STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OZAUKEE COUNTY HIGHWAY EMPLOYEES ASSOCIATION, Complainant,

vs.

OZAUKEE COUNTY, Respondent.

Case 59
No. 61967
MP-3886

Decision No. 30551-A

Appearances:

Shneidman, Hawks, & Ehlke, S.C., by **Attorney Michelle A. Peters,** 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, WI, 53201-0442, appearing on behalf of the Complainant.

Michael, Best & Friedrich, LLP, by **Attorney Eric H. Rumbaugh**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-0108, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 27, 2002, Complainant Ozaukee County Highway Employees Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission in which it alleged that Respondent Ozaukee County had committed prohibited practices in violation of Section 111.70(3)(a)(1) and (3)(a)(4) of the Wisconsin Statutes by unilaterally changing the health insurance benefits of employees represented by the Complainant and failing and refusing to bargain in good faith. On February 11, 2003, the Commission appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter of the prohibited practice complaint filed by the Complainant. On February 11, 2003 this complaint and a complaint

filed by Office & Professional Employees International Union, Local 35, AFL-CIO were consolidated for purposes of hearing. A hearing was scheduled for February 27, 2003 and subsequently postponed to March 3, 2003. The hearing was held in Port Washington, Wisconsin. The record was closed upon receipt of post-hearing written argument on April 22, 2003. The Examiner, being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Ozaukee County Highway Employees Association, hereafter Association or Complainant, is the exclusive collective bargaining representative for the employees of the Ozaukee County Highway Department in the position classification of foreman, mechanic, patrolman and equipment operator. The Association's principal offices are located at 2366 Hillcrest Road, Saukville, Wisconsin 53080. Attorney Jeffrey P. Sweetland represents the Association for the purpose of labor contract negotiations.

2. Ozaukee County, hereafter County or Respondent, is a municipal employer with principal offices located at 121 West Main Street, Port Washington, Wisconsin 53074-0994. John R. Kuhnmuench, Jr., the County's Human Resources Director, represents the County for the purpose of labor contract negotiations.

3. The Association and the County are parties to a collective bargaining agreement that, by its terms, is in effect from January 1, 2000 to December 31, 2002. This collective bargaining agreement includes the following:

ARTICLE VIII
INSURANCE AND RETIREMENT

> Effective, January 1, 1997, the County will furnish and pay ninety percent (90%) of the cost of the monthly premium for group health insurance, under the County's insurance plans offered, single plan or family plan, as applicable, for permanent full-time employees. Coverage is to be effective on the first day of the month following completion of two (2) full months of employment. Participation in any of the County's health insurance plans offered by the County shall be at the employee's option. Election of coverage must be made for the ensuring year during the annual open enrollment period.

a. Effective January 1, 2000, employees shall have a prescription drug co-pay of $8.00 for a generic prescription and $11.00 for a brand name prescription. Effective January 1, 2001, employees shall have a prescription drug co-pay of $9.00 for a generic drug and $14.00 for a brand name prescription. The ability to obtain up to a three (3) month supply of mail order drugs with one co-pay will be implemented.

In the event an employee has a spouse who is also a County employee, that employee and spouse will be entitled to either two (2) single plans or one (1) family plan between them.

Effective, January 1, 2000, utilization of medical services and treatment received outside the provider network will require for the employee to pay 20% co-pay up to a maximum of $1,000 per family or $500 per single plan per year. (Exceptions will be made for verified emergencies and for required services outside of the geographic area where network providers are not available).

A $50.00 Emergency Room visit co-pay will be implemented. The co-pay will be waived if the insured is admitted to the hospital, or if a health care worker certifies that the nature of the visit was an emergency.

The County effective January 1, 1995 will implement an Internal Revenue Code Section 125 Plan for employee health insurance premium contributions.

. . .

The parties shall establish a Cost Containment Committee for the purposes of exploring measures which will contain the cost of providing health insurance and HMO coverage to the employees. Each party shall select two representatives to sit on the committee. The committee may meet quarterly and shall be authorized to obtain information from providers, to survey employees, and to gather comparative information from other public and private employers and unions. The committee shall specifically look into, but not to be limited to, possibilities for second opinions, prior approvals, and higher deductibles and exclusions from coverage.

. . .

ARTICLE XIV
SEPARABILITY AND DURATION

. . .

This Agreement shall become effective January 1, 2000 and shall remain in full force and effect until December 21, 2002.

The parties shall make every effort to exchange initial proposals for a successor agreement in June of the last year covered by the contract.

Prior to June 30, 2002, Association President Kurt Kraus advised Kuhnmuench that the Association was prepared to exchange final offers with the County. Kuhnmuench requested, and was granted, an additional two weeks to submit the County's initial proposal for the successor collective bargaining agreement. The Association's initial proposal for the successor collective bargaining agreement requested changes to at least eight sections of the collective bargaining agreement, including a request that Article VIII, Insurance and Retirement, be maintained except for the following:

1. Add the following to Article VIII:

   The County shall select the insurance plan and may change insurance carriers or administrators at any time, provided that (a) it provides thirty (30) days' advance notice of any such change to the Association and (b) any change maintains benefits that are reasonably equal to those in effect on June 30, 2002.

2. Amend the second to last paragraph of Article VIII (on page 8) to read as follows:

   Any employee who retires during the term of this Agreement and who has accumulated unused sick leave, shall have his or her health insurance paid by the County up to the value of his or her unused sick leave, established at fifty percent (50%) of the rate of pay in the year he or she retires. Thereafter, the retired employee shall continue to be eligible for group health insurance, provided he or she pays the entire premium therefor at the County Personnel Director's office on or before the first work day the County Personnel Director's office is open in the month prior to the month for which the premium is due.

The County's initial proposal, dated July 26, 2002, proposed wage increases and requested changes to Article VIII, as follows:

3. Article VIII – Insurance and Retirement

(a.) Delete entire paragraph and replace with the following language: Effective January 1, 2003, employees will be charged an annual deductible of $250 Single Plan and $500 Family Plan for services provided in the Network. The deductible would be $500 Single and $1,000 Family for services provide outside the Network.

$20.00 per Office Visit, even if more doctors are seen at the same visit. Note: $20.00 Office co-payment will be waived for annual exams, immunizations and well child care (once per year). Standard annual medical procedures will be covered (your medical deductible will not have to be met).

Effective January 1, 2003, employees will be charged a prescription drug co-payment for a one month supply as follows: $10.00 Generic; $20.00 Brand Name for formulary; $30.00 Brand Name for non-formulary. Mail order prescriptions will be permitted, with the ability to order a 3-month supply with the following co-payment: $20.00 Generic; $30.00 Brand Name for formulary; $40.00 Brand Name for non-formulary. The co-payment maximum for prescription drugs will be $250 Single and $500 Family. If any individual's total co-payments reach the maximum stated, then prescriptions are covered 100%.

Emergency Room Care: Remove the $50.00 Emergency Room co-payment and replace with: $75.00 emergency room co-payment for each visit. Co-payment to be waived if the individual is admitted to the hospital or the attending physician certifies the need for such emergency care.

Add: **Home Care Visits** are limited to 40 per calendar year.

Add: **Lifetime Maximum** of $2 million per individual (each member in plan)

Note: The "Office Visit" and "Prescription Drug Co-Payments" will not be applied towards the annual deductible amounts.

New: The County will offer an option for "Employee Plus 1 Rate" for health insurance making three options available: Single; Employee Plus 1 Rate; and Family.

Add: (b). **Section 125.** Remove current paragraph and replace with:

The County will also maintain a Section 125 Medical Reimbursement Plan, for employees in the bargaining unit, to cover the employee's un-reimbursed medical expenses and child care, in addition to the employee health insurance premium contributions.

. . .

The parties' initial bargaining session was held on or about August 20, 2002. At this bargaining session and, at the second bargaining session held on or about September 26, 2002, each party maintained their proposals with respect to health insurance. By letter dated October 2, 2002, the Association submitted an amended bargaining proposal that included the following: a wage proposal; a request to include all tentative agreements reached on September 26, 2002; acceptance of remaining proposals on Association's agenda; direct deposits and "Maintain the employee health insurance plan provided in the County's 2000-2002 Agreement with the Association." This letter also contained the following:

> This is a package offer. The wage proposals are expressly contingent upon the County's acceptance of item 2, above, the maintenance of the current health insurance plan.

In a letter dated October 9, 2002, the County responded to this amended proposal as follows:

> Ozaukee County, in response to your amended proposal dated October 2, 2002, is prepared to offer the following proposal to the Ozaukee County Highway Employees Association:
>
> 1. County proposal dated 7/26/02 with wage increase of 2.75% in each year.
>
> 2. Increase sick pay accrual to 135 days
>
> 3. $1.00/per month longevity increase
>
> 4. Increase foreman pay by .50/hour

5. Flex Ben deposit by County into each insured employee account of:
   1st Year: $500/$250
   2nd Year: $250/$125
   3rd Year $0

6. $1,000 Spousal Carve out

7. Inclusion of all items in which tentative agreement was reached on 9/26/02

This is a package offer and is expressly contingent upon the Association's acceptance of the County's health plan proposal.

The County appreciates that an 11% increase in health insurance costs coupled with the proposed changes takes money out of the employees pockets, and anticipated these changes by offering this economic package.

The County views a 21% increase in health insurance cost unacceptable, together with uncertainty as to what those costs will be in years two and three of the agreement, and may have to seek concessions on wages and other benefits, including tentative agreements already reached, if it is unable to incorporate the proposed changes in its health plans.

The County believes that this package meets the needs of the association, as well as addressing the need to control its health care costs.

The parties' third negotiations session was held on or about October 10, 2002. At the end of this negotiations session, the parties remained firm with respect to their positions on health insurance and the parties agreed that they should prepare final offers for their next meeting scheduled on October 24, 2002. Previously, the County had advised the Association that insurance premiums would increase by 21% if the plan remained unchanged and by 11% if the County's proposed changes were implemented. On or about October 21, 2002, Sweetland and Kuhnmuench had a telephone conversation in which Sweetland advised Kuhnmuench that the Association had decided to bargain with the County on its proposed health insurance changes and, therefore, final offers would be premature. Kuhnmuench did not make any objection to Sweetland at this time. The parties held a fourth negotiations session on October 24, 2002. At the start of this session, Kuhnmuench gave Sweetland a County proposal dated October 24, 2002, which states:

Ozaukee County is prepared to offer the following proposal as its best and final offer to the Ozaukee County Highway Employees Association:

1. County proposal dated 7/26/02 with wage increases of 2.75% 1st year, 3.0% 2nd year, 3.0% 3rd year.

2. Increase sick pay accrual to 150 days

3. $5.00/per month longevity increase

4. Increase foreman pay by .50/hour and temp. foreman to $1.00/hour with no other premium pay

5. Flex Ben deposit by County into each insured employee account of: $500, family/$250, single, payable 1/1/03, $250/$125, payable 12/28/03

6. $3,600 Spousal Carve out payable $100/month for 3 years

7. 4 day work week, MOU will remain as Letter of Understanding

8. Mandatory direct deposit for all employees

9. Life insurance equal to 1x employees annual salary

10. Enhanced LTD benefit of 60% annual salary

This is a package offer and is expressly contingent upon the Association's acceptance of the County's health plan proposal.

The County appreciates that an 11% increase in health insurance costs coupled with the proposed changes takes money out of the employees pockets, and anticipated these changes by offering this economic package.

The County views a 21% increase in health insurance cost unacceptable, together with uncertainty as to what those costs will be in years two and three of the agreement, and is unable to discuss any other plan changes other than those already proposed.

The County believes that this package meets the needs of the association, as well as addressing the need to control its health care costs.

On that same date, Sweetland gave the County a letter dated October 23, 2002, which states as follows:

The Bargaining Committee of the Ozaukee County Highway Employees Association (Association) has authorized me to convey to you its second amended proposal, as follows:

1. Across-the-board wage increases as follows:

   2003 5.5% effective pay period 1 of 2003
   2004 5.5% effective pay period 1 of 2004
   2005 5.5% effective pay period 1 of 2005

2. Accept the County's proposed modifications of the employee health insurance plan, except as follows:

   a. $10.00 co-payment per Office Visit.
   b. $300/$150 co-payment maximum for office visits.
   c. Buy back option to restore lifetime maximum.
   d. Benefits must remain reasonably equal to those in effect on January 1, 2002

3. County contributions into each employee's Flexible Spending Account, to be used by the employee for any unreimbursed medical or dental expenses, in each year of the contract as follows:

   2003 $500/$250
   2004 $500/$250
   2005 $500/$250

   Contributions not used in the year of contribution shall remain in the employee's account for use in succeeding years unless prohibited by applicable provisions of the Internal Revenue Code.

4. Increase sick pay accrual to 150 days (1200 hours).

5. $500 per month spousal carve-out.

6. Inclusion of all items on which tentative agreement was reached on September 26, 2002.

7. Acceptance of remaining proposals on Association's agenda.

8. Mandatory direct deposit for all bargaining unit members.

Since this proposal represents the Association's willingness to negotiate on the basis of the County's health insurance proposals, as modified above, the Association believes that it is premature for the parties to begin presenting final offers.

