STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH SPECIALISTS, Complainant,

vs.

ROCK COUNTY, Respondent.

Case 331
No. 58760
MP-3636

Decision No. 29970-A

Appearances:

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

Attorney Eugene Dumas, Deputy Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Rock County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association of Mental Health Specialists filed a complaint with the Wisconsin Employment Relations Commission on April 11, 2000, alleging that Rock County had committed numerous prohibited practices in violation of Secs. 111.70(3)(a)4 and 5, Stats., of the Municipal Employment Relations Act. On August 29, 2000, the Commission appointed Raleigh Jones, 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. On October 6, 2000, the Respondent County filed an Answer to the complaint. Hearing on the complaint was held on October 11, 2000 in Janesville, Wisconsin. At the start of the hearing, the Complainant withdrew paragraphs 14 through 27 of the complaint because the allegations contained therein had been resolved. The parties then presented their evidence concerning the

portion of the complaint still at issue (namely, paragraphs 1 through 13, 28 and 29). Following the hearing, the parties filed briefs and reply briefs, whereupon the record was closed on December 28, 2000. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Association of Mental Health Specialists, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. Its principal office is c/o Patrick Bailey, 822 Broad Street, Beloit, Wisconsin 53511.

2. Rock County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. Its principal office is located at the Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545.

3. At all times material herein, the Association has been the bargaining representative for two bargaining units of County professional employees. These two units are referred to by the parties as the Human Services Department (HSD) unit and the Health Care Center (HCC) unit. There are about 130 employees in the HSD unit and about 75 employees in the HCC unit. These two units were established by the Commission on February 25, 1997. In the Commission's Direction of Elections, the units were described thus:

> 1. All regular full-time and regular part-time professional employes of the Rock County Human Services Department excluding managerial, confidential and supervisory employes;
>
> and
>
> 2. All regular full-time and regular part-time professional employes of the Rock County Health Care Center excluding managerial, confidential and supervisory employes.

After the Association was selected as the bargaining representative for both of the aforementioned units, the parties negotiated the following recognition clauses:

> 1. The County recognizes the Association as the exclusive collective bargaining representative for all regular full-time and regular part-time professional employees in classifications listed in Appendix A employed by the Rock County – Human Services Department/Psychiatric Hospital, but excluding supervisors, craft employees, physicians, non-professional

employees, temporary employees and independent contractors, on all questions of wages, hours and conditions of employment.

and

2. The County recognizes the Association as the exclusive collective bargaining representative for all regular full-time and regular part-time employees in classifications listed in Appendix A employed by the Rock County Health Care Center, but excluding supervisors, craft employees, physicians, non-professional employees, temporary employees and independent contractors, on all questions of wages, hours and conditions of employment.

4. The Association and the County subsequently negotiated two separate collective bargaining agreements for the two bargaining units referenced above. The expiration date for each collective bargaining agreement was December 31, 1999 and covered 1998 and 1999. Both collective bargaining agreements contained the following provisions:

ARTICLE VII – GRIEVANCE PROCEDURE

7.01 Definition. Any dispute which may arise from an employee or Association complaint with respect to the effect, interpretation or application of the terms and conditions of this Agreement, shall be subject to the following grievance procedure, unless expressly excluded from such procedure by the terms of this Agreement.

Time limits stated herein, may be waived by the mutual agreement of the parties. Saturdays, Sundays and holidays are excluded in computing the time limits specified in this section as is the day in which the act or acts (or omission) being grieved allegedly occurred.

. . .

7.03 Procedure.

Step 1. Grievances shall be filed within fourteen days of the days of the occurrence leading to the grievance or within fourteen days of such time as the aggrieved should reasonably have been expected to be aware of the occurrence. An earnest effort should be made to settle the matter informally between the employee, the appropriate Association representative and the appropriate managerial representative. If the

matter is not resolved within five days the aggrieved and/or the authorized Association representative shall present the grievance in writing to the appropriate managerial representative.

. . .

7.04 Step 2. If the grievance is not satisfactorily settled in Step 1 of the grievance procedure, it may be appealed in writing to the Director of Human Services. The Director of Human Services will meet with the employee and his/her authorized Association representative(s) and attempt to resolve the matter. A written decision will be placed on the grievance and returned to the employee/Association representative within ten work days from its presentation to the Director of Human Services. No decision within such ten day period shall be deemed a denial of the grievance.

7.05 Step 3. If the grievance is not satisfactorily settled in Step 2 of the grievance procedure, it may be appealed in writing to the Personnel Director. The Personnel Director and/or his/her authorized representative(s) shall meet with the employee and his/her authorized representative(s) and attempt to resolve the matter. A written decision shall be placed on the grievance and returned to the employee/Association representative within fourteen work days from its presentation to the Personnel Director.

. . .

7.06 Step 4. If a satisfactory settlement is not reached in Step 3 within fourteen days after the County Administrator's decision the Association or the County may serve written notice upon the other that the difference of opinion or misunderstanding shall be arbitrated. Within seven days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within ten days of said notice of arbitration the parties shall request the Wisconsin Employment Relations Commission to submit a panel of five arbitrators. In the event the parties do not agree on one of the five, the parties shall meet and alternatively strike names from the panel until one name is left, such person being the arbitrator. The party having the first strike is to be the moving part. The decision of the arbitrator shall be final and binding upon the parties. The cost of arbitration shall be borne equally by the

> parties, except that each party shall be responsible for the cost of any witnesses testifying on its behalf. Upon the mutual consent of the parties, more than one grievance may be heard before one arbitrator.
>
> The arbitrator shall have jurisdiction and authority only to interpret the specific provision grieved and shall not amend, delete or modify any of the express provisions of this Agreement.
>
> . . .

Both collective bargaining agreements also contain an article entitled "Association Activity". In the HSD agreement, it is found in Article XXI. In the HCC agreement, it is found in Article XXII. The provisions are not identically worded, so both are listed below:

HSD Agreement

> 21.01 Representation. One Association steward and/or officer (bargaining unit member) shall be permitted to investigate and process a grievance during working hours without loss of pay.
>
> 21.02 Association representatives shall be permitted to participate in collective bargaining sessions, provided that if bargaining sessions are conducted during the regular and normal schedule of working hours for such persons, the County shall continue to pay wages for the time spent in such sessions to only four Association representatives, to be designated by the Association.

HCC Agreement

> 22.01 Representative. One Association steward and/or officer shall be permitted to investigate and process a grievance during working hours without loss of pay.
>
> 22.02 Association representatives shall be permitted to participate in collective bargaining sessions, provided that if bargaining sessions are conducted during the regular and normal schedule of working hours for such persons, the County shall continue to pay wages for the time spent in such sessions to only four Association representatives, to be designated by the Association.

The HSD agreement also contains the following Memorandum of Understanding concerning Article 21.01:

MEMORANDUM OF UNDERSTANDING
between
ROCK COUNTY
and
AMHS-HUMAN SERVICE PROFESSIONALS

The Parties do hereby agree that a portion of Article 21.01 remains in dispute and is the subject of a prohibited practice complaint filed by the Association with the Wisconsin Employment Relations Commission (WERC). The parties further agree that the final status of Article 21.01 will be determined by the ruling of the WERC Examiner, until such time that ruling is reversed upon appeal of either party. If the County prevails in this dispute, the wording of Article 21.01 will remain in subsequent contracts as it is in the 1996-97 contract, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 111.70. If the Union prevails in this dispute, the phrase "(bargaining unit member)" will be removed from the contract and will remain as such, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 111.70. The Union also retains its right to seek a declaratory ruling regarding the arbitrability of this issue if the WERC decision is not issued prior to filing for the declaratory ruling.

Dated this _____ day of _____, 1998.

_____ _____
John S. Williamson, Jr. Victor J. Long

5. After the Association became the bargaining representative for the two aforementioned units (i.e. the HSD and HCC units), the County notified the Association that it was the County's position that it was not legally obligated to pay employees in one bargaining unit represented by the Association to represent employees in the other bargaining unit represented by the Association in negotiations or grievance matters, so it would not do so. This notification was given to the Association orally at the bargaining table and through written correspondence. The County's position in this matter dealt only with paid work time; it did not cover unpaid work time. Thus, the County has not told anyone from the Association that they could not participate in negotiations or grievance matters for the other bargaining unit on their own time or use paid leave for same.

6. A dispute subsequently arose between the parties when an employee in the HCC bargaining unit (i.e. the then-union president) wanted to use paid work time to represent an employee in the HSD bargaining unit on a grievance. The Association contended that the County had to let the union president process grievances in the other bargaining unit on paid work time, while the County disputed that assertion. On September 22, 1997, the Association filed a prohibited practice complaint against the County concerning this matter. This complaint alleged that by its conduct, the County violated Secs. 111.70(3)(a)1, 4 and 5, Stats.

7. While the prohibited practice complaint referenced above was pending, the parties agreed on the following Memorandum of Understanding concerning Article 21.01, which was subsequently attached to the 1998-99 HSD collective bargaining agreement:

MEMORANDUM OF UNDERSTANDING
between
ROCK COUNTY
and
AMHS-HUMAN SERVICE PROFESSIONALS

The Parties to hereby agree that a portion of Article 21.01 remains in dispute and is the subject of a prohibited practice complaint filed by the Association with the Wisconsin Employment Relations Commission (WERC). The parties further agree that the final status of Article 21.01 will be determined by the ruling of the WERC Examiner, until such time that ruling is reversed upon appeal of either party. If the County prevails in this dispute, the wording of Article 21.01 will remain in subequent contracts as it is in the 1996-97 contract, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 111.70. If the Union prevails in this dispute, the phrase "(bargaining unit member)" will be removed from the contract and will remain as such, until such time as it is changed through negotiations or interest arbitration pursuant to State Statute 111.70. The Union also retains the right to seek a declaratory ruling regarding the arbitrability of this issue if the WERC decision is not issued prior to filing for the declaratory ruling.

Dated this _____ day of _____, 1998.

_____ _____
John S. Williamson, Jr. Victor J. Long

8. On April 6, 1998, Commission Examiner Lionel L. Crowley issued his decision in the complaint referenced in Finding 6. Therein, he made the following Conclusions of Law:

> 1. The County's refusal to allow employes in the Health Care Center bargaining unit time off to represent employes in the Human Services Department bargaining unit did not interfere with, restrain or coerce employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and the County has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.
>
> 2. The evidence failed to demonstrate that there was any demand to bargain or a refusal to bargain over the issue of release time with or without pay for members of the Human Services Department bargaining unit to represent members of the Human Services Department bargaining unit in negotiations or grievances, and therefore, there is no evidence of a failure to bargain in violation of Sec. 111.70(3)(a)4, Stats.
>
> 3. The evidence fails to establish that any grievance was filed under the parties' Health Care Center bargaining unit's collective bargaining agreement with respect to the interpretation of the language of the grievance procedure and as there is no collective bargaining agreement for the Human Services Department bargaining unit, the Examiner declines to exercise the Commission's jurisdiction to determine any violation of Sec. 111.70(3)(a)5, Stats.

He therefore found for the County and dismissed the complaint. Decision No. 29211-A (Crowley, 4/98). Neither side appealed his decision, so it was subsequently affirmed by the Commission by operation of law. Dec. No. 29211-B (WERC, 5/98).

9. Prior to September, 1999, the County had not paid for employees in one Association bargaining unit to represent employees in the other Association bargaining unit in negotiations.

10. In September, 1999, the parties began negotiations for successor labor agreements for the HSD and HCC bargaining units which would take effect January 1, 2000. As part of this process, the Association designated four representatives to negotiate on behalf of the HCC bargaining unit. One of the four people so designated was Judy Schultz, who was then president of the Association. Schultz is not in the HCC bargaining unit; rather she is in the HSD bargaining unit. The record does not identify who the other three Association bargainers were, but it can be surmised from the record that they were in the HCC bargaining unit.

11. Schultz subsequently participated in several HCC bargaining sessions which were held during her regular work hours. This happened on September 28, October 13, October 28 and November 16, 1999. On these four occasions, she did not have to attend these bargaining sessions on her own time or use paid leave time; instead, the County paid her to attend same.

12. At the end of the November 16, 1999 HCC bargaining session, County labor negotiator Vic Long told Association representatives that the HSD did not want to pay for Schultz to be present at the HCC negotiations, so henceforth Schultz would not be paid her regular wages for attending the HCC negotiations.

13. On November 19, 1999, County Personnel Director Karen Galbraith followed up on what Vic Long had told the Association bargainers at the November 16 bargaining session by sending a memo to Schultz entitled "HCC Union Work". It provided thus:

> In following up with Don Mulry and Vic Long, in the last negotiations, it was made clear that any Union Work related to HCC would be done on your own time. Therefore, you should not be charging this time to HSD. You may use banked time, comp. time, unpaid time, or benefit time to cover.
>
> Rather than having you calculate retroactively and deducting hours, effective immediately all HCC union work will be covered as indicated above.
>
> Let me know if you have further questions.
>
> Thank you.

14. Schultz subsequently attended two more HCC bargaining sessions held on January 5 and February 16, 2000. On these two occasions, she attended the bargaining sessions on her own time and used paid leave time for same. Thus, the County did not pay her to attend these two bargaining sessions as it had done for the previous four bargaining sessions.

15. When the parties subsequently discussed Galbraith's November 19, 1999 memo to Schultz, County representatives told Association representatives that the wages paid to Schultz for attending the four HCC bargaining sessions referenced in Finding 11 had been paid in error. The record does not indicate why the County felt its wage payments to Schultz were made in error. The County did not recoup or seek to recoup the wages paid to Schultz for attending those four bargaining sessions.

16. On February 22, 2000, the Association filed a grievance concerning Galbraith's November 19, 1999 memo to Schultz. The grievance was processed through the third step of the contractual grievance procedure. Insofar as the record shows, that was as far as it (i.e. the grievance) went. The grievance was not processed through the fourth step which is the arbitration step. Since the arbitration step was not completed, the contractual grievance and arbitration procedure was not exhausted. The County has not refused to arbitrate this grievance.

17. On April 11, 2000, the Association filed the instant complaint against the County. The portion of the complaint in issue here (i.e. paragraphs 1 through 13, 28 and 29) deals with the same subject matter as the grievance referenced in Finding 16.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Inasmuch as the 1998-99 collective bargaining agreements between Complainant and Respondent provide for arbitration of disputes and that contractual procedure has not been exhausted, the Examiner will not assert the jurisdiction of the Commission to determine whether or not Respondent violated the terms of the parties' 1998-99 agreements and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

2. The County did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., when it did not treat the time Judy Schultz spent as an HCC negotiator as work time and pay her regular wages for the time she attended HCC bargaining sessions.

3. The County has not been shown to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats., by its conduct herein.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

The complaint of prohibited practices filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of January, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

ROCK COUNTY

MEMORANDUM ACCOMPAYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

As noted in this decision's prefatory paragraph, the only portion of the complaint which is at issue herein is paragraphs 1 through 13, 28 and 29. That portion alleges that the County committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 5, Stats., when it stopped paying Judy Schultz's wages for the work time which occurred while she attended bargaining sessions for the HCC bargaining unit. The County admits that it stopped treating the time Schultz spent as an HCC bargainer as work time, but denies it committed any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

Association

The Association contends that the County's conduct herein violated both its contractual and statutory rights.

The Association addresses their contractual claim first. According to the Association, the County's actions herein violated the terms of the HSD collective bargaining agreement.

At the hearing, the Association essentially acknowledged that breach of contract claims are normally decided by grievance arbitrators, rather than hearing examiners. It asserts that here, though, the examiner should not defer the case to arbitration, but instead should address the merits of the claim. In their opening statement, the Association's counsel indicated that the reason the examiner should address the merits, and not defer it to an arbitrator, was "that the Union made an offer to submit the merits of its dispute with Rock County to arbitration, but Rock County has declined the offer." Transcript, p. 8. Additionally in their brief, the Association asserted that deferral to arbitration was inappropriate here because "the County refused to waive its procedural defenses" to the merits of the dispute.

Turning now to the merits, the Association argues that the contract language, bargaining history and past practice all support their contention that the County's action violated the HSD collective bargaining agreement. It elaborates on these contentions as follows.

First, the Association avers that the language of Sec. 21.02 of the HSD collective bargaining agreement, particularly when read in conjunction with the Memorandum of Understanding attached to that agreement, clearly and unambiguously provide that Rock County "must pay the wages of the employees that the Association designates to be its representatives in negotiations without regard to their bargaining unit." This argument is premised on the fact that the phrase "bargaining unit member", which is found in Sec. 21.01 of the HSD agreement, is not found in Sec. 21.02 of that same agreement. As the Association sees it, the County is essentially adding the phrase "bargaining unit member" or its equivalent to Sec. 21.02 to impose such a restriction. As such, the Association believes that the County is trying to rewrite Sec. 21.02, and it asks the Examiner to rebuff that attempt. The Association puts it this way in their brief: "In short, the County is impaled on the horns of a dilemma which it itself created by refusing to distinguish between the meaning of a contract clause which contains the phrase '(bargaining unit member)' and the meaning of one which does not."

Second, the Association argues that the parties' bargaining history supports its position here. To support this premise, it notes that in negotiations the County never proposed that the phrase "bargaining unit member" (which is found in Sec. 21.01) also be used in Sec. 21.02. According to the Association, "the failure of the County to seek, much less obtain, language denying such payment by itself dooms its position."

Third, the Association contends that the parties' past practice supports its position here. The "practice" which the Association relies on is that from September to November 16, 1999, the County paid Schultz for her participation in the HCC negotiations (i.e. that the County paid Schultz for those four bargaining sessions.) The Association submits that if the Examiner finds the contract language ambiguous, and in need of clarification, the practice just noted can be used as an aid to help interpret same.

Next, the Association responds to the County's claim that the wage payments which were made to Schultz were made in error. The Association does not believe that was the case. To support this premise, it calls attention to the fact that the County introduced no evidence concerning (1) the nature of this error, (2) why it occurred, or (3) who made it. As the Association sees it, the County's failure to introduce such evidence is fatal to its position.

Turning now to the Association's statutory claim, the Association avers that the County made an unlawful unilateral change in the middle of its negotiations with the Association when it ceased making the wage payments it had made to Schultz; that the County made this change after the terms of each of the parties' collective bargaining agreements had expired; and that this change violated the *status quo*. According to the Association, this change in the *status quo* violated its duty to bargain in good faith.

Next, the Association comments on the Crowley decision and its applicability here. First, it cites with approval his holding that the question of whether union representatives may have time off with or without pay to handle grievances is a mandatory subject of bargaining. Second, it notes that he declined to decide whether the HCC collective bargaining agreement required the County to pay employees from one bargaining unit to process grievances in the other Association-represented bargaining unit. The Association argues that since Crowley did not interpret either labor agreement, his holding cannot be *res judicata* on the proper interpretation to be given to Sec. 21.02 of the HSD collective bargaining agreement.

Finally, the Association responds to the County's assertion that it (i.e. the County) did not unlawfully interfere with any employees' rights. The Association disputes that assertion and avers that the County committed unlawful interference by its conduct herein.

In sum then, the Association believes the County committed both contractual and statutory violations herein. As a remedy for same, the Association asks that the County be ordered to make whole "all Association-designated representatives without regard to their bargaining unit", and to post the appropriate notices.

County

The County contends that its actions herein did not constitute prohibited practices. It makes the following arguments to support this contention.

The County avers at the outset that this complaint is simply the latest case to arise from the County's restructuring of its human services, and the bargaining units which represent the human services employees. The County maintains that while the two bargaining units involved here (HCC and HSD) are both represented by the Association, those units are separate and distinct which function independently from each other. In the County's view, the question here is whether it is obligated to pay the employees in one of those units for the time they spend representing employees in the other unit. The County answers that question in the negative. In their view, it makes no difference whether the representation in question is for the purpose of bargaining contracts or processing grievances.

Next, the County addresses the Association's contractual claim. To begin with, it notes that a large part of the Association's case is built around the premise that the County's conduct herein violated the HSD collective bargaining agreement. Building on that notion, the County calls the Examiner's attention to the fact that the mechanism which the parties have agreed on for resolving contractual disputes is arbitration. The County asserts that what happened here is that the Association failed to exhaust this contractual remedy because it never sought arbitration of its contractual claim. According to the County, the Association offered no

reason why it did not do so (i.e. seek arbitration) and exhaust its contractual remedy. That being so, the County asserts that the Association's contractual claim should not be dealt with herein.

The County argues in the alternative that if the Examiner does address the merits of the contractual claim, it did not violate the HSD collective bargaining agreement by its conduct here. To support this contention, the County first asserts that there is no evidence in the record which establishes that the County ever agreed, or was ever asked to agree by the Association, that HSD employees (such as Judy Schultz) would be paid by the County for the time they spend representing HCC employees. In the County's view, the failure of the Union to raise the matter in negotiations supports the "County's position that it had no reason to think that there would be any confusion, pending receipt of Examiner Crowley's decision, as to how Sec. 21.02 would be administered by Rock County." Second, with regard to the language of Sec. 21.01 of the HSD collective bargaining agreement, the County contends that "the Association's position ignores the express intent of, and makes superfluous the Memorandum of Understanding attached to that agreement." According to the County, "the language was added to [Sec.] 21.01 for the purpose of allowing negotiations to proceed without jeopardizing the rights of either party until Examiner Crowley's decision was received."

Next, the County addresses the Association's statutory claim. First, it contends it did not violate the *status quo* when it did not pay the wages of Association negotiators for the HCC bargaining unit who were not members of that unit (i.e. Judy Schultz). Second, it asserts that it did not unlawfully interfere with any employees' rights when it took this action.

Finally, the County believes that the decision issued by Examiner Crowley is totally dispositive of this case. In its view, the Crowley decision was not limited to just grievance processing, but rather "encompassed all aspects of the collective bargaining relationship and process." It cites his Conclusions of Law 1 and 2 to support this assertion.

In sum then, the County believes the complaint is without merit. In its view, the Association failed to meet its burden of proof in proving any violation of MERA. It therefore requests that the complaint be dismissed.

DISCUSSION

The Association contends that the County's conduct involved here violated both contractual and statutory rights. In the analysis which follows, the breach of contract claim will be addressed first. After it is resolved, the statutory claim will be addressed.

Alleged Violation of Sec. 111.70(3)(a)5

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

A labor organization having exclusive bargaining status can file a complaint with the Commission under this section alleging (1) a breach of contract (specifically that the Employer has violated the parties' collective bargaining agreement); (2) a refusal to arbitrate; or (3) a refusal to accept an arbitration award.

In this case the Association is not seeking an order to compel arbitration (i.e. (2) above), or alleging that the County has refused to accept an arbitration award (i.e. (3) above). Rather, the Association seeks a determination from the Examiner whether the Employer conduct in question breached the parties' collective bargaining agreement (i.e. (1) above). The Association essentially seeks a ruling on the merits of the grievance dated February 22, 2000. Such a ruling would require an interpretation of the collective bargaining agreement.

The Commission's long-standing policy regarding breach of contract allegations has been to not assert jurisdiction to determine the merits of breach of contract allegations where the parties' collective bargaining agreement provides for final and binding arbitration of such disputes and such procedure has not been exhausted. 1/ The Commission does not view this

---

1/ 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. 18525-B, C (WERC, 6/79); and OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/72).

---

refusal to assert its jurisdiction as a "deferral" to arbitration. 2/ Here, the parties' have

---

2/ See STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91) at 12, footnote 3/.

---

negotiated two collective bargaining agreements which provide that the mechanism which the parties will use for enforcing contractual rights is grievance arbitration. The arbitration provision is found in Article VII, Section 7.06, in both agreements. As noted in Finding 16, the grievance dated February 22, 2000 was processed through the third step of the contractual grievance procedure. That was as far as it (i.e. the grievance) went. The grievance was not processed through the fourth step (i.e. arbitration).

If a union appeals a grievance to arbitration and the employer subsequently refuses to arbitrate, then the grievance and arbitration procedure is considered exhausted. The Association essentially claims that happened here. At the hearing, the Association's counsel addressed this matter (i.e exhaustion of the grievance and arbitration procedure) in his opening statement. There, he averred that:

> "the Union made an offer to submit the merits of its dispute with Rock County to arbitration, but Rock County has declined the offer." 3/

3/ Transcript, p. 8.

In response to this assertion, the County's counsel later averred as follows:

> "I don't want to misquote what Mr. Williamson said, but in fact, the evidence supplied by the Union in Union Exhibit 1 and, I think, in Joint Exhibit 6 makes it clear that the County has continued to be willing to respond to the grievances and the efforts by the Association to assert its rights within the framework of the collective bargaining agreement. . ." 4/

4/ Transcript, p. 87.

Except for the statements just noted, there is no other record evidence concerning the possible arbitration of the Association's February 22, 2000 grievance. The Examiner finds that given this dearth of evidence, the Association has not proved that the County refused to arbitrate the Association's February 22, 2000 grievance. Since the arbitration step was not completed, the contractual grievance and arbitration procedure was not exhausted in this case. At the hearing, there was no agreement or stipulation by the parties to waive the arbitration step and have the Examiner decide the contractual claim. The question of whether the parties agreed in the HSD labor agreement that employees in the HSD bargaining unit could represent employees in the

other Association bargaining unit (i.e. the HCC bargaining unit) on work time involves an interpretation of that labor agreement. That being so, the Examiner will not assert the Commission's jurisdiction to determine whether the County's actions herein violated the HSD collective bargaining agreement. Instead, the Examiner will honor the parties' collective bargaining agreements and the arbitration procedure contained therein will be presumed to be the exclusive venue for enforcing contractual rights. In so finding, it is specifically noted that the Association litigated the merits of the contractual claim as part of their overall case. The bulk of their brief was devoted to the proposition that the collective bargaining contract language, past practice and bargaining history support their position that the County's actions herein violated the HSD collective bargaining agreement. Be that as it may, that call is for a grievance arbitrator to make, not this Examiner. Accordingly, the Examiner will not decide the merits of the contractual claim, interpret the collective bargaining agreement, or express any views on any of the Association's arguments concerning same.

Alleged Violation of Sec. 111.70(3)(a)4

The complaint alleges that the County made a unilateral change in the middle of negotiations with the Association. As the Association sees it, the unilateral change was this: the County ceased making wage payments to Schultz for the time she spent in HCC negotiations. The complaint alleges this action violated the County's duty to maintain the *status quo* during negotiations.

My analysis of this unilateral change/duty to bargain claim begins with a review of the applicable legal standards. The MERA duty to bargain is enforced by Sec. 111.70(3)(a)4, Stats., and derivatively by Sec. 111.70(3)(a)1, Stats. The duty to bargain in good faith is broad, and the standards which define it are fact-driven. Pursuant to that duty, the municipal employer must bargain with the employees' bargaining representative during the term of a contract on all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. 5/ Thus, an employer may not normally make a unilateral change

---

5/ SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

---

during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. 6/ Absent a valid defense

---

6/ CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) at 18 citing MADISON JT. SCHOOL DIST. NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74).

---

then, a unilateral change to a mandatory subject of bargaining is a *per se* violation of the MERA duty to bargain. 7/ Unilateral changes are tantamount to an outright refusal to bargain

---

7/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

---

about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 8/ The duty to bargain incorporates a duty to maintain the

---

8/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) at 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) at 18-19.

---

status quo with regard to most mandatory subjects of bargaining even after the collective bargaining agreement has expired, unless the duty to bargain has been discharged by negotiating to the point of impasse. 9/

9/ GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC, 1977).

The first line of inquiry in a unilateral change/refusal to bargain case is whether the subject matter involves a mandatory subject of bargaining. Under Wisconsin law, the principle determining mandatory or permissive status is whether the subject matter is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formulation and choice of public policy; the former subjects are mandatory and the latter permissive. 10/

10/ CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976).

In this case, there is no need for this Examiner to make this call because another WERC examiner has already done so. Examiner Crowley addressed and decided that very question in a prior case involving the parties. ROCK COUNTY, DEC. NO. 29211-A (Crowley, 4/98), affirmed by operation of law, DEC. NO. 29211-B (WERC, 5/98). Therein, he found that "[w]hether representatives can have time off with or without pay is a mandatory subject of bargaining especially when the representative is not a member of the bargaining unit." Page 7. He further found that "[t]he obligation of the County to pay representatives' time spent for negotiations or in grievance handling is a mandatory subject of bargaining." Page 7. Neither party challenges that determination, so Examiner Crowley's holding will be applied here. Accordingly, the subject matter involved here is a mandatory subject of bargaining.

Having so found, the next line of inquiry is whether there was a change concerning this mandatory subject of bargaining. The record indicates that there was. In fact, there were two changes. The following shows this. The first change occurred when the County paid Schultz for attending the HCC bargaining sessions held September 28, October 13, October 28 and November 16, 1999. On these four occasions, Schultz did not have to attend the bargaining sessions on her own time or use paid leave; instead, the County considered it work time and paid her at her regular wage. When it did so, the County's negotiators knew that Schultz was not a member of the HCC bargaining unit, but rather was in the HSD bargaining unit. Paying Schultz to attend the HCC bargaining sessions was a unilateral change by the County because prior to this, the County had not paid for employees who were in one Association bargaining unit to represent employees in the other Association bargaining unit in negotiations. The second unilateral change occurred when the County stopped paying Schultz for the time she spent in HCC negotiations. This happened on November 16, 1999 when the County's labor negotiator told the Association that henceforth Schultz would not be paid her regular wages for attending the HCC negotiations. The County's Personnel Director subsequently confirmed this in writing.

The foregoing demonstrates that in the context of this case, the County made two unilateral changes. Once again, the first was when the County began treating the time Schultz spent as an HCC negotiator as work time, and started paying her regular wages for the time she attended HCC bargaining sessions. The second was when the County stopped paying Schultz for attending HCC bargaining sessions. Not surprisingly, the Association does not object to the first change; it only objects to the second.

Since the County made two unilateral changes involving a mandatory subject of bargaining, the next question is which change altered the *status quo*. Rhetorically speaking, was it the first, the second, or both? Obviously, this depends on what the *status quo* was.

Ordinarily, a determination of the *status quo* involves a review of the contract language, bargaining history and past practice. However, were the Examiner to review all the foregoing matters to make this call, he would be addressing the same points a grievance arbitrator would likely address in deciding whether the County's conduct violated the HSD collective bargaining agreement. The problem with this is that, as noted earlier, the Examiner is not going to decide the merits of the contractual claim, interpret the collective bargaining agreement, or express any views on any of the Association's arguments concerning same.

In this case, it is unnecessary to review the contract language or the bargaining history to determine what the *status quo* was. The reason is this: as noted in Finding 9, prior to September, 1999, the County had not paid for employees in one Association bargaining unit to represent employees in the other Association bargaining unit in negotiations. Thus, that was the *status quo*. The County changed this *status quo* when it started paying Schultz for attending HCC bargaining sessions. When the County later stopped paying Schultz for attending HCC bargaining sessions, what it was doing, in effect, was returning to the original *status quo*. Said another way, the County's second unilateral change was simply an undoing of

their first unilateral change. In my view, MERA does not preclude an employer from making a unilateral change if the unilateral change is a return to the original *status quo*. That is what happened here. That being the case, the Examiner finds that the County's decision to stop paying Schultz for attending HCC bargaining sessions was not unlawful. This conclusion ends the inquiry which is needed to resolve the statutory duty to bargain issue and is consistent with the conclusion reached by Examiner Crowley in his ROCK COUNTY decision. Accordingly, no violation of Sec. 111.70(3)(a)4, Stats., has been shown. 11/

11/ While the Commission has in some cases deferred Sec. 111.70(3)(a)4 unilateral change/refusal to bargain claims to the parties' contractual arbitration procedure where the Respondent objects to Commission exercise of jurisdiction in the matter (See, BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83)), it is apparent from the above discussion that this Examiner considers deferral of these claims inappropriate here. The reason the Examiner has reached the merits of the unilateral change/refusal to bargain claims, rather than deferring them to arbitration, is because the Commission is responsible for ensuring that claims of statutory violations receive a determination on the merits in a manner not repugnant to MERA . Additionally, the Examiner believes that sufficient questions exist concerning whether the three criteria which the Commission has set forth for deferring (3)(a)4 claims to arbitration exist here. The three criteria need not be listed here, but are identified in SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94).

Alleged Violation of Sec. 111.70(3)(a)1

Finally, although the instant complaint did not plead a violation of Sec. 111.70(3)(a)1, nor did the Association raise it at the hearing, the Association's reply brief makes a reference to same when it avers that the County committed interference by its conduct herein. If the Association intended this reference to raise a (3)(a)1 claim, that claim has not been substantiated. The record will not support a finding that the County attempted to interfere with, restrain or coerce the Association and/or its members in the exercise of its/their rights. Accordingly, no violation of Sec. 111.70(3)(a)1, Stats., has been shown.

Inasmuch as the evidence fails to establish any violation of Secs. 111.70(3)(a)1, 4 or 5, Stats., the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of January, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
29970-A.doc