

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RANDOM LAKE UNITED EDUCATION ASSOCIATION, Complainant,

vs.

RANDOM LAKE SCHOOL DISTRICT, Respondent.

Case 30
No. 58011
MP-3554

Decision No. 29998-B

Appearances:

Attorney Michael J. VanSistine, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C., 605 North 8th Street, #610, P.O. Box 1387, Suite 1400, Milwaukee, Wisconsin 53202-6613, by **Attorney Paul C. Hemmer**, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 24, 1999, Random Lake United Education Association, hereafter Association or Complainant, filed a complaint with the Wisconsin Employment Relations Commission in which it alleged that the Random Lake School District, hereafter Respondent or District, has offered certain retirement health insurance benefits to bargaining unit members in violation of Sec. 111.70(3)(a)4 and 1, Stats. On October 31, 2000, the Commission appointed Mr. Lionel L. Crowley, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. On January 19, 2001, the Commission ordered that the designation of Lionel L. Crowley as Examiner be vacated and that Coleen A. Burns be appointed as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing on the complaint was held on March 1, 2001, in Random Lake, Wisconsin. The record was closed on May 24, 2001, upon receipt of post-hearing written arguments.

Dec. No. 29998-B

FINDINGS OF FACT

1. Random Lake School District, hereafter District or Respondent, is a municipal employer with offices located at 605 Random Lake Road, Random Lake, Wisconsin 53075. District Superintendent Joseph R. Gassert and the Random Lake School District Board of Education are agents of the District and are charged with the possession, care, control and management of the property and affairs of the District.

2. Random Lake United Education Association, hereinafter Association or Complainant, is a labor organization with offices c/o Steve Johnson, Executive Director, Cedar Lake United Educators, 411 North River Road, West Bend, Wisconsin 53095.

3. The Association is the exclusive collective bargaining representative of a bargaining unit consisting of:

all employees of the District engaged in teaching, including classroom teachers, guidance personnel and librarians, but excluding the following:

1. Administrator;
2. Principals, Assistant Principals;
3. Office, teacher aides, clerical, maintenance, cooks and operating personnel;
4. Administrative portion of teaching principals, salaries and employment;
5. Substitute teachers, interns, and student teachers;
6. Administrative portion of LVEC.

The Association and the District are parties to a collective bargaining agreement, which by its terms, is effective from July 1, 1997 through June 30, 1999. This collective bargaining agreement includes the following:

ARTICLE III – BOARD FUNCTIONS

- A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties, and activities of its employees, except as expressly limited by the expressed terms of this Agreement.

B. Without limiting the generality of the foregoing (paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

...

2. The determination of the financial policies of the District, including the general accounting procedures, inventory of supplies and equipment procedures, and public relations.

...

10. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

...

C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth, the Board retaining all functions and rights to act not specifically nullified by this Agreement.

ARTICLE IV – NEGOTIATIONS PROCEDURES

The Association and Board agree to negotiate in good faith. Good faith negotiations presume the exchange of facts and proposals, including some reasonable explanations as to why concessions are requested or refused. The parties will meet on or about March 1 to begin negotiating the terms of a successor agreement or the terms subject to a reopener provision, if any.

...

ARTICLE VI – FRINGE BENEFITS AND COMPENSATION

A. Health Insurance. Beginning January 1, 1993, the District will pay 95% of the health insurance premium for Wisconsin Education Insurance Trust Health Insurance, family or single coverage, which includes a preadmission review, major medical \$100/\$200 front end deductible with provision for 100% payment on major medical after the deductible has been met and \$5/\$0 MCP prescription drug program. Teacher(s) who retire with twenty (20) years or more of district

service may be included in the District group if he/she pays the premium in the event that the current carrier notifies the District or the Association that they will not insure retired employees, even where the insurance of such employees is now contractually required, then the parties to this Agreement shall immediately reopen this contract to bargain over any successor replacement language regarding the maintenance of retirees within the group.

4. On or about May 5, 1997, District Administrator Francis D. Murphy, sent the following letter to members of the Association's collective bargaining unit:

Dear Teacher, Counselor, Psychologist, or Librarian:

The Board of Education is offering to contribute toward health premiums to those of you who meet the qualifying criteria as defined on the attached offer sheet.

The dollars will be paid to your insurance provider as you arrange with the District Office. The dollars will be used to pay part or all of your premiums to the insurance company of your choice until the dollars are exhausted.

Note: The offer will be withdrawn at 4:00 P.M. on 6/1/97 and only those whose written notice of retirement is on hand at 4:00 P.M. on 6/1/97 will be included.

Should you have questions, please see me. For those of you planning to retire, this is a good thing and to all of you, "Good luck in your upcoming years."

Attached to this letter was the following:

SCHOOL DISTRICT OF RANDOM LAKE
BOARD OF EDUCATION
HEALTH INSURANCE OFFER

The Board of Education of the Random Lake School District offers to contribute the sum of \$12,500.00 toward the cost of health insurance premiums on behalf of eligible qualified professional employees, as defined below, and pursuant to the following terms and conditions:

1. Employees must hold a professional license or certificate under section 118.19 of the Wisconsin Statutes.
2. Employees must be eligible to begin receiving retirement annuity benefits under the Wisconsin Retirement System, on or before August 15, 1997.
3. Employees must have completed twenty (20) years of service under their professional license within the Random Lake School District by 6/1/97.
4. Employees must present to the office of the District Administrator, on or before 4:00 P.M. on 6/1/97, a written notice of retirement to be effective 6/30/97.

The sum of \$12,500.00 will be deposited and maintained within a School District trust account on behalf of the eligible qualified employee. The sum will be applied toward applicable monthly health insurance premiums on behalf of the eligible qualified employee until the total sum is expended.

If an eligible qualified employee dies before the total sum is expended, the remaining balance will be expended to provide health insurance coverage for the surviving spouse of the employee.

This offer will be withdrawn and terminate at 4:00 P.M. on 6/1/97. Thereafter, this offer will be ineffective and null and void. Employees who submit a notice of retirement after 4:00 P.M. on 6/1/97 will be ineligible to receive the School District contribution toward the cost of monthly health insurance premiums, as described previously. After this offer is withdrawn, it will not be extended again.

By letter dated May 16, 1997, Marguerite Fuller advised the District Administrator of the following:

Effective at the end of the 1996-97 school year I will retire from the Random Lake School District as a high school teacher. This decision was made based upon the school board's offer of the \$12,500 contribution toward health insurance. Beginning September 1, 1997, I wish to have single insurance coverage taken out of the above amount. When this \$12,500 is gone I would like to continue coverage paying the 100% insurance premium until I am sixty-five years of age.

Please respond to this letter before June 1, 1997, in writing. Included in this response would be the specific commitment of the \$12,500 health insurance package, and your acceptance of receiving this letter of resignation. This letter will become binding upon the receipt of your reply.

By letter dated May 19, 1997, Beverly D. Hinz advised the District Administrator of the following:

On June 6, 1997, I will be retiring from my position at the Random Lake Elementary School.

This decision was made based on the board's offer of \$12,500 to be paid for the family insurance plan to W.E.A.

Please respond to this letter before June 1, 1997 in writing, restating the district's specific commitment of \$12,500 to be paid toward a family plan health insurance.

This letter will be binding upon receipt of your letter.

By letter dated May 21, 1997, Bernard Domke advised the District Administrator that, based on the Board of Education's offer of \$12,500 to pay for insurance premiums, he would be retiring effective June 6, 1997. By letter dated May 31, 1997, Edward J. Ferber advised the District that he would accept the May 5, 1997 health insurance offer of the District and tender his resignation as of June 1, 1997. On or about June 3, 1997, the District Administrator notified each of these teachers of the following:

The Board, by unanimous vote, accepted your resignation at last night's special meeting. The District will begin paying the premium for your family health coverage on September 1, 1997 from the \$12,500 set aside for your health premiums. You will not be getting coverage for dental.

The money can be used only for health coverage and will be paid directly to the carrier you select.

In behalf of the Board, I thank you for the many years of service to the students of this district and I wish you years of happy retirement.

At the time that these teachers submitted their resignations, and at the time that the District's Board of Education accepted these resignations, these teachers were employees of the District and members of the collective bargaining unit represented by the Association.

5. At the direction of the District's Board of Education, District Superintendent Joseph R. Gassert prepared a letter dated April 13, 1999, stating as follows:

Dear Professional Staff,

The attached resolution, titled **Health Insurance Offer** is scheduled to be acted upon at the School Board meeting this Monday (April 19th). This resolution appears to have considerable support and it is likely that it will pass.

If the Board approves this offer, and you choose to take advantage of it, the \$12,500 will be paid directly to your insurance provider over whatever number of years you arrange with the District Office. The funds will be used to pay all or part of your health insurance premiums to the insurance company of your choice until they are exhausted.

Please note that this offer, if approved by the Board, will be in effect until 4:00 PM on June 1, 1999. In order to take advantage of this offer (again, if approved) you will be required to provide the District with written notice of your retirement, and your desire to take advantage of this health insurance offer by that date. The earlier you make this decision, the more it will help the District plan for next year.

This is being sent to you for informational purposes only. It is not a request for any specific individuals or group to retire. It is simply to inform you that this offer may be available to you. If you are interested in possibly taking advantage of this offer, if passed by Board, it is suggested that you contact WRS as soon as possible.

If you have any questions, please contact me directly.

Attached to Gassert's letter of April 13, 1999 was the following document:

SCHOOL DISTRICT OF RANDOM LAKE
BOARD OF EDUCATION
HEALTH INSURANCE OFFER

The Board of Education of the School District of Random Lake offers to contribute the sum of \$12,500.00 toward the cost of health insurance premiums

on behalf of eligible qualified professional employees, as defined below, and pursuant to the following terms and conditions:

1. Employees must hold a professional license or certificate under section 118.19 of the Wisconsin Statutes.
2. Employees must be eligible to begin receiving retirement annuity benefits under the Wisconsin Retirement System, on or before August 15, 1999.
3. Employees must have completed fifteen (15) years of service under their professional license within the School District of Random Lake by 6/15/99.
4. Employees must present to the office of the District Administrator, on or before 4:00 P.M. on 6/1/99, a written notice of retirement to be effective 6/30/99.

The sum of \$12,500.00 will be applied toward applicable monthly health insurance premiums on behalf of the eligible qualified employee until the total sum is expended.

If an eligible qualified employee dies before the total sum is expended, the remaining balance will be expended to provide health insurance coverage for the surviving spouse of the employee. If an eligible qualified employee becomes eligible for medicare before the total sum is expended, upon the request of the employee, the remaining balance will be applied toward premiums for medicare supplement or carve out insurance coverage until the remaining balance is expended.

If any aspect of this offer is found by any court of competent jurisdiction or an administrative agency to violate any contractual obligation of the School District, the Federal Age Discrimination In Employment Act, the Wisconsin Fair Employment Act, or any other state or federal law or regulation, then this entire offer shall be considered withdrawn, null and void.

This offer will be withdrawn and terminate at 4:00 P.M. on 6/1/99. Thereafter, this offer will be ineffective and null and void. Employees who submit a notice of retirement after 4:00 P.M. on 6/1/99 will be ineligible to receive the School District contribution toward the cost of monthly health insurance premiums, as described previously.

The District distributed this letter of April 13, 1999, with attachment, to current employees of the District that were members of the Association's collective bargaining unit. The District did not distribute this letter, or its attachment, to any individual that had retired from District employment. Prior to distributing this letter, Gassert did not discuss the letter of April 13, 1999 with any Association representative, except to advise Association President and Chief Negotiator Bob McDermott that a letter would be forthcoming. On April 25, 1999, the District's Board of Education formally approved the health insurance offer attached to Gassert's letter of April 13, 1999. On or about April 27, 1999, Gassert sent the following memo to current employees of the District that were members of the Association's collective bargaining unit:

This is to notify you that the Health Insurance Offer that was previously sent to you with an accompanying letter dated April 13, 1999 was approved by the School Board on April 25, 1999 and is, therefore, open to those of you who meet the eligibility requirements.

Attached is another copy of the offer for your easy reference.

If you have any questions, please see me directly.

Thank you.

Attached to this memo was a copy of the "School District of Random Lake Board of Education Health Insurance Offer" that had been attached to Gassert's letter of April 13, 1999. The District did not distribute this letter, or its attachment, to any individual that had retired from District employment. By letter dated May 3, 1999, David Mueller advised Gassert as follows:

Please accept my letter of registration as of June 8, 1999. I accept the School Board's offer of \$12,500 to be applied toward monthly health insurance when I need it or until the sum is expended.

I enjoyed my 30 years of teaching at Random Lake and I am looking forward to my retirement.

By letter dated May 10, 1999, Barbara Snodgrass advised Gassert as follows:

This letter is to inform you that I do intend to retire at the end of this school year on June 9, 1999.

Thanks for the money that was put into an account for Insurance. I appreciate it very much.

At the time that Mueller and Snodgrass submitted the above letters, each was an employee of the District and a member of the Association's collective bargaining unit.

6. By letter dated May 11, 1999, Cedar Lake United Educators Council (CLUE) UniServ Director and Association bargaining representative, Steven Johnson, advised Gassert of the following:

On behalf of the Random Lake United Education Association, I am writing this letter to object to the attempt by the Random Lake School Board to engage in bargaining with individual members of the bargaining unit. The letter from you dated April 13, 1999, to the entire professional staff, constitutes a violation of Wisconsin Statute 111.70. The Association has decided to challenge the **Health Insurance Offer** and demands that the Board cease from bargaining with unauthorized individual bargaining unit members. The Association expects a letter from the Board withdrawing the offer and that the Board will refrain from such prohibited action in the future.

If the Association does not receive a letter withdrawing the offer within five (5) calendar days from receiving this notice, then the Association will contact the Legal Division of WEAC and request WEAC to pursue legal action against the Random Lake School District.

The Association's position and advice to members is to refrain from entering into such a bargain, because the Association believes the actions of the Board are a prohibited practice under Wisconsin Statute 111.70. The Association believes that contracts agreed to between the Board and individual bargaining unit members that include the **Board's Health Insurance Offer** will eventually be ruled null and void.

The proper place for exchange of proposals between the Random Lake United Education Association and the Random Lake School Board is the negotiation process where duly authorized representatives from both parties may bargain legally.

If you have any questions, please call the CLUE office. Thanks for your cooperation on this matter.

The Board of Education reviewed this letter during a meeting held May 17, 1999; concluded that the Board of Education had the right to make the 1999 "School District of Random Lake Board of Education Health Insurance Offer"; and advised Gassert to not respond to Johnson's letter. By letters dated June 9, 1999, Gassert advised Snodgrass and Mueller of the following:

This is to notify you that at its regular meeting on May 17, 1999, the School Board of the School District of Random Lake formally accepted your resignation for the purpose of retirement effective June 30, 1999. You will be eligible for the attached **Health Insurance Offer** that was previously presented to all teachers employed by the District. Sue Roller, the district financial manager, will contact you regarding your utilization of the allotted funds per the offer.

Thank you for your many years of excellent service to the children of the District. Please accept my best personal wishes to you and your family.

On June 9, 1999, Mueller and Snodgrass were employees of the District and members of the Association's bargaining unit. Mueller and Snodgrass retired from employment with the District, effective June 30, 1999. Snodgrass, but not Mueller, elected to receive the health insurance contributions described in the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer." Snodgrass began receiving this health insurance contribution in September of 1999. Employees who accepted the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer" were not required to meet any conditions other than those set forth in Gassert's letter of April 13, 1999 and the attachment thereto.

7. In Johnson's letter of May 11, 1999, the Association timely requested the District to bargain with the Association over the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer." The District did not offer to bargain with the Association over the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer." During bargaining sessions on the 1999-2001 contract, the parties bargained over retirement incentives to be included in the 1999-2001 contract. The parties did not discuss the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer", or any other retirement incentive for employees retiring during the 1998-99 school year, during any bargaining session on the 1999-2001 contract. The District did not bargain with the Association over the District's 1999 "School District of Random Lake Board of Education Health Insurance Offer." In the Fall of 2000, the District implemented a Qualified Economic Offer. Subsequently, the parties concluded negotiations on a 1999-2001 contract without reaching an agreement on this contract.

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

CONCLUSIONS OF LAW

1. Complainant Random Lake United Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent Random Lake School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Respondent made its 1999 “School District of Random Lake Board of Education Health Insurance Offer” to individuals who were municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

4. At the time that Respondent made its 1999 “School District of Random Lake Board of Education Health Insurance Offer,” and at all times when this offer was in effect, David Mueller and Barbara Snodgrass were municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

5. At the time that David Mueller and Barbara Snodgrass notified the Respondent that they would retire at the end of the 1998-99 school year, and until the effective date of their retirement, David Mueller and Barbara Snodgrass were municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

6. The Wisconsin Employment Relations Commission has jurisdiction to determine Complainant’s claim that Respondent has violated Sec. 111.70(3)(a)4 and 1, Stats., and this claim is not moot.

7. Respondent’s 1999 “School District of Random Lake Board of Education Health Insurance Offer” primarily relates to the wages, hours and conditions of employment of municipal employees and, therefore, is a mandatory subject of bargaining.

8. Complainant has not waived its statutory right to bargain with the Respondent over the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

9. The language of Article VI is the status quo on retirement health insurance benefits, which Respondent is required to maintain during the term of the 1997-99 collective bargaining agreement, unless Respondent and the Complainant bargain otherwise.

10. When Respondent, on or about April 27, 1999, offered the 1999 “School District of Random Lake Board of Education Health Insurance Offer” to members of the collective bargaining unit represented by Complainant, Respondent unilaterally implemented a change in a mandatory subject of bargaining during the term of the parties’ 1997-99 collective bargaining agreement, without a valid defense, thereby violating Sec. 111.70(3)(a)4, Stats., and, derivatively, violating Sec. 111.70(3)(a)1, Stats.

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

ORDER

To remedy the violation of the Municipal Employment Relations Act found in Conclusion of Law 10 in a manner that effectuates the purposes of the Act, **IT IS ORDERED** that the Random Lake School District, its officers and agents, shall immediately:

1. Cease and desist from violating its statutory duty to bargain with the Random Lake United Education Association by unilaterally implementing retirement health insurance benefits for individuals that are employed by the District and represented by the Random Lake United Education Association for the purposes of collective bargaining.
2. Take the following affirmative action:
 - a) Notify all of its employees represented by the Random Lake United Education Association by posting, in conspicuous places on its premises where such employees are employed, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by an agent of the Random Lake School District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by other material.
 - b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 13th day of September, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT violate our statutory duty to bargain with the Random Lake United Education Association by unilaterally implementing retirement health insurance benefits.

Random Lake School District

Date

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

Random Lake School District

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

BACKGROUND

On September 24, 1999, Complainant Random Lake Education Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Respondent Random Lake School District had offered certain retirement health insurance benefits to bargaining unit employees in violation of Sec. 111.70(3)(a)4 and 1, Stats. On November 20, 2000, Respondent filed its answer to the prohibited practice complaint, denying that it has violated Secs. 111.70(3)(a)4 and 1, Stats., as alleged by Complainant.

POSITIONS OF THE PARTIES

Complainant

Contrary to the argument of the District, this case does not present a novel legal issue. It is well established that the District has a statutory duty to bargain with the representatives of its employees with respect to mandatory subjects of bargaining that arise during the term of an existing collective bargaining agreement, except as to those matters that are embodied within the provisions of said agreement, or where bargaining in such matters has been clearly and unmistakably waived.

As the record clearly establishes, the District's 1999 offer of retirement health insurance benefits was made to all eligible members of the Association's collective bargaining unit currently employed by the District and was not made to any retiree. Under well-established Wisconsin Law, the District's 1999 offer of retirement health insurance benefits is a mandatory subject of bargaining.

The Association did not waive its right to bargain over the District's 1999 offer of retirement health insurance benefits. To the contrary, the Association, through its representative Steve Johnson, timely challenged the unilateral implementation of benefits and demanded to bargain over these benefits with the District. Assuming arguendo, that Johnson had not made a request to bargain, a union is not required to request bargaining where the unilateral change amounts to a fait accompli.

The Commission requires any waiver of bargaining rights to be "clear and unmistakable." A finding of such waiver must be based on specific language in the agreement or bargaining history. A silent contract does not constitute waiver under Commission law.

With respect to the District's 1997 offer of retirement health insurance benefits, there is not clear and unmistakable evidence of waiver. Rather, the record indicates that the Association did not file a formal grievance or a prohibited practice complaint, but is silent with respect to whether the Association challenged the 1997 unilateral implementation orally, or in writing.

Assuming arguendo, that the Association had clearly and unmistakably waived its right to bargain retirement health insurance benefits for the 1995-97 contract period, this would not provide a defense to the current violation. As the Commission has previously held, waiver by inaction does not constitute a waiver in perpetuity.

The District bargained with the Association over provisions to be included in the 1999-2001 collective agreement, but did not bargain with the Association over the 1999 offer of retirement health insurance benefits. By unilaterally offering the 1999 retirement health insurance benefit, the District has violated its statutory duty to bargain.

The District's violation of its statutory duty to bargain has caused great harm to the Association. The District has undermined the Association's leverage in attempting to obtain a contractual early retirement benefit because the District comes to the table having already realized substantial savings by replacing these individuals with less expensive employees.

The District stands to profit greatly from its violation of the statutes. If there is a novel legal issue in this case, it is not the question of liability, but rather it is the question of a fair and logical remedy. If the District were allowed to strip the retirees of their retirement incentive, the District would have eliminated the cost associated with two senior teachers without paying a cent to gain this benefit. This would also have a devastating effect on the two people involved.

The Association urges the Examiner to order a remedy that will effectively discourage employers from engaging in this type of behavior. The District should be required to post an appropriate notice and to allow the retirees to retain the retirement benefit. Additionally, the Examiner should fashion a remedy that will place the members of the local where they would be but for the District's unlawful conduct.

