

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-B

Appearances:

George F. Graf, Murphy, Gillick, Wicht & Prachthausen, Attorney at Law, 22370 West Bluemound Road, Suite 204, Waukesha, Wisconsin 53186, appearing on behalf of Ozaukee County Highway Employees Association.

Eric H. Rumbaugh, Michael, Best & Friedrich, LLP, Attorney at Law, 110 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-0108, appearing on behalf of Ozaukee County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 17, 2003, Hearing Examiner Coleen Burns issued Findings of Fact, Conclusions of Law and Order in this matter, holding that the Respondent Ozaukee County (County) had refused to bargain in good faith with the Complainant Ozaukee County Highway Employees Association (Association) by unilaterally changing the *status quo* regarding the health insurance plan available to the employees represented by the Association during a contract hiatus without a valid defense. To remedy this violation, the Examiner, inter alia, ordered the County to restore the *status quo* regarding the design of the health insurance plan and reimburse employees for losses suffered as a result of the unilateral change.

On October 3, 2003, the County filed a timely petition for review of the Examiner's decision and order pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed briefs in support of their positions on or before January 6, 2003. We affirm the Examiner's findings and conclusions, but we modify her remedy as noted and discussed below.

Dec. No. 30551-B

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

ORDER

- A. The Examiner's Findings of Fact 1-4 are affirmed.
- B. The Commission takes administrative notice of the following additional facts:

5. On February 26, 2003, in OZAUKEE COUNTY, DEC. NO. 30562, the Commission held in abeyance the Association's request that it review the investigator's determination that the parties were at impasse, inasmuch as the Commission had not yet made a determination of impasse and could not do so until the exchange of final offers had been completed and the investigator had filed his report.

On March 4, 2003, the investigator received the Association's final offer, which included its caveat about the lack of good faith impasse. On March 24, 2003, the Commission received the investigator's report and notice of close of investigation. The parties then filed written arguments on the Association's claim that the pendency of a prohibited practice complaint regarding the County's unilateral change in health insurance precluded a finding of impasse and a direction of arbitration. The last of these written arguments were received by the Commission on June 11, 2003. On July 9, 2003, the Commission issued its decision denying the Association's request to interrupt the arbitration process. OZAUKEE COUNTY, DEC. NO. 30562-A.

By letter dated July 11, 2003, the County asked the Commission to issue an order directing the parties to proceed to interest arbitration. By letter dated July 14, 2003, the Association requested that the matter instead be remanded to the investigator, arguing that the Commission's July 9 decision had changed the circumstances such that additional bargaining could narrow the issues. The County responded by urging the Commission not to delay interest arbitration any further. On August 5, 2003, the Commission denied the Association's request to reopen the investigation. OZAUKEE COUNTY, DEC. NO. 30562-B. By Order dated September 11, 2003, the Commission appointed an interest arbitrator.

The interest arbitration hearing was scheduled to take place on December 15 and 17, 2003.

- C. The Examiner's Conclusions of Law 1-7 are affirmed.
- D. Paragraph 1.a of the Examiner's Order is affirmed.
- E. Paragraph 1.b. of the Examiner's Order is set aside.
- F. Paragraph 1.c. of the Examiner's Order is renumbered 1.b. and is modified as follows:
 - 1.b. Make whole employees in the bargaining unit represented by the Union, with interest at the applicable interest rate of 12% per annum set forth in Sec. 814.04(4), Stats., for any out of pocket losses caused by the County's changes in its health insurance plans, which losses were/are experienced between January 1, 2003 and the earlier of (1) the parties' unconditional agreement concerning health insurance or (2) the parties' receipt of a Sec. 111.70(4)(cm) 6 and 7, Stats., interest arbitration award concerning a successor collective bargaining agreement.
- G. Paragraph 1.d. of the Examiner's Order is renumbered 1.c. and is affirmed, except that it will refer to and incorporate Appendix A as modified and attached hereto.
- H. Paragraph 1.e. of the Examiner's Order is renumbered 1.d. and is otherwise affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

APPENDIX "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 make whole employees in the bargaining unit represented by the Association, with interest at the applicable interest rate of 12% per annum set forth in Sec. 814.04(4), Stats., for any out of pocket losses caused by the County's changes in its health insurance plans, which losses were/are experienced between January 1, 2003 and the earlier of (1) the parties' unconditional agreement concerning health insurance or (2) the parties' receipt of a Sec. 111.70(4)(cm) 6 and 7, Stats., interest arbitration award concerning a successor collective bargaining agreement.
2. 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

Dated this _____ day of _____, 2004

By _____
Chairperson
Ozaukee County Board of Supervisors

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 ORDER

Summary of the Facts

The County and the Association were parties to a collective bargaining agreement in effect from January 1, 2000 to December 31, 2002 that provided health insurance coverage under the following relevant terms:

- The County paid 90% of the premium; employees paid 10%.
- The plan provided either single or family coverage.
- As of January 1, 2001, prescription drug co-pays were \$9.00 for a generic prescription and \$14.00 for a brand name prescription.
- Employees paid a 20% co-pay for out of network services up to a maximum of \$1,000 per year per family or \$500 per year for a single plan.
- A \$50.00 Emergency Room co-pay per visit.
- An IRS Section 125 Plan for employee health insurance premium contributions.
- No single or family plan deductible.
- No office visit co-pay.
- No lifetime maximum.

The Association's initial proposal for a successor collective bargaining agreement maintained the foregoing elements of the health insurance provision, but added certain language, including language that would allow the County to change the plan or the carrier after notice to the Association, so long as the new plan maintained benefits "that are reasonably equal to those in effect on June 30, 2002." The County's initial proposal included several changes in the terms of the health insurance plan, e.g., a deductible for in-network services, a co-pay for office visits, and increased co-pays for Emergency Room visits and prescription drugs. During negotiations, the County indicated to the Association that, without changes in the plan, the premium costs were expected to increase by 21%; with the County's proposed changes, premiums would increase 11%.

During the parties' first three bargaining sessions, each essentially adhered to its initial positions regarding health insurance. By letter dated October 2, 2002, the Association conveyed a comprehensive "package offer" to the County that, inter alia, maintained the

“current” health insurance plan without change. By letter dated October 9, 2002, the County responded with a package proposal that, in addition to its previous proposed changes to the health insurance plan, also offered “Flex Ben” deposits into employee Section 125 accounts, and a \$1000 “spousal carve out.” At the conclusion of the October 10, 2002 session, the parties agreed that they should prepare final offers for the next session scheduled for October 24.

On or about October 21, 2002, the Association informed the County in a telephone conversation that the Association had decided to negotiate over changes in health insurance and that final offers were therefore premature. At the parties’ fourth session, on October 24, 2002, the County conveyed a comprehensive package proposal, labeled “its best and final offer,” that included Flex Ben deposits and a spousal carve out totaling \$3600 over 3 years, but otherwise did not alter its health insurance proposal. The Association conveyed what it termed its “second amended proposal,” which, inter alia, accepted the County’s proposed health insurance changes, but with lower co-pays and the caveat that “benefits must remain reasonably equal to those in effect on January 1, 2002.” The Association’s proposal also included higher Flex Ben contributions and a lower spousal carve-out than the County had proposed. The County would not accept the Association’s health insurance proposal and the Association then informed the County that any agreement eventually negotiated would include the County’s health insurance package. At the end of the session, the parties discussed their sense of being at impasse and the Association stated it would file for interest arbitration.

By letter dated October 30, 2002, the County conveyed a somewhat modified comprehensive package proposal to the Association. Also on that date, the County telephoned the Association to inquire about the status of the interest arbitration petition. The Association representative apologized for the delay and stated he would file. By letter dated November 13, 2002, the Association negotiator notified the County that the Association was sending a mediation petition to the WERC and enclosed a package proposal for mediation purposes that accepted the County’s proposed health insurance changes, but added the stipulation that the benefits would remain reasonably equal to those in effect on January 1, 2002.

The parties met in a mediation session on December 11, 2002. At that time, the County first realized that the Association had filed for mediation rather than interest arbitration. After again failing to reach agreement, the County informed the Association that the County would file an arbitration petition and the parties agreed to meet again with the Commission mediator on January 14, 2003.

By letter dated December 20, 2002, the County informed the Association that it had on that date distributed payroll stuffers with unit employees’ paychecks informing them that their health insurance plans and premiums would change in specified ways, effective January 1, 2003. The payroll stuffer, which the County included with its letter to the Association, informed employees, inter alia, that the County would deposit \$500 per family plan or \$250 per single plan into employee flexible benefit accounts on January 1, 2002 to help defray the out of pocket costs, that deductibles and co-pays would increase in specific ways, and that employees would have a new option of “employee plus one” as well as family and single plan

choices. In a telephone conversation with the County on December 20, 2002, the Association protested the County's implementation of the health insurance changes as unlawful.

On that same date, December 20, 2002, the County forwarded a petition for interest arbitration to the Commission, stating, inter alia, that "there are no tentative agreements." The County appended a "Final Offer" that included, inter alia, a health insurance proposal largely (but not entirely) similar to its earlier proposals on that subject, and essentially the same as the plan it had outlined in its payroll staffer on that date. Also on December 20, 2002, the Association wrote to the WERC Chair protesting the County's proposed implementation of its health insurance changes and stating, in substance, that the County's action constituted bad faith bargaining and, as such, rendered it impossible for the Commission to determine the existence of "impasse" for purposes of interest arbitration proceedings. The Association's letter stated that a prohibited practice complaint would follow.

Also on December 20, 2002, the Association wrote to the County, demanding that the County refrain from implementing its proposed changes and conveying the Association's willingness to agree to the County's health insurance proposal if the County would agree to various other contractual items. On December 30, 2002, the County advised the Association that the terms it had proposed were not acceptable and on December 26, 2002 the Association filed the instant prohibited practice complaint, with a copy to the County.

On January 1, 2003, the County implemented changes in bargaining unit employees' health insurance, including, inter alia:

- Deductibles of \$250 for single plan in network and \$500 single plan out of network; \$500 family plan in network and \$1000 with referrals.
- \$20.00 co-pay for office visit
- Mandatory HCN network
- \$75.00 co-pay for Emergency Room visits
- \$10.00 co-pay for generic drugs; \$20.00 for formulary brand name and \$30.00 for non-formulary brand name (with specified out of pocket maximums)
- \$40 co-pay for home care visits
- \$2 million lifetime maximum per individual member in the plan

By letter dated January 3, 2003, the Association submitted its preliminary final offer to the WERC, but continued to state its position that "no impasse may be found as long as the County's unilateral implementation of its health insurance proposals remains unremedied." On

January 14, 2003, the parties met with the Commission's investigator (who had also been the mediator at the December 11 session). The Association reiterated its position regarding the lack of a good faith impasse.

By letter dated January 31, 2001, the investigator notified the parties that he "had determined that an impasse exists" and requested them to submit their final offers so that the matter could be advanced to interest arbitration. The County submitted a final offer to the investigator, with a copy to the Association, by letter dated February 7, 2003, noting certain changes in its health insurance proposal.

By letter dated February 10, 2003, the Association filed with the WERC an objection to the determination of impasse, on the ground that the County had unilaterally and unlawfully implemented its health insurance proposal. By letters dated February 11 and 21, 2003, the County requested that the Commission dismiss the Association request as a delay in the arbitration process. On February 26, 2003, OZAUKEE COUNTY, DEC. NO. 30562, the Commission held the Association's request in abeyance, inasmuch as the Commission had not yet made a determination of impasse and could not do so until the exchange of final offers had been completed and the investigator had filed his report.

On March 4, 2003, the investigator received the Association's final offer, which included its caveat about the lack of good faith impasse. On March 24, 2003, the Commission received the investigator's report and notice of close of investigation. The parties then filed written arguments on the Association's claim that the pendency of a prohibited practice complaint regarding the County's unilateral change in health insurance precluded a finding of impasse and a direction of arbitration. The last of these written arguments were received by the Commission on June 11, 2003. On July 9, 2003, the Commission issued its decision denying the Association's request to interrupt the arbitration process. OZAUKEE COUNTY, DEC. NO. 30562-A.

By letter dated July 11, 2003, the County asked the Commission to issue an order directing the parties to proceed to interest arbitration. By letter dated July 14, 2003, the Association requested that the matter instead be remanded to the investigator, arguing that the Commission's July 9 decision had changed the circumstances such that additional bargaining could narrow the issues. The County responded by urging the Commission not to delay interest arbitration any further. On August 5, 2003, the Commission denied the Association's request to reopen the investigation. OZAUKEE COUNTY, DEC. NO. 30562-B. By Order dated September 11, 2003, the Commission appointed an interest arbitrator.

The Commission's records indicate that the interest arbitration hearing was scheduled to take place on December 15 and 17, 2003. The health insurance provisions in each parties' respective final offers are substantially the same. The Association's proposals regarding health insurance were always in "package" form, contingent upon acceptance (or adoption) of all other elements of the Association's package proposal.

DISCUSSION

The County argues that the Examiner was wrong in concluding that the County's unilateral implementation of health insurance changes was unlawful. The County makes two central arguments: first, that the changes cannot be labeled "unilateral" when the subject of health insurance had been fully bargained and the changes were consistent with both parties' final offers; second, that the Association engaged in dilatory tactics that delayed the interest arbitration process and justified the County's action.

The County contends that "there is no Commission precedent addressing the issue of implementation of a term proposed by both parties." We view the Commission's precedent differently. We agree with the Examiner that the Commission issued a blanket holding in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84): where arbitration is available to resolve a negotiations dispute, the law does not permit unilateral changes in mandatory subjects of bargaining, absent a showing of "necessity," waiver, or specific unconditional agreement to implement the change. The fact that the union has agreed to an item as part of a new overall agreement does not mean the union has agreed to implement the item before there is a new agreement. As the Commission said in GREEN COUNTY,

"Neither the potential MIA award nor the collective bargaining agreement that would be entered into pursuant to it could be deemed to be a Union waiver of the Union's rights to a determination of the merits of its [unilateral change] allegations and to an order providing a remedy for the violation found."

ID. at 18.

Continuation of the *status quo* is a right that exists independently of the right to bargain over substantive issues. Indeed, as the Examiner noted, the Commission has stated that a union need not bargain over discontinuing the *status quo*— i.e., the *status quo* is not subject to waiver and will be deemed relinquished only by express agreement. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96) at 21. The County's argument also conflicts with Commission precedent regarding the status or enforceability of tentative agreements during the pendency of interest arbitration. In effect, the County argues that parallel provisions in final offers should have the same force and effect as an agreement to those items, a status that the Commission has refused to attribute even to the parties' tentative agreements. SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87), AFF'D SUB NOM. AFSCME, LOCAL UNION NO. 360 AND 3148 v. WERC, 148 WIS. 2D 392 (CT.APP. 1988) (holding that an employer may discontinue dues checkoff during hiatus, even though it was a tentative agreement for purposes of interest arbitration, because union security provisions are solely a creature of contract). The Commission's language in SAUK COUNTY speaks directly to the County's argument in the instant case:

“Even a formal stipulation of agreed items, standing alone, would represent no more than an agreement that the terms it contains shall become a part of the overall agreement consisting of the final offer selected by the arbitrator plus the terms of the stipulation of agreed items. . . . Occasionally, parties agree to an interim implementation of agreed-upon modifications, but a specific agreement to that effect is necessary to deviate from the well-understood norm.”

ID. at 16 (emphasis added).

Relying upon certain dictum in GREEN COUNTY, the County’s advances a second argument, i.e., that the Association engaged in unlawful or abusive delay in the interest arbitration process, and therefore has surrendered its right to insist upon maintenance of the *status quo* regarding health insurance. In support of this argument, the County notes the delay between October 24, 2002, when the Association promised to file an interest arbitration petition, and November 13, 2003, when it filed a petition with the Commission, as well as the fact that the Association then filed for mediation rather than for interest arbitration. The County further cites what it views as the Association’s specious attempt to persuade the Commission not to proceed with interest arbitration during the pendency of the instant prohibited practice complaint, and, after the Commission ruled against the Association, the Association’s request that the Commission reopen negotiations to permit the Association to amend its proposals. The County contends that its frustration with the Association’s “successful campaign of delay” in moving along the interest arbitration process justified its unilateral implementation of the health insurance changes.

In deciding GREEN COUNTY, the Commission recognized that its decision could offer a tactical advantage to a party willing to delay the interest arbitration process in order to prolong a *status quo* that the party perceived as beneficial. While the Commission ultimately concluded that, on balance, permitting unilateral changes would be even more inimical to the statutory purposes of good faith dispute resolution, the Commission addressed the potential for tactical delays by suggesting that evidence of “unlawful abusive delay of the statutory process” might justify a unilateral change prior to the conclusion of the process. However, we agree with the Examiner that the Association’s actions do not fall within the Commission’s GREEN COUNTY reservation. Filing a petition for mediation, rather than interest arbitration, and later asserting in Commission proceedings that the County’s unilateral action had voided the possibility of a good faith impasse, was not “unlawful.” We add that the delay between October 24 and November 13, some three weeks, cannot reasonably be labeled “abusive,” especially since the County at any time could have filed its own petition and thus propelled the process forward. Moreover, filing for mediation rather than interest arbitration had little practical effect on the process, since both petitions generally initiate a period of mediation by a Commission agent. Here, for example, the parties met with the Commission’s “mediator” on December 11, 2002, in response to the Association’s mediation petition, and arranged to meet again on January 14, 2003 with the same Commission agent acting as an interest arbitration “investigator.” Thus we see no significant delay attributable to the Association, and certainly

no “abusive delay,” prior to December 20, 2002, when the County announced its intent to unilaterally implement the health insurance changes on January 1, 2003.

Nor can we see how the County’s unilateral change on January 1, 2003, could be justified by any of the Association’s allegedly dilatory actions after the County had already implemented its changes. The Commission’s dictum in GREEN COUNTY addressed the hypothetical situation where the respondent unilaterally implemented a change only after complying with its own obligations regarding the *status quo* and facilitating the arbitration process, but where the complainant has unwarrantably prolonged the *status quo* presumably because it is beneficial to the complainant. That is to say, the GREEN COUNTY caveat contemplated a situation where the complainant’s dilatory conduct occasioned the unilateral change. That caveat is not implicated in the instant situation, where the County unilaterally implemented changes before most of the alleged dilatory conduct by the Association. The *status quo* that the Association thus allegedly prolonged was not one that was favorable to itself, but instead already reflected the County’s unilateral change. Accordingly, we see no recourse for the County in the GREEN COUNTY caveat.

REMEDY

The Examiner remedied the unilateral change violation in a customary manner, i.e., by restoring the *status quo ante* and making employees whole for losses attributable to the unilateral change. To restore the *status quo ante* the Examiner directed the County to “rescind the design changes in the health insurance plan. . . .” We have instead ordered the more limited remedy utilized in the GREEN COUNTY decision, i.e., a make whole order that will continue until the parties receive the interest arbitration award (or agree unconditionally to implement changes in the health insurance plan), without a restoration of the *status quo ante*.

In both GREEN COUNTY and its companion decision, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission grappled with the problem of granting make-whole relief where the parties were in the process of obtaining an interest arbitration award that would or could implement the same change retroactively to the period of time covered by the prohibited practice complaint. The Commission concluded that make-whole relief was necessary to deter such unilateral changes, even if doing so conferred a benefit on employees that would not otherwise have been available to them. In BROOKFIELD, for example, where the City had unilaterally changed summer hours from 7:00 a.m. to 3:30 p.m. to 8:00 a.m. to 4:30 p.m., the Commission ordered the City to pay employees overtime pay for any hours worked beyond 3:30 p.m., even though, by the time the Commission issued its decision, an interest arbitrator had issued an award retroactively establishing the hours the City had implemented unilaterally, and even though the City argued that the make-whole relief “deprives the City of this part of the award.” *Id.* at 6. Similarly, in the present case, the County could contend that the arbitration award inevitably will implement the same health insurance changes retroactively (at least in theory), so that employees would have had suffered

these out of pocket costs simply by virtue of the contract. Assuming *arguendo* that it would be practicable to implement these health insurance changes retroactively, we nonetheless continue to endorse what the Commission concluded in GREEN COUNTY and BROOKFIELD, i.e., that, make-whole relief is necessary to remedy effectively the unilateral change violation, despite the possibility that the employees would not be entitled to such monies under the retroactive contract eventually adopted. Without the make-whole remedy, employers would have little if any incentive to comply with the law.

Although the Commission did not discuss the issue in GREEN COUNTY, the Commission's remedy did not include a restoration of the *status quo ante*.^{1/} The Commission, of course, has a great deal of latitude in devising its remedies and may tailor them to the facts of a specific case. See Sec. 111.07 (4), Stats.; EMPLOYMENT RELATIONS DEPT. v. WERC, 122 WIS.2D 132 (1985). Under the specific facts of this case, where unilateral changes in the design of a health insurance plan involved a redistribution of costs (such as a lower premium dollar amount but higher deductibles) and perhaps a change in plan administrator, it could be exceedingly difficult – even detrimental to some employees – to restore the *status quo ante*. For this reason, and because an imminent interest arbitration award would very likely reinstate the very changes we would be ordering rescinded now, we think a restoration of the *status quo ante* is neither practical nor necessary to effectuate the policies of the law. We have modified the Examiner's Order accordingly.

1/ Restoring the status quo ante was not an issue in BROOKFIELD, because the interest arbitration award had already been issued at the time of the Commission decision.

Dated at Madison, Wisconsin, this 26th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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