that the Finance Committee would no longer allow Hass to ignore budget directives, Anderson told Hass that he could not use Budget Line 115 funds to pay Manor and that he could not employ Manor for more than .4 FTE unless he secured additional funding. In July of 1994, recognizing that the Extension Office would have serious problems if it did not have an employe to perform the extra work and that it was best to have the one person who was already trained to perform the extra work, Anderson, as Chair of the Extension's standing committee, decided to request a budget transfer to fund additional days for Manor in 1994 and to request a permanent increase in Manor's established hours from .4 FTE to .6 FTE, effective January 1, 1995. Pursuant to established County Board procedures, these requests were first approved by the Extension's standing committee. The requests were then submitted to the Personnel and/or Finance Committees. In early September of 1994, Hass met with the Finance Committee to discuss the request for an additional day to be added to Manor's position. At that meeting, Hass was told that his request would be considered as part of the 1995 budget process and Hass was directed to follow specified budget guidelines for the use of permanent and temporary secretarial employes. Understanding that Manor had nearly depleted her Budget Line 111 appropriations and that he would not be permitted to use Line 115 appropriations to pay Manor, as he had in the past, Hass decided to advise Manor that he did not have funding to continue to employ her as he had in the past. On or about, September 15, 1994, Hass met with Manor and told Manor that the funds which had been appropriated for her position had been depleted and that her work hours would have to be adjusted accordingly. At that time, the Budget Line 111 funds which had been appropriated for Manor's position were nearly depleted because she had worked more than two days per week. Manor replied that it was not fair; that Hass was changing the rules in the middle of the game; and that Hass should have told her earlier. On September 19, 1994, Hass sent the following letter to Sorenson:

> I am writing to request clarification regarding the part time secretarial position in our office. Could you please clarify the policy regarding the following questions:
>
> 1. What is the total number of days/hours available to work per year for the current position description?
>
> 2. Do we have the ability to adjust the work days in this position?
>
> 3. Can the person filling this position work additional hours above the regularly scheduled hours under a part-time budget line item and what fringe benefits would be available.
>
> Thank you for your clarification of these items.

Sorenson responded by writing "14 hrs" to the first question; "Yes" to the second question; and "No" to the third question. On September 20, 1994, Hass sent the following letter to Manor:

> I am writing in regard to the secretarial employment situation we have been discussing recently in our department. When you applied for the position of Extension Secretary the position description listed it as a part-time (2/5ths) position. As I stated during the interview we were attempting to increase the hours for this position based on the six year plan, but would not know for some time if our request would be approved.
>
> Each year the amount budgeted for this position has been based on an average of two days per week throughout the year. According to the guidelines from the Personnel Department it is permissible to adjust the work schedule for part-time positions based on the needs in the department, as long as we do not exceed the budgeted amount. We have requested you to work additional hours above the two days per week during the first part of this year due to work load requirements. We have also approved your request to adjust your work schedule based on your personal needs for extended weekends.
>
> The 1994 budget allocation for this position totaled $7,828.00 for an average of two days per week. Unless additional funding is transferred into this budget line item, this is the maximum amount of funding available for this position for 1994. Based on the directives from the Finance and Personnel Committees and the Personnel Department, we are no longer able to pay permanent employees with salary funds designated for temporary employees.
>
> By completing the remaining work days provided for in this position you will receive the total amount budgeted for an average of two days per week for the year. In essence you received wages sooner by working more days than the average during the first part of the year.
>
> We will continue to request additional time, but it is uncertain if or when that may be approved. At present we have little choice but to follow the directive of the Finance and Personnel Committees. In order to extend your income and benefits as much as possible for the balance of the year, the best alternative may be to work one day per week with the remaining budgeted funds. By Friday when you are at work we will plan to have the fund balance calculated so we can determine a specific work schedule for the balance of the year.
>
> JoAnn, you perform quality work for our department which is appreciated by Agents, Secretaries and clientele alike. It is my hope that this good working relationship continues.

Thanks for your patience and cooperation.

On September 22, 1994, Hass sent the following letter to Manor:

> The attached information shows the amount of funds appropriated in the 1994 budget for your-position. Based on the amount of funds utilized for the time you have worked this year there are funds available for eight days of work during the balance of 1994. In order to plan for the rest of the year the following dates should be considered as work dates:
>
> Sept.19
> Sept.23
> Sept.26
> Oct. 3
> Oct. 10
> Oct. 17
> Oct. 24
> Oct. 28
>
> At this time these are planned work days. If there is a need to change any of them due to other circumstances we can discuss it further and mutually agree on suitable dates.
>
> If you have any questions or concerns please let me know.

The "attached information" was as follows:

> Extension Secretary Position - part-time (2/5ths)
>
> | | | |
> |---|---|---|
> | 1. | 1994 adjusted budget - salary (based on line item #111) | $7,828.00 |
> | 2. | Amount spent to date through Sept. 16 (from line item #111) | 7,253.56 |
> | 3. | Remaining fund balance in #111 | 574.44 |
> | 4. | Hourly rate for balance of 1994 | 10.47 |
> | 5. | Balance of hours remaining in 1994 (divide # 3 by # 4) | 54.9 |
> | 6. | Balance of work days remaining in 1994 | 7.8 |

(divide #5 by 7 hrs./day)

On September 29, 1994, Hass prepared a "Budget Transfer Request Form" which indicated that, on July 14, 1994, the Ag Committee had approved a request to transfer $361.63 from Extension Budget Line 115 and $2,000 from the County's contingency fund to provide secretarial services for the balance of 1994. Hass believed that this sum would be sufficient to pay Manor to work two days per week for the remainder of 1994. The minutes of the September 30, 1994 Finance Committee meeting include the following:

> Meeting called to order by Chair Wilhelm at 8:10 a.m. with Berggren, Truax, Anderson and Schoeder present.
>
> . . .
>
> Resource Agent/Office Chair Hass present to request transfer of funds for secretarial salary. He has exceeded his 1994 budget for salaries for part time employee. He was advised that the position was authorized for two days per week only. Motion by Berggren/Truax directing Attorney Weld to prepare a side letter agreement between both parties allowing the part time position to exceed the authorized hours and to work two days per week for the remainder of 1994. They further moved that $2,000 from the Contingency Fund and $361.00 from 101-01-55620-115 be transferred into 101-01-55620, line items 111, 151, 152, 153, 154 and 161. Motion carried.
>
> . . .

The Wednesday, October 12, 1994 minutes of the Personnel Committee meeting include the following:

> Meeting called to order by Chair Wilhelm with Schoeder, Truax and Berggren present. Anderson was excused.
>
> . . .
>
> Committee reviewed 10/7 Finance Committee recommendation to increase hours for part time Cooperative Extension Secretary. Motion by Truax/Berggren to recommend to the County Board that the position be increased the equivalent of 7 hours per week effective 1/1/95. Motion carried.
>
> . . .

On October 13, 1994, Hass sent the following letter to the Extension's Agents and Secretaries:

Dear Colleagues,

Last week was very busy in the office with many activities including preparations for the 4-H Banquet and the Dairy Banquet, Budget Hearings and Agent Performance Evaluations. Since hectic schedules make it very difficult for all of us to meet to discuss some common issues I am taking this opportunity for an update on current issues.

Secretarial Help

As you all are aware we have been struggling to get additional secretarial help in the office for several years. The issue came to a head in September when I met with the Personnel/Finance Committees to request funding for an additional day of secretarial help. The decision was deferred for consideration as part of the 1995 budget process, and I was directed to follow specific budget guidelines for the use of permanent and temporary secretarial support based on line item appropriations. The net result was a severe shortage of secretarial help for the balance of 1994 and uncertainty for additional time in 1995.

I subsequently requested additional funding in our budget to extend our part-time secretarial position for two days/week for the balance of 1994. This has been approved pending completion of a side letter agreement among the union/county/JoAnn. When this is finalized it means that JoAnn will be able to continue working two days/week throughout the rest of the year.

This will be a tremendous help for our office because of JoAnn's experience and knowledge of office functions. However, we will still need additional secretarial help to complete the workload that needs to be accomplished.

It has been difficult to identify temporary secretarial help to assist on an on-call basis as we need them. However, I think we need to take every opportunity to identify and train part-time secretaries to fill in as needed. I realize this has its limitations because other secretaries are asked to provide training which reduces their available time to complete projects. For the long term needs of the office I feel we need to begin identifying and training temporary support staff. Unless we are willing to identify and train temporary help we are really limiting our ability to accomplish our future office needs and are placing an undo burden on the secretary which may be the only one working in the office when others are out.

One strategy may be to have temporary help come into the office to assist on large projects (i.e. groundwater database) to provide assistance in completing those projects as well as some training time in the office for other functions.

We also need to plan ahead to provide support to cover the office at times when secretaries plan to be gone on vacations.

Since we are all affected by these situations I am asking for your help in finding the most acceptable solutions to make sure we all are able to complete the tasks necessary for the operation of our office.

At the budget hearings last Friday I again pleaded our case for the addition of one additional day of secretarial time to be added to the part-time secretary position. The request was approved and added to the 1995 budget and now awaits County Board approval.

If the budget is approved as requested it will provide funding for an average of one additional day per week for JoAnn (average of 3 days/week) starting in January of 1995. As I have discussed with JoAnn, office staff, the Extension Committee and the Personnel/Finance Committee the additional day should be flexible throughout the year to provide secretarial support as needed particularly during vacation times of other secretaries and for major projects (i.e. 4-H enrollments) and during the County Fair. The average for the year would be 3 days/week, however some weeks would be more than three days and some less. It was on this basis that the additional day was approved. This will require advance scheduling of vacations and major projects. We will need to put a system in place for scheduling major projects and secretarial vacations to assure that we have sufficient secretarial support at all times to meet the workload demands.

. . .

Office Meeting

There are a number of issues affecting the office which we need to discuss collectively. Therefore, as I have discussed with the agents, an expanded Monday morning conference on October 17, should give us the opportunity to discuss these items. I would ask that everyone reserve the time from 8:40 a.m. to 10:00 a.m. to discuss the following:

- Secretarial hours for the balance of 1994
    - permanent
    - temporary
- Secretarial hours for 1995
- Scheduling of major projects and vacations
- Accountability methods - response to clientele requests
- ROPES Program - expectations and training
- 1995-99 Program Planning (Agents)

I invite your participation and input in the discussion.

On October 25, 1994, Marie Cebulla began employment as a temporary employe in the Extension Office and continued this employment through January of 1995. Cebulla was hired to complete a groundwater study which had been assigned to Manor in July of 1994. At the time that this study was assigned to Manor, she understood that she was to work on the study as time permitted. As of September, 1994, Manor had not had time to perform more than a de minimis amount of work on the groundwater study. In late Summer of 1994, Manor was occupied with performing duties related to the County Fair. Although not hired to prepare 4-H enrollments, Cebulla prepared the 4-H enrollments when Hass determined that the Extension Office's regular secretarial staff, including Manor, could not perform this work within their established work hours. Manor normally prepared the 4-H enrollments, with assistance from the other Extension Office secretaries as time permitted. Cebulla worked 31 days in 1994, and 5 days in January of 1995. Cebulla was not paid fringe benefits and received a lower wage rate than was paid to Manor. Manor was capable of performing all of the work which was performed by Cebulla.

11. On September 26, 1994, the Union, on behalf of Manor, filed a written grievance with Sorenson alleging a violation of the collective bargaining agreement and requesting that the County restore two days per week and quit retaliating against Manor. On November 8, 1994, Sorenson sent the following to Lundgaard, in her capacity as Union Steward:

> The Agreement sent to AFSCME 556 President Jim Matzek on November 4 is the final offer of the County. Since the authorization to fund extended hours during 1994 for the part time Extension Secretary is contingent upon the signing of an agreement and no agreement has been reached, Resource Agent/Office Chair Ed Hass is being instructed to discontinue scheduling hours for the part time secretary effective with the 11/11/94 payroll. The part time Extension Secretary scheduling will resume January 2, 1995.
>
> If you intend to grieve this decision, the Personnel Committee is meeting on November 14 and 28, 1994. Please contact Sandy or me if you wish to be on a future agenda.

A copy of this letter was sent to Jim Matzek, AFSCME 556 President. The Agreement sent to Union President Matzek states as follows:

> **AGREEMENT**
>
> This Agreement is made by and among **Pierce County** ("County"), and **JoAnn Manor,** and **Local 556** ("Union").
>
> WHEREAS, JoAnn Manor has worked for the County as a parttime employee;

WHEREAS, Ms. Manor, at the request of her Department Head, worked additional hours during the first nine (9) months of calendar year 1994 thereby allowing the Department to timely process its workload;

WHEREAS, the Finance Committee has agreed to supplement the Department's budget so that it has adequate clerical support until the end of the calendar year;

IT IS HEREBY AGREED THAT:

1. Ms. Manor will work and/or be compensated for fourteen (14) hours per week for the remainder of calendar year 1994.

2. The 14 hours per week will be scheduled by her Department Head based on the needs of the Department (normally seven hour days on Monday and Friday).

3. In the event Ms. Manor is absent for medical reasons on her scheduled work day, she will be entitled to up to seven (7) hours of pay assuming that she has hours remaining in her sick leave bank.

On November 8, 1994, Sorenson sent the following letter to Hass:

RE: Scheduling of part time Extension Secretary

On September 30 the Finance Committee agreed to transfer additional funds into the 1994 Cooperative Extension budget, extending the hours of the part time Extension Secretary for the remainder of 1994. This approval was based upon an agreement which would note an exception to the original terms of the creation of the permanent part time position. No agreement has been signed by the parties and, therefore, the funds can not (sic) be released. Please be advised that there is no funding available for the position of part time Extension Secretary for the remainder of 1994 and you should discontinue scheduling that employee effective with the 11/11/94 payroll.

If you have any questions, please contact me.

A copy of this letter was also sent to Manor and Union President Matzek. By November 15, 1994, Manor, representatives of the Union and the County had executed the following:

AGREEMENT

In regard to the part time Extension Secretary position currently filled by JoAnn Manor, it is mutually agreed that the following procedure will be followed for the remainder of 1994:

1. Based on the Finance Committee meeting of September 30, 1994, additional funds were authorized for this position to work two days per week until the end of the year.

2. Eligibility for pro-rated fringe benefits requires working a minimum of 14 hours per week as stated in the Personnel Code.

3. The additional funds appropriated will cover salary for two days worked per week and holiday pay until funds are depleted. Since the authorized funds will be depleted prior to the end of 1994 with 12.6 hours remaining, JoAnn will take two (2) earned vacation days during the last week of December.

The parties agree that this Agreement is non-precedential.

Manor worked the remainder of 1994 in accordance with the above agreement. After Manor's position was increased to a .6 FTE, Hass asked Manor to flex her 1995 work days such that she would work fewer days per week in the early part of the year and more days per week in the latter part of the year so that Manor would be available to work during periods of peak workload. Manor preferred to work a consistent three days per week, but agreed to Hass' request. On December 27, 1994, Hass sent the following to Sorenson:

JoAnn Manor will begin working 0.60 FTE starting in January of 1995, and I am writing to request clarification on some employment and benefit issues as follows:

1. Work schedule. This position is funded as a 0.60 FTE position averaging 3 days/week throughout the year. In the recent past, the days worked in the office have generally been Mondays and Fridays, however, this has varied. It is my understanding that the specific days to be worked are flexible based on the needs of the department, provided adequate advance notice is given for scheduling.

There will be times when other secretaries are on vacation or during the county fair when JoAnn will be requested to work five days during those weeks. Correspondingly, there may be other weeks when she only works one day that week. Scheduling of work in the department will be based on the understanding that there will be a total of 156 work days (52 weeks X 3 days/wk) for the year with the flexibility of scheduling these days according to the needs of the department with

advance scheduling.

2. Employee benefits. In the Personnel Code, Section IX. A. it states that "Individuals appointed to permanent positions normally scheduled to work less than full-time shall be eligible for fringe benefits on a pro-rata basis, but must work at least fourteen (14) hours per week." Based on the flexible work schedule discussed in the paragraph above, there may be some weeks involving less than 14 hours work. Since this is a 0.60 FTE position it is my understanding that benefits would be based on 60% of a full time position, and eligibility would not be limited due to occasional weeks involving less than 14 hrs. of work.

3. Payroll. Since this position is 0.60 FTE and budgeted at that level, is it possible to establish a regular payroll check based on 3 work days/week? This would provide uniformity by basing each two week pay period on 6 work days throughout the year. The actual work schedule would vary based on scheduling within the department with the maximum annual 156 work days.

4. Health Insurance. If it is possible to establish the payroll schedule as described in the paragraph above, then the health insurance contributions each month could be paid 60% by the county and 40% by the employee. The rate could then be the same for each month, thereby, avoiding the necessity of calculating the contribution based on the actual work schedule the previous quarter.

5. Holiday Pay. If this arrangement can be established then holiday pay would be based on 60% employment (7 hrs./day X 60% = 4.2 hrs.) for each holiday. A voucher could be prepared for payment of holiday pay for each pay period which includes a holiday.

I would appreciate if you could review these items prior to January 1995 to assure that we all have a common understanding of these Policies.

Thank you.

On December 30, 1994, Hass sent the following to Manor:

Starting in January 1995 your position will change from 0.40 FTE to 0.60 FTE for the year. The additional time was approved based on departmental needs provided a work schedule is arranged in advance. There is no intent to have a situation where an employee would be "on call".

Based on a 0.60 FTE position for the year, one option we have discussed would be to establish a payment schedule for each pay period based on an average of three days work per week throughout the year. All fringe benefits then would be

based on the 60% level in each pay period. When we discussed this option previously, we both verbally agreed to pursue this arrangement. The Personnel Dept. also supported this procedure. Therefore, in a letter to Dave Sorenson dated 12-27-94 I requested if this procedure could be established. Subsequently, Dave discussed this with representatives of the union. It is my understanding that union representatives have indicated that this procedure would have to be negotiated and, therefore, would not be put in place starting in January 1995.

Therefore, based on discussions with the Personnel Dept., it is my understanding that we will then continue with the existing procedure, whereby, holiday pay and health insurance benefits are based on the actual time worked in the previous quarter.

I have also attached a copy of a letter from Administrative Coordinator Dave Sorenson regarding scheduling of permanent part time employees for 1995. As you will note, the directive applies to all departments having permanent part time employees.

If you have any questions I am available to discuss this or you may wish to contact the Personnel Dept.

The enclosed letter from Sorenson was addressed to the Cooperative Extension, County Clerk, District Attorney, Emergency Government, Public Health, Register of Deeds, Sheriff, and Treasurer and states as follows:

RE: Scheduling of Permanent Part Time Employees for 1995

Each of your departments has one or more permanent part time AFSCME Courthouse employees authorized for 1995. Each department has been granted an employee/employees for a specific number of hours annually based on need and financing as determined by the Finance Committee and Personnel Committee. You must not exceed that number of hours or expend any funds other than those salary/benefits line items appropriated in your budget to fund these positions. To exceed the budgeted amount will require prior authorization from the standing committee, Personnel Committee and Finance Committee.

If you have any questions, please contact Sandy or me.

12. In January of 1995, Manor's January 1, 1995 holiday was prorated and paid on the basis of hours worked during the previous quarter. On March 27th, 1995, Union Steward Lundgaard telephoned Langer to advise Langer that, since Manor was now a .6 FTE employe, she

should have all of her benefits prorated at sixty percent. Following this conversation,

Lundgaard understood that she and Langer had reached an agreement and that Langer would have County Attorney Weld confirm this agreement in writing. On April 6, 1995, Weld sent the following to Langer:

> RE: **Manor Grievances**
>
> You have requested that I develop a sideletter implementing the McLaughlin award in the holiday pay grievance case. As you will recall, JoAnn Manor filed two grievances against the County one of which addressed her rate of pay. That grievance was decided by Arbitrator McLaughlin in the County's favor and there is no need for remedial action. The second grievance addressed the appropriate holiday pay for part timers in the courthouse unit. The contract language, Article 19, Section 4, reads as follows:
>
> Regular part time employees shall receive pro rated fringe benefits in accordance with the amount of time worked.
>
> The County had a consistent practice dating back to the 1970s by virtue of which it prorated the holiday benefit for part timers in the courthouse unit on hours scheduled rather than hours worked. This is not consistent with the way the County prorates the holiday benefit for part time employees in the nurses unit nor is it consistent with the way the County prorates other benefits for part time employees in the courthouse unit. It is my understanding that the County utilizes a quarterly calculation for prorating the holiday benefit in the nurses union and in prorating other benefits in the courthouse union. It would seem that such a proration would make sense for this benefit as well. Accordingly, I have incorporated my understanding of that practice into this sideletter.
>
> If you have any questions or if this doesn't meet the County's need, please call.

A copy of this letter was sent to Union Representative Hartmann. The attached side letter states as follows:

> **SIDELETTER**
>
> **WHEREAS**, Arbitrator McLaughlin issued a decision in 1994 in which he held that the County's 20-year practice of prorating holiday benefits based on scheduled hours, as compared to hours worked, conflicted with Article 19, Section 4 and, therefore, he ordered the County to prospectively prorate the holiday benefit based on hours part time employees work; and,
>
> **WHEREAS**, the County prorates the holiday benefit for part time

employees in the nurses unit in the following fashion; and,

WHEREAS, the County prorates all other benefits for part time employees in the courthouse unit in the following fashion;

WHEREFORE, the parties hereby agree as follows:

1. The year will be divided into four quarters:
   a. January, February and March;
   b. April, May and June;
   c. July, August and September; and,
   d. October, November and December.

2. Hours worked in the previous quarter will be used to determine a part time employee's eligibility for the holiday benefits in the subsequent quarter.

3. This arrangement will be in place until the end of the current contract term.

Lundgaard did not agree that this letter reflected the agreement which had been reached with Langer and advised Langer of this fact. Langer agreed that this letter did not reflect the agreement which had been reached between Langer and Lundgaard and told Lundgaard that she would speak with Attorney Weld. Lundgaard and Manor understood that, for employes who experienced an increase in established hours, the County had a past practice of prorating benefits on the basis of the newly established hours, rather than on hours worked during the past quarter. Langer understood that, for part-time employes who do not have a change in their established hours, the County consistently prorated benefits based upon hours worked during the prior quarter. When Darlene Dailey's position was increased from 40% to 100% in January of 1996, she immediately received benefits at 100%. When Julia Hines' position was reduced from full-time to part-time in 1994, her vacation and sick leave benefits were prorated on the basis of her newly established FTE, rather than the 100% which she had worked during the prior quarter. After three months, Hines' vacation and sick leave did not accrue at her FTE rate, but rather, fluctuated each quarter. On April 13, 1995, Weld sent the following to Langer:

RE: **Courthouse Unit Sideletter**

Following transmittal of my April 6, 1995, letter, you requested that I revise the proposed sideletter implementing the McLaughlin award to reflect a "conceptual agreement." It is my understanding that both the County and the Union would like to use hours budgeted in prorating benefits for all part-time employees in the courthouse unit.

A copy of this letter was sent to Hartmann. The revised proposed sideletter is as follows:

This is an agreement by and between Pierce County and AFSCME Local 956.

1. Article 19, Section 4., of the current agreement provides that fringe benefits for part-time employees shall be prorated in accordance with the amount of time worked.

2. In the past, the County utilized the hours worked in the prior quarter (3 months) to prorate all benefits, except holidays, in the subsequent quarter.

3. In the past, holidays were prorated based on hours scheduled.

4. For calendar year 1995, all benefits, including holidays, shall be prorated based on the hours budgeted for fiscal year 1995.

5. Employees will only be allowed to work up to the number of hours budgeted. Therefore, in the event an employee is budgeted to work 910 hours in a year (50%), that employee's benefits will be based on that budgeted amount, i.e. 50%.

6. The 1995 budgeted hours for part-timers in the courthouse unit are:

   (chart omitted)

7. Part-time employees may not work beyond the total number of hours budgeted without County Board approval.

8. In the event the County Board adjusts the budget to reflect an increased (or decreased) number of hours for a part-time employee, benefits earned subsequent to the date of change will be prorated based on the revised number of hours.

9. The parties further agree that this agreement shall sunset at the end of the 1995 contract. The parties will, therefore, negotiate on this issue in negotiations for a 1996 agreement.

The chart which was incorporated in Item 6 above indicated that employes who were budgeted for 3 days' work per week, as was Manor, would have a benefit proration of 60%. On June 1, 1995, Weld sent a letter to Union Staff Representative Steve Hartmann which indicated that the parties had reached an agreement on prorating part-time benefits. Weld indicated that he understood that Manor's benefits would be prorated on the basis of scheduled hours and that the benefits of all other part-time employes would be prorated on the basis of hours worked during the preceding quarter. On June 12, 1995, Hartmann sent the following to Weld:

Prior to January 1, 1995 JoAnn Manor was a two day per week employee. By action of the County Board her work was increased by "one additional day per week", effective January 1, 1995. This changed her from a 40% employee to a 60% employee.

To meet the needs of her department and the County, she agreed to flex her additional day per week so long as she was treated as a 60% employee for fringe benefits. Effectively, she would work fewer days per week (and suffer a smaller paycheck and larger fringes) in the early part of the year in return for smoothing out her fringe benefits at 60% year round. Toward the latter half of the year she would work more days than the three days per week authorized by the board (and receive more pay but lesser fringes) such that at the end of the year she would have worked an amount equal to three days per week for the whole year (60%), and would receive fringe benefits equal to her days worked (60%). The only circumstance that would alter this would be if the County worked her more days per year than three days per week times 52. In that case the McLaughlin decision would rule.

This offer has not been acceptable to Administration even though this is done in the Treasurer's office to smooth out the bumps (tax times) in that offices year.

Therefore the Union has no choice but to hereby inform the County that it desires to move the prorationing grievance to arbitration and inform the County that Ms. Manor be moved to a permanent three day per week schedule as approved by the County Board except that she be allowed to work sufficient additional days the rest of 1995 to make up for those weeks early in 1995 when she worked less than three days per week as a sign of her good faith.

Finally, it is the belief of the Union that the reason that this matter has not been previously settled is animus to this employee and retaliation for her Union activities. We will take such action as is appropriate to remedy this violative conduct.

On June 16, 1995, Hass sent the following to Richardson:

On January 1, 1995 the position of Extension Secretary filled by JoAnn Manor increased from 0.40 FTE to a 0.60 FTE with the additional time being on a flexible schedule to accommodate departmental needs. As part of the agreement to work the additional time in a flexible schedule the payment of fringe benefits at 60% throughout the year would provide for a uniform payment of fringes consistent with the approved position.

> Therefore, I would request that health insurance premiums and holiday pay be paid at 60%. Also, since the position status changed effective January 1, 1995 I would ask that you calculate the amount of reimbursement necessary to accommodate a 60% payment of the health insurance premium and holiday pay since that date. When that amount is calculated we could then submit a voucher for payment.
>
> Thank you.

On June 20, 1995, County Administrative Assistant Sandra Langer sent a letter to Hass which reflected that a settlement had been reached between the Union and the County on the proration of Manor's holiday and health insurance premiums. This settlement reflected that each of these benefits would be prorated at 60%, retroactive to January 1, 1995. On June 27, 1995, Lundgaard sent the following letter to Langer

> Regarding: Calculation of Vacation and Sick Leave Benefits
> (**JoAnn Manor**)
>
> Vacations are earned on an annual basis, unlike sick leave which is earned at the rate of 1 day a month.
>
> JoAnn Manor's vacation benefits earned May 15, 1994 through May 14, 1995 shall be calculated as follows:
>
> 05/15/94 - 12/31/94 prorated on actual hours.
> 01/01/95 - 05/14/95 prorated at 60% of full time.
>
> Future prorations will be based on a straight 60% of full time as long as she is a 60% employee.
>
> JoAnn's sick leave, earned monthly shall be calculated as follows:
> Prior to 1/1/95, prorated on actual hours.
> 1/1/95 forward, prorated at 60% of full time: 4.2 hrs/month
>
> According to the individual vacation/sick leave chart distributed by Sue on June 14, 1995, JoAnn has been short-changed on her vacation and sick leave benefits.

On August 1, 1995, Langer sent the following to Lundgaard, in her capacity as Union Steward:

> As I stated in our telephone conversation of 7/27, the County also wishes to resolve this issue on behalf of JoAnn Manor. We have drafted two different

> proposals, I believe, in an attempt to clarify contract language. Neither has been approved by your unit. In June, we received a memo from Ed Hass, Extension Chair, suggesting uniform payment of the health insurance premiums and holiday pay to reflect the .6 FTE. We responded to this and an adjustment was made immediately, addressing what we considered to be the only unresolved issue in the proration. We had hoped our action demonstrated our willingness to cooperate in this matter. It appears, however, that the vacation and sick leave are now to be addressed as a separate issue.
>
> A final settlement to this issue has apparently not been arrived at even though proration of holiday pay was the issue in the original arbitration issued November 15, 1994. At a meeting on May 11, 1995, when this issue was again brought up, I requested that Mr. Hartmann or members of the Local prepare and present us with a specific proposal which could address any issues surrounding this matter so that this could be concluded. We have not received anything in writing or otherwise to assist us.
>
> The County is desperate to resolve this matter to everyone's satisfaction and does not wish to again proceed to arbitration. I will meet with you at your convenience to review any proposal.

Lundgaard responded by reminding Langer that she had sent the memo of June 27, 1995. During the 1995 Fair, Manor requested comp time. Previously, Fritz and Nelson had received comp time for working the Fair, but Manor had not received comp time. After Manor requested comp time, the County Administration told the Extension Office that comp time had to be reported to the County Administration. Fritz did not want to report her comp time to County Administration because she was concerned that the method that would be used to calculate her comp time could affect her retirement. Fritz understood that County Administration wanted to have comp time reported in order to maintain accurate records. After the 1995 Fair, the Extension Office had a staff meeting during which Hass commented that "we did not have any problems in our office until JoAnn started working there." On November 30, 1995, Hass sent the following letter to Anderson:

> Yesterday Julie Brickner, Gayle Nelson and I discussed our budget situation and options to cover the line item deficits. It was my understanding based on the November 13, 1992 Finance Committee Directive (sent earlier) that we were required to make line item transfers to enable us to cover deficits in other line items. This would then allow us to expend funds for the approved purpose.
>
> However, Julie stated that it is acceptable to run line items in a deficit provided the overall budget is not exceeded. Therefore, it will not be necessary to request all of the line item transfers that the Extension Committee approved at the last meeting.

Also, for the Sundry line item #299 (fee-generating workshops, etc.) Julie suggested that it should not be a problem to request additional funds ($600) in the budget because we have generated more revenues than expenses. She said it does not come out of the General Fund, but rather handles it as a paper transfer in conjunction with Rod Paulson's audit. She indicated that this is the expected procedure and that other departments do this frequently.

Therefore, for the December 15 Finance Committee meeting I have asked Sandy to include the following two agenda items:

1. Budget Transfer from 1995 to 1996 Budget for Equipment (computers) ($13,030 from salary savings).

2. Budget Transfer into Extension Sundry Line 1299 ($600).

These items are detailed more on my letter to Sandy.

I hope this is all clear and you are in agreement. Please call if you have questions or concerns.

Thank you.

13. On January 31, 1996, representatives of the Union and the County settled a 1995 grievance on the proration of Manor's 1995 vacation and sick leave benefits. This settlement states as follows:

SETTLEMENT OF PRORATION BENEFITS
Case 113 No. 53341 MA-9317

Courthouse Employees of AFSCME Local 556 will withdraw its request for arbitration hearing on Monday, February 5th, 1996 on the above issue provided Pierce County will prorate fringe benefits for JoAnn Manor based on hours worked in the same manner as it does for all other part-time employees.

To make the employee whole, the following will have to take place:

1. Due to a status change on 1/1/95 the vacation and sick leave benefits should have been calculated at 60% of FTE.

   3.78 hours of vacation and 3.78 hours of sick leave for January of 1995 will be changed to 4.2 hours each.

3.78 hours of vacation and 3.78 hours of sick leave for February of 1995 will be changed to 4.2 hours each.

3.78 hours of vacation and 3.78 hours of sick leave for March of 1995 will be changed to 4.2 hours each.

Vacation equals an additional 1.26 hours
Sick leave equals an additional 1.26 hours

2. Insurance premiums for all of 1995 were prorated at 60%. Actual hours worked by JoAnn were 63% of FTE. Refund to JoAnn the difference of $152.44.

   Holiday pay for all of 1995 was prorated at 60%. The difference of $38.39 shall be paid to JoAnn.

3. Continue to prorate fringe benefits in the same manner as all other part-time employee's benefits are calculated. For the first quarter of 1996 this calculates to be 69% proration.

Prior to January of 1995, the County prorated the fringe benefits of part-time bargaining unit employes on the basis of hours worked in the previous quarter, except that the holiday pay of part-time employes was prorated on the basis of the FTE which had been established by the County Board. This exception was the subject of Arbitrator McLaughlin's Award of November 11, 1994. Commencing with January 1, 1995, the County prorated the fringe benefits of part-time bargaining unit employes who did not move between part-time and full-time employment on the basis of hours worked in the previous quarter, unless the parties mutually agreed otherwise. Commencing on January 1, 1995, and until the parties mutually agreed otherwise, the County prorated Manor's fringe benefits on the basis of hours worked in the previous quarter.

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

CONCLUSIONS OF LAW

1. The parties' collective bargaining agreement contains a grievance procedure which provides the exclusive remedy for the allegation that Respondent has violated the parties' collective bargaining agreement and, therefore, it is not appropriate for the WERC to assert jurisdiction over Complainant's allegation that Respondent violated Sec. 111.70(3)(a)5, Stats., by violating the parties' collective bargaining agreement, when Respondent hired Marie Cebulla in late October of 1994.

2. The WERC does not have jurisdiction to determine whether or not Respondent conduct occurring prior to October 5, 1994, violates any provision of Sec. 111.70(3)(a), Stats., because such conduct is beyond the one year statute of limitations set forth in Sec. 111.07(14), Stats.

3. JoAnn Manor engaged in protected, concerted activity on October 20, 1993, when she met with the County Personnel Committee and requested that the County prorate the holiday pay of part-time employes on the basis of hours worked.

4. Complainant has not shown, by a clear and satisfactory preponderance of the evidence, that Respondent conduct occurring on or after October 5, 1994, has violated Sec. 111.70(3)(a)1 or 3, Stats., as alleged by the Complainant.

Upon the basis of the above and foregoing Conclusions of Law, the Examiner makes and issues the following

ORDER

The Complaint filed by AFSCME Local 556, Pierce County Courthouse Employees against Pierce County is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 9th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

PIERCE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed on October 5, 1995, alleges that Respondent Pierce County committed prohibited practices by engaging in a course of harassing and retaliatory conduct against JoAnn Manor as a result of her exercise of her lawful collective bargaining rights in violation of Sec. 111.70(3)(a)1, 3, and 5, Stats. Respondent denies that it has committed the prohibited practices alleged in the complaint.

COMPLAINANT'S POSITION

JoAnn Manor, accompanied by Union Steward Foley, appeared before the Personnel Committee in October of 1993 to assert that she had not been paid holiday pay in accordance with the Union contract. Granting Manor's request would have abolished the alleged seventeen year past practice of not prorating holiday pay according to the contract and, thereby, would have affected all part-time employes in the bargaining unit. Despite the County's assertions to the contrary, Manor was engaged in protected, concerted activity at that time.

Within one week of this October meeting, Personnel Committee Chairman Anderson and County Administrative Coordinator Sorenson took action to reduce Manor's normal hours of work by denying Manor the opportunity to perform the extra work that she customarily performed. In September and November, 1994, Manor was threatened with layoff. This threat of layoff was directly related to the threats of reprisal issued in October of 1993. In 1995, the County refused to prorate Manor's benefits in the same manner as all other part-time employes. By these actions, the County has engaged in conduct which has a reasonable tendency to interfere with the exercise of her Sec. 111.70(2) rights and, thus, has violated Sec. 111.70(3)(a)1, Stats.

Evidence of the County's hostility towards Manor's exercise of her Sec. 111.70(2) rights includes the following: the immediate and retaliatory actions of Anderson; Sorenson's statement that extension work could be performed by "anyone but JoAnn"; Resource Agent Hass' statement, in a staff meeting, that they did not have any trouble until JoAnn showed up; the threatened layoff in the Fall of 1994; the employment of a temporary to perform Manor's normal and customary work; and the year long struggle to get the benefit proration that every other part-time employe received. The County has retaliated against Manor for exercising her Sec. 111.70(2) rights in violation of Sec. 111.70(3)(a)3, Stats.

The County violated the collective bargaining agreement when it hired a temporary employe to perform Manor's work in the fall of 1994. By such conduct, the County violated Sec. 111.70(3)(a)5, Stats.

The Pierce County Finance Committee instructions, relied upon by the County to legitimize its conduct, are strictly enforced only when convenient to cover actions which are violative of MERA. The County's excuse for Sorenson's "use any other part-timer in the bargaining unit but Manor" comment is not credible. Nor does the record support the County's assertion that Manor was treated like every other employe when the County prorated her January 1, 1995 holiday pay based on the previous quarter.

In remedy of its statutory violations, the County should be ordered to:

1. cease and desist from interfering with employes' Sec. 111.70(3)(a)1, 3 and 5 rights.
2. pay, with interest, Manor for all hours worked by Cebulla in the fall of 1994 and January of 1995, and adjust Manor's pro-ration for 1995 accordingly.
3. post a notice including the above admonitions; and
4. any other remedy the Commission may deem appropriate.

RESPONDENT'S POSITION

In 1993, the Finance Committee removed $2,000 from the 1994 Budget Line 115 because the extension had not used the entire $4,000 which had been budgeted in 1993. This decision took place while Hass was in Australia, before Manor appeared before the Personnel Committee. At that time, the Finance Committee had no idea that the extension was not following its November, 1992 directive to not use Budget Line 115 monies for regular part-time employes such as Manor.

Manor raised a concern about her own holiday pay to the Personnel Committee. This action was for her personal benefit, not the benefit of other employes similarly situated, and therefore, is not concerted activity.

In the October 27, 1993 meeting, Sorenson informed Hass and Nelson of the need to use Manor only two days per week as authorized in the budget. As Sorenson testified, his suggestion that the extension use the part-time receptionists to work in the extension office was inappropriate because they, like Manor, would have to be funded out of the extension's depleted Budget Line 111.

At the time that Hass requested approval of the Finance Committee to transfer monies from Budget Line 111 to upgrade a computer, he thought he had extra Budget Line 111 funds and did not anticipate that the Finance Committee would preclude the extension from continuing to use Budget Line 115 monies to pay Manor. It is not evident that the decision to transfer these monies was based upon anything other than a desire to meet the needs of the Department.

In September of 1994, Hass informed Manor of the status of her position and the efforts being undertaken to address the budgetary situation. The information which he provided was factual, presented positively and was not threatening.

The Finance Committee approved a transfer of $2,000 from the contingency fund to subsidize Manor's regular schedule (two days per week) for the remainder of 1994. Manor continued to work two days per week. The Union's September, 1994 grievance, requesting that the County make Manor whole by restoring her two days per week demonstrates that Manor's regular work schedule was two days a week. Manor was not reduced in hours in 1994.

The hours worked in late 1994 by temporary employe, Marie Cebulla, were not hours previously scheduled for Manor, but rather, involved a special project which had been languishing since 1991. Nelson, another bargaining unit member, suggested that Cebulla handle the 4-H enrollment. Budget Line 115 funds were available to pay a temporary employe to perform this work, but funds were not available to pay a regular employe to perform this work.

The Union claims that other part-time employes have consistently worked over their allotted percentage of authorized hours and have not been threatened with layoff. However, after November 19, 1992, Manor was the only regular employe in the County who continued to be paid out of Budget Line 115, the temporary employe budget line.

Every part-time employe except one has received fringe benefits prorated on the basis of hours worked during the previous quarter. By mutual agreement, the one exception has her benefits annualized over the year. The calculation of Manor's holiday pay in 1995 was consistent with the remedy requested in her grievance. Manor was treated better, not worse, than other employes in the first quarter of 1995 and there was no damning admission in the settlement.

As Secretary Barb Fritz testified, Hass' comment was made after the 1995 County Fair. While this statement may have expressed a measure of frustration, it does not demonstrate hostility.

Manor has been affected by decisions made by the County. However, animosity toward her or the Union was not a factor in those decisions. Rather, there are valid business reasons for the actions taken by the County. As the WERC has ruled, employer actions taken for a valid business reason are not prohibited.

The parties have a contractual grievance arbitration procedure which provides the exclusive remedy for the Union's claim that the County violated the collective bargaining agreement by hiring the temporary employe, Marie Cebulla. The Commission should not assert jurisdiction over the breach of contract claim.

The alleged claims of prohibited practice are without merit. The Examiner should dismiss the complaint in its entirety and award attorneys' fees.

DISCUSSION

The Complainant alleges that the Respondent has engaged in a course of harassing and retaliatory conduct against JoAnn Manor in response to her exercise of protected, concerted

activities in violation of Sec. 111.70(3)(a)1, 3 and 5, Stats. The Respondent denies that it has committed the prohibited practices alleged by the Complainant and asserts that the Commission should not exercise its jurisdiction to hear Complainant's Sec. 111.70(3)(a)5 claim.

The prohibited practice complaint was filed on October 5, 1995. The timeliness of complaints of prohibited practice is governed by Secs. 111.70(4)(a) and Sec. 111.07(14), Stats., which, read together, provide:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged.

In arguing that the Respondent has violated MERA, the Complainant relies upon conduct which occurred in 1993, 1994 and 1995. Where, as here, a complaint contains allegations which occur within and without the statute of limitations period, the Commission has relied upon LOCAL LODGE 1424 V. NLRB (BRYAN MFG. CO.), 362 US 411 (1960), 45 LRRM 3212, 3214-15, in which the United States Supreme Court stated as follows: 1/

> It is doubtless true that Sec. 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of Sec. 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarily does not bar such evidentiary use of anterior events. 6/ The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (footnote omitted)

As Examiner McLaughlin stated in SCHOOL DISTRICT OF CLAYTON, DEC. NO. 20477-B (10/83):

> The BRYAN decision is an appropriate guide for applying Sec. 111.07(14), Wis. Stats., because both the federal and state acts serve the same underlying purposes. Both acts involve a legislatively enacted limitation on legislatively created employe rights. Each act limits the time for asserting those rights to preclude the resolution of labor disputes on stale evidence, and to foster the stability of employer/employe relations by demanding that disputes be promptly asserted and not be left to fester indefinitely. 6/ (footnote omitted)

As Examiner McLaughlin stated in MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-C (9/89):

> The BRYAN analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

Under the BRYAN analysis, the Examiner may consider evidence of events occurring outside the one year statute of limitations which will "shed light" on the alleged prohibited practices occurring within the one year statute of limitations. However, the Examiner does not have jurisdiction to determine whether or not events occurring outside the statute of limitations constitute unfair labor practices.

Sec. 111.70(3)(a)5 Claim

Complainant alleges that Respondent breached the parties' collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when the Respondent hired a temporary employe, Marie Cebulla, to work in the Extension Office in late October of 1994. The Respondent argues that the WERC should not exercise its jurisdiction over this Sec. 111.70(3)(a)5 claim because the parties' contractual grievance procedure provides the exclusive remedy for Respondent's breach of contract claim.

The alleged breach of contract occurred within the one year statute of limitations applicable to complaints of prohibited practices. However, generally, the WERC will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure with final and binding arbitration. [ROCK COUNTY, DEC. NO. 28494-A (JONES, 1/96); JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET AL., DEC. NO. 16753-A (YAEGER, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (YAEGER, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/72)]

A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language which provides it is not. [MAHNKE V. WERC, 66 WIS.2D 524, 529] 2/

The parties' collective bargaining agreement contains a grievance procedure which provides for final and binding arbitration. This agreement does not contain express language stating that final and binding arbitration is not the exclusive remedy for a breach of contract claim. The record does not establish that Complainant has a valid excuse for failing to exhaust the contractual grievance procedure. Accordingly, it is not appropriate for the Examiner to assert jurisdiction over Complainant's Sec. 111.70(3)(a)5, Stats., claim.

Sec. 111.70(3)(a)1 and Sec. 111.70(3)(a)3

As Examiner Mawhinney has stated in CITY OF OSHKOSH, DEC. NO. 28971-A (8/97):

Section 111.70(3)(a), Stats., states:

> It is a prohibited practice for a municipal employer individually or in concert with others:
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., referred to above, states:

> 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, . . .

To establish a claim of interference, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of the section (2) rights. 1/ It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. 2/ However, employer conduct which may well have a reasonable tendency to interfere with an employe's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. 3/

In CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), the Commission elaborated on concerted and protected activity as follows:

> The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection..." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by the MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.
>
> . . .
>
> It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns.

1/ BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

2/ CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84).

3/ CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Complainant must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Manor was engaged in protected activity; and

2. The employer was aware of the activity; and

3. The employer was hostile to the activity; and

4. The employer's conduct was motivated, in whole or in part, by hostility toward

the protected activity. 3/

An employer who violates Sec. 111.70(3)(a)3, Stats., derivatively violates Sec. 111.70(3)(a)1, Stats.

As Examiner Crowley stated in CITY OF NEW LISBON, DEC. NO. 28935-A (7/97):

> It is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors for such action is the employe's protected concerted activity. 8/ If animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action, as an employer may not subject an employe to adverse consequences when one of the motivating factors is his union activity. 9/ Evidence of hostility and illegal motive may be direct (such as with overt statements) or, more often, inferred from the circumstances. 10/

8/ LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78).

9/ MUSKEGO-NORWAY, SUPRA.

10/ In TOWN OF MERCER, DEC. NO. 14783-A (GRECO, 3/77), the Examiner stated that:

> > . . . it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, SHATTUCK DENN MINING CORP. V. NLRB, 362 F.2D 466, 470 (9TH CIR., 1966):
> >
> > Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.

1993 Conduct

As discussed SUPRA, the Examiner does not have jurisdiction to determine whether or not 1993 conduct of Respondent Representatives violates MERA. The Examiner, however, may review such conduct for evidence that Respondent Representatives were hostile toward Manor for

engaging in concerted, protected activity.

As the Respondent argues, at the time that Manor met with the Personnel Committee on October 20, 1993, she had not filed a grievance on holiday pay. However, as Respondent's Attorney recognizes in his letter of November 4, 1993, when Manor met with the Personnel Committee, she was seeking a "review of the treatment for part time courthouse employes" and asking that the Committee consider adjusting Manor's pay and "amending the current practice of prorating holiday pay for part timers on the basis of hours scheduled."

Manor's behavior at the October 20, 1993 meeting of the Personnel Committee manifests and furthers collective concerns. Thus, contrary to the argument of the Respondent, Manor engaged in protected, concerted activity when she addressed the Personnel Committee on October 20, 1993 and requested that the Respondent change its method of prorating the holiday pay of part-time employes.

On October 21, 1993, Ray Anderson, Vice-Chair of the Personnel Committee, telephoned Ed Hass, the head of Manor's Department, and told Hass that Manor could only work two days per week; that the Extension would have to hire temporaries to work any extra time; and that $2,000 would be cut from the part-time budget. On that same date, Hass relayed this conversation to Manor, who concluded that retaliation was swift.

Anderson acknowledges that he spoke with Hass on October 21, 1993. According to Anderson, ". . . I told him that the financing and that was determined, and no exceptions whatsoever, that he no longer could use 115, or to hire employee, JoAnn Manor, beyond the regularly scheduled hours." Anderson maintains that this conversation occurred during budgetary discussions and that Manor's expression of concern regarding the proration of holiday pay had nothing to do with any of these discussions. 4/

It is not evident that any Respondent Representative exhibited hostility towards Manor during the October 20, 1993 meeting. Nor is it evident that Anderson made any reference to the Personnel Committee meeting of October 20, 1993, or to Manor's holiday pay claim, during the telephone conversation of October 21, 1993. The Complainant relies on the nature of Anderson's statements and the timing of Anderson's statements to argue that Anderson was hostile toward Manor for engaging in concerted, protected activity.

Manor customarily worked more than two days per week. Thus, Anderson's directive that Manor could only work two days per week and that the Extension would have to hire temporary employes to work any extra time, if followed, would have reduced Manor's work opportunities. By providing such a directive on the day after Manor had engaged in protected, concerted activity, Anderson engaged in conduct which gives rise to an inference that Anderson was hostile to Manor's exercise of her Sec. 111.70(2) rights.

For budget year 1993, Manor's position had been established and funded as a .4 FTE. By bringing her holiday pay claim before the Personnel Committee, Manor confirmed that she was working more than the .4 FTE which had been authorized and funded by the County Board. Thus, the timing of Anderson's directive is consistent with his claim that he was addressing budgetary

considerations.

Under the Finance Committee's directive of November 13, 1992, Budget Line 115 funds are appropriated for temporary employes and may not be used to pay part-time employes. Budget Line 115 and Budget Line 111 monies are not fungible because Budget Line 111 funds have matching fringe benefit appropriations, while Budget Line 115 funds do not. Thus, the nature of Anderson's directive is consistent with Anderson's claim that he was addressing budgetary considerations.

In summary, the nature and timing of Anderson's directive gives rise to an inference that Anderson was hostile toward Manor for engaging in protected, concerted activity. This inference, however, is countered by other record evidence which provides a reasonable basis to conclude that, on October 21, 1993, Anderson was addressing budgetary concerns by directing Hass to follow established budgetary procedures.

Manor recalls that Hass told her that monies had been cut from the part-time budget. Anderson's testimony, however, demonstrates that the $2,000 had been removed from Budget Line 115 prior to October 20, 1993; that the Finance Committee reduced the budget because there had been a surplus in 1993; and that Anderson had opposed the reduction.

By reducing the Extension Office's 1994 Budget Line 115 by $2,000, the Finance Committee reduced a fund that Hass had used to pay Manor to perform extra work. However, by engaging in such conduct, the Finance Committee, in general, and Anderson, in particular, has not demonstrated hostility toward Manor for engaging in protected, concerted activity.

Anderson maintains that he "blew up" on May 12, 1993, because the unions did not have the courtesy to notify the Finance Committee that they intended to boycott the Finance Committee's meeting. It is not evident that, after this "blow up," Anderson harbored anger towards the Complainant for its conduct on May 12, 1993.

On October 27, 1993, Hass, Extension Office lead Secretary Gayle Nelson, and County Clerk and Administrative Coordinator Dave Sorenson met at the request of Hass and for the purpose of discussing the Payroll Clerk's notification that the Extension Office inappropriately paid Manor out of Budget Line 115. At this meeting, Hass told Sorenson that Manor's share of Budget Line 111 funds would be depleted before the end of the year. Sorenson responded by stating that Manor should not be working more than 2/5's time because she was hired for that time and that the Extension Office could hire anyone, including the part-time County switchboard operators, but not Manor, to perform extra work.

It is not evident that Sorenson referred to Manor's holiday pay claim, or to any other protected, concerted activity, at the time of the October 27, 1993 meeting. Within the context of the meeting, Sorenson's statement that Hass should not use Manor more than 2/5's time reasonably may be construed to be a reiteration of budget realities, i.e., that Manor's position was established and funded as a .4 FTE and, thus, if Manor had not worked more than 2/5's time, then the Extension Office would not have depleted Manor's Budget Line 111 funds.

As Sorenson acknowledged at hearing, the part-time switchboard operators would have had to be paid out of the Extension Office's Budget Line 111 and, thus, using the part-time switchboard operators, rather than Manor, would have the same result, i.e., a deficit in Budget Line 111. While Sorenson claims that he made a mistake when he suggested that Hass use the part-time switchboard operators, the absence of any legitimate business justification for his disparate treatment of Manor, gives rise to an inference that Sorenson was discriminating against Manor and, thus, was hostile toward Manor.

During this conversation, Sorenson also stated that the Personnel Committee might be willing to change Manor's position from a two day per week position to a three day per week position. Since such a change would permit Hass to assign "extra work" to Manor, this conduct of Sorenson gives rise to the inference that Sorenson was not opposed to having Manor perform "extra work," but rather, was opposed to having Manor perform work for which money had not been appropriated. The inference that Sorenson was opposed to having Manor perform work for which money had not been appropriated is further supported by Sorenson's statements that times were changing and the County would no longer permit the Extension Office to use Budget Line 115 monies for Budget Line 111 expenses without obtaining approval of the County Board.

During the meeting, Nelson asked Sorenson to clarify which rate should be paid to Manor when Manor filled in for Nelson. Sorenson responded that it was wrong to pay Manor at Nelson's higher rate of pay and that no one else did that. The most reasonable construction of Sorenson's remarks is that Sorenson is advising Nelson that, by paying Manor at the higher rate of pay, the Extension Office is not following County policy. While applying County policy to Manor may have an adverse impact upon Manor, it is not evidence of disparate treatment.

Considering the circumstances which gave rise to the meeting and the entire conversation of October 27, 1993, the most reasonable construction of Sorenson's remarks is that Sorenson did not take action to reduce Manor's work hours, as claimed by Complainant, but rather, provided advice on County budget and personnel policies in response to a request for such advice. The clear and satisfactory preponderance of the evidence does not demonstrate that, in 1993, Sorenson was hostile toward Manor for engaging in protected, concerted activity.

At some point in October of 1993, Nelson and Manor met with Hass and expressed a shared concern that limiting Manor to two work days per week would have an adverse impact upon the Extension Office employes' ability to complete necessary work. Hass responded by stating that Manor should continue to work the extra days, as she had in the past, until Hass received written instructions to the contrary. Manor continued to work her customary extra days throughout 1993.

Hass knew that his decision to continue using Manor to work more than .4 FTE was contrary to Finance Committee directives. Hass, however, ignored these directives because he needed to have the extra work performed and he was hopeful that the County Board would agree to increase Manor's FTE so that his use of Manor would be in compliance with the Finance Committee directives. The clear and satisfactory preponderance of the evidence does not demonstrate that, in 1993, Hass was hostile toward Manor for engaging in protected, concerted

activity.

On November 19, 1993, Union Local 556 filed two grievances on behalf of Manor. One grievance alleged that the Respondent had violated Article 25, Section 1, by denying Manor three days wages at a higher rate for working out of classification. The other grievance alleged that the Respondent had violated Article 19, Section 4, of the labor contract by not prorating holiday pay on the basis of time worked. The two grievances were denied and, thereafter, submitted to arbitration.

1994 Conduct

The Complainant asserts that, in September and November of 1994, Manor was threatened with layoff and that these threats were in retaliation for Manor's engaging in protected, concerted activity. Conduct occurring in September, 1994, falls outside the one year statute of limitations period. Thus, the Examiner does not have jurisdiction to determine whether or not such conduct violates Sec. 111.70(3)(a)1 or 3, Stats., as alleged by the Complainant. It is appropriate, however, to review such conduct for evidence that Respondent Representatives were hostile toward Manor for engaging in protected, concerted activity.

On or about September 15, 1994, Hass notified Manor that her work schedule would be altered such that, for the remainder of 1994, Manor would be working fewer hours than customary. During this meeting, Manor objected to the alteration of her work hours.

After Hass met with Manor on September 15, 1994, Hass sent the following letter to Sorenson:

> I am writing to request clarification regarding the part time secretarial position in our office. Could you please clarify the policy regarding the following questions:
>
> 1. What is the total number of days/hours available to work per year for the current position description?
>
> 2. Do we have the ability to adjust the work days in this position?
>
> 3. Can the person filling this position work additional hours above the regularly scheduled hours under a part-time budget line item and what fringe benefits would be available.
>
> Thank you for your clarification of these items.

Sorenson responded in writing by answering "14 hrs" to the first question; "Yes" to the second question; and "No" to the third question. Sorenson's response is consistent with established budgetary policies.

On September 20, 1994, Hass sent Manor a letter, confirming that, unless additional funding were to be transferred into her budget allocation, he would have to adjust her work schedule for the remainder of 1994. On September 22, 1994, Hass sent Manor a letter, confirming the balance in the funds which had been appropriated for her position and the number of work days which could be funded from this balance.

It is not evident that the decision to notify Manor of the need to alter her work schedule was initiated by anyone other than Hass. According to Hass, he made the decision to provide such notification to Manor because, in September, 1994, he knew that the Budget Line 111 funds which had been appropriated for Manor's .4 FTE position were nearly depleted and that the Finance Committee would not permit him to use Budget Line 115 monies to pay Manor.

Hass' testimony that Budget Line 111 funds had been depleted by September of 1994 is supported by the testimony of Secretary Gayle Nelson. Hass' testimony that the Finance Committee would not permit him to use Budget Line 115 monies to pay Manor is consistent with statements in his letter of October 13, 1994 and is supported by Anderson's claim that, in July of 1994, the Finance Committee finally put its foot down on budget irregularities. 5/

Anderson's claim that the Finance Committee had finally "put its foot down" is supported by the fact that, in July of 1994, Anderson initiated the request for a budget transfer to fund additional days for Manor and, at or about that same time, Anderson also initiated a request to increase Manor's established hours, effective January 1, 1995. By initiating these requests, Anderson took extraordinary measures to ensure that Manor continued to work more than her established .4 FTE.

Prior to notifying Manor that her work schedule would be altered, Hass had ignored several directives to limit Manor to her established .4 FTE and to not use Budget Line 115 funds to pay Manor for extra work. By ignoring these directives, Hass took extraordinary measures to ensure that Manor continued to perform her customary extra work.

As the Complainant argues, other County Departments used regular part-time employes to work more hours than the FTE which had been established by the County Board. It is not evident, however, that any of these extra hours had been funded from Budget Line 115. Thus, by denying Hass the right to pay Manor with Budget Line 115 funds, Respondent was not discriminating against Manor.

At times, when other County Departments used regular part-time employes to work more hours than had been established by the County Board, these extra hours were funded from Budget Line 111 appropriations which had become available due to staff turnover or leaves of absences. At other times, these County Departments expended more money than had been appropriated in their Budget Line 111. It is not evident that, in September of 1994, that the Finance Committee knew of these practices of the other County Departments.

Complainant does not argue, and the record does not demonstrate, that, in September, 1994, the Extension Office's Budget Line 111 contained excess appropriations. Complainant argues, however, that Hass could have continued to employ Manor by adjusting the hours of other Extension Office employes.

Such an adjustment would have resulted in Manor earning more monies then had been appropriated for her position and another employe earning less money than had been appropriated for his/her position. By choosing to adjust Manor's schedule, rather than adjusting another employe's schedule, Hass did not subject Manor to disparate treatment.

As the parties stipulated at hearing, the Extension Office could have expended more in Budget Line 111 than had been appropriated for Budget Line 111 and be in compliance with the Finance Committee's directive of November 13, 1992. It is not evident, however, that Hass understood this fact in September of 1994. 6/

To be sure, the Extension Office's internal budget documents indicate that, prior to September of 1994, the Extension Office had year end deficits in some areas. It is not evident, however, that Hass had advance knowledge of these deficits. By choosing to adjust Manor's work schedule, rather than incur a deficit in Budget Line 111, Hass did not subject Manor to disparate treatment.

As the Complainant argues, in March, 1994, Hass requested and received a budget transfer of $2,974 from Budget Line 111. The transferred funds had been appropriated from savings in the Family Living Agent position. Had these funds not been transferred, Budget Line 111 monies may have been available to pay Manor to work more than her established FTE. Since it is not evident that these funds were transferred for any reason other than to purchase a needed computer, the fact that the funds were transferred does not suggest that Hass, or any other Respondent Representative, was hostile toward Manor.

On September 26, 1994, the Complainant filed a grievance on behalf of Manor alleging a violation of the collective bargaining agreement and requesting that the Respondent restore two days per week and quit retaliating against Manor. On September 30, 1994, the Finance Committee approved the following Motion:

> . . . directing Attorney Weld to prepare a side letter agreement between both parties allowing the part time position to exceed the authorized hours and to work two days per week for the remainder of 1994. They further moved that $2,000 from the Contingency Fund and $361.00 from 101-01-55620-115 be transferred into 101-01-55620, line items 111, 151, 152, 153, 154 and 161.

As Complainant argues, it is not evident that the Finance Committee normally seeks Complainant's agreement to fund a position. Complainant, however, had recently filed a grievance

on Manor's work hours. The Finance Committee had a legitimate business reason to direct its Attorney to reach an agreement with the Complainant. 7/

In summary, in September of 1994, Hass took action to reduce Manor's customary work hours and the Finance Committee conditioned the release of additional funds for Manor's position upon reaching an agreement with Complainant on Manor's work hours for the remainder of 1994. Neither this conduct, nor any other conduct relied upon by the Complainant, demonstrates by a clear and satisfactory preponderance of the evidence that, between January 1, 1994, and October 5, 1994, Anderson, Hass, or any other County Representative was hostile toward Manor, or the Union, for engaging in protected, concerted activity.

On October 12, 1994, the Personnel Committee reviewed the October 7, 1994 Finance Committee recommendation and approved a Motion to increase Manor's position by seven hours per week, effective January 1, 1995. Since the Personnel Committee and the Finance Committee have the same membership, this action of the Personnel Committee militates against a finding that the Finance Committee was hostile toward Manor for engaging in protected, concerted activity.

On November, 8, 1994, Sorenson sent a letter to Union Steward Lundgaard stating that the authorization to increase the 1994 funding for Manor's position was contingent upon the execution of an agreement between the Complainant and the Respondent; that the Complainant and the Respondent had not reached an agreement; and, therefore, that Hass had been instructed to discontinue scheduling 1994 hours for Manor, effective November 11, 1994. On that same date, Sorenson sent a letter to Hass notifying Hass that he should discontinue scheduling Manor effective November 11, 1994, because funds could not be released without a signed agreement between the Complainant and the Respondent and no agreement had been signed.

By issuing the letter to Hass, Sorenson took action to reduce Manor's customary work hours. However, it is not evident that Sorenson took this action for any reason other than to implement the Finance Committee's directive of September 30, 1994. Sorenson's letters of November 8, 1994, do not contain either a threat of reprisal or a promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2) rights.

On or about November 10, 1994, the Complainant, the Respondent and Manor executed an agreement which governed Manor's work schedule for the remainder of 1994. As a result, Sorenson's directive to discontinue scheduling hours of work for Manor was never implemented.

For the remainder of 1994, Manor worked in accordance with the agreement of November 10, 1994. Since Complainant and Manor had the option to not sign the agreement, Complainant's assertion that Manor was coerced into signing the agreement is without merit. Having voluntarily signed the agreement, Complainant's claim that the work schedule set forth in the agreement is retaliatory is not persuasive.

In October of 1994, Hass hired a temporary employe, Marie Cebulla, to complete a groundwater project which previously had been assigned to Manor. After Cebulla was hired, she was assigned to prepare the 4-H enrollment which previously had been prepared by Manor. Cebulla was not paid fringe benefits and received a lower wage rate than Manor. Cebulla was

paid out of Budget Line 115, which funds were not available to pay Manor. By employing Cebulla, Respondent did not deprive Manor of her right to work the schedule which had been agreed upon on November 10, 1994.

It is not evident that the employment of Cebulla was motivated by any factor other than legitimate business reasons. The employment of Cebulla does not warrant a finding that Respondent was hostile toward Manor for engaging in protected, concerted activity.

Arbitrator McLaughlin's Award of November 11, 1994 denied the grievance which alleged a violation of Article 25, Section 1. Arbitrator McLaughlin's Award dated November 11, 1994, upheld Manor's contention that holiday pay should be prorated on the basis of time worked, rather than on the basis of the FTE established by the Respondent.

1995 Conduct

After Manor's position was increased to a .6 FTE, Hass asked Manor to flex her 1995 work days such that she would work fewer days per week in the early part of the year and more days per week in the latter part of the year. Manor preferred to work a consistent three days per week, but agreed to Hass' request. It is not evident that Hass' request was based upon any factor other than Hass' desire to have Manor work at times of peak workload.

Hass' letter of December 30, 1994, states that he, Manor, and the County's Personnel Department were willing to agree to prorate Manor's 1995 benefits based upon a .6 FTE, but that since Union representatives had indicated that such a procedure would have to be negotiated, the County would continue the existing procedure, i.e., whereby holiday pay and health insurance benefits are based on time worked during the previous quarter. Consistent with statements made in this letter, in January of 1995, the County prorated and paid Manor's January 1, 1995 holiday on the basis of hours worked in the previous quarter, i.e., 40%.

In 1995, Complainant and Respondent Representatives engaged in a series of discussions and exchanged a series of correspondence concerning the proration of Manor's benefits. On January 31, 1996, Complainant and Respondent entered into a settlement agreement which resolved the dispute on the proration of Manor's fringe benefits.

Complainant argues that, in 1995, Manor was not treated like similarly situated employes because her benefits were not immediately prorated on the basis of her newly established hours, i.e., .6 FTE. The record, however, fails to establish that any part-time employe's benefits were immediately prorated on the basis of a newly established part-time FTE.

To be sure, Darlene Dailey received 100% of benefits when she moved from part-time to full-time. When Julia Hines' position was reduced from full-time to part-time, her vacation and sick leave benefits were prorated on the basis of her newly established FTE, rather than the 100% which she had worked during the prior quarter. Since Manor remained a part-time employe, and,

therefore, had worked as a part-time employe during the last quarter of 1994, she is not similarly situated to either Dailey or Hines.

The record demonstrates that, during 1995, the County pro-rated the fringe benefits of part-time employes who did not move between full-time and part-time employment on the basis of hours worked during the previous quarter, unless the parties mutually agreed otherwise. 8/ This is the procedure which was applied to Manor.

Contrary to the argument of the Complainant, neither the preamble, nor Item 3, of the settlement agreement of January 31, 1996, contains an admission that, in 1995, Respondent did not prorate Manor's fringe benefits in the same manner as other Respondent employes. Nor is it evident that the delay in resolving the dispute over the proration of Manor's 1995 benefits was due to any factor other than bona fide misunderstandings and/or differences of opinion regarding the merits of the dispute.

In summary, as Complainant argues, in 1995, Respondent did not immediately prorate Manor's benefits on the basis of her newly established .6 FTE. Complainant, however, has not established, by a clear and satisfactory preponderance of the evidence, that this conduct of Respondent violates either Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)3, Stats.

After the 1995 Fair, the Extension Office had a staff meeting. At this staff meeting, Hass commented that "we did not have any problems in our office until JoAnn started working there." It is not evident that Hass identified the nature of the "problems." Nor is it evident that he made any reference to protected, concerted activity at the staff meeting. The statement made by Hass is too vague to warrant the conclusion that Hass was exhibiting hostility toward Manor for engaging in concerted, protected activity.

Hass' statement does not contain either a threat of reprisal or a promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. Accordingly, Hass' statement does not violate Sec. 111.70(3)(a)1, Stats.

Conclusion

The clear and satisfactory preponderance of the evidence does not establish that, on or after October 5, 1994, any Respondent Representative retaliated against Manor, in whole or in part, because Manor had engaged in concerted, protected activity. Accordingly, Complainant has not prevailed on its claim that Respondent has violated Sec. 111.70(3)(a)3, Stats.

The clear and satisfactory preponderance of the evidence does not establish that, on or after October 5, 1994, any Respondent Representative interfered with, restrained or coerced municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats. Accordingly, Complainant has not prevailed on its claim that the Respondent has violated Sec. 111.70(3)(a)1, Stats.

The WERC has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. [WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90)] The allegations of the complaint have not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of costs and attorneys' fees.

Dated at Madison, Wisconsin, this 9th day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

ENDNOTES

1/ The holding in BRYAN MFG. CO. was adopted by the Commission in CESA NO. 4, DEC. NO. 13100-E (YAFFE, 12/77).

2/ There are certain exceptions which excuse the failure to exhaust the contractual grievance procedure such as the employer's repudiation of the grievance procedure, unfair representation by the union and futility.

3/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967) and is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

4/ T. II at 145.

5/ T. II at 165.

6/ Hass' letter of November 30, 1995, indicates that he did not become aware of this fact until November 29, 1995.

7/ Complainant relies upon Anderson's testimony (T. II at 151) to argue that grievances had nothing to do with the Finance Committee's decision. However, this testimony is ambiguous. Anderson appears to be confirming that the two grievances which had been filed in 1993 did not have any bearing on the County's decision to offer Manor additional time in 1994 and 1995.

8/ Each party argues that an exception was mutually agreed to by the parties for an employe(s) in the County Treasurer's Office. The record, however, does not reveal the specifics of this exception.