

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 617, AFSCME, AFL-CIO, Complainant

vs.

TAYLOR COUNTY, Respondent.

Case 82
No. 57508
MP-3515

Decision No. 29647-B

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of Local 617, AFSCME, AFL-CIO.

Prentice & Phillips, by **Attorney John J. Prentice**, 611 North Broadway, Suite 220, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 617, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission on April 26, 1999, which it amended on September 13, 1999, alleging that Taylor County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats. On June 18, 1999, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on August 2, 1999, in Medford, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which were exchanged on November 2, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

No. 29647-B

FINDINGS OF FACT

1. Local 617, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all times material herein is the exclusive collective bargaining representative of all part-time, full-time and seasonal Highway Department employees of the County, as well as the Purchasing/Machinery Clerk, excluding the Commissioner, Patrol Superintendent, all other clerks, engineers, foremen and temporary employees. The Union's principal offices are located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717.

2. Taylor County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at the Courthouse, 224 South Second Street, Medford, Wisconsin 54451.

3. The Union and the County have been parties to a series of collective bargaining agreements, the most recent of which, by its terms, covered the period January 1, 1996 through December 31, 1998. The agreement contained an Addendum which provided as follows:

RE: TEN HOUR, FOUR DAY WORKWEEK

1) The parties agree that in 1996, 1997, and 1998 beginning Memorial Day and continuing through the Friday preceding Labor Day, the regular work week shall be forty (40) hours, and the regular work day shall be ten (10) hours per day, Monday through Thursday, except for two (2) patrolmen whose regular work day schedule be ten (10) hours per day, Tuesday through Friday.

2) Working hours shall be 6:30 a.m. to 4:30 p.m., with a ten (10) minute morning break, and a fifteen (15) minute lunch period, without loss of pay.

3) Upon two (2) weeks notice to the Union, the County may begin the ten (10) hour day, four (4) day week work period one month prior to Memorial Day, and continue this work period for one month after Labor Day.

4) Pay for a vacation day, holiday, or sick day taken during the ten (10) hour day, four (4) day week work period shall be at ten (10) hours per day.

5) Hours worked over ten, or over forty, during the ten hour day, four day week work period, will be compensated at the rate of time and one-half (1-1/2) regular pay.

6) The ten hour day, four day week work period will be scheduled in 1996-1998 on the same basis as in 1990, unless either party notifies the other party, in writing, prior to January 1, 1997 or January 1, 1998, that it wishes to discontinue the schedule.

Said Addendum had been signed by the County but not the Union and had been applied each of the three years of the contract.

4. This Addendum was first agreed to in the 1988-1989 collective bargaining agreement and continued in each contract with the dates updated for the contract period. There was little if any discussion in negotiations over the Addendum and in the 1992-1993 contract, the Addendum was signed by the Union but not the County, but the parties applied its provisions during the term of the agreement. It was part of the 1994-1995 agreement, updated for the contract term and was signed by both parties.

5. Sometime in 1998, the parties commenced negotiations for a successor to the 1996-1998 collective bargaining agreement. Neither side proposed any changes to the Addendum. In January, 1999, the Union filed a petition for interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. On April 1, 1999, the parties met with the investigator who attempted to mediate the dispute. The County asserted that it raised the Addendum with the investigator and the Union denied that there was any communication about the Addendum from the investigator. The parties were unable to reach a settlement.

6. The status quo which existed at the expiration of the 1996-1998 collective bargaining agreement included the terms and conditions of the Addendum on the ten hour, four day work week.

7. On April 1, 1999, after the investigation was completed, the County Personnel Committee met and voted unanimously to instruct the Highway Commissioner to go to a five day, eight hour work week during the summer of 1999, instead of the four day, ten hour work week. Thereafter, the Highway Commissioner discontinued the four day ten hours per day schedule for the summer and employees worked a five day, eight hour schedule. The Committee's action on April 1, 1999, was motivated, in part, by anti-union animus toward the Union's protected concerted activity.

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

CONCLUSIONS OF LAW

1. The County, by its change of the work schedule contrary to the Addendum, unilaterally violated the status quo and committed a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., and derivatively interfered with the Sec. 111.70(2) rights of bargaining unit employees in violation of Sec. 111.70(3)(a)1, Stats.

2. The County's decision to change the summer work schedule was motivated, in part, by its hostility toward the Union's protected concerted activity and violated Sec. 111.70(3)(a)3, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

3. The Union failed to prove any violation of Secs. 111.70(3)(a)2 or 5, Stats.

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

ORDER

IT IS ORDERED that:

1. The alleged violations of Secs. 111.70(3)(a)2 and 5, Stats., are dismissed.

2. Taylor County, its officers and agents, shall immediately:

(a) Cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by changing the status quo during the hiatus period by failing to maintain the ten hour, four day work week without the proper notification of its discontinuance.

(b) Cease and desist from discriminating against bargaining unit employees for engaging in protected concerted activity.

(c) Take the following affirmative action which will effectuate the policies and purposes of the Municipal Employment Relations Act:

1. Immediately compensate all bargaining unit employees who were required to work an eight hour, five day work week instead of a ten hour, four day work week had the Addendum not been changed, eight hours at a time and one-half for each Friday worked after Memorial Day through the Friday before Labor Day in 1999, together with interest on said sums at the rate of 12% per year.

2. Notify all bargaining unit employes, by posting in conspicuous places where employes work, copies of the Notice attached hereto and marked "Appendix A." The notice shall be signed by a responsible representative of the County and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to ensure said Notice is not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin, this 23rd day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

APPENDIX A

NOTICE TO EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, Taylor County hereby notifies its employees that:

1. The County will not make any change in the status quo by unilaterally changing the summer work schedule as provided in the Addendum to the 1996-1998 collective bargaining agreement until changed in negotiations or until proper notice is given to discontinue the schedule.
2. The County will not discriminate against bargaining unit employees on the basis of their having engaged in concerted protected activity.
3. The County will make employees whole by paying those employees who otherwise would not have worked on Mondays or Fridays from after Memorial Day and before Labor Day, time and one-half for the eight hours worked on Fridays, plus interest.

Dated at Medford, Wisconsin, this _____ day of _____, 1999.

For Taylor County

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

TAYLOR COUNTY

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

In the complaint initiating this proceeding, the Union alleged that the County violated Secs. 111.70(3)(a)1, 2, 4 and 5, Stats., by unilaterally canceling the ten hour per day/four day per week work schedule during the hiatus prior to reaching a successor collective bargaining agreement. The County answered said complaint asserting it failed to state a complaint upon which relief could be granted. After the hearing, the Union amended its complaint to include a violation of Sec. 111.70(3)(a)3, Stats.

UNION'S POSITION

The Union contends that the County violated its duty to bargain by unilaterally altering the status quo by changing its summer work schedule for 1999. It submits that work hours are a mandatory subject of bargaining and that the Addendum was part of the agreement but was not an issue over which the parties reached an impasse. It argues that, absent a valid defense, a unilateral change in the status quo hours during a contract hiatus is a per se violation of the employer's duty to bargain under MERA. It claims that the evidence is overwhelming and largely undisputed that the County acted unilaterally to implement a change in the status quo. It notes that the Personnel Committee acted on April 1, 1999, to cancel the 1999 construction work schedule because it believed it was a benefit the County "could take away" from the Union. The Union believes the fact that the County acted affirmatively to implement the change, establishes that the County viewed the summer schedule as the status quo.

It observes that the Commission has consistently ruled that the relevant language from the expired contract as historically applied or as clarified by bargaining history are critical considerations as to what constitutes the status quo. It contends that the bargaining history over a ten year period establishes little or no mention of the continuation of the summer schedule and the provision was routinely considered as any other contractual provision which neither party sought to modify and its continuation and updating essentially became a clerical endeavor. It points out that the "status quo doctrine" entitles the parties to retain those rights and privileges in existence when the old contract expired which primarily relate to wages, hours and conditions of employment while they bargain over the rights they will have under the next contract.

The Union alleges that the County violated Sec. 111.70(3)(a)3, Stats., by discriminating against employes for engaging in legally protected activities by changing the summer work schedule when the parties were unable to reach agreement on a successor contract. The Union states that to support a charge of discrimination it must prove that: (1) the employe was engaged in protected concerted activity; (2) the County was aware of such activity; (3) the

County was hostile to such activity; (4) the County's complained-of conduct was motivated at least in part by such hostility. The Union maintains that items (1) and (2) were moot as the parties had just completed an unproductive mediation/investigation session and both parties were aware of this protected concerted activity. As to items (3) and (4), the Union observes that the timing of the motivating incident is important in that the Committee immediately after reaching impasse acted in a retaliatory manner. It points to the testimony of Personnel Committee Chairman, Tim Peterson, who testified that the decision to change the schedule was to retaliate for the Union's refusal to accept a change sought by the County in contract negotiations. It concludes that the County's decision was "at least in part" retaliatory and it acted unlawfully.

The Union seeks a remedy that includes a cease and desist order, a posting and a make-whole remedy for the County's egregious conduct.

COUNTY'S POSITION

The County contends that the Addendum to the parties' collective bargaining agreement, by its own terms, automatically expired on December 31, 1998, and thus the County had no obligation to continue it. The County also maintains that no remedy is available to the Union because employees worked the same number of hours in 1999 as they would have under the Addendum.

As to the alleged violation of Sec. 111.70(3)(a)1, Stats., the County denies that it in any way attempted to "interfere with, restrain or coerce" its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats. It insists that the alleged retaliation was a legitimate and lawful exchange in collective bargaining. It allowed the Addendum to sunset to leverage changes in the leave provision. It observes from the testimony of the Personnel Committee Chairman that the Committee was frustrated by the intransigence of the Union but this was part of the rough and tumble world of collective bargaining. The County did nothing except intend the four day, ten hour work week as a quid pro quo for modifications in the leave provisions.

The County notes that there was no evidence of any violation of Sec. 111.70(3)(a)2, Stats.

As to the Sec. 111.70(3)(a)3, Stats., violation, the County notes that this issue was raised after the hearing, and it was unsure how it allegedly violated this section and reserved the right to respond to it after review of the Union's brief.

With respect to the alleged violation of Sec. 111.70(3)(a)4, Stats., the County contends that there is simply no merit to this allegation. It insists that it bargained over the four day, ten hour work week and any allegation it refused to do is without merit.

As to the alleged violation of Sec. 111.70(3)(a)5, Stats., the County notes that the Addendum expired at the end of 1998. It observes that the Addendum refers to only 1996, 1997 and 1998, and asks what could be clearer. It argues that if it was the intent that the Addendum become a permanent part of the contract it should have been made a part of Article IV or written without the explicit date limitations. It insists that the Union's position does not make sense and does not comport with the realities of the collective bargaining process. It requests that the complaint be dismissed in toto.

UNION'S REPLY

The Union contends that the County is in error in stating that the Union initially proposed to modify the work week in 1988-1989. It notes that the Union was seeking 10 cents an hour as a quid pro quo for the schedule modification which strongly suggests that the County initially proposed it.

The Union points out that the County in its brief asserted it used the four day, ten hour work week as a bargaining tool to obtain modifications in the leave of absence provision. It notes that the County unilaterally discontinued the ten hour day during the hiatus period and reiterates that this is a per se violation of the duty to bargain. It insists that the proper method to change the contract was in interest arbitration, not unilateral implementation.

It disputes the County's claim that the Addendum "sunset" or that it expired at the end of 1998 observing that the collective bargaining agreement had an express expiration date of December 31, 1998, but after that the County could not unilaterally modify wages, hours and conditions of employment and that is the essence of the Union's refusal to bargain assertion. The Union further argues that bargaining history supports its contention. The Union seeks a make-whole remedy of two hours Monday through Thursday and premium compensation for Friday.

COUNTY'S REPLY

The County points out that the Union states a number of facts which do not appear in the record such as the rationale for the modified schedule and why it became popular with employees. It also argues that the Union mischaracterized as facts certain arguments. It contends that these should not be considered in any respect.

The County maintains that it did not modify the status quo. In ascertaining the status quo, the County cites Commission rulings that application of the dynamic status quo is done on a case-by-case basis with an examination of the language of the collective bargaining agreement, past practice and bargaining history. As to the language of the Addendum, the County observes that this was viewed as a side letter which is distinguishable from the

collective bargaining agreement. It refers to the CITY OF BROOKFIELD, DEC. NO. 19822-B (RUBIN, 2/84) in support of its position that side letters are intended for limited purposes and argues that there is a tension between the agreement and the side letter during a hiatus.

As to bargaining history, the County claims the dearth of bargaining can be construed as the parties' intent to maintain the original objective of the modified work schedule which was that the parties never intended to permanently lock themselves into the summer hours schedule. It claims the parties wanted an "escape clause" and the parties intended the side letter be maintained on the same basis as in 1990, which means on a limited basis.

The County argues that there is no past practice that establishes the dynamic status quo. The County does an analysis of past practice theory in the context of determining whether one exists and whether it is applicable to ambiguous contract language. It claims the nature and scope of any past practice is unclear and it insists that there is no past practice. The County asserts that the side letter lapsed at the end of the contract period. It also claims it had a legitimate business interest in the action it took as it no longer believes the summer work schedule benefited the County. It concludes that bargaining history and past practice do not support the Union's theory.

The County denies any retaliation against the Union in violation of Sec. 111.70(3)(a)3, Stats. It submits that there is no credible evidence that the County engaged in any unlawful discrimination or retaliation here. It insists that the Union erroneously applied the standards to establish a violation of Sec. 111.70(3)(a)3, Stats. It argues that there was no showing that the County was hostile to the Union and the conduct occurred as an adjunct to the collective bargaining process and the County considered modification of the schedule as a "bargaining tool." It claims that the testimony of the Personnel Committee Chairman does not establish discrimination (at least in part) but was merely hard bargaining and use of the schedule as a quid pro quo for a revision in the leave provision. It claims that the Union has taken the Chairman's testimony out of context.

The County maintains that it did not violate the law in any way, but if there is a finding that it did, the appropriate remedy is simply a cease and desist order as employees suffered no monetary loss. It asserts the County acted in good faith and without animus and there is no basis for paying compensation for lost work on Mondays through Thursdays.

DISCUSSION

Section 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employees in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. 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.

The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

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. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) AT 12; GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) AT 18-19; and SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) AT 14. In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA AT 14.

Status quo is a dynamic concept which can allow or mandate change in employe wages, hours and conditions of employment. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92). Thus, application of the dynamic status quo principle may dictate that additional compensation be paid to employes during a contract hiatus period upon attainment of additional experience or education, or may give the employer the discretion to change work schedules during a contract hiatus period. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); WASHINGTON COUNTY, DEC. NO. 23770-D (WERC, 10/87). When determining the status quo within the context of a contract hiatus period, the Commission considers relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA, NOTE 2. The past practice of the parties is also considered. SCHOOL DISTRICT OF PLUM CITY, DEC. NO. 22264-B (PIERCE COUNTY CIRCT, 4/88).

A review of the Addendum reveals that it does not have an expiration date so there is no sunset provision as alleged by the County. The instant case is distinguished from CITY OF BROOKFIELD, SUPRA, because there the summer hours were for a trial period ending September 1, 1981, which after September 1, 1981, the hours provision in the agreement became the status quo. Here, the Addendum does not have such an expiration date but does have an escape clause that either party by giving written notice by January 1 could discontinue the schedule. No such notice was given. The County relies on the years stated in the Addendum to argue that it sunset, however, this argument falls within the static status quo which has been rejected by the Commission with the adoption of the dynamic status quo. See MENASHA JOINT SCHOOL DISTRICT, DEC. NO. 16589-B (WERC, 9/81) REV'D, CASE NO. 81-CV-1007 (CIRCT WINNEBAGO, 8/83). Thus, the specification of years does not mean that the Addendum expired at the end of the last year stated in the Addendum. The bargaining history indicates that there was little bargaining over the Addendum and essentially the dates were changed to reflect the new collective bargaining term (Exs. 7-25). Thus, the bargaining history supports the conclusion that the parties did not consider the Addendum as expiring but continuing until notice was given in accordance with its terms or it was changed in negotiations. Although the parties disputed whether it was brought up in negotiations for the successor agreement, any discussion is irrelevant to the status quo. It is well understood that the status quo doctrine generally entitles the parties to retain those rights and privileges in existence when the old contract expired, which primarily relate to wages, hours and conditions of employment, while the parties bargain over what rights they will have under the next contract, ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (WERC, 7/93) AFF'D 180 WIS.2D 671 (1994). A party is not obligated to bargain over the loss of existing status quo protections during the contract hiatus but only over the new provisions in a successor agreement. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96). Thus, the County was obligated to maintain the status quo which included the Addendum for the calendar year 1999 as no new agreement was reached and no notice prior to January 1, 1999, was given.

Although the County argued no past practice established the dynamic status quo, the County's arguments are misplaced. Had the parties previously gone into a hiatus where the Addendum was followed or for that matter not followed, then that past practice would shed light on the dynamic status quo. Inasmuch as the parties always reached agreement before Memorial Day and the Addendum applied, past practice is not applicable to establish what the dynamic status quo is. It is concluded that the language of the Addendum as historically applied and the bargaining history establishes that the status quo as it applied to summer hours, which is a mandatory subject of bargaining, required the County to apply the Addendum to the 1999 Memorial Day to Labor Day period. The County's changing the summer hours violated the status quo and constituted a refusal to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of

employment. The right to bargain through representatives of their own choosing is a right under Sec. 111.70(2), Stats., and under Sec. 111.70(1)(a), Stats., the duty to bargain does not compel either party to agree to a proposal or require the making of a concession. Furthermore, as noted above, the status quo related to summer hours was a condition of employment employees could rely on during a hiatus period.

To establish a violation of Sec. 111.70(3)(a)3, Stats., the complaining party must prove each of the following factors:

1. that employees have engaged in protected, concerted activity;
2. the employer was aware of such activity;
3. the employer was hostile to such activity; and
4. the employer's conduct was motivated, in whole or in part, by hostility toward the protected activity.

MUSKEGO-NORWAY V. WERB, 35 WIS.2D 540 (1967).

It is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors for such action is the employee's protected concerted activity. LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). If animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action, as an employer may not subject an employee to adverse consequences when one of the motivating factors is his union activity. MUSKEGO-NORWAY, SUPRA. Evidence of hostility and illegal motive may be direct (such as with overt statements) or, more often, inferred from the circumstances. TOWN OF MERCER, DEC. NO. 14783-A (GRECO, 3/77).

There is no dispute that the employees were engaged in protected, concerted activity as they were bargaining with the County. Obviously, the County was well aware of this as the County was the other party in bargaining. The evidence establishes that the County was hostile to the Union's activity. Mr. Peterson, the Personnel Committee Chairman and a member of the bargaining team for the County, testified that the Committee was very frustrated because all of the County's proposals and offers were rejected on the leave issue. (Tr. 53) The Union is not obligated to make any concession. The County could put their proposal in their final offer and argue the merits to the interest arbitrator, and if persuasive, its offer may be chosen and the problem resolved. As to the fourth element, the County, almost immediately after the mediation session ended, voted to change the summer work hours. (Ex. 33) The County took the action to eliminate the four ten-hour days because the Union

would not agree to its proposal on leave. (Tr. 45) It refers to the County's action as a "bargaining tool" but it appears clear that the action was taken to punish the Union. The County could still use the threat to change summer hours in the next contract or by giving the notice required for the next year as a bargaining tool but it was the implementation that was improper. Motive is sometimes hard to determine and reliance on inferences from the facts is necessary. Also, if the Employer had legitimate reasons for its action, this is a factor in determining motive. *EMPLOYMENT RELATIONS DEPT. V. WERC*, 122 WIS.2D 132 (1985). Here the timing of the action as well as lack of any legitimate reason and the admission that the Committee was frustrated proves that the change in summer hours was motivated, in part, by the Union's stance in negotiations, a clearly protected activity. Thus, the County violated Sec. 111.70(3)(a)3, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

The Union alleged a violation of Sec. 111.70(3)(a)2, Stats., but offered no arguments in its brief in support of this charge. That section makes it a prohibited practice for a municipal employer to "initiate, create, dominate, or interfere with the formation or administration of any labor or employee organization . . ." Domination requires the actual subjugation of the labor organization to the employer's will. To establish a violation of this section, a complainant must demonstrate that a respondent's conduct threatened the independence of the union as an entity devoted to the employees' interests as opposed to the employer's interest. In this case, there is no evidence whatsoever that the County's action impaired the Union's independence as an entity devoted to the employees' interests. As a result, there is no basis in the record for concluding that the County violated this section by its conduct herein. Accordingly, no violation of Sec. 111.70(3)(a)2, Stats., has been found.

The Union also alleged a violation of Sec. 111.70(3)(a)5, Stats. 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. The rationale for this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. 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. Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. The Union failed to prove that it followed the contractual grievance procedure and the Examiner declines to exercise the Commission jurisdiction over the merits of a breach of contract claim.

In summary, it is concluded that the County did not violate Secs. 111.70(3)(a)2 or 5, Stats.

As to the remedy, besides a cease and desist order and a notice posting, the County argues that as employees worked 40 hours, five eight-hour days as opposed to four, ten-hour days, they suffered no loss. Sort of a no harm, no foul. However, in *CITY OF BROOKFIELD*, SUPRA, the Commission held that employees should be treated as if no change had been made.

If there was no change, then employes would have worked 40 hours Monday through Thursday or Tuesday through Friday. They were in fact paid 40 hours but they worked eight hours on Friday or Monday which they would not have unless it was overtime, so the eight hours worked on Friday would have been overtime. Thus, the appropriate remedy is to make employes whole by paying them time and one-half for the eight hours worked on Friday.

Dated at Madison, Wisconsin, this 23rd day of November, 1999.

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner