STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME LOCAL 2816 WASHBURN COUNTY COURTHOUSE EMPLOYEES, Complainant, vs. WASHBURN COUNTY, Respondent.	Case 35 No. 53877 MP-3145 Decision No. 28721-A

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 364, Menomonie, Wisconsin 54751-0364, for AFSCME Local 2816, Washburn County Courthouse Employees, referred to below as the Union.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Washburn County, referred to below as the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 23, 1996, the Union filed a complaint of prohibited practices alleging that the County had violated Secs. 111.70(3)(a)1 and 4, Stats., by hiring a new employe into a position represented by the Union under terms and conditions other than those collectively bargained by the Union and the County. After informal attempts to resolve the matter proved unsuccessful, the Wisconsin Employment Relations Commission, on May 7, 1996, designated Richard B. McLaughlin, a member of its staff, to act as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07, Stats. Hearing on the matter was held on June 11, 1996, in Shell Lake, Wisconsin. At that hearing, the Union amended the complaint to include alleged County violations of Secs. 111.70(3)(a)3 and 5, Stats. A transcript of that hearing was provided to the Commission on June 26, 1996. The parties filed briefs and a reply brief or a waiver of the right to file a reply brief by October 9, 1996.

In a letter to the parties dated January 27, 1997, I stated:

> I write to summarize our conference call of January 24, 1997. I will note that I initiated the call to express misgivings I had concerning my issuance of a decision in the above-noted matter.
>
> My concerns focus on the appropriate scope of the decision I am to issue. The facts underlying Ms. Tobias' assumption of the Jobs Implementation Coordinator/JOBS Coordinator position potentially call into question terms from the 1993-95 labor agreement, the successor to that agreement and the County's statutory duty to maintain the "status quo" in the period between the expiration of one agreement and the ratification of its successor. As I reviewed the record, I became convinced that the record clearly supported a conclusion only through the "status quo" obligation. Such a conclusion is, in a sense, fictional since it fixes an obligation pending the negotiation of a successor agreement which was ultimately ratified. The 1996 agreement is not, however, part of the record. There is a stipulation concerning its terms at Pages 6-7 of the Transcript. My statement of that understanding is, unfortunately, something less than crystalline, and this ambiguity clouds the record.
>
> Thus, my concern regarding the issuance of the decision was whether the two of you thought my role as examiner extended into the interpretation of the 1996 agreement. . . .

The parties responded by filing a series of written stipulations with the Commission on March 14, 1997. Among those stipulations, the parties stated that they "waive their right to further brief the issues in this matter." I sought, and the parties provided, a final clarification to the stipulation by April 17, 1997.

FINDINGS OF FACT

1. The Union is a labor organization which maintains its principal offices in care of P. O. Box 364, Menomonie, Wisconsin 54751-0364.

2. The County is a municipal employer which maintains its principal offices at 110 West Fourth Avenue, Shell Lake, Wisconsin 54871.

3. The Union has been certified by the Commission as the exclusive collective bargaining representative for certain County employes. The Union and the County have negotiated

collective bargaining agreements covering these employes. One of those agreements, referred to below as the 1993-95 agreement, contains the following provisions:

ARTICLE 1 RECOGNITION

Section 1.01. The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining on matters concerning wages, hours and conditions of employment, as certified by the Wisconsin Employment Relations Commission, under date of July 9, 1984, Decision Number 21674.

Section 1.02. The bargaining unit consisting of all regular full time and regular part time employees employed by Washburn County in the Courthouse, Department of Social Services and related departments, including professional employees, but excluding Highway Department "blue collar" employees, law enforcement employees, elected officials, supervisory, managerial, confidential and casual employees.

. . .

ARTICLE 7 EMPLOYEE DEFINITIONS

. . .

Section 7.03. Temporary/Seasonal/Provisional Employee: An employee performing work for a limited term in these categories is hereby defined as an employee hired to work for a specified period of time, or to perform on a specific project, not to exceed four (4) calendar months . . . These employees are not covered by the terms of this agreement and do not accrue seniority or accrue or receive any fringe benefits . . .

. . .

ARTICLE 8 PROBATIONARY PERIOD

Section 8.01. Duration: Newly hired employees shall serve a six (6) month probationary period. During the probationary period, the employee shall be subject to discipline and discharge without recourse to the grievance procedure.

Section 8.02. Benefits: Employees shall receive benefits as outlined in this agreement. Upon satisfactory completion of the probationary period, employees shall receive all rights and privileges under the working agreement computed from their

starting date of employment and may be disciplined or discharged for just cause only with full recourse through the grievance procedure of the agreement.

ARTICLE 9 SENIORITY, LAYOFF AND RECALL

Section 9.01. Definition: It shall be the policy of the Employer to recognize seniority. The seniority of all regular full time and regular part time employees covered by the terms of this agreement shall consist of the total calendar time elapsed since the date of original employment. However, seniority shall not be diminished by temporary layoff or leaves of absence or contingencies beyond the control of the parties to this agreement.

. . .

Section 9.02. Termination of Seniority: Seniority shall be deemed to have been terminated when:

1. . . .
3. An employee resigns . . .
8. . . .

ARTICLE 13 WAGES

. . .

Section 13.03. The County agrees to provide longevity pay in the amount of five (5) cents per hour for all employees with five (5) or more years of service for the County; an additional five (5) cents per hour for all employees with ten (10) years or more of service for the County; and an additional five (5) cents per hour for all Employees with fifteen (15) or more years of service for the County. Longevity pay is in addition to the base rate shown in Appendix A.

. . .

ARTICLE 17 VACATIONS

Section 17.01. All employees shall earn and receive annual paid vacations at their respective classified rate of pay in accordance with the schedule listed below:

1. During the first calendar year, vacation with pay shall be prorated with a full calendar year equal to seven (7) calendar days vacation;

2. From two (2) to five (5) years, twelve (12) working days of vacation with pay;

3. From five (5) to ten (10) years, seventeen (17) working days of vacation with pay;

4. From ten (10) to twenty (20) years, twenty (20) working days of vacation with pay;

5. After twenty (20) years of service, employees shall receive an additional day of vacation with pay for each additional year of service thereafter, not to exceed twenty-five (25) days.

. . .

ARTICLE 18 SICK LEAVE

. . .

Section 18.05. Newly Hired Employees: Newly hired employees shall not be allowed to use sick leave during the initial probationary period; however, at the completion of their initial probationary period, newly hired employees shall be credited with sick leave computed from their starting date of employment.

. . .

ARTICLE 27 ENTIRE MEMORANDUM OF AGREEMENT

Section 27.01. This agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by parties hereto. Waiver of any breach of this agreement by either party shall not constitute a waiver of any breach of this agreement.

ARTICLE 28 DURATION AND EXECUTION

> Section 28.01. This agreement shall be binding and in full force from January 1, 1993 through December 31, 1995.

The 1993-95 agreement states, at Appendix A, the wage schedule governing unit positions. Appendix A states those wages both as "Hourly" and as "Biweekly" rates. The wage schedule set forth at Appendix A consists of the following four steps: "Start"; "6 Mos."; "18 Mos."; and "24 Mos." The Hourly rates for the classification "JOBS Coordinator" for that part of Appendix A effective on July 1, 1995, are, from the Start through the 24 Month step: 10.68; 11.12; 11.53; and 11.98.

5. The parties were unable to agree on the terms of a successor to the 1993-95 agreement until after the expiration dated stated in Article 28 of that agreement. The parties' collective bargaining for a successor agreement ultimately produced an agreement which was not ratified by both parties until May of 1996. This agreement is referred to below as the 1996 agreement. The labor agreement ratified on that date did not change the following provisions from the 1993-95 labor agreement: Section 1.02; Section 7.03; Section 8.01; Section 8.02; Section 9.01; Section 9.02; Section 13.03; Section 17.01; Section 18.05; and Section 27.01.

6. Sharon Tobias has served as a County employe since May 5, 1975. She was first hired as an Income Maintenance Worker in the Social Services Department. On January 2, 1989, Tobias posted into the position of CWEP Coordinator. She held this position until January 1, 1994, when she became the Office Manager for the Social Services Department. This position, unlike her prior two County positions, was not included in the bargaining unit represented by the Union. Her promotion to the position of Office Manager was confirmed in a letter dated January 14, 1994, authored by Stephen Pittelkow, the County's Personnel Director. That letter states:

. . .

> Through County Board action on November 16, 1993, your position has been approved effective January 1, 1994. Your salary will be $21,500 annually with a performance review upon completion of probation. As you are aware, this is a non-union position and you will receive all fringe benefits included in the County benefit package for non-represented employees. Any previously accrued and earned benefits such as sick leave, vacation and compensatory time will be carried forward to your new position . . .

The County abolished the Office Manager position effective December 31, 1995. Tobias was, at that time, earning $11.87 per hour. In a memo to Pittelkow dated January 5, 1996, Dennis Boland, the County's Director of the Department of Social Services, stated the following:

> This is to inform you that I hired Sharon Tobias as a LTE in the JOBS office effective 1/1/96.

While employed as Office Manager, Tobias did not perform exclusively supervisory and managerial duties. She also performed duties identified with the classification of Jobs Implementation Coordinator. Such work is also done by Union represented employes.

7. The County created a position classified as Jobs Implementation Coordinator/Jobs Coordinator within its Department of Social Services. This position is referred to below as the JOBS Position. The notice of posting for that position stated a salary of "$10.68 - 11.98/hr," and a posting period of "December 29, 1995 - January 4, 1996." The notice also stated the following:

> Note: This position is part of a defined Collective Bargaining Unit in Washburn County. Interested parties currently employed by the County, will be considered according to the applicable section/s of the Bargaining Agreement.

Gilbert White was the sole unit member to sign this posting. On January 16, 1996, the Personnel Committee of the County Board acted to fill the posted position. The minutes of the Personnel Committee document that action thus:

> Motion . . . to deny the position . . . to Gilbert White and to waive the normal hiring procedure and appoint Sharon Tobias to the position due to her experience with the JOBS program. Sharon Tobias's benefits shall remain in effect, however, she will be placed at the bottom of the seniority list . . .

In a memo dated January 19, 1996, Joyce Erickson, the Union's President, advised Pittelkow of the Union's position regarding the Board's response to the posting. That memo states:

> The executive board . . . voted today that the hiring of Sharon Tobias should be treated as any new employee according to our existing Labor Agreement Contract.

Pittelkow confirmed Tobias' placement in the JOBS position in a letter to Tobias dated January 22, 1996. That letter states:

> This is to confirm your employment as JOBS Implementation Coordinator/JOBS Coordinator in the Washburn County Social Services Department, retroactive to January 1, 1996.
>
> The Personnel Committee moved to continue your health insurance, vacation and sick leave benefits as are currently in place. Your salary will be $10.68 per hour retroactive to January 1, 1996 . . .

8. The Union filed two grievances regarding the award of the JOBS Position to Tobias. One of those grievances challenged the County's failure to award that position to White, and the other challenged the County's grant of any benefit to Tobias which it would not have granted to a new hire without prior County service. The latter grievance was filed on February 6, 1996. The grievance form states the remedy sought by the Union thus: "Comply with contract." Union and County representatives discussed the February 6 grievance on a number of occasions. They considered a variety of ways to settle the matter, and a number of proposals and counter-proposals were made. They were, however, unable to settle the grievance. The grievance was not discussed during the collective bargaining sessions set for negotiating a successor to the 1993-95 agreement. Neither party proposed to resolve the issues underlying the February 6, 1996 grievance through language to be included in the 1996 agreement.

9. In a letter to Boland dated March 14, 1996, Tobias stated:

> As an employee of Washburn County and as a member of Local 2816, I am requesting that my seniority be restored back to the date of my original employment May 1, 1975, excluding the time that I was a non-union employee, and to lateral my salary to the 24 month hourly wage for the JOBS Coordinator position effective 1/1/96.
>
> . . .

This letter states that Pittelkow and "Local 2816" were issued a copy. After receiving this memo, Boland issued the following memo, dated March 15, 1996, to "Steve Pittelkow and Washburn County Personnel Committee:"

> In as much as seniority issues are controlled by the employer, I strongly recommend to the Personnel Committee that Mrs. Tobias' requests be granted as outlined in her 3/14/96 letter.

The Personnel Committee did not grant Boland's recommendation.

10. The County has, on two occasions, moved employes from non-unit positions into positions represented by the Union. In each case, the County and Union representatives discussed the move prior to its implementation. The first of these moves was summarized by Pittelkow in a memo to Erickson dated September 4, 1992. That memo states:

> Pursuant to our conversation of September 1, 1992 during which you mentioned that Janet Ullom wishes to be a member of AFSCME Local 2816, please be advised that I have no objection to Janet's union membership provided the following conditions are met:
>
> 1. Janet's position classification must reflect the appropriate range which is Deputy.
>
> 2. Janet's wage will be set at $9.27 per hour. This is the 24 month rate in the current labor agreement. Future increases in hourly rate will be granted under the terms of successive labor agreements.
>
> 3. Janet will be eligible for longevity pay under the current labor agreement. Janet's date of service remains 04/30/84 and she will begin receiving longevity pay from the date of entry into the bargaining unit.
>
> 4. Janet will not supervise any employees once she becomes a union member.
>
> . . .

Prior to events summarized in this memo, Ullom had not been employed in a Union represented position. Her movement into the bargaining unit was not prompted by a change in positions. Rather, the position she had formerly occupied as a non-unit position was moved into the bargaining unit. She retained fringe benefits not mentioned in this letter, which she had earned prior to the time her position was moved into the bargaining unit. She did not serve a probation period as a unit member. The second of these moves was summarized by Pittelkow in a letter, dated January 10, 1994, to Kathleen Pfister, with a "cc" section including Boland and Erickson. That letter states:

> This letter is to confirm your request to return as a member of AFSCME Local 2816 effective January 1, 1994. Please be advised that there are no objections to your union membership provided the following conditions are met:
>
> 1. The position classification must reflect the appropriate range which is Administrative Assistant II.
>
> 2. The wage will be set at $10.04 per hour. This is the 24 month rate in the current labor agreement. Future increases in hourly rate will be granted under the terms of successive labor agreements.
>
> 3. You will be eligible for longevity pay under the current labor agreement. Your date of service remains January 23, 1989.
>
> . . .

Pfister was initially hired into a position represented by the Union, but moved into a non-unit position. The January 10, 1994 letter summarizes the results of discussions between Union and County representatives concerning her return to a position represented by the Union. She retained certain fringe benefits not mentioned in this letter, which she had earned while occupying the non-unit position.

11. The County has moved unit members other than Tobias into a non-unit position. For example, the County moved Diane Kubista from a position represented by the Union into the non-unit position of Child Support Director. Pittelkow, in a letter to Kubista dated March 25, 1993, summarized the details of that move thus:

> It is understood that your starting date will be March 29, 1993 and

> you will be required to serve a six month probationary period. Your starting salary will be $19,000 annually with a performance review upon completion of probation. As you are aware, this is a non-union position and you will receive all fringe benefits included in the County benefit package for non-represented employees. Any previously accrued and earned benefits such as sick leave and vacation will be carried forward to your new position . . .

12. The County was not hostile to the exercise of any rights protected by Sec. 111.70(2), Stats., when it posted and filled the JOBS Position.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. Tobias, as of January 1, 1996, was a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

3. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The County did not violate Secs. 111.70(3)(a)1, 3 or 4, Stats., by making Tobias a temporary employe or by awarding Tobias the JOBS Position.

5. Whether the County violated Sec. 111.70(3)(a)1 or 4, Stats., by establishing Tobias' wages and benefits for the JOBS Position during the hiatus between the 1993-95 and the 1996 agreements is a moot point.

6. The County violates Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats., to the extent it granted Tobias benefits as a temporary employe for the period from January 1, 1996 until January 16, 1996; when it granted Tobias the JOBS Position retroactive to January 1, 1996; when it granted Tobias seniority for work performed prior to January 16, 1996; and to the extent it calculated vacation or sick leave benefits which accrue from a date other than January 16, 1996.

7. The County does not violate Sec. 111.70(3)(a)5, or, derivatively, Sec. 111.70(3)(a)1, Stats., by permitting Tobias to carry over sick leave or vacation earned, but not used, while she served as Office Manager; or by paying Tobias longevity based on her total years of service for the County.

ORDER 1/

1. Those allegations of the complaint, as amended, alleging County violations of Secs. 111.70(3)(a)3 and 4, Stats., are dismissed.

2. To remedy its violation of Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., the County shall immediately:

a. Cease and desist from:

(1). Calculating the benefits paid under the 1996 labor agreement

---

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

to Tobias in a manner which violates the agreement.

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

(1). Date the seniority of Tobias from January 16, 1996.
(2). Calculate Tobias' accrual of vacation and sick leave as a bargaining unit member from January 16, 1996.
(3). Pay Tobias longevity based on her original date of hire with the County.
(4). Permit Tobias to use sick leave or vacation earned, but not used, prior to January 1, 1996. Her use of such sick leave or vacation shall conform to the requirements of the 1996 agreement regarding the use of such paid leave.
(5). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the County has taken to comply with this Order.

Dated at Madison, Wisconsin, this 22nd day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the factual background, the Union notes that its "contractual and statutory rights" as the exclusive bargaining representative for certain Courthouse employes "have been trampled in this matter." The County's unilateral award of fringe benefits and waiver of a probationary period poses, the Union urges, issues of law and contract, not equity.

Tobias resigned her unit position in January of 1994, and thus terminated her seniority under Section 9.02. After her management position was eliminated, she served as an LTE governed by Section 7.03. That section denies her the benefits unilaterally afforded her by the County. The Union contends that Section 9.01 precludes "the unilateral awarding of retroactive seniority." Beyond this, the Union contends that Articles 8 and 10 require a probation period for all newly hired employes, whether hired from within or outside of the bargaining unit. A review of the County's acts establishes, according to the Union, that "(I)t would be an understatement that Ms. Tobias has been unilaterally granted a different status than other new hires."

Nor has any past practice been proven to defend the County's actions. The two instances pointed to by the County show only that "the County secured the consent of the Union prior to agreeing to put (non-unit County employes) in the bargaining unit." Even if this was not the case, the Union argues that two instances are not a sufficient basis upon which to find a binding past practice. That the County does not consider itself bound to the purported practice when unit employes move into non-unit positions establishes that the County does not conform to the practice it asserts.

The Union concludes that the County has committed a violation of Sec. 111.70(3)(a)5, Stats., by violating Articles 1, 7, 8, 9, 13, 17 and 18 of the labor agreement. That the County's actions took place after the expiration date of the labor agreement establishes, according to the Union, "a per se violation of s. 111.70(3)(a)4." That this course of action "has a reasonable tendency to interfere" with rights protected by Sec. 111.70(2), Stats., also establishes a violation of Sec. 111.70(3)(a)1, Stats. The Union concludes by making the following remedial request:

> The Union asks the Commission to order Washburn County to cease and desist violating the Agreement and s. 111.70(3)(a)(1)(4)&(5), treat Ms. Tobias as required by the Agreement until such time as the County bargains a different result with the Union, and any other remedy the Commission may deem appropriate.

The County's Initial Brief

After a review of the factual background, the County contends that any allegation of a violation of Sec. 111.70(3)(a)3, Stats., is unfounded. The County notes that Tobias was "not happy" with the Personnel Committee's determination to afford her a pay cut and to place her at the bottom of the seniority list. It necessarily follows, according to the County, that "there was no 'encouragement' of union status with respect to Ms. Tobias' wage rate and seniority placement." Regarding her continuation of fringe benefits, the County urges that Tobias "was treated the same as two other County employees." Acknowledging that the County secured the Union's consent in those two cases, it contends that it did so "because the County was offering each of these employees a better deal with respect to wage rate and seniority than provided by the contract." By treating Tobias as a new employe, the County did no more than it was required to do and such action cannot be treated as a violation of Sec. 111.70(3)(a)3, Stats.

Nor can the County be considered to have violated its duty to bargain. The County argues that its implementation of Tobias' wage rate and seniority placement "were consistent with what the Union believed the collective bargaining agreement required." It follows that since these points were covered by the labor agreement that the County had no statutory duty to bargain with the Union. Beyond this, the County argues that "the Union never made any request to bargain issues regarding Ms. Tobias' return to the bargaining unit." The parties were then involved in bargaining a successor labor agreement, and the County notes that this makes the absence of a request to bargain egregious.

The County notes that "(t)he collective bargaining agreement does not address the issues of the retention of earned and accrued fringe benefits for employees who transfer from a non-union position to a union position without a break in service." Employes who move in the opposite direction are governed by a County practice "of allowing employees to retain their earned and accrued fringe benefits." The parties have, according to the County, established a practice of permitting employes who move from non-union to union status." That practice must govern "(i)n the absence of contract language addressing the issue." The fundamental fairness of this practice cannot be doubted, and the County concludes that there has been no contract violation.

Viewing the record as a whole, the County requests that the Examiner "dismiss the complaint in its entirety."

The Union's Reply Brief

The Union notes initially that the County "acknowledges that Ms. Tobias is an external applicant." It follows, the Union urges, that "the terms and conditions for her should be the same as any other external applicant, until such time as the parties agree to a different set of terms and conditions." To the extent past practice can be viewed as relevant, the Union urges that it shows only that employes maintain fringe benefits "by mutual agreement, not by unilateral action of the employer." That Tobias did not serve a probationary period and was permitted to draw on contractual benefits during the period of time which should have been probationary demonstrates, according to the Union, that she enjoyed "a superior level of benefits to any other external applicant without agreement of the parties."

That the Union did not request bargaining should not, the Union argues, be permitted to mask the fact that the County unilaterally implemented her terms and conditions of employment without any request for bargaining.

The County's Reply Brief

The County waived its right to file a reply brief.

DISCUSSION

The amended complaint alleges violations of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. Tobias lost her non-unit position and the JOBS Position was first posted during the term of the 1993-95 labor agreement. She was granted an LTE position, the JOBS Position and certain fringe benefits during the hiatus between the 1993-95 agreement and its successor. This background creates a quagmire of potentially applicable legal obligations.

The contractual ramifications of the parties' dispute are posed by Sec. 111.70(3)(a)5, Stats., and can arguably be focused on either the 1993-95 or the 1996 labor agreement. The statutory ramifications of the dispute are posed by the alleged violations of Secs. 111.70(3)(a)1, 3 and 4, Stats. A review of the record establishes that the parties' dispute is contractual in nature and that the 1996 agreement is the governing authority. Examination of this conclusion will focus initially on the statutory provisions which cannot be considered to govern the complaint.

The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)1, Stats., protects municipal employes from employer interference, restraint or coercion involving rights stated by Sec. 111.70(2), Stats. Violations of Sec. 111.70(3)(a)1, Stats., can either be independent or derived from other prohibited practices. Monroe Water Department et. al., Dec. No. 27015-B (WERC, 4/93).

The Union does not contend County conduct poses anything other than a derivative violation of Secs. 111.70(3)(a)3, 4 or 5, Stats. Thus, examination of the alleged violation of Sec. 111.70(3)(a)1, Stats., is subsumed in the discussion of those subsections.

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 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." On a general level, it is not apparent how the County's actions can be considered to have encouraged or discouraged any membership in the Union. There is no evidence on what, if any, impact the County's actions had on White beyond the denial of the JOBS Position. That action is subject to a grievance not in issue here. There is, then, no evidence to establish the County acted to discourage White's membership in the Union. Nor is there any evidence to support a conclusion the County acted to "encourage or discourage" Tobias. An assertion that the County meant to discourage Tobias from joining the Union has no support. The County cut her pay, and succeeded only in provoking dissension between Tobias, her supervisor and Personnel Committee. There is no persuasive evidence, on a general level, to conclude the County violated Sec. 111.70(3)(a)3, Stats.

On a more specific level, the elements to establish a violation of Sec. 111.70(3)(a)3, Stats., are well established. To prove such a violation, the Union, by a clear and satisfactory preponderance of the evidence, 2/ must establish (1) employe exercise of activity protected by Sec. 111.70(2), Stats.; (2) employer awareness and hostility to that activity; and (3) employer action, based at least in part, upon hostility to employe exercise of protected activity. 3/

None of these elements has been established in this case. No employe exercise of protected activity has been established. Even if White is presumed to be the employe and his signing of the posting for the JOBS Position is the concerted activity, there is no persuasive evidence the County acted to deny him the JOBS Position for any reason beyond a preference for Tobias. There is no evidence the source of that preference is anti-Union hostility.

2/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

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).

The Alleged Violation of Sec. 111.70(3)(a)4, Stats.

The Union contends that the County violated its duty to bargain by unilaterally establishing the benefits paid Tobias. The Union asserts two bases to ground this contention. First, the County failed to maintain the "status quo" during the gap between the expiration of the 1993-95 labor agreement and the execution of its successor. Second, the County afforded Tobias greater than contractually set wages and benefits without its consent.

The Commission has stated the legal obligation underlying the first of the Union's arguments thus:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act . . . (S)uch an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 4/

The Commission's definition of the status quo turns on its consideration of "relevant language from the expired contract as historically applied or as clarified by bargaining history, if any." 5/

A review of the evidence in light of these principles establishes that the first of the Union's contentions is moot. The Commission has defined "a moot case" as ". . . one which . . . cannot have any practical legal effect upon the existing controversy. 6/ A determination of the alleged violation of Sec. 111.70(3)(a)4, Stats., "cannot have any practical effect upon the existing controversy."

That the application of the status quo doctrine might not resolve the dispute underlying the complaint prompted the January 24, 1997 conference call. During that call, the parties confirmed that the provisions of the 1996 agreement should be considered to resolve the issues posed by the complaint. This agreement means that the parties' 1993-95 and 1996 labor agreements continuously govern the wages and benefits afforded Tobias. The purpose of the status quo doctrine is to "continue the allocation of rights and opportunities reflected by the terms of the

---

4/ Village of Saukville, Dec. No. 28032-B (WERC, 3/96) at 15, citations omitted.

5/ Ibid.

6/ City of Brookfield, Dec. No. 25843-A (WERC, 8/89) at 10, citing WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436 (1948).

expired contract while the parties bargain a successor agreement." 7/ The parties were able to bargain a successor agreement which provides continuous coverage from the expiration of the 1993-95 agreement. Against this background it serves no practical purpose to interpret the status quo obligation in this case.

This is not a case in which a determination of the status quo could avert a future dispute. Tobias' situation is unique in the parties' experience and cannot reoccur. Any implications her case may have on the future turn on the contractual significance of a non-unit employe's return to the unit. The determination of the status quo is, however, quasi-contractual in nature. A determination of the status quo cannot establish the contractual significance of her case. All it can accomplish is the establishment of the environment which is a prelude to the parties' negotiation of the point. In this case, that determination has no significance, since the parties successfully negotiated a 1996 agreement.

Beyond this, the attempt to apply the status quo doctrine could yield a determination inconsistent with the interpretation of the governing labor agreements. For example, what constitutes a "practice" as a matter of contract interpretation need not be what constitutes a "practice" as a matter of interpreting the status quo obligation. 8/ Thus, whether the parties have a "practice" concerning the County Board policy of permitting employes to retain benefits accrued under Board policy after a move from a non-unit to a unit position could yield a different answer under the status quo doctrine than under principles of contract interpretation. That the status quo doctrine can yield differing interpretations on the same facts is apparent in Commission case law. 9/ Against this background, the status quo dimension of the Union's arguments should be considered moot.

The second dimension of the Union's argument is that the County unilaterally imposed conditions of employment other than the contract permits without first securing the Union's consent. This argument cannot be considered moot. However, the argument states a matter of contract interpretation. The parties do not dispute that the 1993-95 and 1996 labor agreements govern the extension of benefits to Tobias. The Union has consistently argued that the labor agreement should be enforced as written. Thus, it never proposed to address Tobias' situation during collective bargaining for the 1996 agreement. It is apparent that the grievance was processed during the hiatus between agreements, and has been submitted for interpretation under the 1996 agreement. 10/ Against this background, there is no duty to bargain issue. The processing of a

---

7/ Dec. No. 28032-B at 18.

8/ See, for example, School District of Plum City, Dec. No. 22264-A (McLaughlin, 10/85), aff'd Dec. No. 22264-B (WERC, 6/87).

9/ In Plum City, for example, the application of the doctrine yielded four opinions.

10/ Parties to a collective bargaining agreement can waive the arbitration process to permit the Commission to interpret the agreement under Sec. 111.70(3)(a)5, Stats. City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94).

grievance can fulfill an employer's duty to bargain, 11/ and the duty to bargain is waived as to matters covered in a labor agreement. 12/

The Alleged Violation of Sec. 111.70(3)(a)5, Stats.

The complaint addresses the County's conduct toward Tobias after the termination of her Office Manager position on December 31, 1995. The 1993-95 labor agreement expired on that date. Sec. 111.70(3)(a)5, Stats., grants no more than the authority granted in a collective bargaining agreement. The 1993-95 agreement had expired by its terms and thus, under Sec. 111.70(3)(a)5, Stats., the authority governing the County's conduct toward Tobias centers on the 1996 agreement.

The Union questions Tobias' receipt of benefits as a temporary employe and as an employe in the JOBS Position. The specific benefits involve seniority, longevity, vacations, sick leave and the use of benefits during a probationary period.

The first disputed contract provision is Section 7.03, which became applicable when Tobias was hired as a temporary employe effective January 1, 1996. Section 7.03 mandates that such employes "are not covered by the terms of this agreement and do not accrue seniority or accrue or receive any fringe benefits." The evidence indicates Tobias did earn benefits effective January 1, 1996. This appears traceable to Personnel Committee action taken on January 16, 1996, and confirmed in Pittelkow's letter of January 22, which granted Tobias the JOBS Position "retroactive to January 1, 1996." The contractual source for this retroactivity cannot be traced to Section 7.03. That provision, without any apparent ambiguity, precludes granting benefits to a temporary employe.

Tobias' accrual of benefits from her hire as a temporary employe until her placement in the JOBS Position thus must turn on a provision other than Section 7.03. No such provision has, however, been established. Article 10 governs job postings, but that provision has not been argued to be applicable here.

No other agreement provision can account for the retroactivity asserted in Pittelkow's letter. The record is silent on when Tobias assumed the duties of the JOBS position, and Pittelkow was not aware of the duties she performed as a temporary employe. It cannot, then, be concluded that she received the retroactive benefits to compensate for her performing the JOBS Position prior to

---

11/ See School Board, School District No. 6, City of Greenfield, Dec. No. 14026-B (WERC, 11/77).

12/ School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94).

January 16, 1996. More significantly, the posting of the position is not at issue here and must be presumed to have been in good faith. The retroactive grant of benefits, however, awards Tobias the position during the effective period of the posting. The Personnel Committee presumably considered White's bid for the job. This precludes concluding her placement in the JOBS Position can precede its action of January 16, 1996. To consider her an employe covered by the labor agreement prior to January 16, 1996, renders Section 7.03 and the job posting meaningless.

The Union next challenges the County's unilateral "waiver" of the probationary period noted in Articles 8 and 18. Section 8.01 cannot be considered meaningfully in dispute. That the County may have "unilaterally" determined not to "discipline or discharge" Tobias during her first six months in the JOBS position is insignificant. As a technical matter, the County could have done so under Section 8.01 and Tobias would have been "without recourse to the grievance procedure." That it chose not to is of no contractual significance. Under any view of the facts, it is apparent the County views Tobias to be a satisfactory employe.

Section 8.02 governs employe receipt of benefits in general. The record establishes that Tobias earned and used fringe benefits such as sick leave and vacation during what should have been a six month probation under Section 8.02. The Union contends Sections 8.02 and 18.05 clearly establish that Tobias, as a "newly hired employee" was permitted to draw sick leave which the contract does not afford. The County urges that Tobias drew on previously earned benefits as permitted by past practice.

The parties make two different, but valid, points. The Union's reading of the disputed sections is persuasive. Sections 8.01, 8.02 and 18.05 share the terms "newly hired employee" and "starting date of employment." The two articles establish an "initial probationary period" during which an employe can accrue, but not use, certain benefits. These provisions clearly apply to a new hire arrangement in which an employe is brought in "off the street."

It does not, however, appear the sections were negotiated to apply to a situation in which an employe starts the employment relationship with benefits earned under the labor agreement or County policy and retained under County policy. Unlike Articles 8 and 18, the contract provisions establishing benefits beyond sick leave do not use the same terms. In all probability, this reflects the amendment or addition of benefits over time. Those benefit provisions have not, however, been coordinated to address the situation posed by Tobias, presumably because such a situation is rare. That the parties negotiated Ullom's and Pfister's return to the bargaining unit underscores this conclusion.

Against this background, Articles 8 and 18 must be read, as the Union asserts, to establish the terms governing "newly hired employees." There is no persuasive basis to consider Tobias anything other than a "newly hired employe." The reference to an "initial" probationary period in Section 18.05 has no demonstrated applicability to her. That reference presumably establishes that an employe who has passed an "initial" probationary period cannot be dismissed "without recourse

to the grievance procedure" or denied sick leave during, for example, a trial period following a successful posting to a new position. Tobias was, as of January 16, 1996, new to the unit and new to the JOBS Position. The validity of the Union's arguments must, on this point, be granted.

This does not, however, end the examination of the benefits afforded Tobias by the County. The conclusion that Articles 8 and 18 govern her accrual of benefits as a new hire says nothing about the benefits traceable to her non-unit status. Articles 8 and 18 cannot persuasively be read to eliminate those benefits. Rather, they are silent on the point. Because this point is broader than the benefits specifically governed by Articles 8 and 18, discussion of this point must be deferred until the remaining disputed provisions are addressed.

Sections 9.01 and 9.02 govern the determination of seniority. The Personnel Committee voted to place her at the bottom of the seniority list, and the Union's executive committee sought to have her treated as "any new employee."

Section 9.01 does not use the terms employed by Articles 8 and 18. The second sentence of Section 9.01 defines seniority to "consist of the total calendar time elapsed since the date of original employment." These terms are distinguishable from the reference in Articles 8 and 18 to "starting date of employment." The reference to "total calendar time . . . since the date of original employment" is broad enough to be read as asserted in Tobias' March 14 letter. That the reference is distinguishable from the terms of Articles 8 and 18 underscores the persuasive force of her argument. All the words of a labor agreement should be construed to have meaning. Thus, the second sentence of Section 9.01, standing alone, should be read to grant Tobias seniority to her original date of hire.

The second sentence of Section 9.01 does not, however, stand alone. The final sentence of Section 9.01 and Section 9.02 limit it. That seniority "shall not be diminished by . . . contingencies beyond the control of the parties to this agreement" implies that it shall be diminished by contingencies within the parties' control, and not otherwise covered in Section 9.01. Tobias' removal from the unit, and her subsequent hire as a temporary employe, were not traceable to a "temporary layoff" or a "leave of absence." Both were contingencies beyond the Union's control, but within the County's. It offered Tobias the non-unit supervisory and temporary positions she accepted. The reference to "the parties' control" is plural, but the Union had no control over Tobias' move from the unit. Thus, her seniority, under Section 9.01, should not include time spent as a non-unit supervisor or as a temporary employe.

This limited grant of seniority is, however, further limited by Section 9.02. That section establishes eight contingencies by which "(s)eniority shall be deemed to have been terminated." The third of those contingencies is resignation. "Resigns" can connote either a voluntary relinquishment of a unit position or of County employment generally. Because Article 9 is restricted to seniority, and seniority is a consideration applicable only to unit employes, it is more persuasive to read the term "resigns" in the narrow sense argued by the Union. To read it as a broad reference to County employment unpersuasively expands the reference beyond the scope of Article 9. Thus, the right to seniority otherwise granted in Section 9.01 was "terminated" by Section 9.02. Tobias chose to leave the unit to assume non-unit positions. Under Subsection 3 of Section 9.02, that choice has contractual significance. Her seniority cannot be read to extend to County service preceding January 16, 1996.

Longevity is governed by Section 13.03. The section extends "pay . . . in addition to the base rate" at three levels pegged to "years of service for the County." The agreement states no limit on what constitutes "service for the County." There is no reference to "employee" service which could be read to mean service as a member of the unit. Nor is there any reference similar to that of the final sentence of Section 9.01. Tobias has served the County since her date of hire, and is

entitled, under Section 13.03, to longevity for her "years of service for the County." Her longevity benefit must, then, be pegged to her original date of hire.

Article 17 governs the vacation benefit and establishes a "calendar year" system of accrual extended to "(a)ll employees." The references to "calendar" years and to "employees" are broad enough to incorporate service outside of the unit. However, doing so effectively renders County Board policy for non-unit employes a nullity. Section 17.01 extends the vacation benefit to "employees . . . at their respective classified rate of pay" in accordance with a "calendar year" system of accrual. If the reference to "employees" or to "calendar years" is read broadly enough to include non-unit employes such as Tobias, then Section 17.01 expands beyond the recognition clause of Article 1 and unpersuasively renders County policy with regard to non-unit employe vacations a nullity. It is undisputed that when Tobias and Kubista left the unit, their maintenance of benefits turned on County policy not negotiated with the Union. It follows from this that Article 17 cannot be construed in a fashion which overturns that policy. Whatever claim Tobias can make to vacation earned outside the unit must be based on County policy, not Article 17.

In sum, the vacation benefits of Article 17 cannot, like the longevity benefit of Article 13, be pegged to County service generally. The calculation of Tobias' vacation entitlement under the labor agreement starts on January 16, 1996.

As alluded to above, the final problem to be addressed is how the contract handles benefits earned but not used by Tobias prior to her return to the unit. This concern applies to sick leave and vacation benefits which may have survived Tobias' exit from, and return to, the unit.

This problem must be addressed under Sec. 111.70(3)(a)5, Stats., but has ramifications beyond the contract. Cases involving unilateral changes in benefits can have ramifications on the statutory duty to bargain as well as on the contract. As noted above, violations of the statutory duty to maintain the status quo can undercut the integrity of a bargaining representative. In cases of improper unilateral changes, the Commission may undo benefits unilaterally granted by an employer. This is done to remedy the chilling effect on the assertion of bargaining rights which can result from an employer's unilateral action. 13/

These considerations do not play any role here, and afford no basis to deny benefits earned or retained by Tobias as a non-unit employe. As noted above, the parties successfully negotiated a successor agreement. Tobias' situation has not been shown to have played any negative role in that process. There is, then, no basis to deny her prior benefits to assure the County's unilateral actions do not taint the bargaining process or undermine the Union as a bargaining agent. To deny the benefits earned by Tobias as a non-unit employe constitutes a forfeiture.

13/ See, for example Village of Saukville, footnote 4/ above; and Racine Unified School District, Dec. No. 23904-B (WERC, 9/87).

Nor can that forfeiture be given a solid contractual basis. The agreement provisions discussed above govern the accrual of employe benefits, but are silent on how to handle benefits earned or retained in non-unit status. Avoiding the imposition of forfeitures has become an axiom of contract interpretation under arbitral precedent. 14/ More significantly here, the parties have by practice avoided working such forfeitures. Both Ullom and Pfister retained those benefits on their return to the unit. Significantly, the retention of sick leave and vacation earned in non-unit status is not mentioned in the written agreements summarizing the conditions of their return to unit status. This cannot be persuasively attributed to inadvertence by the negotiators. Rather, it underscores that the parties treat the avoidance of an employe forfeiture of benefits as a given. This is not surprising, since the Union has a duty to fairly represent unit employes and squaring an employe forfeiture with that duty can pose troublesome issues.

Also worthy of some note is that Tobias and Kubista retained those benefits on leaving the unit. This underscores that the Union has not sought to compel the forfeiture or the pay out of paid leave on termination from a unit position.

The evidence appears sufficient to establish a narrow past practice. The practice concerns only the issue of avoiding employe forfeiture of sick leave and vacation benefits in the transition from a non-unit to a unit position. The contract is silent on this point, and the instances in which this point has arisen are limited. However, the fact remains that the parties have mutually addressed employe transition from unit to non-unit status and back but have never effected an employe forfeiture of accrued sick leave or vacation benefits. As noted above, this consistency cannot persuasively be considered inadvertent.

If binding, the practice concerns a point on which the contract is silent and is thus terminable. 15/ It would not, however, be terminable without notice. 16/ The Union, in 1994,

---

14/ See, for example, Elkouri & Elkouri, How Arbitration Works, (Fifth Edition, BNA, 1997) at 500-501; and Bornstein and Gosline, Labor and Employment Arbitration, (Matthew Bender, 1996) at Sec. 14.02(3)(g).

15/ For a more detailed discussion of this point, see City of Stevens Point, Dec. No. 21646-A (Rubin, 1/85); aff'd Dec. No. 21646-B (WERC, 8/85).

appears to have informed the County it wished to discontinue a practice which granted employe seniority for service prior to the date of a return from non-unit to unit status. Any such termination has no bearing on the arguable practice posed here.

The Union forcefully points out that Section 27.01 of the parties' agreement precludes finding such a practice. This poses a sufficiently significant point that the discussion above refers to the "arguable practice." It is not, however, necessary to resolve this point to determine the issues posed by the complaint.

Whether viewed as a binding practice or as bargaining history, the parties' conduct affords no justification for denying Tobias' earned, but not used, sick leave and vacation. The contract establishes how Tobias must now earn and use contractual benefits, but is silent on how previously earned benefits must be treated. Arbitral precedent and the parties' practice, whether viewed as binding or not, support the avoidance of a forfeiture of those benefits. Even if the burden of proof is not the Union's, the record supports the County's position on this point.

The Order set forth above specifies how the disputed benefits are to be afforded Tobias. No further discussion on those benefits is necessary. It can be noted that the record indicates Tobias may have received other benefits, such as insurance, as a temporary employe. The record is sufficiently sketchy that no reliable conclusions may be drawn. Such benefits, if any, cannot be considered in dispute. The Order entered above should not, however, be read to authorize the forfeiture of any benefit, such as insurance, not specifically addressed by it.

Dated at Madison, Wisconsin, this 22nd day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

16/ Ibid., see also Pierce County, MA-6649 (McLaughlin, 2/92) and Pierce County, MA-8316 (McLaughlin, 11/94).