Highway Commissioner Robert Dreblow, a member of the County's negotiating team, was not aware of the fact that the Association had changed its position with respect to submitting final offers and expected the Association to present its final offer. Sweetland described the telephone conversation that he had had with Kuhnmuench and Kuhnmuench acknowledged that he had been informed of the Association's change in position on health insurance. During the negotiation session of October 24, 2002, the County told the Association that it would not agree to the Association's most recent proposal on health insurance and, thereafter, the Association told the County that any agreement that would be negotiated would include the County's health insurance package. At the end of this negotiation's session, the parties discussed that, given the disparity in their wage proposals, it was unlikely that the parties would be able to bridge their differences without outside assistance. Representatives of the Association and the County each discussed that the parties were at impasse and Sweetland stated that he would file for arbitration. By letter dated October 30, 2002, Kuhnmuench advised Sweetland of the following:

Ozaukee County is prepared to offer the following proposal as its best and final offer to the Ozaukee County Highway Employees Association:

1. County proposal dated 7/26/02 with wage increases of 2.75% 1st year, 3.0% 2nd year, 3.0% 3rd year.

2. Increase sick pay accrual to 135 days

3. Increase foreman pay by .50/hour

4. Flex Ben deposit by County into each insured employee account of: $500, family/$250, single, payable 1/1/03, $250/$125, payable 12/28/03

5. $3,600 Spousal Carve out payable $100/month for 3 years

6. 4 day work week(summer hours), MOU will remain as Letter of Understanding

7. Mandatory direct deposit for all employees

8. Life insurance equal to 1x employees annual salary

9. Enhanced LTD benefit of 60% annual salary

This is a package offer and is expressly contingent upon the Association's acceptance of the County's health plan proposal.

The County appreciates that an 11% increase in health insurance costs coupled with the proposed changes takes money out of the employees pockets, and anticipated these changes by offering this economic package.

The County views a 21% increase in health insurance cost unacceptable, together with uncertainty as to what those costs will be in years two and three of the agreement, and is unable to discuss any other plan changes other than those already proposed.

The County believes that this package meets the needs of the association, as well as addressing the need to control its health care costs.

On or about October 30, 2002, Kuhnmuench telephoned Sweetland because the County had not received a copy of the interest arbitration petition. Sweetland apologized for the delay and stated that he would file for interest arbitration. After reviewing the interest arbitration provisions of the statutes, Sweetland concluded that the Association was required to certify that it had completed various steps, including mediation, and, thus, filed a Request to Initiate Mediation, rather than a petition for interest arbitration. By letter dated November 13, 2002, Sweetland notified Kuhnmuench that the Association was sending a mediation request to the Wisconsin Employment Relations Commission (Commission). Enclosed with this letter was an Association offer for use in mediation that included a position on every Article contained in the parties' collective bargaining agreement, including the following:

VIII Insurance and Retirement

1. Accept the County's proposed modifications of the employee health insurance plan.

2. Health insurance benefits must remain reasonably equal to those in effect on January 1, 2003.

Kuhnmuench received a copy of this letter. Kuhnmuench did not realize that a Request for Mediation, rather than a petition for interest arbitration, had been filed until the parties met for a mediation session on December 11, 2002. The parties did not reach agreement on a successor agreement during this mediation session; Kuhnmuench notified Sweetland that the County would be filing a petition for interest arbitration; and the parties agreed to meet again on January 14, 2002. By letter dated December 20, 2002, Kuhnmuench advised Sweetland of the following:

> Enclosed for your review, please find the payroll stuffer that the members of your bargaining unit are receiving with their paychecks today. Included within that packed of information is an announcement as to the new health insurance premium contributions and plan design changes effective 1/1/03.
>
> All of these plan designs changes have been discussed with you and your bargaining team on numerous occasions in negotiations. As you know, we had representatives of the WCA Group Health Trust Explain these changes and answer any questions that the OPEIU and Highway Association representatives would have about the plan design changes.
>
> As you know, we believe its in the best interest of all of our employees to take this step in order to avoid the increased cost of out of pocket health insurance premiums by our employees. The original cost increase for the current plan effective 1/103 from the WCA Group Health Trust would have been a 21% increase, which, due to the plan design changes has now been reduced to an increase of 11%.
>
> As your are undoubtedly aware, all of our County employees will now be covered under this new plan design. We will be funding the flexible benefit account for each insured employee including members of your bargaining unit by depositing $500 per family plan or $250 for a single plan to pay for the deductibles and co-pays effective January 1, 2003 in order to help defray the employee's out of pocket costs.
>
> We are now requiring your employees to secure out of network coverage with a referral from an in-network primary care physician and will no longer have 80/20 co-pay but will have a $500/$1,000 deductible. Finally, employees are allowed the option of taking an employee plus one health insurance plan thereby reducing their cost.

If your union is interested in implementing the "Voluntary Non-Duplication of Health Insurance Incentive" plan of $400/per month as proposed by the County for the duration of the contract, please advise us immediately and we will take the necessary steps to effectuate that matter as well.

As discussed, the underlying relevant plan changes are in the process of being incorporated into the summary plan description by WCA Group Health Trust. Such information will be provided to all employees upon receipt.

We are committed to bargaining in good faith to achieve a new successor agreement. If there are any questions, please feel free to contact the undersigned.

The referenced payroll stuffer, which was distributed to members of the Association's collective bargaining unit on December 20, 2002, notified these employees that, effective January 1, 2003, the employees health insurance premiums would be increased by 11%, with the effect that the single premium would be $516.88; the employee plus one premium would be $1,033.77; and that the family premium would be $1293.68. The enclosed payroll stuffer also included the following:

HIGHWAY UNION EMPLOYEES Insurance Changes
To Be Effective JANUARY 1, 2003

Annual Deductible	Single - $250 In Network Family -$500 Deductibles Single - $500 Out of Network Deductibles Family - $1000 with Referrals
Office Visits Co-Payments	$20.00 per Office Visit, even if more doctors are seen at the same visit
Annual Medical Exam	$20.00 Office Co-Payment will be waived for annual exams, immunizations and well child care (once per year) *Standard annual medical procedures will be covered (your deductible will not have to be met).*

➢ **HCN Network**	Mandatory network for all
➢ **Emergency Room Usage**	$75.00 – Co-payment for each visit. Co-payment to be waived if the individual is admitted to the hospital or the attending physician certifies the need for emergency care.
➢ **Prescription Drug Co-Payments**	$10.00 Generic $20.00 Brand Name for formulary $30.00 Brand Name for non-formulary Mail order prescriptions will be permitted, with the ability to order a 3-month supply with the following co-payment: $20.00 Generic $30.00 Brand Name for formulary $40.00 Brand Name for non-formulary
➢ **Prescription Drug Out of Pocket** ➢ **Maximum**	Single - $250 Family - $500 If any individual spends more than these amounts in co-payments, the entire prescription will then be covered by the health insurance.
➢ **Home Care Visits**	40 per year
➢ **Lifetime Maximum**	$2 million per individual (each member in plan)
▪ Exceptions will be made for college students who are "out of network" and also medical emergencies for active employees ▪ The "Office Visit" and "Prescription Drug Co-Payments" will not be applied towards the annual deductible amounts.	

On December 20, 2002, Sweetland and Kuhnmuench had a telephone conversation regarding Kuhnmuench's letter of December 20, 2002. During this telephone conversation, Sweetland told Kuhnmuench that the County could not implement the health insurance changes on January 1, 2003. By letter dated December 20, 2002, the County forwarded a Petition for Arbitration Pursuant to Section 111.70(4)(cm)6, Wis. Stats., to the Commission. This letter advised the Commission, *inter alia,* that the parties had scheduled a bargaining session for January 14, 2003; that, at that time, the parties would be prepared to certify final offers; and that "There are no tentative agreements." Attached to the Petition was a "Final Offer of Ozaukee County to Ozaukee County Highway Employee's Association" dated December 20, 2002 that included proposed changes to Articles V, VI, VIII, X, XII, XIV, and XXI, as well as a Memorandum of Understanding. The proposed changes to Article VIII included:

3. Article VIII – Insurance and Retirement (pp. 6-7): Revise as follows:

a. Delete the second, third, fourth and fifth paragraphs, replace with:

1) The County may change insurance carriers or administrators provided it submits thirty (30) days advance notice to the Association. The County guarantees that insurance coverage under the Insurance Plan shall be reasonably equal to that in effect in January 1, 2003.

2) In the event an employee has a spouse that is also a County employee, that employee and spouse will be entitled only to either two (2) single plans or one (1) family plan between them from the Employer.

3) Effective January 1, 2003, the following plan design will be implemented:

a) There will be an annual deductible of $250/single plan and $500/family plan for services provided in the Network and $500/single plan and $1000/family for services if referred outside the Network. The deductible is waived for annual exams, immunizations, and well child care.

b) The employees will be charged $20 per office visit*, even if more doctors are seen at the same visit. The co-payment will be waived for annual exams, immunizations, well child care and prenatal care for pregnant women.
**not applicable to annual deductible.*

c) The employees will be charged a $75 emergency room co-payment for each visit. The co-payment will be waived if the individual is admitted to the hospital or the attending physician certifies the need for such emergency care.

d) The employees will be charged for prescription drugs as follows.

1) Up to a 30-day supply will be $10/generic; $20/brand name; $30/brand name non formulary.*

2) 3-month supply order by mail will be $20/generic; $30 brand name; $40 brand name non formulary.*
**not applicable to annual deductible.*

The maximum out-of-pocket for prescription drugs will be $250/single and $500/family. If an individual's total out-of-pocket payments reach the maximum stated, then prescriptions are covered 100%.

e) Home Care Visits are limited to forty (40) visits per calendar year.

f) The lifetime maximum will be $2,000,000 per each individual in the plan.

By letter dated December 20, 2002, Sweetland advised Commission Chair Steve Sorensen, *inter alia*, that it had received a copy of the County's letter dated December 20, 2002; that it had concluded that this letter "threatens unilateral implementation of the County's proposed changes to the bargaining unit's health insurance plan effective January 1, 2003" and that "The Association views the County's action as a flagrant violation of its duty to bargain under Wis. Stat. Sec. 111.70(3)(a)4 to bargain with the Association in good faith." Sweetland further stated that:

> The Association hereby requests, indeed insists, that the Commission hold any such interest arbitration proceeding in abeyance pending resolution of the prohibited practice, including the satisfactory compliance with any and all remedies therefore. Interest arbitration presupposes that impasse has resulted from good faith bargaining on both sides. 2/ Where the bargaining process has been infected by prohibited unilateral conduct, such as this, proceeding to a determination of impasse under Sec. 111.70(4)(cm)6.am is most improper.

Sweetland also advised that the Association would be filing a prohibited practice complaint. This letter indicates that Kuhnmuench was faxed a copy of this letter. By letter dated December 23, 2002, the Association advised the County that:

As we have discussed, the Ozaukee County Highway Association demands that the County not implement its proposed changes to the health insurance plan applicable to the highway bargaining unit until the parties have reached a final collective bargaining agreement either voluntarily or through the interest arbitration process.

This will also confirm that the Association will agree to a contract that includes the County's health insurance proposal if the County agrees to the following:

a. The same percentage wage increases that the Sheriffs received, i.e. 2/1/2/2/2/2 over a three-year contract. If the parties settle on a two-year contract, then 2/2/2/2.

b. Carryover of 150 days of sick leave, and annual cash payout of 75% of accumulated sick leave in excess of 150 days.

c. Same sliding scale as Sheriffs received for payment of retiring employee's accrued sick leave to health insurance, up to 65%.

d. Deposit of $500/$250 into individuals flexible spending accounts in 2003, and additional wellness incentive of $250/$125 as described in County's "Final Offer."

e. Annual longevity cash payment of $3 per month of service at the end of each calendar year, with payments to begin at end of the year in which employee reaches his fifth anniversary. Each employee's longevity payment will be $3 times his total months of service at the time of payment.

f. The Association would prefer a three-year contract, but will agree to a two-year contract, subject to (a) above.

As I said, unless the County agrees to these items prior to January 1, 2003, the unilateral implementation of the health insurance proposals will constitute a refusal to bargain in good faith in violation of Wis. Stat. § 111.70(3)(a)4.

Feel free to call if you have any questions.

On December 30, 2002, Kuhnmuench telephoned Sweetland and advised Sweetland that the County would not agree to the Association terms set forth above. By letter dated December 26, 2002, the Association filed the instant prohibited practice complaint with the Commission. This letter indicates that Kuhnmuench was sent a copy of this complaint. By letter dated January 3, 2003, the Association submitted the Association's final offer to the Commission, which offer included proposals to change Articles V, VI, VIII, X, XII, XIV and XXI. This letter states, *inter alia*, that

> Pursuant to Wis. Stat. Sec. 111.70(4)(cm)6.a., I enclose the Association's preliminary final offer. By submitting this preliminary final offer in order to comply with the statute, the Association in no way departs from its position that no impasse may be found as long as the County's unilateral implementation of its health insurance proposals remains unremedied.

The parties met with the Commission's Investigator on January 14, 2003. At that meeting, the Association stated its position that there was no impasse while the bargaining process was being infected by the County's unilateral implementation of health insurance benefits. By letter dated January 31, 2001, the Commission's Investigator notified the Association and the County that he had "determined that an impasse exists with respect to your contract negotiations" and requested the parties to submit their final offers so that the matter could be advanced to interest arbitration. By letter dated February 7, 2003, the County submitted a final offer to the Commission Investigator, which offer included changes to Articles V, VI, VIII, X, XII, XIV and XXI. In this letter, the County noted that the enclosed final offer reflected clarification of the County's December 20, 2002 final offer, particularly a health insurance change of the addition of Single Plus One coverage, which provided coverage for those employees without children or whose dependents are no longer insured under the County's plan, at a reduced premium of $1,033.70, resulting in an annual savings of $311.88 to the employee and $3, 118.56 to the employer. This letter included the following:

> We would like to certify the final offer as soon as possible. We do not desire the assignment of an out of state arbitrator. There are no tentative agreements. .

This letter indicated that a copy of this letter and its enclosure had been provided to Sweetland. By letter dated February 10, 2003, the Association filed with the Commission an objection to an impasse determination in its contract negotiations with the County. The Association's objection included statements that the County unilaterally implemented its health insurance proposals without either a voluntary settlement or an interest arbitration award and that the Association did not consent to the County's unilateral implementation of proposed changes to the health insurance plan in the absence of a complete agreement for a successor Highway Labor Contract. By letters dated February 11 and 21, 2003, Attorneys for the County acknowledged to the Commission that the County had received the Association's February 10,

2003 letter and requested that the Commission dismiss all requests by the Association to delay the interest arbitration process. The parties have not agreed upon a collective bargaining agreement to succeed the one that expired on December 31, 2002. The determination of whether or not the parties' dispute with respect to the terms and conditions to be included in their successor collective bargaining agreement should proceed to interest arbitration is the subject of other Commission proceedings.

4. At the time of the expiration of the Association's 2000-2002 collective bargaining agreement, the emergency room co-pay was $50; the co-pay for prescription drugs was $9.00 for a generic and $14.00 for a brand name; there was no single or family deductible; there was no office visit co-pay; and there was no lifetime maximum. The health insurance benefits that existed at the time of the expiration of the parties' 2000-2002 agreement primarily relate to the wages, hours and working conditions of these employees. The health insurance plan design changes set forth in the payroll stuffer provided to the Association's bargaining unit employees on December 20, 2002 went into effect on January 1, 2003. These health insurance plan design changes altered the *status quo* of the Association's bargaining unit members' health insurance benefits that existed at the time of the expiration of the parties' 2000-2002 collective agreement. The Association has not agreed to the implementation of these health insurance plan design changes. By implementing the County's health insurance plan design changes effective January 1, 2003, the County unilaterally changed the *status quo* on mandatory subjects of bargaining during a contract hiatus, without a valid defense.

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

CONCLUSIONS OF LAW

1. Respondent, Ozaukee County, is a municipal employer, within the meaning of Sec. 111.70(1)(j), Stats.

2. Complainant, Ozaukee County Highway Employees Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. On January 1, 2003, the Complainant and Respondent had not agreed to the terms of the collective bargaining agreement to succeed their collective bargaining agreement that expired on December 31, 2002 and their dispute over the terms and conditions of this successor agreement was subject to the interest arbitration process provided for in Sec. 111.70(4)(cm)6, Stats.

4. The health insurance plan benefits in existence at the expiration of the parties' 2000-2002 collective bargaining agreement primarily relate to the wages, hours and working conditions of Respondent's employees represented by the Complainant for the purposes of collective bargaining and, thus, are mandatory subjects of bargaining.

5. Complainant has not agreed to the implementation of the health insurance plan design changes that were implemented by the County on January 1, 2003.

6. Complainant has not engaged in illegal conduct that has prevented the parties from reaching agreement or impasse and has not engaged in unlawful abusive delay in the interest arbitration process.

7. By implementing the health insurance plan design changes effective January 1, 2003, Respondent has unilaterally changed the *status quo* on mandatory subjects of bargaining during a contract hiatus, without a valid defense, and, therefore, has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., and, has committed a derivative act of interference in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

1. IT IS ORDERED that the Respondent, Ozaukee County, will immediately take the following affirmative actions that will effectuate the purposes of the Municipal Employment Relations Act:

a. Cease and desist from unilaterally implementing, during the contract hiatus and without a valid defense, design changes in the health insurance plan of the Complainant's bargaining unit members that change the *status quo* on mandatory subjects of bargaining.

b. Rescind the design changes in the health insurance plan of the Complainant's bargaining unit members that were implemented effective January 1, 2003 and restore the *status quo* that existed prior to Respondent's unlawful unilateral implementation of these health insurance plan design changes.

c. Reimburse members of the Complainant's bargaining unit for the losses suffered as a result of the Respondent's failure to maintain the *status quo* that existed prior to Respondent's unlawful unilateral implementation of health insurance plan design changes effective January 1, 2003, together with the applicable statutory interest of twelve percent (12%) per annum set forth in Sec. 814.04(4), Stats.

d. Notify all members of the Complainant's bargaining unit, by posting in conspicuous places in its offices and buildings where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by Respondent's Human Resources Director and shall be posted for a period of thirty days thereafter. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced or covered by other material.

e. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Madison, Wisconsin, this 17th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

ATTACHMENT "A"

NOTICE TO OZAUKEE COUNTY EMPLOYEES REPRESENTED BY OZAUKEE COUNTY HIGHWAY ASSOCIATION

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

1. WE WILL immediately rescind the health insurance plan design changes that we implemented effective January 1, 2003 and restore the *status quo ante* on the health insurance plan.

2. WE WILL reimburse all bargaining unit employees for the losses suffered by our failure to maintain the *status quo* on the health insurance plan, together with the applicable statutory interest of twelve percent (12%) per annum as set forth in Sec. 814.04(4), Stats.

3. WE WILL NOT refuse to bargain in good faith and interfere with the exercise of employee rights guaranteed in Sec. 111.70(2), Stats., by failing to maintain the *status quo* with respect to mandatory subjects of bargaining during the contract hiatus.

OZAUKEE COUNTY

By _____

Human Resources Director

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY THE OZAUKEE COUNTY HIGHWAY ASSOCIATION FOR A PERIOD OF 30 DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

OZAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 27, 2002, the Association filed a complaint of prohibited practices alleging that the County had violated Sections 111.70(3)(a)(1) and (4), Wis. Stats., by unilaterally changing employee health insurance benefits and failing and refusing to bargain in good faith. On January 27, 2003, the County filed its Answer, denying that it had committed the prohibited practices alleged by the Association. In its Answer, the County asserted the following "defenses":

(1) The Union/Complainant has negotiated in bad faith.

(2) The sole and exclusive remedy in this case is through arbitration.

(3) Insofar as another statutory remedy exists which may provide jurisdiction over the facts alleged in this matter, the complaint in this case is pre-empted.

(4) The complaint fails to state a claim upon which relief can be granted.

(5) The Union has committed prohibited practices in violation of the Wisconsin Statutes.

POSITIONS OF THE PARTIES

Association

During the contract negotiations for the successor collective bargaining agreement, Attorney Jeffrey Sweetland represented the Association and Director of Human Resources John Kuhnmuench represented the County. Beginning in the summer of 2002, the Association and the County met on several occasions to bargain a contract to succeed the contract that expired on December 31, 2002. The parties were unable to reach an agreement on this contract prior to December 31, 2002.

Highway Commissioner Dreblow's testimony establishes that, in late November or early December of 2002, the County discussed the need to get all employees under the same health insurance plan and to consider implementing that plan, unilaterally, beginning the first of the year. (Tr. at 233). On January 1, 2003, the County unilaterally implemented changes to health insurance benefits of the Association's bargaining unit members.

Health plan changes are a mandatory subject of bargaining. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); CITY OF MILWAUKEE, DEC. NO. 29524-A (WERC, 6/99). By implementing these health insurance changes, the County unilaterally changed the *status quo* as to mandatory subjects of bargaining during the contract hiatus period. It is well established that, absent waiver or necessity, a unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the MERA duty to bargain and, therefore, of Section 111.70(3)(a)(4), Stats.

No impasse existed at the time of the County's unilateral implementation. Moreover, as the Commission held in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) and CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) an impasse-based defense is not available in disputes that are subject to compulsory, final and binding arbitration. The County may not lawfully implement its proposed plan changes unless and until the parties have reached a voluntary settlement, or the County has obtained an interest arbitrator's award adopting the plan, even if both parties final offers included the changes.

The record is void of any evidence that any side agreement was reached with the Association for the implementation of the health insurance changes. The County does not have a valid defense of waiver or necessity to its unilateral implementation of the health plan changes in a contract hiatus.

Although Kuhnmuench testified that the County would experience a double-digit increase in health care costs if the changes had not been implemented, economic savings are not a valid defense. CITY OF MILWAUKEE, SUPRA. A desire to have all employees on the same health plan is not a business necessity and is not a valid defense to a claim of unilateral implementation. Moreover, the County received a report from the Group Health Trust in mid-year 2002 that contained premium increases, as well as information that potentially some County employees could be on the current health insurance plan and other County employees could be on the proposed health insurance plan.

The Commission has recognized that an extreme case of unlawful abusive delay of a statutory process may be a defense to a unilateral implementation charge. GREEN COUNTY and CITY OF BROOKFIELD. Neither Sweetland's filing a request for mediation, nor any other evidence demonstrates that the Association engaged in any conduct that constitutes an unlawful abusive delay of the statutory process.

The "doctrine of unclean hands" provides:

> For relief to be denied, a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief. . .It must clearly appear that the stain

> from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct. LAKE BLUFF HOUSING PARTNERS V. CITY OF SOUTH MILWAUKEE, 246 Wis. 2d 785, 793, 632 N.W. 2d 485, 489 (Ct. of Appeals, 2001) *citing* SECURITY PACIFIC NAT'L BANK V. GINKOWSKI, 140 Wis. 2D 332, 410 N.W. 2D 589 (Ct. of App. 1987).

The doctrine of unclean hands is not a valid defense for this prohibited practice.

The County's asserted defenses are not valid defenses to the Association's prohibited practices claim. The Association requests that the Examiner find that the County violated Section 111.70(3)(a)1 and 4, Stats., when it unilaterally implemented health plan changes, effective January 1, 2003, for the members of the Ozaukee County Highway Employees Association during a contract hiatus. The Association respectfully requests the Examiner to restore the *status quo* by restoring the health insurance benefits that are set forth in the expired collective bargaining agreement; make the members of the Association's bargaining unit whole for the difference in the health insurance plans; and all other appropriate relief.

County

In order to prevail upon a complaint of prohibited practices, a complainant must demonstrate by "clear and satisfactory preponderance of the evidence" that the respondent violated the sections of the statute identified in the complaint. With respect to a Section 111.70(3)(a)4 claim, the Association must prove that: (1) the matter at issue was a mandatory subject of bargaining; (2) the parties have not waived bargaining over the matter at issue; and (3) Respondent refused to bargain with the Complainant over the mandatory subject. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29659-B (4/2000); CITY OF BELOIT, DEC. NO. 28270-B (11/95).

Additionally, a complainant must demonstrate that it has "clean hands." A complainant is not entitled to relief if it is "guilty of substantial misconduct 'in regard to . . .events connected with the matter in litigation." DAVID ALDER AND SONS CO. V. MAGLIO, ET AL., 200 Wis. 153, 228 N.W. 123 (1929).

Absent a valid defense, a unilateral change in a mandatory subject of bargaining constitutes a violation of Section 111.70(3)(a)(4). CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). Defenses include waiver (CITY OF BROOKFIELD, DEC. NO. 11406-A, B) (WERC, 9/73) and necessity (RACINE SCHOOLS, DEC. NO. 13696-C, 13876-B) (WERC, 4/78).

On or about December 20, 2002, the County notified the Association that it would be implementing changes to health insurance effective January 1, 2003. The changes are set forth in Joint Exhibit 11. The Highway Association argues that this implementation constituted a "refusal to bargain" and was unlawful. Neither argument has merit.

In late 2002, the County was all but uninsurable and it's health insurance premiums had increased rapidly. The County sought alternative insurers to provide coverage, but only one insurer even submitted a bid. That bid was more than a $1,000,000 more expensive than the County's than current insurance.

Ultimately, the County selected a set of modifications to its insurance plan that would lower its increase in insurance premiums from 21% to 11%. The County timely notified the Association (at the beginning of bargaining) of its intent to make changes to its health plan.

The Association was willing to allow significant amounts of taxpayer money to be wasted by deliberately holding a gun to the head of the County, compelling the County to offer more than a fair contract proposal. Such a waste is not to the advantage of the Association.

Although there is no law that requires a union to receive a "quid pro quo" for changes in health insurance, the County has offered significant items as "quid pro quo." Ultimately, an interest-arbitrator will decide whether the County's offer or the Association's offer is more appropriate.

The Association acknowledges that, regardless of how its contract discussions with the County are resolved, the final "package" would include the County's health insurance proposal. The County and the Association reached agreement on the issue of health insurance (Tr. 169-171).

In GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission decided a case of "first impression" regarding whether the existence of "impasse" grants the right to unilaterally implement changes in mandatory subjects of bargaining in cases subject to final and binding arbitration. The Commission, following a careful balancing of interests, held that the private sector right to implement following impasse does not apply in cases subject to final and binding interest-arbitration.

Although the Commission ultimately decided not to allow implementation following impasse, it conceded the validity of the argument militating the other way. The concern the Commission expressed in GREEN COUNTY was that if it were to allow implementation following impasse, a party could make proposals, "engineer" impasse, and implement proposals unacceptable to the other party. This most decidedly is not what occurred in this case because the parties bargained, and reached agreement on the terms that were implemented.

As the Commission noted, there is no explicit statutory ban on unilateral implementation following impasse. The Commission, following a balancing of interests, extrapolated the prohibition on implementation following impasse from the statutes. The

policy considerations present in GREEN COUNTY are not present here. There is no Commission precedent addressing the issue of implementation of a term agreed to by the parties.

The Commission has held that an "unlawful, abusive delay of the statutory process" might "render lawful a unilateral change previously supposed." While the "unlawful, abusive delay" defense is seldom used, the Commission has consistently restated the existence of this defense. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28614-A, at footnote 9/ (WERC, 6/96); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B, at footnote 6/ (WERC, 3/96).

The County is not arguing that it may unilaterally implement following impasse. Rather, the County is arguing that the Association's denial of impasse, despite admissions that impasse existed prior to any implementation by the County, and its conduct in openly and unapologetically trying to "push back" interest-arbitration constitutes evidence of the Association's dilatory tactics. This is precisely the abuse of process that the Commission was concerned about in GREEN COUNTY.

The hearing examiner should well ask "What if a municipal employer was to openly deny the existence of impasse, when it clearly exists, in an effort to push back interest-arbitration?" The unions have done so here. The hearing examiner must now decide if the law will be applied evenly to the unions as it would be applied to a municipal employer.

The County's conduct cannot be logically construed to be "unilateral." The County has not violated MERA as claimed by the Association. Moreover, the Association has unclean hands and has engaged in abusive, dilatory tactics. The Association's behavior militates against a finding of any prohibited practice or unlawful behavior on the part of the County. The Examiner should dismiss the complaints in their entirety.

DISCUSSION

Complainant alleges that the County violated Sec. 111.70(3)(a)1 and 4, Stats., by unilaterally changing the *status quo* on health insurance benefits that are a mandatory subject of bargaining during the contract hiatus. Section 111.70(3)(a)1, Stats., 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 sub. (2).

Section 111.70(2), guarantees employees the following rights:

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

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

> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

. . .

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." To violate Sec. 111.70(3)(a)4, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats. CITY OF GREEN BAY, DEC. NO. 30130-A (GALLAGHER, 1/02); AFF'D BY OPERATION OF LAW DEC. NO. 30130-B (WERC, 2/02). The Examiner considers any Affirmative Defenses alleged in the County's Response to the Complaint, but not addressed in the County's post-hearing brief, to have been abandoned by the County.

By a letter dated December 20, 2002, the County provided notice to the Association of its intent to implement certain health insurance plan design changes effective January 1, 2003. On that same date, the County provided notice to the Association's bargaining unit members of these health insurance plan design changes. These noticed health insurance plan design changes went into effect on January 1, 2003.

On January 1, 2003, the parties' most recent collective bargaining agreement had expired and the parties had not reached an agreement on a successor collective bargaining agreement. By making the health insurance plan design changes effective January 1, 2003, the County implemented these changes during a contract hiatus.

Under Wisconsin law, the principle determining mandatory or permissive status with respect to subjects of bargaining 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. 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). The employee health insurance plan benefits in effect at the expiration of the parties' 2000-2002 collective bargaining agreement primarily relate to wages, hours and

conditions of employment and, thus, are mandatory subjects of bargaining. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92).

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission stated as follows:

> It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA. (At pp. 5-6)

In its decision, the Commission went on to note that:

> [A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA. (At p. 8)

In this case, there is no evidence of practice. The only evidence of bargaining history is the negotiations on the agreement to succeed the expired 2000-2002 agreement.

Prior to Sweetland and Kuhnmuench's telephone conversation, which occurred on or about October 21, 2002, the Association's bargaining stance with respect to the negotiations in this successor agreement was to reject the County's proposed health insurance changes. During this telephone conversation, Sweetland advised the County that the Association was willing to bargain with the County on this issue.

Sweetland's testimony demonstrates that, during the parties' next bargaining session on October 24, 2002, Association representatives indicated to the County that the contract negotiated by the parties would include the County's health insurance package. The most reasonable construction of this conduct of the Association is that the Association was indicating acceptance of the County's health insurance proposals as part of a total contract settlement.

As the County argues, the Association subsequently made offers to the County that included acceptance of the County's health insurance proposals. These offers, however, were package offers. By including its acceptance of the County's health insurance proposals in a package offer, the Association was conditioning acceptance of the County's health insurance proposals upon acceptance of the Association's entire package. The County does not argue, and the record does not demonstrate, that the County ever accepted the Association's entire package.

Sweetland expressly objected to the County's implementation of its health insurance plan design changes during the telephone conversation of December 20, 2002, as well as in his letter of December 23, 2002. Moreover, in this letter, Sweetland expressly confirmed that the Association's agreement to the County's health insurance proposals was conditioned upon the County's acceptance of all of the Association's bargaining proposals set forth in that letter. This conduct of Sweetland indicates that the Association's agreement to the County's health insurance proposals was conditioned upon acceptance of the Association's entire package.

Kuhnmuench's letter to the Commission, dated December 20, 2002, states, *inter alia*, "There are no tentative agreements," as does Kuhnmuench's February 7, 2003 letter to the Commission Investigator. Such a statement evidences a County understanding that no agreement had been reached by the parties with respect to health insurance. The County's conduct in continuing to propose package offers that include its health insurance proposals indicates a continuing County understanding that there is no agreement on the County's health insurance proposals.

In his December 20, 2002 letter to Sweetland, Kuhmuench informs Sweetland of the County's intent to implement its health insurance plan design changes, effective January 1, 2003. In this letter, Kuhnmuench does not confirm that the parties have agreed to these changes. Rather, Kuhnmuench states "All of these plan designs changes have been discussed with you and your bargaining team on numerous occasions in negotiations." Such a statement indicates a County understanding that there is no agreement on the County's health insurance proposals.

To be sure, in his testimony, Sweetland acknowledges that it is likely that the final offers certified to the interest arbitrator would each contain the health insurance plan design changes implemented by the County on January 1, 2003. However, absent an agreement from

the Association that permits an employer to implement any such "parallel" health insurance language, such language does not become effective until the issuance of the Interest Arbitrator's Award. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93); AFF'D DEC. NO. 27215-D (WERC, 7/93), AFF'D (CTAPP III) 186 WIS.2D 671(1994); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-B (WERC, 5/89); SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87), AFF'D (CTAPP IV) 148 WIS.2D 392(1988). The evidence that the Association is likely to include the health insurance plan design changes implemented by the County on January 1, 2003 in its final offer to be submitted to the interest arbitrator does not establish that the Association has agreed to the health insurance plan design changes implemented by the County on January 1, 2003.

The County does not argue that the language of the expired agreement provides the County with a right to implement the County's health insurance plan design changes. Nor does the health insurance provision of the expired agreement, Article VIII, expressly provide such a right. Indeed, to interpret this language as providing the County with such a right would be to ignore clear and unambiguous contract language, such as that requiring the County to provide employees with a prescription drug co-pay of $9.00 for a generic drug and $14.00 for a brand name prescription or a $50.00 Emergency Room visit co-pay.

In summary, there is no evidence of the parties' practice or historical application of the relevant contract language. The relevant contract language of the expired agreement and the evidence of bargaining history does not establish that the County has the right to implement the health insurance plan design changes that were implemented by the County on January 1, 2003. Notwithstanding the County's argument to the contrary, the evidence of the parties' most recent contract negotiations does not establish that the Association has agreed to the health insurance plan design changes that were implemented by the County on January 1, 2003. Rather, such evidence establishes that the Association has not agreed to such changes.

Applying the principles of the *dynamic status quo,* the County's implementation of its health insurance plan design changes on January 1, 2003 is a unilateral change in the *status quo* of a mandatory subject of bargaining during a contract hiatus in violation of the County's statutory duty to bargain, unless the County establishes that it has a valid defense. The Examiner turns to the question of whether or not the County has established a valid defense.

The Commission has recognized "necessity" as a valid defense to a unilateral change in the *status quo* of a mandatory subject of bargaining during a contract hiatus. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The County neither argues, nor does the record establish, that it was not possible to continue to maintain the *status quo* on the health insurance benefits provided to the Association's bargaining unit members. Rather, as Kuhnmuench's December 20, 2002 letter to Sweetland establishes, the County chose to implement the County's health insurance plan design changes in order to reduce health

insurance costs. Economic savings do not constitute a valid "necessity" defense to the Association's unilateral change claim. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28614-A (CROWLEY, 6/96); AFF'D BY OPERATION OF LAW DEC. NO. 28614-B (WERC, 7/96); VILLAGE OF SAUKVILLE, DEC. NO. 28032- B (WERC, 3/96).

The Commission has held that the status quo doctrine entitles the parties to retain those rights and privileges in existence at the time that the old contract expired and that are primarily related to wages, hours and conditions of employment while they bargain over what rights they will have under the next contract. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96). Relying on its holding in ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93), the Commission in SAUKVILLE stated:

> . . ., the employer **is** entitled to force the union to bargain over new provisions in a successor agreement which retroactively change the employer's rights and obligations as to mandatory subjects of bargaining. But **during** any such employer effort, the union **is not** obligated to bargain over loss of existing status quo protections during the contract hiatus. There is only one bite at the apple.

Inasmuch as the Association is entitled to retain the existing *status quo* on health insurance benefits that are a mandatory subject of bargaining during the contract hiatus until a successor agreement is reached, voluntarily or by interest arbitration award, the Association does not have a duty to bargain over a change in this *status quo*. Accordingly, a waiver defense is not available to the County.

The County's notification of its intent to make changes to the health insurance plan may have been timely for the purposes of negotiating changes to be included in the successor collective bargaining agreement. Such notification, however, does not provide the County with any right to unilaterally change the *status quo* on health insurance benefits that are mandatory subjects of bargaining during the contract hiatus period.

The County states that, in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission decided a case of first impression and argues that the policy considerations that lead the Commission to conclude that an impasse based defense is not available to an employer that unilaterally changes the *status quo* on mandatory subjects of bargaining during a contract hiatus when the contract dispute is subject to interest arbitration are not present here. Specifically, the County argues that the concern that the Commission expressed in GREEN COUNTY, *i.e.*, if it were to allow implementation following impasse, a party could make proposals unacceptable to the other party; maneuver to an impasse; and impose the unacceptable proposal, is not present in this case because the parties bargained and agreed upon the health insurance plan design changes that were implemented by the County.

Although GREEN COUNTY was a case of first impression, the principle that an impasse based defense is not available to an employer that unilaterally changes the *status quo* on mandatory subjects of bargaining during a contract hiatus when the contract dispute is subject to interest arbitration has been reaffirmed by the Commission. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93); CITY OF EAU CLAIRE, DEC. NO. 22795-B (WERC, 3/86); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). Moreover, as discussed above, the Association has not agreed to the implementation of the County's health insurance plan design changes. GREEN COUNTY and its progeny are applicable to this case. An impasse defense is not available to the County.

The County argues that the Association must demonstrate "clean hands." The Commission, however, has refused to apply the "clean hands" doctrine in prohibited practice cases. CITY OF BURLINGTON, DEC. NO. 13256-B (SCHURKE, 8/75); GREEN BAY SCHOOL DISTRICT, DEC. NO. 9095-E (WERC, 9/71); CITY OF MILWAUKEE, DEC. NO. 7950 (WERC, 3/67); MILWAUKEE CHEESE CO., DEC. NO. 5792 (WERC, 8/61).

In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29659-B (WERC, 4/00), the Commission stated that, where a union has engaged in illegal conduct that prevents parties from reaching agreement or impasse, an employer is entitled to implement and that such an approach draws support from existing Commission precedent. The precedent cited by the Commission is CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). The Commission stated that, in these cases, it noted "that a union's unlawful abusive delay in the interest arbitration process may allow the employer to implement **even where the dispute will ultimately be resolved through interest arbitration.**"

The County claims "abusive delay" because the Association denied impasse, despite prior admissions that impasse existed, and it openly and unapologetically tried to "push back" interest arbitration. Apparently, the latter claim is based upon Sweetland's conduct in declaring at the October 24, 2002 bargaining session that he would file an interest arbitration petition and then filing a mediation petition; Sweetland's conduct in declaring, at the October 24, 2002 bargaining session, that the parties were at impasse and then stating to the Commission in a letter dated December 20, 2002, that the Association "was taking the position that there could not be impasse, while the entire bargaining process was being infected by the employer's unilateral implementation of its key proposals;" and the Association's objection to proceeding to interest arbitration until the instant prohibited practice complaint had been resolved. This conduct of the Association and its representatives, nor any other conduct of the Association and its representatives evidenced herein, is "unlawful." The County has not established that the Association has engaged in "unlawful abusive delay" that permits the County to unilaterally implement its health insurance plan design changes on January 1, 2003.

Conclusion

The Association has established, by a clear and satisfactory preponderance of the evidence, that by implementing its health insurance plan design changes on January 1, 2003, the County unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus without a valid defense. By this unilateral implementation, the County has failed to bargain in good faith, in violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, has interfered with employee rights guaranteed by Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

In remedy of the County's statutory violations, the Examiner has ordered the County to cease and desist from unilaterally implementing its health insurance plan design changes; to restore the *status quo ante* on the County's health insurance plan; to post a notice; and to reimburse the Association's collective bargaining unit members for all losses incurred as a result of the County's unlawful unilateral implementation, together with interest at the statutory rate of twelve percent (12%) *per annum*. This interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83)., citing ANDERSON V. LIRC, 111 Wis. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 Wis. 2D 623 (Ct. App. IV 1983).

On September 15, 2003, the Association requested that this Examiner order the parties to return to mediation and/or submit final offers. Given the Commission's decision in OZAUKEE COUNTY, DEC. NO. 30561-B, 30562-B (8/03), such a remedy would reopen an investigation that the Commission concluded was properly closed on March 24, 2003. Notwithstanding the Association's argument to the contrary, an appropriate remedy for the County's unlawful unilateral implementation does not include an order to reopen the parties' interest arbitration investigation.

Dated at Madison, Wisconsin, this 17th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

CAB/gjc
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