STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY and JAMES WAGMAN, Respondents.

Case 303
No. 55463
MP-3328

Decision No. 29219-B

Appearances:

Attorney John S. Williamson, Jr., 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of the Association of Mental Health Specialists.

Mr. Thomas A. Schroeder, Corporation Counsel, Rock County, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Rock County and James Wagman.

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

On May 28, 1998, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that by certain conduct with regard to the creation of two Human Services Worker positions, Respondents had not committed any prohibited practices within the meaning of Secs. 111.70(3)(a) 1, 3, 4 or 6, Stats. The Examiner further concluded that it was not appropriate to exercise jurisdiction over the alleged violation of Sec. 111.70(3)(a)5, Stats. He therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed briefs in support of and in opposition to the petition, the last of which was received August 20, 1998.

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

ORDER

A. Examiner Findings of Fact 1-24 are affirmed.

B. Examiner Conclusion of Law 1 is reversed and the following Conclusion of Law is made:

1. By failing to place the Human Services Worker position in Complainant's bargaining unit when this new position was created and filled, and by unilaterally establishing the wages, hours and conditions of employment for the Human Services Worker position prior to commencement of bargaining with Complainant over said matters, Respondent Rock County committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and derivatively 1, Stats.

C. Examiner Conclusions of Law 2-5 are affirmed.

D. Examiner Order is affirmed to the extent it dismissed the complaint allegations addressed by Conclusions of Law 2-5.

E. Examiner Order is reversed to the extent it dismissed the allegation addressed by Conclusion of Law 1 and the following Order is made:

ORDER

Rock County, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain with the Association of Mental Health Professionals as to the wages, hours and conditions of employment of new positions which fall within the scope of the Association's bargaining unit.

2. Take the following affirmative action:

A. Continue bargaining with the Association of Mental Health Specialists over the wages, hours and conditions of employment of the Human Services Workers.

B. Notify all of its employes represented for the purposes of collective bargaining by the Association of Mental Health Specialists by posting, in conspicuous places on its premises where said employes work, copies of the Notice attached hereto and marked Appendix A. The Notice shall be signed by an official of Rock County and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

C. Within 20 days of the date of this Order, notify the Wisconsin Employment Relations Commission in writing of the action taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL NOT violate our duty to bargain with the Association of Mental Health Specialists by failing to bargain over the wages, hours and conditions of employment applicable to new positions within the Association's bargaining unit.

_____ _____

Rock County Date

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

Rock County

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

The Pleadings

In its complaint, Complainant asserts in pertinent part:

4. At all times herein, the Association has been representative for a bargaining unit which included of (sic) Psycho-Social Workers employed in the Human Services Department of Respondent County. During this time, there was a collective agreement in effect between the Association and Respondent County.

5. After Respondent County filed Petitions for Election, Respondent Wagman, purporting to act for County, without notice to or the knowledge of Complainant, establish new positions in the bargaining unit Complainant represents. The collective agreement did not provide for such positions.

6. Respondents unilaterally established the hours, the wages, and the working conditions for these positions. Neither the hours nor the wages, nor, on information and belief, the working conditions conform to those negotiated with the Association.

7. To conceal its unlawful actions from the Association Respondent County did not deduct dues and transmit them to the Association until after it became certified although it was required to do so by the collective agreement..(sic) Respondent County continues to refuse to make such payments in order to inflict economic damage on the Association.

8. Respondent County has used its deceitful and unlawful conduct to strengthen its bargaining power during present negotiations for a 1996-1997 collective agreement when it proposed that the position "Human Services Worker", the position it unilaterally created, become one of the lowest paid positions in the bargaining unit. Instead of restoring the status quo or taking any other steps to undo its violation, Respondent County has demanded that the Association treat the positions it unilaterally created as if they were lawfully created bargaining unit positions.

9. Respondent County's continued insistence on treating these positions as if they were validly created positions disrupts the on-going the (sic) negotiations between the Association and County.

10. By their actions set for their (sic) paragraphs "1" through "9", Respondents have violated and are violating Section 111.70(a)(1), (4), (5), and (6).

AS AND (sic) FOR A SECOND CAUSE OF ACTION

11. THE Association repeats, reiterates, and realleges each and every other allegation set forth in paragraphs "1" through "10" herein.

12. Respondent Wagman created the "Human Service Worker" positions to encourage the persons he placed in them to be hostile to the Association.

13. The County, by condoning and defending Respondent Wagman's conduct set forth in paragraph "11" through "12", has also acted to encourage these employees to be hostile the (sic) Association.

14. For the period of time that the County did not deduct dues from the employees in the so-called Human Services Worker positions, the County acted to discourage their membership in the Association.

15. By the act Set (sic) forth in paragraphs "11" through "14", Respondents violated and are violating Section 111.70(a)(1) and (3).

In their answer, Respondents deny having committed any prohibited practices, assert that the complaint fails to state a claim, and allege that the Commission lacks jurisdiction to the extent the Complainant has failed to utilize available contractual remedies.

THE EXAMINER'S DECISION

The Examiner dismissed the complaint in its entirety. He reasoned:

Refusal to Bargain

Section 111.70(3)(a)4, Stats., requires Respondents to bargain collectively with the Association. The Association's main argument is that the County violated this statutory provision when it made unilateral changes in the wages, hours and working conditions of the Human Services Worker position. The Association also claims that Wagman's unilateral dealing with the employes in said position are per se violations of the duty to bargain in good faith.

As pointed out by Respondents, however, Sec. 111.70(3)(a)4, Stats., provides:

> An employer shall not be deemed to have refused to bargain until an election has been held and the results certified to the employer by the Commission.

The record indicates that the County was involved in proceedings before the Commission relative to its petitions for election at the time the aforesaid position was created. Following the Association's certification as the bargaining representative for a bargaining unit which included the position, the County attempted to bargain the wages, hours and working conditions for the position. The County has continued to be willing to bargain the wages, hours and working conditions for the position at all times material herein. The Association, however, refused to bargain over same.

The Association argues that it should not be forced to bargain wages, hours and working conditions for the aforesaid position until the County abolishes the position, and restores the status quo. Otherwise, according to the Association, the County enjoys an unfair advantage in negotiations.

The problem with this approach, as pointed out by Respondents, is that Section 2.01 of the parties' collective bargaining agreement gives the County the right to abolish and/or create positions, as well as the right to create job descriptions. In addition, the Commission has held that the decision to establish or abolish positions need not be bargained where such a decision primarily relates to policy and organization structure determinations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-B (WERC, 5/89); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83); OAK CREEK-FRANKLIN SCHOOL DISTRICT, DEC. NO. 11827-D (WERC, 9/74). As noted in Finding of Fact No. 10, the County's decision to create the Human Services Worker position primarily related to policy and organization structure determinations. In particular, the Examiner notes the County's determination that the new position could better meet its needs to provide necessary services to the psychiatric hospital's patients. Therefore, the Examiner finds that the County did not have a duty to bargain with the Association over the elimination of two psychiatric technician positions and the creation of two Human Services Worker positions. Since the County did not have a duty to bargain as noted above, it did not have an obligation to abolish the Human Services Worker position prior to bargaining with the Association over the wages, hours and working conditions for said position.

The Association also argues that Respondents introduced no evidence to explain why it did not know that the disputed positions were part of the existing Association unit. However, as noted above, at the time the position was created the County was involved in an election proceeding before the Commission. These proceedings were protracted. Therefore, the County had a legitimate concern, in the opinion of the Examiner, that if the positions were assigned to any one union, it would be accused of favoritism and attempting to unduly influence the pending

Commission election proceedings. Respondents point out that the County had already been accused of such conduct once before when it attempted to fill a CHIPS Case Manager position. ROCK COUNTY, DEC. NO. 28494-B (JONES, 1/96) ORDER DENYING MOTION TO INTERVENE AND DISMISSING PETITION FOR REVIEW, DEC. NO. 29494-B (WERC, 11/96) In addition, the Examiner notes that since an election was pending the County certainly had a good faith question as to who the appropriate bargaining representative would be.

The Association argues, however, that the County should have known that the position was within the aforesaid unit because all professionals in the psychiatric hospital (Health Care Center) were in the then-existing Association unit and the professional tasks the employes were assigned were those previously performed by the Recreational Therapist or the Crisis Intervention Workers. However, the Association offered no persuasive evidence or argument that the County acted improperly by creating these positions as unrepresented positions. If the Association felt these positions should have been in the unit, it could have filed for a unit clarification. In addition, the Association did not establish that the duties assigned to the new position from positions within the unit were professional in nature. Nor did the Association establish that the new position is performing duties that require the person performing them to meet the statutory definition of a professional employe. Acceptance of the Association's position noted above would require a finding, not supported by the record, that all of the duties performed by the aforesaid unit positions had been professional in nature. Based on same, and all of the foregoing, as well as the fact that the new position performs duties that were previously performed by the non-professional Psychiatric Technician position, the Examiner rejects the above argument of the Association.

The Association further argues that it could not take any action to enforce its rights regarding the Human Services Worker position because it was not notified of the creation of same. The trade off for the Human Services Workers was the deletion of two Psychiatric Technician positions represented by AFSCME. AFSCME was notified of that fact. In addition, as noted above, the positions were created as non-union. Based on the foregoing, the Examiner does not believe that the County had any obligation to inform the Association of the creation of the Human Services Worker position.

In any event, the disputed positions were created as part of the County's budgetary process with public hearings and notification. The positions were also included by the County on the list of employes eligible to vote in the aforesaid election. The Examiner is of the opinion that based on same the Association knew or should have known of the positions' existence prior to June of 1997. Based on all of the foregoing, the Examiner also rejects the above argument of the Association.

In addition, the Association argues that Wagman's unilateral dealings with the employes are per se violations of the duty to bargain in good faith. However, as noted above, the Association did not prove that the County failed to bargain in good faith with respect to the creation and filling of the Human Services Worker position. Since the County did not violate the duty to bargain in good faith as alleged, it follows that for the same conduct Wagman did not violate said duty. Nor did the Association offer any other persuasive evidence or argument in support of this allegation.

Finally, the Examiner believes that the record supports a finding that the Association did not want to bargain with the County over the wages, hours and working conditions for the Human Services Worker position except on its own terms. The law and the record facts, however, do not support such an approach.

Based on all of the above, the Examiner finds that by their conduct Respondents did not violate their duty to bargain as provided in Sec. 111.70(3)(a)4, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

Contract Violation

The complaint also alleges a violation of Sec. 111.70(3)(a)5, Stats., and presumably a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

The County argues that the parties' contractual grievance/arbitration procedure is the proper forum to resolve these disputes. The Association offers no rebuttal argument. For the reasons discussed below, the Examiner agrees with the County's position.

Generally, the Commission 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, B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (WERC, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/79). The rationale for this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. CITY OF MADISON, DEC. NO. 28864-A, P. 17 (CROWLEY, 1/97), AFF'D EXAMINER'S FINDINGS OF FACT, MODIFIED EXAMINER'S CONCLUSION OF LAW AND AFFIRMED EXAMINER'S ORDER, DEC. NO. 28864-B (WERC, 10/97). 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, 225 N.W.2D 617, 621 (1975). Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. It is undisputed that no grievances were filed in this matter. Thus, it must be concluded that the Association has failed to exhaust the contractual grievance procedures.

While the Commission recognizes certain exceptions to this general policy, no such exception exists here. See WONDER REST CORP., 275 WIS. 273 (1957) - the employe alleges denial of fair representation; ALLIS CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67) - the parties have waived the arbitration provision; and MEWS READY MIX CORP., 29 WIS.2D 44 (1965) - a party ignores and rejects the arbitration provisions in the contract.. The Association offered no persuasive reason for not filing a grievance in the matter and pursing a resolution of the dispute to arbitration. The County has specifically stated that the arbitral forum is the proper place to resolve any contractual disputes and has not raised any arbitrability objections regarding same.

The parties have a contract which contains a grievance procedure which culminates in final and binding arbitration. The parties have agreed to have an arbitrator determine whether there has been a violation of the contract. This agreement must be given effect and as noted above, no exceptions apply. It is therefore the arbitrator that should decide the merits of the Association's claim. This is the parties' exclusive remedy and the Examiner will not assert the Commission's jurisdiction to determine whether or not Respondents violated the parties' contract. Thus, the alleged violation of Sec. 111.70(3)(a)5, Stats., as well as the derivative violation of Sec. 111.70(3)(a)1, Stats., are dismissed in their entirety.

Discrimination and Interference

Complainant further asks that the Examiner find that Respondents violated Sec. 111.70(3)(a)1 and 3, Stats.

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. Complainant was engaged in protected activities; and

2. Respondents were aware of those activities; and

3. Respondents were hostile to those activities; and

4. Respondents' conduct was motivated, in whole or in part, by hostility toward the protected activities. 1/

1/ 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).

It is undisputed that Complainant engages in protected activities when it represents and bargains for unit employes and that Respondents are aware of those activities. The evidence fails to establish that Respondents were hostile to Complainant's protected activities. Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that there was such hostility. The evidence failed to show that Wagman created the "Human Service Worker" position to encourage the persons he placed in them to be hostile to the Association. Nor does the evidence indicate that Wagman took any other action relative to the aforesaid position out of hostility toward the Association. There is no evidence of any animosity on the part of Wagman or the County toward Complainant's protected activity. Therefore, it must be concluded that there is simply no evidence to support a finding of hostility toward Complainant's protected activity. Since there is no evidence that Wagman was hostile to Complainant's protected activity, the County, by "condoning and defending Respondent Wagman's conduct" noted above, did not act out of hostility toward Complainant's protected activity as alleged by Complainant.

Even if there were hostility, Respondents' conduct would have to be motivated by said hostility. Motive is difficult to determine as usually there is no direct evidence so it must be determined from the total circumstances proved. Here, despite the Complainant's elaborate theories regarding Respondents' misconduct as noted above, the Examiner finds that based on the totality of circumstances, the evidence simply fails to show that Respondents' actions were motivated by hostility. Thus, the allegation of Sec. 111.70(3)(a)3, Stats., violations have been dismissed.

The Complainant has alleged a violation of Sec. 111.70(3)(a)1, Stats. Inasmuch as there is no Sec. 111.70(3)(a)3, Stats., violation, there is no derivative Sec. 111.70(3)(a)1, Stats., violation.

As far as an independent violation, Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

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

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

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

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1995). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

Employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28846-A (CROWLEY, 5/97) AFF'D DEC. NO. 28846-D (WERC, 12/97). Here, based on all of the foregoing, the Examiner finds no conduct by Respondents that would have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights. However, assuming arguendo that there is such conduct, the Examiner finds that the Respondents had valid business reasons for its actions. In this regard, the Examiner points out that valid budgetary, programmatic and policy reasons existed for Respondents' actions. In particular, the County attempted, without

success, to fill the position of recreational therapist. Thereafter, the County obtained a waiver from the State to have such a position because it was unable to fill the position and subsequently assigned some of the duties that the recreational therapist had performed to the Human Services Worker position. In addition, prior to the creation of the Human Services Worker position, the County had the job of leading patient groups assigned to Psychiatric Technicians. The County also had Nursing Assistants filling out financial forms on patients. Since the County was unable to fill the Recreational Therapist position, the County "saw a need for a position that would fit somewhere between the traditional psych tech position and that of the professional social worker" to perform the aforesaid functions. (Tr. At 51) The County then decided that it could better provide this service by deleting two Psychiatric Technician positions and using that funding to create a lesser FTE Human Services Worker.

In deciding to create this new position, the County also came to the conclusion that it was not necessary to have an employe with the certification of social worker to perform the functions in question. Another factor in arriving at this course of action was the advent of certification for social workers, i.e. anyone calling themselves a social worker needed that certification. The County wanted to comply with State requirements in this area.

Based on the foregoing and the record as a whole, the Examiner is persuaded that the County took the aforesaid actions in order to better serve its human services customers.

Based on all of the above, the Examiner finds that the evidence failed to prove any violation of Sec. 111.70(3)(a)1, Stats., and, therefore, that charge has also been dismissed.

Alleged Violation of Sec. 111.70(3)(a)6, Stats.

The Association also argues that Respondents violated Sec. 111.70(3)(a)6, Stats., by failing to deduct Union dues upon the creation and filling of the aforesaid positions. However, the Association offered no additional evidence or argument, except as discussed above, in support of this claim. In addition, the record is clear that the County, upon notification from the Commission of the results of the election, immediately began deducting dues for the persons in the position of Human Services Worker. Based on the foregoing, the Examiner finds that there has been no violation of Sec. 11.70(3)(a)6, Stats.

Based on all of the foregoing, and the record as a whole, the Examiner finds that the allegations of prohibited practices by Complainant are without merit, and the Examiner has dismissed the complaint in its entirety.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant asks that the Examiner be reversed in all respects.

Complainant contends the Examiner erroneously characterizes Complainant's position in this litigation. Complainant asserts it is not arguing that Respondent County acted unlawfully by creating the two Human Services Worker positions. Instead, Complainant is arguing that Respondents committed prohibited practices by placing the positions outside of Complainant's unit, by bargaining directly with the new employes, and by depriving the employes of the protections and benefits to which they were entitled under the status quo created by the expired contract.

Complainant also argues the Examiner improperly relied on Sec. 111.70(3)(a) 4, Stats., when finding that Respondent County had not violated the duty to bargain with Complainant. Complainant alleges this statutory provision does not extinguish Respondent County's duty to maintain the status quo even where an election petition is pending.

Complainant asserts the Commission should reject the Respondents' contention that the decision not to place the positions in Complainant's unit was a valid attempt to stay neutral and avoid litigation during an election between competing unions. Complainant argues that Respondents were legally obligated to place the positions in Complainant's unit and thus that any legal claim to the contrary by a competing union would have been without merit.

Complainant alleges that because of the unique but important issues raised by this case, it is appropriate for the Commission to assert jurisdiction over the Complainant's violation of contract claim. Complainant contends that the Respondents in effect repudiated the contractual grievance procedure when they decided not to place the new positions in Complainant's unit.

Respondents

Respondents contend the Examiner's Findings and Conclusions are entirely consistent with the record and the applicable law. Respondents argue they proceeded in good faith to create positions based on service needs and sought to bargain with Complainant over the positions' wages, hours and conditions of employment as soon as Complainant was certified as the collective bargaining representative. Respondents contend that placement of the new positions in any collective bargaining unit during the pendency of the election proceeding before the Commission would have subjected the Respondents to claims of favoritism by one or more of the competing unions and to additional litigation. Respondents assert that if Complainant was dissatisfied with the initial "no-unit" placement of the position, Complainant could have filed a unit clarification petition.

Given all of the foregoing, Respondents urge affirmance of the Examiner's decision.

DISCUSSION

The focal point of this litigation is Respondent County's initial decision not to place the Human Services Worker position in the existing professional employe bargaining unit represented by Complainant. Respondent County defends its decision by citing the then pending election proceedings and its interest in avoiding any action which could be viewed as favoring any of the affected unions. While we find the Respondent County's asserted motivation and concern to be understandable and credibly supported by the record, we nonetheless conclude that Respondent County should have placed the Human Services Worker position in Complainant's existing unit even given the pending election proceeding.

In SAWYER COUNTY, DEC. NO. 25681-A (WERC, 3/89), we rejected a claim that scheduling a bargaining session between an incumbent union and a municipal employer during the pendency of an election petition interfered with the voting employes' ability to freely cast their ballots. In reaching that conclusion, we noted that such conduct by the incumbent union and the employer was consistent with the incumbent union's ongoing obligation to represent employes during the pendency of the election petition.

Applying SAWYER COUNTY to the case at hand, we find the Respondent County's neutrality concerns did not warrant creation of the Human Services Worker as an unrepresented position. The pending election petitions did not affect Complainant's ongoing status as the collective bargaining representative of professional Health Care Center employes. If new professional Health Care Center positions were created during the pendency of the election proceedings, Complainant was entitled to represent the employes filling those positions. As evidenced by Respondent County's agreement that the Human Services Workers were eligible to vote in the professional Health Care Center election and ultimate post-election placement of the Human Services Workers in the professional Health Care Center unit, the Respondent always viewed the Human Services Workers as professional Health Care Center employes. Thus, Complainant was entitled to act as the collective bargaining representative of the Human Services Workers during the pendency of the election proceeding and Respondent County's initial treatment of the employes as unrepresented by Complainant and the resulting unilateral establishment of said employes' wages, hours and conditions of employment violated Respondent County's duty to bargain with Complainant. Therefore, a finding of a violation of Sec. 111.70(3)(a)4, Stats., has been made. As there is no persuasive evidence of any individual bargaining with the employes, our finding of a violation is not premised on Complainant's allegation that such bargaining occurred.

In reaching this conclusion, we have rejected the Examiner's reliance on the portion of Sec. 111.70(3)(a)4, Stats., which provides:

> An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission.

This statutory language insulates an employer from liability when it refuses to bargain with a union which claims to be the bargaining representative of unrepresented employes. NEW RICHMOND JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 15172-B (WERC, 5/78). It has no application to the instant case.

As to the appropriate remedy for this violation, the record establishes that since Respondent County placed the Human Services Worker positions in the bargaining unit represented by Complainant, it has been attempting to bargain with Complainant over the wages, hours and conditions of employment applicable to the employes in question. Complainant has resisted those attempts based on its belief that good faith bargaining cannot occur until the Human Services Worker wages, hours and conditions of employment unilaterally imposed by Respondent County have been rescinded. Complainant asserts we should order such a remedy.

We do not find such a remedy to be appropriate in this case. First, there is the practical question of what would the wages, hours and conditions of employment become for the new positions/employes if the existing wages, hours and conditions of employment were rescinded. Complainant suggests that the expired contract should apply but the Service Workers positions did not exist when that contract was bargained and thus, for instance, there obviously is no Human Services Worker wage rate in the expired agreement. What wage rate would establish the "level playing field" which Complainant seeks? Second, the decision to create the new positions was a permissive subject of bargaining primarily related to Respondent County's assessment of the service needs of patients. We have consistently held that an employer can proceed to implement a permissive subject of bargaining while bargaining over the impact of the permissive action on wages, hours and conditions of employment is ongoing. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83); CITY OF MADISON, DEC. NO. 17300-C (WERC, 7/83). Thus, if Respondent County had bargained with Complainant over Human Services Worker wages, hours and conditions of employment from the time the position was created and if the parties had not reached agreement on these matters at the point in time when Respondent wanted to begin to provide services to patients, Respondent would have been entitled to proceed to implement its permissive decision by filling the positions using unilaterally established wages, hours and conditions of employment-subject to amendment by the parties' ultimate agreement on what those wages, hours and conditions of employment should be from the time the two Human Services Worker positions were filled. Thus, we conclude the remedy which best effectuates the purposes of the Municipal Employment Relations Act in this case is one which leaves the existing Human Services Worker wages, hours and conditions of employment intact pending the parties' completion of bargaining over these matters.

We have affirmed the Examiner's dismissal of all other complaint allegations.

The Sec. 111.70(3)(a)5, Stats., violation of contract allegation can only be applicable to conduct prior to January 1, 1996 inasmuch as the contract expired December 31, 1995. As to pre-January 1, 1996 conduct (all of which was more than one year prior to the filing of this complaint on April 13, 1997 and thus would not be properly before us if Respondents had pled the affirmative defense of our one year statute of limitations-See STATE OF WISCONSIN, DEC.

NO. 28222-C (WERC, 7/98), the Examiner correctly concluded that the contractual grievance arbitration procedure is the exclusive mechanism for litigation of such issues.

The Sec. 111.70(3)(a)1 and 3, Stats., allegations were appropriately dismissed inasmuch as the record does not satisfy us that Respondents' conduct had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2), Stats., or was motivated by illicit hostility toward Complainant.

The Sec. 111.70 (3)(a)6, Stats., allegation is appropriately dismissed because this statutory provision is applicable to alleged unauthorized deductions of union dues from employes and there is nothing in the record to indicate such unauthorized dues deductions occurred.

Given all of the foregoing, we have reversed in part and affirmed in part the Examiner's decision.

Dated at Madison, Wisconsin this 21st day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner