STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 617, AFSCME, AFL-CIO, Complainant.

vs.

TAYLOR COUNTY, Respondent.

Case 62
No. 57508
MP-3515

Decision No. 29647-C

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 Taylor County.

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

On November 23, 1999, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he decided that by certain conduct regarding a summer work schedule, Respondent Taylor County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats. He therein also concluded that no violations of Secs. 111.70(3)(a)2 or 5, Stats., had occurred.

Respondent Taylor County timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition.

By letter dated May 16, 2000, the Commission advised the parties of its intent to take notice of the content of the file in TAYLOR COUNTY, Case 79, No. 57220, INT/ARB-8668 including Arbitrator Krinsky's award issued April 26, 2000. In that letter, the Commission asked that the parties advise it on or before May 26, 2000 if there was an objection to the Commission taking such notice. No objection was received. Notice is hereby taken.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-4 are affirmed.

B. Examiner Finding of Fact 5 is modified to read as follows:

5. In October, 1998, the parties commenced bargaining for a successor to their 1996-1998 contract. No agreement on a successor contract had been reached when the 1996-1998 contract expired on December 31, 1998. In January, 2000, the Union filed a petition for interest-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats.

Until April 1, 2000, the status of the Addendum as part of the successor agreement was not discussed or specifically referenced in a bargaining proposal from either party. On that date, during a mediation session conducted by a Commission investigator pursuant to a Sec. 111.70(4)(cm)6, Stats., the County told the investigator that it was willing to include the Addendum in the successor agreement if the Union was willing to make concessions in existing leave of absence provisions. Later that same day, the investigator advised the County that the Union was unwilling to make the leave of absence concessions. The parties did not reach agreement on a new contract during the April 1, 2000 mediation session.

The parties then began to provide the Commission's investigator with their respective final offers for submission to an interest arbitrator. The Union' April 15, 1999 final offer included a proposal that the new agreement contain:

2. ADDENDUM TO AGREEMENT TEN HOUR, FOUR DAY WORKWEEK (ITEM 6)-REPLACE YEARS 1996-1998 WITH 1999-2000

The Union's April 23, 1999 final offer again contained the Addendum proposal modified only to reflect that the Union was proposing a three year contract and thus that the 1996-1998 dates in the Addendum should be replaced with 1999-2001 dates.

By letter dated May 26, 1999, the Union advised the investigator that it was revising its final offer to " . . . delete reference to extending the 10 hour day side letter."

The County's final offer made no reference to the Addendum.

The Union's final offer was selected by Arbitrator Krinsky in an April 26, 2000 interest arbitration award. Thus, the parties' 1999-2001 contract does not contain the Addendum.

C. Examiner Finding of Fact 6 is reversed and the following Finding is made:

6. Between the time the parties first agreed to the Addendum and this dispute, there has not been a contract hiatus. Therefore, there is no past practice relevant to determining whether the Addendum is part of the status quo as to mandatory subjects of bargaining that the County was obligated to maintain during the hiatus following the expiration of the 1996-1998 contract.

The status quo for the hiatus following expiration of the 1996-1998 contract did not include the Addendum.

D. Examiner Finding of Fact 7 is affirmed.

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

1. Respondent Taylor County did not alter the status quo by requiring Highway Department employes to work five eight hour days per week during the summer of 1999 and thus did not thereby commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4 or 1, Stats.

F. Examiner Conclusion of Law 2 is affirmed as modified to read as follows:

2. Because Respondent Taylor County's decision to require Highway Department employes to work five eight hours days during the summer of 1999 was based in part on hostility toward the exercise of rights established by Sec. 111.70(2), Respondent Taylor County thereby commited prohibited practices within the meaning of Sec. 111.70(3)(a)3 and 1, Stats.

G. Examiner Conclusion of Law 3 is affirmed.

H. Examiner Order is affirmed in part and reversed in part and modified to read as follows:

ORDER

1. The portions of the complaint alleging violations of Secs. 111.70(3)(a)2, 4 and 5, Stats. are dismissed.

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

a. Cease and desist from acting in whole or in part out of hostility toward employes' exercise of rights established and protected by the Municipal Employment Relations Act.

b. Take the following affirmative which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Notify Taylor County Highway Department employes represented by Local 617 by conspicuously posting the attached Notice-Appendix "A"- in places where notices to such employes are customarily posted, and take reasonable steps to assure that said Notice remains posted and unobstructed for a period of thirty days.

2. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to the action the County has taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I concur in part and dissent in part.

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

APPENDIX "A"

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, Taylor County hereby notifies all Highway department employes represented by Local 617, AFSCME, AFL-CIO that:

> WE WILL NOT take action based in whole or in part on hostility toward your exercise of rights established and protected by the Municipal Employment Relations Act.

Dated and posted this ____ day of_____ , 2000.

TAYLOR COUNTY

By _____

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

TAYLOR COUNTY

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

The Pleadings

In its original complaint filed April 26, 1999, the Union asserted that the County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 4 and 5, Stats. by discontinuing a four ten hour day summer work schedule for Highway Department employes.

Following the hearing before the Examiner, the Union moved to amend the complaint to include allegations that the County had discontinued the four ten hour day schedule in retaliation against employes' exercise of protected concerted activity and thereby violated Secs. 111.70(3)(a)3 and 1, Stats.

The Examiner granted the motion to amend on September 15, 1999.

The County denied that it had committed any of the alleged prohibited practices.

The Examiner's Decision

As to the alleged violation of the duty to bargain during the contract hiatus, the Examiner concluded that the County's failure to honor the summer hours Addendum modified the status quo and thus violated Secs. 111.70(3)(a) 4 and 1, Stats. He reasoned:

> 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.

Turning to the allegation that the County retaliated against the Union because of the Union's refusal during the mediation session to agree to concessions as to leave of absence issues, the Examiner concluded that the County violated Secs. 111.70(3)(a) 3 and 1, Stats. He reasoned:

There is no dispute that the employes 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 Examiner dismissed the alleged violations of Secs. 111.70(3)(a)2 and 5, Stats.

POSITIONS OF THE PARTIES ON REVIEW

The County

The County contends the Examiner erred by concluding that the County committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats. The County asks that the Examiner be reversed.

As to the Examiner's conclusion that the County violated its obligation to maintain the status quo during the contract hiatus, the County argues that the Examiner incorrectly analyzed the applicable evidence regarding contract language, bargaining history and past practice when determining what was the status quo. The County asserts that the language of the Addendum itself reflects that it has no application to the summer of 1999. In particular, the County notes that there is no reference in the Addendum to giving notice "prior to January 1, 1999". The County argues that the bargaining history surrounding the parties' initial agreement to the Addendum and the surrounding 1999-2001 contract also support the conclusion that the Addendum expired by its terms at the end of the 1996-1998 contract. The County asserts that there is no applicable evidence of past practice. Should the Commission reject the County's position and conclude that the Examiner correctly analyzed the status quo issue, the County asks that the Examiner's remedy be modified so as to avoid providing employes with a windfall for hours not worked.

As to the Examiner's conclusion that the County violated Secs. 111.70(3)(a)3 and 1, Stats., by deciding not to have a summer work schedule of four ten hour days, the County argues that its action was not illegal retaliation, but rather the exercise of a legitimate bargaining tool.

The Union

The Union urges affirmance of the Examiner's decision but asks that the remedy ordered be modified to reflect the serious nature of the County's misconduct. Because the County's misconduct is more serious than that which confronted the Commission in CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Union asks for the Commission to make each employe whole for the eight hours per week they would have worked Monday through Thursday had the County not violated the law. The Union also asserts that because an extraordinary remedy is warranted, the County should be required to pay the Union's attorney fees.

DISCUSSION

It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS. 2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS. 2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS. 2D 647 (1994)

AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA.

Here, the question before us is whether the status quo the County was obligated to maintain during the summer of 1999 was established by the generic date-free language of Article 4, Section 1 of the expired contract which stated:

> Section 1. The regular work week shall be forty (40) hours, Monday through Friday, eight (8) hours per day. . .

or by the Addendum which contained a four ten hour day summer option.

Looking first at the language of the Addendum itself, we conclude that there is substantial evidence that the Addendum was not part of the status quo the County was obligated to maintain during the contract hiatus. Two sections of the language are particularly instructive. First, the Addendum begins with the phrase "The parties agree that in 1996, 1997, and 1998. . ." This language on its face indicates that the Addendum has no application beyond 1998 (i.e. does not apply to the summer of 1999). Second, the Addendum concludes with a provision which states:

> 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. (emphasis added).

It is our view that if the Addendum was to be part of the County's status quo obligations for the summer of 1999, the Addendum would have included the phrase "**or January 1, 1999**" after "or January 1, 1998". It does not.

Given all of the foregoing, we conclude the date and year specific language of the Addendum supports a conclusion that a work week of four ten hour days was not part of the status quo applicable to the summer of 1999. Our conclusion is consistent with our decision in WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98) regarding the status quo implications of using specific dates/years in contract language.

Looking at the analytical factor of past practice, we find that because this is the first contract hiatus to occur since the inception of the Addendum, there is no evidence of past practice to help us in our status quo analysis.

Turning to bargaining history, the evidence is mixed. The Union correctly asks why would the County feel compelled to take specific action to ban the four ten hour day schedule for the summer of 1999 if the County thought it had no status quo obligation to maintain the schedule in the first place. On the other hand, during bargaining for the 1999-2001 contract, the County never proposed to delete the Addendum – a bargaining position consistent with the view that the Addendum had automatically expired. We find the evidence of bargaining history inconclusive.

In summary, we have contract language which is supportive of a status quo which does not include a four ten hour day summer schedule, no evidence of past practice, and inconclusive bargaining history. On that basis, we conclude that the status quo for summer hours was not the four ten hour days of the Addendum but rather the five eight hour days set forth in Article 4, Section 1 of the expired 1996-1998 agreement. Thus, we reverse the Examiner's conclusion to the contrary and find that the County did not violate Secs. 111.70(3)(a)4 Stats. by scheduling work on a five eight hour day basis during the summer of 1999.

Turning to the allegation of retaliation, Sec. 111.70(3)(a)3, Stats. is violated where a municipal employer takes action toward municipal employes which is motivated at least in part, by hostility toward the exercise of rights protected by the Municipal Employment Relations Act. MUSKEGO-NORWAY V. WERB, 35 WIS. 2D 540 (1967); and STATE V. WERC, 122 WIS. 2D 132 (1985). The record establishes that on April 1, 1999, while bargaining the 1999-2001 contract, the County offered to include the four ten hour day option as part of the new contract if the Union would make leave of absence concessions. When the Union refused, the County Personnel Committee immediately took action to instruct the Highway Commissioner that the summer of 1999 work schedule would be the five eight hour day work week mandated by the status quo/Article 4, Section 1 of the expired contract. If this was the extent of the evidence, we would agree with the County that it was acting well within the bounds of its rights when bargaining a successor agreement. However, our record also contains testimony from a Personnel Committee member that the County was retaliating against the Union for its unwillingness to compromise on the leave of absence issue. This testimony and the timing of the County's action persuade us that the County was acting at least in part out of hostility toward the employes' exercise of their protected right to bargain collectively and thus that the County thereby violated Sec. 111.70(3)(a)3 and 1, Stats. by such conduct.

Having found a violation of Sec. 111.70(3)(a)3 and 1, Stats., the question becomes one of determining what remedy best effectuates the purposes of the Municipal Employment Relations Act. As noted by the Court in WERC V. EVANSVILLE, 69 WIS. 2D. 140 (1975), our remedial authority gives us discretion to order "affirmative action" which is "reasonably necessary" to effectuate the purposes and policies of the Act.

The remedy ordered by the Examiner (and the more extensive remedy now sought by the Union on review) are both designed at least in part to address a violation of the status quo as to summer hours – a violation which we have not found. Thus, we do not find the Examiner's remedy (or that now proposed by the Union) to be appropriate.

When crafting our remedy, we acknowledge that the parties' 1999-2001 contract does not contain the summer hours Addendum. We also note that it would be highly speculative to conclude that but for the County's retaliatory conduct, the summer hours Addendum would have become part of the 1999-2001 contract. Thus, a make whole remedy is not appropriate. Considering all of the circumstances present and the nature of the violation of law committed, we conclude that it best effectuates the purposes and policies of the Municipal Employment Relations Act to order the County to cease and desist and post a notice to employes. We reject the Union request for attorney's fees because we do not believe an extraordinary remedy is warranted. TREMPEALEAU COUNTY, DEC. NO. 29598-B (WERC, 1/2000).

In closing, we note that we have affirmed the Examiner's dismissal of the alleged violations of Sec. 111.70(3)(a)2 and 5, Stats. Our dismissal of the violation of contract/ (3)(a)5 allegation reflects the reality that there was no contract in effect at the time of the alleged violations.

Dated at the City of Madison, Wisconsin this 12th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

TAYLOR COUNTY

CONCURRENCE AND DISSENT OF COMMISSIONER A. HENRY HEMPE

I would affirm the Examiner, except as to remedy. Thus:

1) I agree with the Examiner's conclusion that the County, by its unilateral change of the work schedule contrary to the Addendum, 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 the bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats.

2) I further agree with the Examiner's conclusion that the County's change of the 1999 summer work schedule was motivated, at least 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)(3)(a)1, Stats.

3) I would, however, modify the remedy ordered by the Examiner.

4) I further agree with the Examiner's dismissal of the alleged violations of Secs. 111.70(3)(a)2 and 5, Stats.

Contrary to the Examiner's conclusion, the majority does not believe the County violated the status quo. Consistent with the Examiner's conclusion, the majority finds the County's action with respect to the 1999 summer work schedule of Highway Department employes to have been based in part on hostility towards the exercise of rights established by Sec. 111.70(2) and thus in violation of Sec. 111.70(3)(a)3 and 1, Stats. In addition, the majority modifies the remedy ordered by the Examiner.

Thus, in summary, as regards the decision of the majority, I concur in part and dissent in part.

Status Quo

The facts of this matter are undisputed. The Addendum in question had its genesis in the 1988-89 labor agreement of the parties. Establishing a 4-day, 10 hour per day workweek from Memorial Day through the Friday preceding Labor Day, it was limited to 1988, except that the same work period was also scheduled for 1989 unless either party notified the other prior to January 1, 1989 that it wished to discontinue the summer schedule. In that event the summer work schedule reverted to a 5-day, 8 hour per day workweek.

Unaltered except for updating as appropriate, this Addendum continued in place through successive labor agreements the parties reached, including the contract covering the years 1996, 97 and 98. Until the recent interest arbitration award issued in April 2000, this was the latest labor contract between the parties.

Four salient factors emerge from the parties' bargaining history from 1988 to the 1996-98 agreement:

1) The parties' bargaining practice was to list only demands for changes. The parties appeared to assume that any portion of the labor contract not specifically referenced in the bargaining demands of either would continue unaltered.

2) Consistent with this practice, the Addendum was continued in successive agreements from 1988 without written demand or apparent discussion, modified only by updating the years enumerated therein. Although signature lines for the County and the Union appeared at the bottom of the Addendum, the Addendum was not always signed by each of the parties, yet the summer hours specified therein remained in full force.

3) The years enumerated in the Addendum always exactly coincided with the termination dates of the successive labor agreements. No expiration date appeared in the Addendum. No explicit language contained within the Addendum described it as a "sunset" document that would evaporate upon the expiration of the remainder of the parties' labor agreement.

4) Attached to the 1988-89 labor agreement between the parties, in addition to the Addendum, was a separate document dealing with an entirely different subject entitled "Letter of Understanding." By its explicit language this "Letter of Understanding" did "sunset" with the expiration of the entire labor agreement, and each side was prohibited from claiming the conditions specified therein constituted the *status quo*." Consistent with the "sunset" language contained therein, the "Letter of Understanding" did disappear.

I find this record persuasive of the proposition that over the years the parties themselves treated the Addendum as having become subsumed into the entire labor agreement. I find significant that the Addendum contained no expiration date. I find significant that the Addendum was continued from agreement to agreement without written demand, comment or modification (except for updating). I find significant that from time to time the Addendum was not separately signed by each party but nonetheless remained in full force. I find significant

that no explicit "sunset" language was contained within the Addendum in contrast to very explicit "sunset" language contained in a separate "Letter of Understanding" that the parties clearly intended to evaporate.

Considered together, these factors offer reasonable support for the view that the parties viewed the Addendum in the same light as they would a numbered article integrated into the labor contract. On this state of the record I believe the terms and conditions of the Addendum constituted the status quo the County was obligated to maintain.

The majority adopts the County's argument that the dates contained within the Addendum create a "sunset" document. Examiner Crowley ably punctures this argument:

> "A review of the Addendum reveals that it does not have an expiration date so there is no sunset as alleged by the County. The instant case is distinguished from CITY OF BROOKFIELD [DEC. NO. 19822-C (WERC, 11/84)] because there the summer hours were for a trial period ending September 1, 1981 . . . Here the Addendum does not have such an expiration date but does have an escape clause that either party by giving 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."

Hostility and Retaliation

Turning to the next issue, Examiner Crowley concluded that the County's decision to change the summer work schedule was motivated, in part, by its hostility toward the Union's protected, concerted activity. The majority affirms this conclusion and I join in that affirmation.

It is axiomatic, of course, that neither the Union nor the Employer is required to make bargaining concessions to the other. But while the County refers to the action it took as a "bargaining tool," it seems reasonably clear that the action of its Personnel Committee was taken to punish the Union for its refusal to agree to any County proposal for change on a separate issue. 1/

1/ That issue involved leaves of absence. The County was concerned that current contract language left its Highway Department understaffed during deer hunting season when a large number of employes typically wanted time off. Bargaining unit negotiators were apparently unwilling to make any movement towards alleviating the County's understandable concern about this issue. With the parties' failure to perceive any mutual interests underlying the issue, the problem remains unsolved.

Based on the majority's discussion, further comment herein is unnecessary.

Remedy

For a remedy, the Examiner relied on CITY OF BROOKFIELD, SUPRA, a case that also featured an illegal discontinuation of summer hours by the employer. The Examiner correctly explained that in the BROOKFIELD case the Commission held the employes should made whole as if no change (in summer hours) had been made. Since the BROOKFIELD employes had already lost the benefit of the discontinued hours, they were awarded a monetary "make-whole" remedy.

Applying this reasoning to the instant matter, the Examiner acknowledged the employes herein had worked 40 hours per week, Monday through Friday, in contrast to the summer 4-day, 10-hour per day workweek they would have worked had the County maintained the *status quo* and not taken the hostile action against them. Since the summer of 1999 is long past the Examiner replicated the remedy ordered in CITY OF BROOKFIELD, SUPRA, and ordered the County immediately to "compensate all bargaining unit employes who were required to work an 8-hour, 5-day workweek instead of a 10-hour, 4-day workweek (had the Addendum not been changed) 8-hours at 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."

The County argues this remedy is punitive to the County and constitutes an unearned windfall to the employes. Predictably, the Union disagrees and argues for even more extensive relief. Given the emergence of an equitable alternative remedy following the recently concluded interest arbitration proceeding between these parties and the issuance of an award to them in April 2000, it is unnecessary to decide between these competing viewpoints.

The Examiner, of course, did not have the advantage of being able to review the interest arbitration proceeding involving these parties (of which the Commission took administrative notice). As a result of that proceeding there are currently no summer work hours in effect for the Taylor County represented highway department employes.

Under this unique circumstance, it is possible to make the employes more or less whole without money payments by crafting a remedy that would reinstate summer hours for the summer of 2000 on the same terms and conditions as would have been in effect for the summer of 1999, had not the County taken its illegal action. Thus I would modify the order of the Examiner by deleting the monetary payment. In lieu thereof (and in addition to the cease and desist and notice posting provisions), I would direct the County reestablish a 4-day, 10 hour per day workweek for the members of the bargaining unit herein for the summer of 2000, unless the parties otherwise agree.

Standing alone, however, I deem the cease and desist order and notice posting provisions ordered by the majority as inadequate measures to make the employes whole or effectuate the purposes of MERA.

Dismissal of Alleged Violations of Secs. 111.70(3)2 & 5

The majority affirms the examiner's dismissal of alleged violations by the County of Secs. 111.70(3)(a)2 and 5, Stats. I concur.

Dated at Madison, Wisconsin this 12th day of June, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

gjc
29647-C.D