By paying \$12,500 to each of the two individual retirees, the District avoided paying their salaries and, undoubtedly, was able to replace them at a much lower cost. Theoretically, absent the retirement benefit, the two retirees would have continued to work for a number of years.

Under the QEO law, the amount the District saved actually comes out of the salary schedule for the remaining members of the bargaining unit. Under the QEO cast forward rules, the employer is allowed to "cast forward" the cost of the retiring teachers on paper while actually only expending the cost of much less expensive replacements. Thus, in the

1999-2000 contract year, individuals who remain in the bargaining unit are deprived of significant monies that would otherwise be part of the total package distributed across the salary schedule. In the 2000-2001 contract year, the situation becomes even more egregious.

It would be unreasonable to believe that the legislature intended that the QEO would become an incentive for School Districts to violate other parts of Sec. 111.70. Unless a significant remedy is fashioned in this case, there would be incredible incentive, especially under the QEO law, for Districts to engage in this type of unlawful behavior.

The Commission does not appear to have addressed the specific remedy issue in this case. The NLRB, albeit outside of the QEO context, has addressed similar issues and its opinions are instructive. The NLRB “traditionally orders that unlawful unilateral actions by an employer be rescinded, except for those which benefit employees, and further orders bargaining with the Union.” *J.P. STEVENS & COMPANY, INC. VS. AMALGAMATED CLOTHING AND TEXTILES UNION*, 268 NLRB 89 (1983).

In *A.S. ABELL COMPANY VS. BALTIMORE TYPOGRAPHICAL UNION*, 230 NLRB 17 (1977), the Board dealt with a situation almost identical to that in the present case. In addressing the proper remedy the NLRB held that

The 38 employees who were unlawfully induced to leave their jobs must be offered an opportunity to return to work if they so desire. They are also free to remain in permanent retirement. If they do return, they must be made whole, and paid for what wages they lost in the job for having left. As usual, any interim earnings they have had will be deducted from their lost wages with respondent in the event of their return. In this special case, the measure of interim earnings will include what payments the respondent in fact gave them in the form of preferred benefits under the plan, including, wherever it may have happened, the \$15,000 offered as a single payment benefit.

The remedy in *ABELL* suggests an important principle for any remedy in this case, i.e., that an employer should not benefit in any way from its violation of the law.

Adopting an appropriate remedy in this case is complicated by the fact that the District subsequently imposed a QEO. If the QEO remains in effect, simply adopting the NLRB remedy in this case would be problematic. Unless the retirees return to the bargaining unit, given the QEO, the Association’s salary schedule would not be returned to the status quo.

The most equitable and logical remedy would be to permit the two individuals to remain in retirement with the full incentive; to require the District to post an appropriate notice of its statutory violation; and to order the District to restore to the District’s QEO calculations

the monies lost as a result of the District's unlawful conduct. For the 1999-2000 year, this would entail approximately \$35,000 being divided among the members of the bargaining unit. For the 2000-2001 school year the amount would increase to approximately \$60,000 (less any step or lane change of the replacements) divided among the members of the bargaining unit. The latter amount increases because the original cost of the incentives no longer must be subtracted.

A less equitable and logical remedy, but one vastly preferable to simply allowing the District to profit from its violation of the statute, would be to invalidate the District's QEO; order the District to post the appropriate notice; and order the parties to bargain over a contractual early retirement benefit, with the \$12,500 serving as the status quo contractual retirement benefit. In the event that the parties bargain an incentive that is greater than \$12,500, the retirees should be given the difference between the benefit they received and the bargained amount.

Respondent

The recognized mandatory subject of collective bargaining is limited to retirement proposals applicable to current employees who retire during the term of the collective bargaining contract that incorporates the retirement proposal. A collective bargaining proposal related to retired employees must have perspective effect in the successor contract to be mandatory. On this basis, employer action under a silent labor agreement, concerning persons retiring before the term of the successor agreement, is not a mandatory subject of bargaining.

By its terms, the Board of Education resolution was withdrawn and terminated on June 1, 1999. The District had no intention of extending, and did not extend, its offer to persons who might retire during the successor 1999-2001 contract. Health insurance contributions offered under this proposal were not payable, and were not paid, until Mr. Mueller and Ms. Snodgrass retired.

Retired persons are not municipal employees within the meaning of Sec. 111.70(1)(i), Stats. The Association has a statutory right to represent only municipal employees and cannot represent former employees for the purposes of collective bargaining. Thus, the Association cannot compel the District to bargain over the wages, hours and conditions of employment of individuals who are not in the bargaining unit.

The Association never requested the District to negotiate over the April 13, 1999 proposal. The Association only demanded that the District withdraw its April 13, 1999 proposal and negotiate over provisions to be added to the 1999-2001 contract. The District did negotiate with respect to the 1999-2001 contract, but declined to withdraw the April 13, 1999 plan. By failing to request the District to bargain over the 1999 proposal, the Association has waived any statutory right to bargain over this proposal.

The unilateral plan of April 13, 1999 was specifically limited to persons retiring before the term of the successor contract, and did not concern a mandatory subject of bargaining. Accordingly, the District had no obligation to withdraw the plan.

In 1997, as well as on April 13, 1999, the existing collective bargaining contract was silent with regard to the issue of District health insurance premium contributions on behalf of employees following retirement. The District was under no obligation to reopen negotiations over the terms of the 1997-1999 agreement and was not requested to do so by the Association. The District does not have a duty to bargain over a previously negotiated and expired collective bargaining contract.

The unilateral offer of the Board of Education was not threatening or coercive of the members of the collective bargaining unit. The unilateral offer did not undermine the status of the Association as the collective bargaining representative.

The free speech right of the District to communicate with employees is firmly established and cannot be infringed by the Association. District communications alone cannot be characterized as a refusal to bargain or a prohibited practice.

In 1997, the District offered a similar retirement health insurance benefit. The Association did not file a grievance or prohibited practice complaint over this offer. Nor did the Association request to bargain over this offer. By silence and inaction, the Association has acquiesced to the practice of providing a “window” for retiree health insurance benefits. This failure to object also establishes that the District’s retirement health insurance proposals have not harmed the Association, or its members. The District reasonably relied upon this tacit acceptance of the District’s 1997 offer.

At the time the District proposed to contribute toward health insurance premiums of persons retiring at the end of the 1997-1999 agreement, the agreement was silent with respect to this issue. Thus, the Association had not negotiated any limitation upon the authority of the Board of Education to extend public funds for this purpose.

The status quo was the “window” which the District had opened in May of 1997 and to which the Association did not object. Thus, the District’s plan to contribute toward the health insurance premiums of an individual retiring at the end of the 1998-99 school year did not alter the status quo. Under Commission law, an employer action that does not result in a change in the status quo is not a unilateral change or a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats.

In adopting the resolution and directing the notice of April 13, 1999, the Board of Education made a public policy decision pursuant to its authority to manage the workforce. In the face of a silent contract, the Association must demonstrate some interest sufficient to

supersede the statutory authority of the School Board to administer the School District, including management of the workforce.

In announcing its plan of April 13, 1999, the Board did not ignore, supersede, supplant, or disregard a negotiated labor contract provision. Nor did the Board negotiate or enter into individual contracts.

This complaint is a contrivance intended to coerce the District into accepting the Association collective bargaining proposals. The Association has not established any injury or loss to members of the collective bargaining unit, or the Association, resulting from the unilateral action of the District in April 1999.

The Commission has no jurisdiction over Ms. Snodgrass or Mr. Mueller because they no longer are municipal employees or members of the collective bargaining unit. The absence of a meaningful remedy compels the conclusion that the District's 1999 proposal was not a refusal to bargain or a prohibited practice.

By its terms, the Board of Education resolution attached to the letter of April 13, 1999 was withdrawn and ineffective as of June 1, 1999. Although the decision to withdraw the offer was made independently, and in advance of the demand letter of the UniServ Director on May 11, 1999, this withdrawal was precisely the action which the Association requested and has rendered this matter moot. This action was also rendered moot by the retirement of Mr. Mueller and Ms. Snodgrass.

The Association's claim that the District has eliminated the cost associated with two senior teachers is speculation, without any supporting record evidence. As is the Association claim that Mr. Mueller and Ms. Snodgrass would not have retired but for the District's retirement health insurance proposal. Speculation cannot provide a basis for a remedy.

Contrary to the argument of the Association, the Examiner did not take administrative notice of any QEO documents. The sole inquiry of the Examiner was directed toward the date upon which the District implemented a QEO with regard to collective bargaining over the 1999-2001 labor contract. The Examiner has no authority, through this proceeding, to invalidate a QEO implemented in conformance with the rules of the Commission.

Revising the teacher pool to reflect staffing changes after the "snap shot date" of April 1st has been specifically rejected by the WERC. Ms. Snodgrass and Mr. Mueller were both employed on April 1, 1999, and their levels of total compensation were appropriately included within the QEO base year calculation for the 1999-2001 contract term. It is illogical for the Association to argue both that the \$12,500 benefit authorized through the April 13, 1999 announcement should be imposed as the status quo and that the District did not act in conformance with the status quo.

The unilateral offer of the District to contribute toward the health insurance premium for persons retiring at the end of an expired labor contract was not in any manner a refusal to engage in collective bargaining. The District did not engage in any conduct proscribed by Sec. 111.70(3)(a)4, Stats. The Association's complaint is without merit and should be dismissed.

DISCUSSION

Background

Many of the relevant facts are not in dispute. By letter dated April 13, 1999, District Superintendent Gassert notified individuals currently employed by the District and represented by the Complainant for purposes of collective bargaining that, on April 19, 1999, the Board would be acting upon a resolution that provided contributions toward the health insurance of employees who provided notice of their retirement prior to 4:00 p.m. June 1, 1999. By memo dated April 27, 1999, Gassert notified these same employees as follows:

This is to notify you that the Health Insurance Offer that was previously sent to you with an accompanying letter dated April 13, 1999 was approved by the School Board on April 25, 1999 and is, therefore, open to those of you who meet the eligibility requirements.

Attached is another copy of the offer for your easy reference.

If you have any questions, please see me directly.

Thank you.

The attached copy of the offer stated as follows:

SCHOOL DISTRICT OF RANDOM LAKE

BOARD OF EDUCATION

HEALTH INSURANCE OFFER

The Board of Education of the School District of Random Lake offers to contribute the sum of \$12,500.00 toward the cost of health insurance premiums on behalf of eligible qualified professional employees, as defined below, and pursuant to the following terms and conditions:

1. Employees must hold a professional license or certificate under section 118.19 of the Wisconsin Statutes.
2. Employees must be eligible to begin receiving retirement annuity benefits under the Wisconsin Retirement System, on or before August 15, 1999.
3. Employees must have completed fifteen (15) years of service under their professional license within the School District of Random Lake by 6/15/99.
4. Employees must present to the office of the District Administrator, on or before 4:00 P.M. on 6/1/99, a written notice of retirement to be effective 6/30/99.

The sum of \$12,500.00 will be applied toward applicable monthly health insurance premiums on behalf of the eligible qualified employee until the total sum is expended.

If an eligible qualified employee dies before the total sum is expended, the remaining balance will be expended to provide health insurance coverage for the surviving spouse of the employee. If an eligible qualified employee becomes eligible for medicare before the total sum is expended, upon the request of the employee, the remaining balance will be applied toward premiums for medicare supplement or carve out insurance coverage until the remaining balance is expended.

If any aspect of this offer is found by any court of competent jurisdiction or an administrative agency to violate any contractual obligation of the School District, the Federal Age Discrimination In Employment Act, the Wisconsin Fair Employment Act, or any other state or federal law or regulation, then this entire offer shall be considered withdrawn, null and void.

This offer will be withdrawn and terminate at 4:00 P.M. on 6/1/99. Thereafter, this offer will be ineffective and null and void. Employees who submit a notice of retirement after 4:00 P.M. on 6/1/99 will be ineligible to receive the School District contribution toward the cost of monthly health insurance premiums, as described previously.

On or about May 3, 1999, District employee and Complainant bargaining unit member David Mueller notified Gassert that he would be retiring effective June 8, 1999 and accepted the District's offer of \$12, 500 to be applied toward health insurance. On or about May 10, 1999,

District employee and Complainant bargaining unit member Barbara Snodgrass notified Gassert that she would be retiring effective June 9, 1999 and thanked Gassert for the insurance money. Snodgrass and Mueller each retired at the end of the 1998-99 school year.

Snodgrass, but not Mueller, elected to receive the retirement health insurance benefit contribution provided in the 1999 "School District of Random Lake Board of Education Health Insurance Offer." Snodgrass began receiving this contribution in September of 1999.

Statutory Claim

Complainant alleges that Respondent violated Sec. 111.70(3)(a)4 and 1, Stats., by failing to bargain in good faith with the Complainant over the 1999 "School District of Random Lake Board of Education Health Insurance Offer." Although the Complaint, as filed, alleges that Respondent has engaged in individual bargaining, Complainant's arguments at hearing and in post-hearing brief address the allegation that Respondent has unilaterally implemented a mandatory subject of bargaining. Thus, the Examiner has limited her discussion to this latter claim.

Section 111.70(3)(a)4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer:

To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

A violation of Sec. 111.70(3)(a)4, Stats., constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats., which, provides that it is a prohibited practice for a municipal employer "to interfere with, restrain or coerce municipal employees in the exercise of their rights" guaranteed in Sec. 111.70(2), Stats. The rights guaranteed in Sec. 111.70(2), Stats., include:

. . . the right of self organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection, . . .

Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the bargaining representative of its employees with respect to mandatory subjects of bargaining.

Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which "primarily relate" to the formulation and choice of public policy. 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 БЕЛОIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976).

A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. 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). As Examiner Raleigh Jones stated in ROCK COUNTY, DEC. NO. 29970-A (1/01),

. . . an employer may not normally make a unilateral change 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 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 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 *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/

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).

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

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.

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

As Examiner Nielsen stated in CITY OF GREEN BAY, DEC. NO. 29469-A (7/99), the duty to bargain is not self-actuating, but rather, rises upon a demand for such. Accordingly, waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in mandatory subjects of bargaining, except where the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. CITY OF GREEN BAY, SUPRA; ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93); WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (GRATZ, 12/78).

The Commission has recognized that municipal employers enjoy a protected right of free speech. In ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77), the Commission stated:

Just as employes have a protected right to express their opinions to their employers, 7/ so also do employers enjoy a protected right of free speech 8/ in public sector collective bargaining. 9/ Accordingly, employers have long enjoyed the right to tell their employes what they have offered to their union in the course of collective bargaining. 10/ However, notwithstanding labor relations policies modeled on the NLRA favor “uninhibited, robust, and wide-open debate in labor disputes,” 11/ employer’s statements must stop short of coercion, threats or interference with employe rights, 12/ and the employer statements must not constitute bargaining with the employes rather than their majority collective bargaining representative. 13/ (cites omitted)

Jurisdiction

Respondent argues that the Commission does not have jurisdiction over Complainant’s prohibited practice claim because the employees affected by the 1999 “School District of Random Lake Board of Education Health Insurance Offer” are retirees and not members of the collective bargaining unit represented by Complainant. In GREEN COUNTY, DEC. NO. 21144 (WERC, 11/83), the Commission recognized that its prior decisions noted a distinction between a retirement benefit for those employees who have already retired and those who will retire in the future. In GREEN COUNTY, the Commission also reconfirmed its holding in CITY OF MILWAUKEE, DEC. NO. 19091 (WERC, 10/81) that

Although, for existing employes, the Commission has held that the level and scope of health insurance benefits constitute a mandatory subject of bargaining and that retirement benefits for existing employes are mandatory subjects of bargaining, the Commission has never held that these same subjects are mandatory when they apply to non-unit members exclusively. In fact,

consistent with the Supreme Court's decision in PITTSBURGH, the Commission has concluded that proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining. Also consistent with the decision in PITTSBURGH, we conclude that an individual who is no longer employed due to retirement and without an expectation of further employment is not an "employee" within the meaning of MERA, nor is that person a member of the bargaining unit.

In the 1999 "School District of Random Lake Board of Education Health Insurance Offer," the Respondent did not offer retirement health insurance benefits to "an individual who is no longer employed due to retirement and without an expectation of further employment." Rather, the Respondent offered retirement health insurance benefits to individuals who were current employees of the District and members of the Complainant's collective bargaining unit.

Notwithstanding Complainant's arguments to the contrary, the individuals affected by the 1999 "School District of Random Lake Board of Education Health Insurance Offer" are municipal employees within the meaning of Sec. 111.70(1)(i), Stats., as well as members of the Complainant's collective bargaining unit. The Commission has jurisdiction over Complainant's claim that Respondent has violated its statutory duty to bargain by unilaterally implementing the 1999 "School District of Random Lake Board of Education Health Insurance Offer."

Mootness

As Examiner McGilligan states in WISCONSIN EDUCATION ASSOCIATION COUNCIL, ET AL, DEC. NO. 28543-A (9/97):

. . . the Commission, following the lead of the Wisconsin Supreme Court, has defined a "moot" case as:

. . . one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment about some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 2/

2/ *LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, DEC. NO. 16277-C (10/80, HENNINGSSEN), at 15, AFF'D BY OPERATION OF LAW, DEC. NO. 16277-D (WERC, 12/80), CITING WERB v. ALLIS-CHALMERS WORKERS UNION, LOCAL 248, USWA, CIO, 252 WIS. 436, 32 N.W.2D 190 (1948).*

Respondent argues that this case is moot because the 1999 “School District of Random Lake Board of Education Health Insurance Offer” was withdrawn on June 1, 1999 and such a withdrawal was the remedy requested in Complainant’s letter of May 11, 1999. However, to comply with the withdrawal request of Complainant, Respondent would have had to withdraw this offer upon receipt of the request and not provide the offered health insurance benefits to any bargaining unit employee.

Respondent did not do so. Rather, Respondent continued the 1999 “School District of Random Lake Board of Education Health Insurance Offer” in effect until June 1, 1999. Additionally, on June 9, 1999, Respondent agreed to provide the health insurance benefits offered in the 1999 “School District of Random Lake Board of Education Health Insurance Offer” to two bargaining unit employees that retired effective June 30, 1999.

The 1999 “School District of Random Lake Board of Education Health Insurance Offer” was, by its terms, of limited duration. Nonetheless, Respondent implemented this offer when, on April 27, 1999, Respondent advised Complainant’s bargaining unit employees that this offer had been approved by the Board and was available to those employees that met the eligibility requirements set forth in this offer.

This case presents the claim that Respondent violated its MERA duty to bargain by unilaterally implementing the 1999 “School District of Random Lake Board of Education Health Insurance Offer.” Inasmuch as a judgment in this case will have a practical legal effect upon an existing controversy, this case is not moot.

Respondent implemented the 1999 “School District of Random Lake Board of Education Health Insurance Offer” prior to June 30, 1999. Thus, assuming *arguendo*, that Respondent is correct when it argues that the Commission does not have jurisdiction over Respondent conduct toward Snodgrass and Mueller that occurs after June 30, 1999, such a fact would not render this case moot.

Mandatory vs. Permissive Subject of Bargaining

The Courts and the Commission have recognized that collective bargaining agreements commonly impose deferred obligations beyond the stated term of the agreement and that such deferred compensation may be in the form of payments of health insurance premiums. The Courts and the Commission also have recognized that, if such a deferred compensation proposal applies only to current employees who retire during the term of the agreement, then the proposal is a mandatory subject of bargaining even though the employer's obligation to such individuals would begin only at the time of the individuals' retirement. GREEN COUNTY, SUPRA; CITY OF MILWAUKEE, DEC. NO. 19091 (WERC, 10/81); CITY OF BROOKFIELD, DEC. NO. 25517 (WERC, 6/88); AND CITY OF BROOKFIELD V. WERC, 153 WIS.2D 238 (1989).

The 1999 "School District of Random Lake Board of Education Health Insurance Offer" provides payment towards the health insurance premiums of individuals that retire with at least fifteen years of District service. Thus, contrary to the argument of the Respondent, this offer is compensation for services provided to the District.

The compensation for services provided in the 1999 "School District of Random Lake Board of Education Health Insurance Offer" is payable after the expiration of the 1997-99 agreement. Thus, this offer involves deferred compensation.

The deferred compensation provided for in the 1999 "School District of Random Lake Board of Education Health Insurance Offer" is offered only to current employees that are members of the Complainant's bargaining unit and that retire effective June 30, 1999. The 1997-99 collective bargaining agreement was in effect from July 1, 1997 through June 30, 1999. Thus, the 1999 "School District of Random Lake Board of Education Health Insurance Offer" applies only to current bargaining unit employees who retire during the term of the agreement.

In summary, the 1999 "School District of Random Lake Board of Education Health Insurance Offer" is a deferred compensation proposal that applies only to current bargaining unit employees who retire during the term of the 1997-99 agreement. Thus, contrary to the argument of the Respondent, under GREEN COUNTY and the other cases cited above, the 1999 "School District of Random Lake Board of Education Health Insurance Offer" is a mandatory subject of bargaining even though the offered health insurance contributions are not payable until after the employee retires and the 1997-99 collective bargaining agreement expires.

Waiver By Contract

As discussed supra, waiver by contract language is a valid defense to a charge of unilateral implementation. At the time that Respondent offered its 1999 "School District of

Random Lake Board of Education Health Insurance Offer,” and, at all times in which this offer was in effect, the parties’ 1997-99 collective bargaining agreement was also in effect.

Respondent argues that the 1997-99 contract is silent with respect to the issue of contributions toward the health insurance premiums of persons retiring at the end of the 1997-99 contract. Respondent asserts, therefore, that Complainant has not negotiated any limitation upon Respondent’s Sec. 120 authority to expend public funds for this purpose.

If, as Respondent argues, the parties’ 1997-99 collective bargaining agreement were silent on the issue of contributions toward the health insurance premiums of persons retiring at the end of the 1997-99 agreement, such silence would not provide Respondent with a Sec. 120 right, or any other right, to unilaterally implement its 1999 “School District of Random Lake Board of Education Health Insurance Offer.” Waiver of the statutory right to bargain is not established by the absence of contract language, but rather, is established by the existence of specific contract language.

Contrary to the argument of the Respondent, however, the 1997-99 collective bargaining agreement is not silent on the issue of retirement health insurance benefits. Rather, this subject is expressly addressed in the following article:

ARTICLE VI – FRINGE BENEFITS AND COMPENSATION

A. Health Insurance. Beginning January 1, 1993, the District will pay 95% of the health insurance premium for Wisconsin Education Insurance Trust Health Insurance, family or single coverage, which includes a preadmission review, major medical \$100/\$200 front end deductible with provision for 100% payment on major medical after the deductible has been met and \$5/\$0 MCP prescription drug program. Teacher(s) who retire with twenty (20) years or more of district service may be included in the District group if he/she pays the premium in the event that the current carrier notifies the District or the Association that they will not insure retired employees, even where the insurance of such employees is now contractually required, then the parties to this Agreement shall immediately reopen this contract to bargain over any successor replacement language regarding the maintenance of retirees within the group.

The language of Article VI establishes that the Complainant has not waived its statutory right to bargain over the issue of retirement health insurance benefits, but rather has bargained with Respondent on this issue. The result of this bargain is the following language:

Teacher(s) who retire with twenty (20) years or more of district service may be included in the District group if he/she pays the premium in the event that the current carrier notifies the District or the Association that they will not insure retired employees, even where the insurance of such employees is now contractually required, then the parties to this Agreement shall immediately reopen this contract to bargain over any successor replacement language regarding the maintenance of retirees within the group.

The above language is the status quo on retirement health insurance benefits, which Respondent is required to maintain during the term of the 1997-99 collective bargaining agreement, unless Respondent and the Complainant bargain otherwise.

In summary, Respondent would have a valid waiver by contract defense to Complainant's unilateral implementation claim if specific language of the 1997-99 contract provided Respondent with the right to make its 1999 "School District of Random Lake Board of Education Health Insurance Offer." However, neither the Article III management rights relied upon by the Respondent, nor any other contract language specifically provides Respondent with a right to make its 1999 "School District of Random Lake Board of Education Health Insurance Offer." Thus, Respondent does not have a valid waiver by contract defense to Complainant's claim that Respondent has violated its statutory duty to bargain by unilaterally implementing the 1999 "School District of Random Lake Board of Education Health Insurance Offer."

Waiver by Conduct

1997

As Respondent argues, Respondent implemented a similar retirement health insurance offer in the Spring of 1997. By its terms, this offer was withdrawn at 4:00 p.m. on June 1, 1997.

The 1997 offer was not in effect at the time that Respondent implemented the 1999 "School District of Random Lake Board of Education Health Insurance Offer." Respondent argues, however, that by failing to object to the 1997 offer of retirement health insurance, Complainant has acquiesced to a past practice of opening a window of Respondent contributions toward the health insurance of retiring employees and that this past practice has become the status quo.

It is not evident that Complainant made any objection to Respondent's 1997 offer. However, one instance of acquiescence to Respondent conduct is not sufficient to establish a

binding past practice. The record does not demonstrate that, in April of 1999, the status quo was a practice that permitted Respondent to implement the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

Waiver of the right to bargain by inaction is not a waiver that continues in perpetuity. TAYLOR COUNTY, DEC. NO. 29046-A (SHAW, 11/97). By failing to object to Respondent’s 1997 offer, Complainant has not waived its right to bargain with Respondent over the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

1999

In his letter of April 13, 1999, the District Superintendent placed the Association on notice that Respondent would consider the adoption of the 1999 “School District of Random Lake Board of Education Health Insurance Offer” at a subsequent School Board meeting. The 1999 “School District of Random Lake Board of Education Health Insurance Offer” was adopted on April 25, 1999 and implemented on April 27, 1999.

Inasmuch as Complainant received notice of the 1999 “School District of Random Lake Board of Education Health Insurance Offer” prior to its implementation, the implementation was not a fait accompli. Accordingly, it was possible for Complainant to make a timely demand to bargain on the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

In his letter of May 11, 1999, UniServ Director Johnson, acting on behalf of Complainant, expressly objected to the 1999 “School District of Random Lake Board of Education Health Insurance Offer.” Johnson also stated as follows:

. . . The letter from you dated April 13, 1999, to the entire professional staff, constitutes a violation of Wisconsin Statute 111.70. The Association has decided to challenge the Health Insurance Offer and demands that the Board cease from bargaining with unauthorized individual bargaining unit members. The Association expects a letter from the Board withdrawing the offer and that the Board will refrain from such prohibited action in the future.

. . .

The proper place for exchange of proposals between the Random Lake United Education Association and the Random Lake School Board is the negotiation process where duly authorized representatives from both parties may bargain legally.

The Board of Education discussed Johnson's letter of May 11, 1999 at the Board meeting of May 17, 1999. At that time, the Board of Education concluded that it had a right to make the 1999 "School District of Random Lake Board of Education Health Insurance Offer" and advised the District Superintendent to not respond to the May 11, 1999 letter.

The letter of May 11, 1999 contains an objection to the 1999 "School District of Random Lake Board of Education Health Insurance Offer" and advises Respondent that it must bargain such proposals with the Complainant. Thus, by this letter, Complainant has placed Respondent on notice that, if Respondent wishes to implement the 1999 "School District of Random Lake Board of Education Health Insurance Offer," then it must bargain this offer with the Complainant. Notwithstanding Complainant's argument to the contrary, Johnson's letter of May 11, 1999 is a demand to bargain.

Respondent's District Superintendent presented the May 11, 1999 letter to the Board of Education at its May 17, 1999 meeting. At this meeting, the Board of Education voted to accept the retirement offers of Mueller and Snodgrass. On June 9, 1999, the District Superintendent notified the two employees that it had accepted their retirement offers and confirmed that each was eligible for the 1999 "School District of Random Lake Board of Education Health Insurance Offer."

Respondent was aware of the May 11, 1999 letter prior to accepting any employee retirement, or confirming any employee's eligibility for the health insurance benefits provided in the 1999 "School District of Random Lake Board of Education Health Insurance Offer." Accordingly, any delay in making the demand to bargain was not prejudicial to Respondent.

In summary, the Complainant did not silently acquiesce to the 1999 "School District of Random Lake Board of Education Health Insurance Offer." Rather, Johnson's letter of May 11, 1999 provided timely notice of Complainant's objection to the 1999 "School District of Random Lake Board of Education Health Insurance Offer," as well as a timely demand to bargain this offer with the Complainant.

Complainant did not have a duty to follow-up the May 11, 1999 letter with a bargaining proposal on retirement health insurance benefits for employees retiring at the end of the 1997-99 school year. Rather, upon receipt of Johnson's May 11, 1999 letter, it was incumbent upon Respondent to either maintain the status quo on retirement health insurance reflected in the provisions of Article VI, or to bargain with Complainant on the 1999 "School District of Random Lake Board of Education Health Insurance Offer."

Conclusion

As discussed above, the statutory right to bargain may be waived by contract language or conduct. Notwithstanding Respondent's arguments to the contrary, the record does not demonstrate that the Complainant clearly and unmistakably waived, by contract language or

conduct, its statutory right to bargain with Complainant on the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

Unilateral Implementation

Respondent argues that it fully participated in extended collective bargaining over the issue of “early retirement incentive.” However, the extended collective bargaining relied upon by Respondent did not involve the 1997-99 collective bargaining agreement, but rather, involved proposals on the successor 1999-2001 agreement. By bargaining on proposals to be included in the successor 1999-2001 agreement, Respondent has not bargained with Complainant on the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

The District Superintendent’s letter of April 13, 1999 identified the attached “School District of Random Lake Board of Education Health Insurance Offer” as a resolution scheduled to be acted upon at the School Board meeting of April 19, 1999. The District Superintendent advised the Association President that this letter would be forthcoming. Respondent, however, did not bargain with the Complainant over the 1999 “School District of Random Lake Board of Education Health Insurance Offer” prior to the District’s implementation of this offer, or at any other time.

Absent a valid defense, Respondent may not make a unilateral change to a mandatory subject of bargaining, during the term of the parties’ 1997-99 contract, without first bargaining on the proposed change with the Complainant. A valid defense would be that Complainant has waived, by contract language or conduct, its right to bargain with Respondent over the mandatory subject of bargaining.

The 1999 “School District of Random Lake Board of Education Health Insurance Offer” is a change to a mandatory subject of bargaining. Respondent implemented the 1999 “School District of Random Lake Board of Education Health Insurance Offer” during the term of the parties’ 1997-99 collective bargaining agreement without bargaining with Complainant over the 1999 “School District of Random Lake Board of Education Health Insurance Offer.” Respondent does not have a valid defense to its failure to bargain with Complainant over the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

Respondent argues that its conduct has not harmed the Association or its collective bargaining members. However, by unilaterally implementing a change to a mandatory subject of bargaining during the term of an existing agreement, without a valid defense, Respondent has ignored Complainant’s status as exclusive collective bargaining agent and, thus, has acted in a manner inherently inconsistent with the statutory mandate to bargain in good faith. As discussed above, such a unilateral implementation is a per se violation of Sec. 111.70(3)(a)4, Stats.

As Respondent argues, it has certain free speech rights. As discussed above, this right of free speech does not include the right to interfere with rights protected by MERA. Respondent's communications to employees regarding the 1999 "School District of Random Lake Board of Education Health Insurance Offer" was the instrument by which Respondent unlawfully unilaterally implemented a change to a mandatory subject of bargaining. Inasmuch as these communications interfered with rights protected by MERA, these communications are not protected free speech.

In determining the merits of the unilateral implementation claim presented in this case, the Examiner need not determine whether or not Respondent's 1999 "School District of Random Lake Board of Education Health Insurance Offer" was a self-help measure in pursuit of bargaining objectives. Accordingly, the Examiner has not addressed Respondent's arguments on this issue.

In its brief, Complainant states that "by breaking the law, the District was able to undermine the Association's leverage in attempting to obtain a contractual early retirement benefit." Relying upon this statement, Respondent argues that "this complaint proceeding is nothing more than leverage in attempting to obtain a contractual early retirement benefit" and, thus, the complaint must be rejected by the Commission as an abuse of Section 111.70(3)(a)4, Stats.

The "leverage" referenced in Complainant's argument is Complainant's right to bargain with Respondent over a contractual early retirement benefit. By seeking to enforce this right in the present complaint and, thus, obtain "leverage" to which it is statutorily entitled, Complainant has not engaged in an abuse of process.

As Respondent argues, during the negotiation of the 1999-2001 agreement, Complainant's bargaining proposals included an offer to withdraw this complaint. Contrary to the argument of Respondent, this offer to withdraw the complaint does not establish that the Complainant does not have a bona fide concern that Respondent has violated its statutory duty to bargain.

As Respondent argues, in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission stated that:

The conventional remedy for a unilateral change refusal to bargain includes an order to restore the status quo existing prior to the change and to make whole affected employees for losses they experienced by reason of the unlawful conduct. 26/ The purposes of reinstatement of the status quo ante is to restore the parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view, the

purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from the wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations in the future. (cites omitted)

By its terms, Respondent's 1999 "School District of Random Lake Board of Education Health Insurance Offer," was withdrawn effective June 1, 1999. Inasmuch as Respondent has already withdrawn this offer, the Examiner has not ordered Respondent to rescind this offer.

A restoration to the status quo that existed before Respondent's unlawful conduct could include an order that Respondent cease and desist from making health insurance contributions to Mueller and Snodgrass under the 1999 "School District of Random Lake Board of Education Health Insurance Offer." However, inasmuch as Complainant has not requested the Examiner to issue such an order, the Examiner has not issued such an order.

Complainant argues that Mueller and Snodgrass were unlawfully induced to retire at the end of the 1998-99 school year. Complainant requests, therefore, that the Examiner order Respondent to continue to pay the health insurance contributions offered in the 1999 "School District of Random Lake Board of Education Health Insurance Offer."

The 1999 "School District of Random Lake Board of Education Health Insurance Offer" includes the following statements:

If any aspect of this offer is found by any court of competent jurisdiction or an administrative agency to violate any contractual obligation of the School District, the Federal Age Discrimination In Employment Act, the Wisconsin Fair Employment Act, or any other state or federal law or regulation, then this entire offer shall be considered withdrawn, null and void.

Given this language, Mueller and Snodgrass were placed on notice that Respondent's offer of retirement health insurance was not guaranteed, but rather, was subject to legal challenge.

Mueller and Snodgrass did not testify at hearing. In the letters offering their retirement, each accepted the retirement insurance contributions offered by Respondent, but neither stated that these contributions were a consideration, much less a determining factor, in their decision to retire.

The record does not establish that Mueller and Snodgrass were unlawfully induced to retire at the end of the 1998-99 school year. Thus, on the facts of this case, it is not

appropriate to order Respondent to continue to pay the retirement health insurance contributions offered in the 1999 “School District of Random Lake Board of Education Health Insurance Offer.”

For the reasons discussed above, it is not evident that, but for Respondent’s 1999 “School District of Random Lake Board of Education Health Insurance Offer,” Mueller and Snodgrass would not have retired from District employment at the end of the 1999 school year. Thus, on the facts of this case, the status quo ante is that Mueller and Snodgrass voluntarily retired from the District at the end of the 1998-1999 school year.

Given the conclusion that Mueller and Snodgrass voluntarily retired, Complainant’s request to order the Respondent to adjust QEO calculations to take into consideration monies saved as a result of Mueller’s and Snodgrass’ retirement would not restore the status quo ante, but rather, would change the status quo ante. Thus, assuming arguendo, that the Examiner has authority to affect the manner in which Respondent calculates QEO’s implemented after the end of the 1998-99 school year, the remedy requested by the Complainant would not be appropriate.

Prior to withdrawing its 1999 “School District of Random Lake Board of Education Health Insurance Offer,” Respondent engaged in unlawful conduct by unilaterally implementing a change to a mandatory subject of bargaining, without a valid defense. Therefore, it is appropriate to order Respondent to cease and desist from such unlawful conduct and to order Respondent to post an appropriate notice.

Dated at Madison, Wisconsin this 13th day of September, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner