STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 35, AFL-CIO
PRINCIPAL REPRESENTATIVE: JUDITH BURNICK,** Complainant,

vs.

**OZAUKEE COUNTY
PRINCIPAL REPRESENTATIVE: JOHN KUHNMUENCH,** Respondent.

Case 60
No. 61974
MP-3889

Decision No. 30552-A

Appearances:

Mr. George F. Graf, Attorney at Law, 22370 West Bluemound Road, Suite 204, Waukesha, Wisconsin 53186, 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 January 2, 2003, Office and Professional Employees International Union, Local 35, AFL-CIO, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission in which it alleged that Ozaukee County had committed prohibited practices in violation of Sections 111.70(3)(a)(4) and (3)(a)(5) of the Wisconsin Statutes by unilaterally changing the health insurance benefits of employees represented by Office and Professional Employees International Union, Local 35, AFL-CIO. 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 the complaint and a complaint filed by Ozaukee County Highway Employees Association were consolidated for purposes of hearing. A hearing was scheduled for February 27, 2003 and then 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. Office and Professional Employees International Union, Local 35, AFL-CIO, hereafter Complainant or Union, is the exclusive collective bargaining representative for all regular full-time and regular part-time employees of Ozaukee County, including professional employees and car drivers, but excluding elected officials, supervisors, administrative, managerial, casual and confidential employees and employees of other certified or recognized bargaining units and employees of Lasata Care Center. Ms. Judith Burnick, Business Manager, Office and Professional Employees International Union, AFL-CIO represents the Union. The Union's principal offices are located at 5235 N. 124th Street, Suite 101, Butler, WI 53007.

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 purposes of labor contact negotiations.

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

ARTICLE XX - HEALTH AND DENTAL INSURANCE

20.01 Hospital and Surgical Insurance. The policy of furnishing group health insurance shall be as follows:

a) For full-time employees, the employer shall pay up to ninety percent (90%) of the premium cost of the single or family plan of group health insurance.

b) The employee will be required to pay the other ten percent (10%) of the premium cost.

Effective July 5, 2000, use of HCN provider network is mandatory. Exceptions will be made for out-of-area students, emergencies, life-threatening situations, the purchase of durable medical equipment and covered oral surgery. Further exceptions will be made for secondary providers if the primary provider is part of the network.

Prescription Drug Co-payments: Effective January 1, 2000 co-payments per prescription shall be $4.00 for generic and $7.00 for brand name. Effective January 1, 2001 co-payments per prescription will increase to $8.00 for generic and $11.00 for brand name. Effective January 1, 2002 co-payments per prescription will increase to $9.00 for generic and $14.00 for brand name.

Effective July 5, 2000, generic drugs are mandatory unless a physician or licensed health care provider stipulates "no substitutions". Mail order purchases for prescriptions will be permitted, with the ability to order 3-month supplies with a single co-payment.

Emergency Room Care: Effective July 5, 2000, a $50.00 co-payment for each visit. This co-payment will be waived if the individual is admitted to the hospital or the attending physician or an attending licensed health care provider certifies need for such emergency care.

c) Coverage is to be effective on the first day of the month following completion of two (2) calendar months of employment.

d) The County shall select the insurance plan and may change insurance carriers or administrators at any time, provided that it submits thirty (30) days advance notice of the change to the Union's Business Manager and that any change maintains reasonably equal benefits.

e) Regular part-time employees classified as Cooks and Dispatchers and regular part-time employees working in the Parks and Land and Water Conservation Departments who are normally scheduled to work at least forty (40) hours during a biweekly pay period, and all other regular part-time employees who are normally scheduled to work at least thirty-seven and one-half (37-1/2) hours during a biweekly pay period, will be allowed to participate in any of the County's insurance plans, provided such employees pay the entire premium therefore at the County Personnel Director's Office on or before the first workday the County Personnel Director's Office is open in the month prior to the month for

which the premium is due. In the event such part-time employee becomes a full-time employee without a break in service, such part-time employee will be eligible for coverage and County premium payment pursuant to paragraphs a) and b) above effective on the first day of the month following completion of two (2) calendar months of full-time employment, provided however, that until such employee is eligible for coverage and payment under Paragraphs a) and b) above, such employee may continue to participate in the insurance plan by continuing to pay the entire premium therefore as set forth above.

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

g) Any employee who retires from County employment shall continue to be eligible for group health insurance, provided the employee pays the entire premium therefore 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.

h) The Employer will establish a health insurance premium account for any employee who retires with at least ten (10) years of service and has at least seventy-five (75) days of unused accumulated sick leave remaining in their account. The account for such employee will contain an amount equal to fifty percent (50%) of the employee's unused sick leave, established at the rate of pay at the time they retire. Such health insurance premium account will be used for the payment of health insurance premiums on behalf of such retired employee at whatever the premium cost is per month.

. . .

4. Beginning in early May of 2002, the Union attempted to obtain health insurance bids from other insurers, but the Union's attempts were not successful. By letter dated May 28, 2002, Burnick asked Kuhnmuench to open negotiations on the collective bargaining agreement to succeed that which would expire on December 31, 2002. Attached to this letter was a copy of the Union's bargaining proposals. The Union's proposals contained three modifications to Article XX, Health and Dental Insurance, *i.e.*, to modify Sec. 20.01(h) to increase the amount of sick leave an employee may use for health insurance; to add a new provision offering a $1,000 reimbursement for full-time employees who do not take health insurance; and to modify the current premium contribution for dental insurance. Kuhnmuench,

who requested and received a two-week extension to respond to these proposals, provided Burnick with a copy of the County's proposals by a letter dated July 24, 2002. This proposal included the following changes to Article XX, Health and Dental Insurance:

20.01-Hospital and Surgical Insurance.

(b) Remove the date "Effective July 5, 2000, from this paragraph, and begin with "Use of the HCN provider is mandatory. Exceptions will be made, etc., through the end of this paragraph.

Add 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 provided 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).

Change **Prescription Drug Co-payments** language: 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%.

Remove the date on the following paragraph: Effective July 5, 2000, generic drugs, etc. to start with "Generic drugs are mandatory, etc."

Emergency Room Care: Remove the date: Effective July 5, 2000, and change the $50.00 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 to: **Section 20.03 Section 125 Option.** 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.

The County's proposal on health insurance was made for the purpose of more closely conforming its plan to that of other members of the WCA Trust and to contain health insurance costs. The Union and the County held their initial bargaining session on or about September 25, 2002 and, thereafter, met five or six times. At the initial bargaining session, the parties discussed tentative agreements and agreed that tentative agreements would be implemented following the ratification of a new contract, or the issuance of an interest arbitration decision. Pursuant to an agreement of the parties, the initial bargaining sessions focused upon non-economic items. In the latter sessions, the parties discussed health insurance. In September or October of 2002, a representative of the WCA Trust, which administered the County's employee health insurance plans, met with employees represented by the Union and Union representatives for the purpose of answering questions on health insurance. On November 7, 2002, Burnick had a discussion with Kuhnmuench. From this discussion, Burnick understood that the County had reached an agreement on health insurance with the Ozaukee County Highway Employees Association (Association) and that the Association and the County would be arbitrating wages. Burnick's subsequent discussions with representatives of the Association lead her to conclude that the Association had not reached such an agreement. On November 15, 2002, the Union gave the County a proposal that included the following:

> 28. Conditional upon reaching an overall settlement that is recommended by the OPEIU Local 35 Bargaining Committee, the union is willing to consider the County's proposed Health Insurance changes with the following modifications:
>
> - Mental Health – when ongoing mental health treatment is required, the $20 co pay shall not apply for mental health visits by a psychologist, therapist, counselor, Social worker or any other mental health professional.

- Chemotherapy and radiation treatments shall not be subject to the $20 co pay.

- Visits for chiropractic care if ordered by a physician shall not be subject to the $20 co pay.

- A co-payment maximum of $150 single and $350 family shall apply for all co-payment charges. Once an employee has met the appropriate maximum, they will no longer have to pay the $20 co-payment for office visits.

- The County will make a $250 contribution for single coverage and a $500 contribution for family coverage to each employee's Flexible Spending Account in each year of a three year agreement. The County contributions shall be used by the employee for any unreimbursed medical or dental expenses. County contributions into each employee's Flexible Spending Account shall remain in the employee's account for use in succeeding years unless prohibited by the Internal Revenue Code.

- Benefits must remain reasonably equal to those in effect on January 1, 2002.

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By a letter dated November 25, 2002, Kuhnmuench made a bargaining proposal to Burnick that resubmitted the County's offer of July 24, 2002, with the following modifications:

> Flex Ben deposit by County into each insured employee account of $500/family; $250/single for 2003, which will help offset the annual employee deductible for the first year the benefit change is in place.
>
> **Note:** *One important change to the health insurance proposal offered to OPEIU union employees is that when an employee sees a doctor outside of the HCN network, after the annual out of network deductible is met ($500/Single and $1,000 Family), the out of network change will then be covered.* Currently, when an OPEIU union employee or family member sees a doctor outside of the HCN Network, there is no coverage.

The County's proposal also included the following:

8. **Inclusion of all tentative agreements** reached during negotiations.

This is a package offer and is expressly contingent upon the Union'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 believes that this package meets the needs of the Union, as well as addressing the need to control its health care costs. The County reserves the right to add, modify, or delete proposals during the course of negotiations.

The Union did not accept the County's modified health insurance proposal during the November 25, 2002 bargaining session and Burnick told the County that she would file a petition for arbitration. On November 27, 2002, Burnick prepared a Petition for Arbitration Pursuant to Sec. 111.70(4)(cm)6, Wis. Stats. Burnick filed this petition with the Wisconsin Employment Relations Commission. Burnick signed this Petition, which is on a Commission form that includes the following statement:

> The parties allege that they have reached a deadlock after a reasonable period of negotiation and after mediation by the Commission (and after other settlement procedures established by the parties have been exhausted), and request the Wisconsin Employment Relations Commission to proceed, pursuant to Sec. 111.70(4)(cm)6, Wis. Stats., and conduct an investigation and certify the result thereof and determine whether arbitration should be initiated.

Attached to the Petition were various "Tentative Agreements" that had been signed by Burnick and Kuhnmuench. The signed "Tentative Agreements" did not include an agreement on health insurance or to modify the language of Article XX. The "OPEIU Local 35 Preliminary Final Offer" attached to this Petition included the following:

1. The tentative agreements reached by the parties and signed are attached. Other tentative agreements that have not as yet been signed are noted.

. . .

21. **Health Insurance.** Conditional upon reaching an overall settlement that is recommended by the OPEIU Local 35 Bargaining Committee, the union is willing to consider the County's proposed Health Insurance changes with the following modifications:

- Mental Health – when ongoing mental health treatment is required, the $20 co pay shall not apply for mental health visits by a psychologist, therapist, counselor; Social worker or any other mental health professional. ***County stated that it is covered now and agreed to write language in the plan to that effect.***

- Chemotherapy and radiation treatments shall not be subject to the $20 co pay. ***County stated that it is covered now and agreed to write language in the plan to that effect.***

- The County will make a $250 contribution for single coverage and a $500 contribution for family coverage to each employee's Flexible Spending Account in each year of a three year agreement. The County contributions shall be used by the employee for any un-reimbursed medical or dental expenses.

- Benefits must remain reasonably equal to those in effect on January 1, 2003.

In mid-December 2002, Kuhnmuench telephoned Burnick and asked if the Union would agree to implement the County's health insurance proposals and then arbitrate the quid pro quo. Burnick told Kuhnmuench "No" and explained that she did not think that the Union's bargaining unit members would accept the increased costs associated with the proposed deductibles and co-pays if the wage increase were not settled. On December 20, 2002, Kuhnmuench telephoned Burnick and told Burnick that he was making a courtesy call to advise her that the County would be implementing their health insurance proposals on January 1, 2003. At that time, Kuhnmuench stated that he believed that the parties were at impasse and the County could implement their proposals. Burnick denied that the parties were at impasse. Burnick also stated that the parties were in the mediation/arbitration process; that the County could not implement their proposals; and that the Union would challenge any implementation. During, or shortly after this telephone conversation, Burnick received a letter from Kuhnmuench, dated December 20, 2002, which advised Burnick 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 it's 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 1/1/03 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 also providing your employees the ability to have coverage out of network with a referral from an in-network primary care physician. Finally, employees are allowed the option of taking an employee plus one health insurance plan thereby reducing their cost.

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 enclosed payroll stuffer, which was distributed to the Union's bargaining unit employees on December 20, 2002, included an announcement that 2003 health insurance premiums would be increased by 11% and that the deductions reflected on the employee paycheck dated December 20, 2002 would be $51.69 single; $103.38 for Employee +1; and $129.37 for family, as well as the following:

OPEIU 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.	

In response to this letter, Burnick sent an e-mail to the Union's bargaining unit members stating that she considered the County's conduct to be unlawful; that an impasse had not been declared; and that the Union was investigating its legal options. On December 20, 2002, the County withheld employee health insurance premium contributions as set forth in the payroll stuffer. By letter dated December 20, 2002, Kuhnmuench filed the County's responsive preliminary final offer with Wisconsin Employment Relations Commission (Commission) Chair Steven Sorensen. This letter states as follows:

> We have received the November 27, 2002 letter, petition for interest/arbitration and tentative final offer from OPEIU Local 35. Enclosed on behalf of Ozaukee County is our final offer dated December 20, 2002.
>
> We have clarified our final offer position on several outstanding issues. We are hereby sending a copy of this final offer to the OPEIU representative Judy Burnick and to the Union President, Damon Anderson.
>
> We reserve our right to review our position in this matter after reviewing the Union response to this final offer.
>
> If there are any questions, by you, the members of the Union or the bargaining team with regard to understanding any portion of our final offer, please contact the undersigned in writing as soon as possible.

Item 3 of the enclosed "Final Offer," states:

> 3. Article XX – Health Insurance (pp. 22-23). Revise as follows:
>
> a. For full-time employees, the employer shall pay up to ninety percent (90%) of the premium cost of the single or family plan of group health insurance. Coverage is to be effective on the first day of the month following completion of two (2) calendar months of employment. The employee will be required to pay the other ten percent (10%) of the premium cost.
>
> b. Use of the HCN provider network is mandatory. Exceptions will be made for out-of-area students, emergencies, life-threatening situations, the purchase of durable medical equipment and covered oral surgery.

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.

c. 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 by a primary care provider in network. The deductible is waived for annual exams, immunizations, and well child care.

d. 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 well child care for pregnant women.

e. 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.

f. The employees will be charged for prescriptions as follows.

1) 30-day supply will be $10/generic; $20/brand name formulary; $30/brand name non-formulary.
2) 3-month supply order by mail will be $20/generic; $30/brand name formulary; $40/brand name 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%.

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

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

i. 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.

j. The County will maintain an Internal Revenue Code Section 125 for employee health insurance premium contributions. On January 1, 2003, for insured employees, the County will deposit into a flexible spending account to be used by employees for any un-reimbursed medical expenses incurred in 2003, $500 for family plan participants and $250 for single plan participants.

k. Any employee who retires from County employment shall continue to be eligible for group health insurance, provided the employee pays the entire premium on or before the first work day in the month prior to the month for which the premium is due.

l. The Employer will establish a health insurance premium account for any employee who retires with at least ten (10) years of service and has at least seventy-five (75) days of unused accumulated sick leave remaining in their account. The account for such employee will contain an amount equal to fifty percent (50%) of the employee's unused sick leave, established at the rate of pay at the time they retire. Such health insurance premium account will be used for the payment of health insurance premiums on behalf of such retired employee at whatever the premium cost is per month.

. . .

Item 6 of this final offer states: "All Tentative Agreements reached during negotiations." Burnick received a copy of this letter, with enclosures, prior to January 1, 2003. The County implemented the health insurance plan changes referenced in the payroll stuffer of December 20, 2002 on January 1, 2003. By e-mail dated January 7, 2003, an employee of the County's Human Resources office notified the Union's bargaining unit members of the following:

FLEX BEN SIGN-UP

OPEIU/HIGHWAY

If you are currently insured under the County Health Plan you are entitled to a contribution made by Ozaukee County to a Flex Ben medical reimbursement account of $250/Single or $500/Employee + 1 and Family.

This sign-up is only for the County Contribution and does not allow for a salary deduction at this time.

In order to access this benefit you must fill out the attached form and return it to the Human Resources Dept. no later than **5:00 PM, Friday, January 31st, 2003.**

On that same date, Kuhnmuench sent an e-mail to County employees, including Union bargaining unit members, that states:

Subject: Negotiations update
I want to ensure that you are all aware of certain important facts before you make certain conclusions:

1. Your insurance premiums have gone up in double digit fashion for the past five years. This year marks the lowest increase, 11%, because the changes to the Plan that all of your fellow employees are now under. If these changes were not made, your premium would have experienced an increase of 21%

2. The County has funded the flex-ben accounts of all insured employees with $500/family, $250/single, for 2003, effective January 1, providing you with a funding mechanism to meet most of the out of pocket costs associated with the Plan changes.

3. Your insurance coverage has been expanded and will now allow you to go out of network, with a referral from an in network primary care physician. You now have the opportunity to participate in the single plus one coverage, resulting in a significant premium savings as well.

4. The changes made were modest and were necessary. The County was the only member of the Group Health Trust without deductibles, co-pays and maximums.

5. The County retained the services of a healthcare consultant, T.E. Brennan and Associates, to assist it in marketing its health plan to other health care providers other than the Group Health Trust to get more competitive quotes (hopefully cheaper) and only one provider bid on the business, at a premium that was over a Million dollars higher than the current Trust plan. The rest of the providers declined to bid, citing the large number of County large claim health cases (in excess of 81 large claim cases.)

6. Health care costs continue to rise in the Greater Metropolitan Milwaukee area and the County is dedicated to contain those costs while still providing a comprehensive health plan that meets the needs of its employees.

7. The County remains committed to bargaining in good faith to obtain a fair and equitable contract that is in the best interests if [sic] the County and its employees.

. . .

Burnick received numerous questions from Union bargaining unit members regarding the issue of health insurance, which questions she directed to the County's Human Resources office. By letter dated January 7, 2003, the Commission Investigator confirmed that an informal investigation would be held on January 14, 2003. The parties met with the Investigator on January 14 and 29, 2003. On January 29, 2003, the County presented a final offer entitled "Amendment to Final Offer Dated 12/20/02," which offer resubmitted Article XX, Sections a through k listed on the 12/20/02 offer and modified Subsection 1. This amended final offer included, as item 6, "All Tentative Agreements reached during negotiations." On January 29, 2003, the Union submitted proposed Tentative Agreements to the County, including the following:

The following clarifications of the proposed changes to the Ozaukee County Health Care Plan have been agreed to between the County and OPEIU Local 35.

Prescription Drugs: Employees will be required to pay only the Generic Drug Co-Pay of $10 in situations where the physician states ***"Brand Name Only"*** *on the prescription or there is no generic drug available.*

Office Co-payment of $20: The $20 office visit co-payment shall not apply for the following services:

- *Ongoing Mental Health treatment by a psychologist, therapist, counselor, Social Worker or any other mental professionals.*
- *Chemotherapy treatments*
- *Radiation treatments*
- *Dialysis*
- *Allergy Shots*
- *Pregnancy – the $20 co-pay will apply to the first visit only.*
- *Services provided by a Physical Therapist or Medical Technician.*

Deductibles: Charges accumulated towards the in-network deductible shall also apply towards the out-of-network deductible.

Kuhnmuench stated that he was not certain that the generic co-pay would apply if physician wrote brand name only and, thus, did not sign this Tentative Agreement. Had Kuhnmuench signed this Tentative Agreement on January 29, 2003, the only difference in the parties' health insurance proposals would have been the amounts to be contributed by the County to employee Flexible Benefit accounts. By letter dated January 31, 2003, the Commission's Investigator advised Kuhnmuench and Burnick that he had determined that an impasse existed with respect to the parties' contract negotiations and directed the parties to submit final offers on all proposals in dispute in order that the Investigation could be closed and the matter advanced to interest arbitration. Burnick responded to the Investigator by reiterating the objection that she had made to the Investigator on January 29, 2003, *i.e.*, that the parties were not at impasse because there was a pending prohibited practice claim that, by unilaterally implementing the health insurance changes, the County was not bargaining in good faith. The Union requested the Commission to review the Investigator's determination of impasse. The parties have not agreed upon the terms and conditions to be included in the collective bargaining agreement to succeed that which expired on December 31, 2002.

5. The health insurance plan in effect at the time of the expiration of the parties' 2000-2002 collective bargaining agreement did not have coverage for out of network medical expenses; did not contain any deductibles; did not have any co-pays for office visits; did not have any lifetime maximum; had a $50 emergency co-pay for each emergency room visit, with certain exceptions; and had prescription drug co-pays of $9.00 for generic and $14.00 for brand name. 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 implemented by the County on January 1, 2003 did not maintain reasonably equal benefits. The health insurance plan design changes implemented by the County on January 1, 2003 altered the *status quo* of the Union's bargaining unit members' health insurance benefits that existed at the time of the expiration of the parties' 2000-2002 collective agreement. The Union has not agreed to the health insurance

plan design changes that were implemented by the County on January 1, 2003. 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, Office and Professional Employees International Union (OPEIU) Local 35, AFL-CIO, 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.

8. By implementing the health insurance plan design changes effective January 1, 2003, Respondent has not violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, 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 Complainant's allegation that Respondent, Ozaukee County, violated Sec. 111.70(3)(a)5, Stats., is dismissed in its entirety.

2. IT IS ORDERED that 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 26th 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 OPEIU, LOCAL 35, AFL-CIO

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 OPEIU, LOCAL 35, AFL-CIO, 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 January 2, 2003, the Union filed a complaint of prohibited practices alleging that the County had violated Sections 111.70(3)(a)(4) and (5), Wis. Stats., by unilaterally changing employee health insurance benefits. On January 27, 2003, the County filed its Answer, denying that it had committed the prohibited practices alleged by the Union. 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.

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.

POSITIONS OF THE PARTIES

Union

The Union's allegation that the County has violated Sections 111.70(3)(a)(4) and (5), Stats., are both related to the County's unilateral implementation of a new health insurance program for the employees represented by the Union on December 20, 2002. At the time of the County's unilateral implementation of a new health insurance program, the parties were engaged in negotiations for a new collective bargaining agreement to replace the one expiring on December 31, 2002. The facts that form the basis of the Union's complaint are recounted in the complaint and supported by the undisputed testimony of Union representative Judy Burnick.

The most recent collective bargaining agreement between the Union and the County was effective from January 1, 2000 through December 31, 2002. That documents, and Article XX, identify the health and dental insurance benefits of Union bargaining unit members.

The County, in its contract proposals, sought substantial changes in the health insurance plan provided to the Union's bargaining unit members. Among the changes which would be more costly to the Union's bargaining unit members are: initiate deductibles of $250 single and $500 family for in-network services; initiate deductibles of $500 single and $1,000 family for out-of-network services; initiate a co-pay of $20.00 per office visit; implement a formulary and increase the co-pays on prescription drugs; increase the emergency co-pay from $50.00 to $75.00; limit home care visits; impose a lifetime maximum for individuals; and provide that office visits and prescription drug co-pays not be applied toward the annual deductible. Despite meeting for at least six bargaining sessions in September, October and November of 2002, the parties were not able to reach agreement on a successor contract.

In mid-December, the County's chief negotiator, John Kuhnmuench, contacted Burnick and asked if she would agree to the County's health insurance proposal and arbitrate a quid pro quo. Burnick refused. On December 20, Kuhnmuench gave Burnick a "courtesy call" to inform her that the County was implementing its health insurance proposal on that date, proclaiming that this could be done because the parties were at impasse. Burnick disagreed and pointed out that the parties were in the midst of the mediation arbitration process.

By letter dated December 20, 2002, Kuhnmuench informed Burnick of the fact that the County had, on that date, notified employees of the new health insurance program which was being implemented and the increased the premiums. The increased premiums and the changes in the health insurance coverage were set forth in attachments to this letter.

The undisputed facts established by oral and documentary evidence conclusively prove that the County has violated Sections 111.70(3)(a)(4) and (5), Stats., as alleged in the complaint. As the Commission stated in CITY OF EAU CLAIRE, DEC. NO. 29346-C (12/02), the Commission has a long-held doctrine that a municipal employer violates Wisconsin Statutes 111.70(3)(a)(4) when the employer unilaterally changes the status quo, absent a valid defense.

That changes in health insurance benefits represent an unlawful change in the status quo is established in MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (Ct. App. 1995) and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). Kuhnmuench apparently believes that, if the parties were at impasse, then the County was free to implement its health insurance proposal. The Commission, however, has clearly established that impasse in negotiations does not justify changing the status quo. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). There is no impasse defense available to the County.

Burnick expressly refused Kuhnmuench's request that the Union agree to the County's health insurance changes and arbitrate the wage quid pro quo. Burnick also expressly told Kuhnmuench that the County's unilateral implementation of health insurance changes was illegal. The record provides no reasonable basis to conclude that the Union has waived its right to have the *status quo* maintained.

The early "projections" of the County's consultant form the only basis for the County's claim that there would be a 21% increase in premiums if the old health insurance program were retained. Apparently, the County decided to force the new plan on these employees on January 1, 2003 because it would put all employees under the same plan and possibly make it easier to administer.

Although the Commission has recognized that there may be a "necessity" which justifies an employer changing the status quo, the present case is void of any facts to establish such a defense. See CITY OF BROOKFIELD, DEC. NO. 11406-B (WERC, 9/73) and RACINE SCHOOLS, DEC. NO. 13696-C and 13876-B (WERC, 4/78). The Examiner should find, on this record, that the County has shown a complete disregard for the policy of collective bargaining envisioned and required under Section 111.70(3)(a)(4), Stats.

Under Section 111.70(3)(a)(5), Stats., it is a prohibited practice for a municipal employer to violate a collective bargaining agreement. Here, the violations are manifest and proven by the County's own document of December 20, 2002.

The MERA Declaration of Policy set forth in Section 111.70(6), Stats., calls for the parties to have an opportunity to reach a voluntary settlement through collective bargaining. Unlawful, unilateral changes such as that committed by the County herein tend to undercut both the integrity of the statutory bargaining process and the status of the Union as the exclusive collective bargaining representative, thereby interfering with employee rights to bargain collectively through their chosen representative. GREEN COUNTY, SUPRA.

The County has flagrantly and deliberately violated the law by the unilateral actions of December 20, 2002. The relevant prior cases have provided remedies including cease and desist orders, reinstatement of the status quo, a make-whole order for adversely affected employees and the posting of appropriate notices. The violations committed by the County require this type of remedy.

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 Union must prove that: (1) the matter at issue was a mandatory subject of bargaining; (2) the parties had 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 (4/00); CITY OF BELOIT, DEC. NO. 28270-B (11/95).

With respect to a Sec. 111.70(3)(a)5 claim, the Union must prove that:

1. There was a collective bargaining provision regarding wages, hours, and conditions of employment that governed that matter at issue, including an agreement to arbitrate questions arising as to the meaning or application of the terms of the agreement; and

2. The Respondent's actions violated the collective bargaining agreement.

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).

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. As the Commission noted, there is no explicit statutory ban on unilateral implementation following impasse. The Commission, following a careful balancing of interests, extrapolated the prohibition on implementation following impasse from the statutes and 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 health insurance terms that were implemented. Thus, the policy concerns present in GREEN COUNTY are not present here.

In GREEN COUNTY, the Commission recognized that its refusal to permit implementation following impasse could tempt parties opposed to the changes to drag out the statutory process. Thus, it held that a defense exists where "unlawful, abuse of the statutory process exists." While the "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).

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 Union (at the beginning of bargaining) of its intent to make changes to its health plan.

The Union 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 Union.

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 Union's offer is more appropriate.

On or about December 20, 2002, the County notified the Union that it would be implementing changes to health insurance effective January 1, 2003. The Union argues that this implementation was unlawful. The Union's argument is without merit.

The County is not arguing that it may unilaterally implement following impasse. Rather, the County is arguing that the Union'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 Union'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 union has done so here. The hearing examiner must now decide if the law will be applied evenly to the union as it would be applied to a municipal employer.

The County's conduct cannot be logically construed to be "unilateral." The County and the Union reached agreement on the issue of health insurance. There is no Commission precedent addressing the issue of implementation of a term agreed to by the parties.

The County has not violated MERA as claimed by the Union. Moreover, the Union has unclean hands and has engaged in abusive, dilatory tactics. The Union'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)4 and 5, Stats., by unilaterally implementing certain health insurance changes. 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.
>
> . . .

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).

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. . . .

Sec. 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

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."

By a letter dated December 20, 2002, the County provided notice to the Union 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 Union's bargaining unit members of these health insurance plan design changes. These noticed health insurance plan design changes did not go into effect until 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. Thus, the health insurance plan design changes that are the subject of this dispute were not implemented during the term of a valid collective bargaining agreement, but rather, were implemented during a contract hiatus. The County's implementation of the health insurance plan design changes has not violated Sec. 111.70(3)(a)5, Stats., as claimed by the Union.

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); AFF'D MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (Ct. App. 1995)

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 or historical application of the relevant contract language. The only evidence of bargaining history pertains to the negotiations on the agreement to succeed the expired 2000-2002 agreement. The County, contrary to the Union, argues that, during these negotiations, the Union agreed to the health insurance changes that were implemented on January 1, 2003.

The County's initial bargaining proposal of July 24, 2002 requested changes to the existing health insurance plan design. On November 15, 2002, the Union presented a proposal that indicated a willingness to consider the County's health insurance proposals, with specified modifications. In this proposal, the Union expressly stated that this "willingness" was conditioned "upon reaching an overall settlement that is recommended by the OPEIU Local 35 Bargaining Committee." The parties did not reach an overall settlement on November 15, 2002.

On November 25, 2002, the County made a bargaining proposal that resubmitted the County's initial health insurance proposal, with certain modifications. These modifications did not include all of the modifications requested by the Union in its proposal of November 15, 2002. The County's proposal of November 25, 2002 included the statement: "This is a

package offer and is expressly contingent upon the Union's acceptance of the County's health plan proposal." The Union did not accept the County's health plan proposal on November 25, 2002 and Burnick advised the County that she would file a petition for interest arbitration.

On or about November 27, 2002, Burnick filed a petition for interest arbitration. Attached to this petition was the Union's preliminary final offer, as well as "Tentative Agreements" that had been signed by both parties. These "Tentative Agreements" did not include any agreement to modify Article XX, or the existing health insurance benefit. This preliminary final offer included the following:

> **2.** The tentative agreements reached by the parties and signed are attached. Other tentative agreements that have not as yet been signed are noted.
>
> . . .
>
> **21.** **Health Insurance.** Conditional upon reaching an overall settlement that is recommended by the OPEIU Local 35 Bargaining Committee, the union is willing to consider the County's proposed Health Insurance changes with the following modifications:
>
> - Mental Health – when ongoing mental health treatment is required, the $20 co pay shall not apply for mental health visits by a psychologist, therapist, counselor; Social worker or any other mental health professional. ***County stated that it is covered now and agreed to write language in the plan to that effect.***
>
> - Chemotherapy and radiation treatments shall not be subject to the $20 co pay. ***County stated that it is covered now and agreed to write language in the plan to that effect.***
>
> - The County will make a $250 contribution for single coverage and a $500 contribution for family coverage to each employee's Flexible Spending Account in each year of a three year agreement. The County contributions shall be used by the employee for any un-reimbursed medical or dental expenses.
>
> - Benefits must remain reasonably equal to those in effect on January 1, 2003.

In mid-December, Kuhnmuench asked Burnick if the Union would agree to implement the County's health insurance proposals and arbitrate only the quid pro quo wage increase. Burnick told Kuhnmuench that the Union would not agree to this request and explained that she did not believe that the Union's bargaining unit members would accept the increased co-pays and deductibles if the wage increases were not settled.

On December 20, 2002, Kuhnmuench made a "courtesy" telephone call to Burnick to advise her that the County would be implementing its health insurance proposals on January 1, 2003. During the telephone conversation, Kuhnmuench told Burnick that he believed that the parties were at impasse and that the County could implement their proposals. Burnick denied that the parties were at impasse; told Kuhnmuench that the County could not implement their proposals; and stated that the Union would challenge any implementation.

On December 20, 2002, Kuhnmuench provided Burnick with a letter. In this letter, Kuhnmuench informs Burnick of the health insurance changes that the County intends to implement on January 1, 2003. Kuhnmuench also provides Burnick with a copy of a "payroll stuffer." This payroll stuffer, which was distributed to the Union's bargaining unit members, advises the Union's bargaining unit members of these health insurance changes.

In his letter to Burnick, Kuhnmuench does not confirm that the parties have agreed to these health insurance changes. Rather, Kuhnmuench states "All of these plan designs changes have been discussed with you and your bargaining team on numerous occasions in negotiations."

By letter dated December 20, 2002, Kuhnmuench filed the County's responsive preliminary final offer with the Commission. In this letter, Kuhnmuench expressly states, "We have clarified our final offer position on several outstanding issues." One such clarification was to revise Article XX, Health Insurance, to incorporate the health insurance changes referenced in the December 20, 2002 payroll stuffer and letter to Burnick.

The parties did not resolve their contract dispute prior to January 1, 2003. In response to the Union's petition for interest arbitration, a Commission Investigator met with the parties on January 14 and 29, 2003. On January 29, 2003, the County amended its final offer of December 20, 2002. The amended final offer resubmitted the health insurance proposals that were implemented by the County on January 1, 2003. On that same date, the Union submitted a "Tentative Agreement" on health insurance changes. Had Kuhnmuench signed this "Tentative Agreement" the only difference in the health insurance proposals between the County and the Union would have been the amounts contributed by the County to employee Flexible Benefit accounts. Kuhnmuench, however, did not sign this "Tentative Agreement" because he was not certain that employees would only be required to pay the Generic Drug co-pay in situations where the physician states "Brand Name Only."

According to Kuhnmuench, the Union's most recent offer includes the health insurance changes that were implemented by the County on January 1, 2003. (T. at 175-76) The County relies upon this testimony to argue that the Union has agreed to these health insurance changes. To conclude that this testimony demonstrates that the Union has agreed to the implemented health insurance changes, would not only ignore the realities of package offers, but also would ignore the evidence that the Union consistently conditioned acceptance of the County's health insurance changes upon reaching an overall settlement; the evidence that the parties have not reached an overall settlement; the failure of Kuhnmuench to sign the health insurance "Tentative Agreement" proposed by the Union; and Burnick's testimony that the Union has not agreed to the County's health insurance changes.

By letter dated January 31, 2002, the Investigator notified the parties that he had determined that an impasse existed and requested the parties to submit their final offers so that the matter could proceed to interest arbitration. It may be that the final offers submitted to the interest arbitrator will have "parallel" health insurance proposals and that these "parallel" proposals will contain the health insurance plan design changes implemented by the County on January 1, 2003. However, absent an agreement from the Union that permits the County to implement such a "parallel" proposal, the "parallel" proposal would 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 record does not demonstrate any Union agreement to implement any "parallel" proposals.

In summary, the evidence of the parties' negotiations history does not demonstrate that the Union has agreed to the health insurance plan design changes that were implemented by the County on January 1, 2002. Rather, such evidence demonstrates that the Union has not agreed to such changes.

Although the health insurance provision of the expired agreement, Article XX (d), provides the County with certain rights to select the insurance plan, insurance carriers and administrators, this language also obligates the County to maintain reasonably equal benefits. The health insurance plan design changes implemented by the County on January 1, 2003 permit reimbursement for out of network medical expenses and single plus one coverage. This is an improvement for those employees who use these benefits. The Examiner notes, however, that these plan design changes also impose deductibles and office co-pays where none previously existed; significantly increase the existing brand name prescription drug and emergency room co-pays; and impose a lifetime maximum of $2 million per individual, where no lifetime maximum previously existed.

The health insurance plan design changes implemented by the County on January 1, 2003 do not maintain "reasonably equal benefits." The fact that, in 2003, the County funded a flexible benefits spending account to offset out of pocket costs associated with the health insurance plan design changes does not establish otherwise.

In summary, there is no evidence of the parties' practice or historical application of the relevant contract language. Neither the evidence of bargaining history, nor the contract language of the expired agreement, provides the County with the right to implement the health insurance plan design changes on January 1, 2003.

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 Union's bargaining unit members. Rather, as Kuhnmuench's December 20, 2002 letter to Burnick 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 Union'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 Union 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 Union 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, inasmuch as the Union has not agreed to the implementation of the County's health insurance plan design changes, the policy concerns that were persuasive in GREEN COUNTY are present in this case. GREEN COUNTY and its progeny are applicable to this case. An impasse defense is not available to the County.

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 that the Union engaged in unlawful, dilatory behavior by admitting that the parties were at impasse before the County implemented the health insurance changes and then claiming that no impasse occurred. In making this claim, the County relies upon the fact that Burnick filed a Petition for Interest Arbitration and, subsequently, told Kuhnmuench that the parties were not at impasse, but rather, were in mediation/arbitration and told the Commission's Investigator that the Union objected to any declaration of impasse because the Union had a pending prohibited practice claim.

Burnick testified at hearing that she never alleged any impasse. (T. at 155-56). However, by filing the petition for interest arbitration, Burnick acknowledged that the parties had reached deadlock. The Commission has stated "... we view 'deadlock' as being akin to the term 'impasse' which is a traditional labor relations term of long-standing." CAMPBELLSPORT SCHOOL DISTRICT, DEC. NO. 30585 (WERC, 3/03).

Burnick's conduct in filing the petition for interest arbitration is an admission of impasse. However, it is also a request to the Commission to conduct an investigation regarding the status of negotiations and to determine whether or not interest arbitration should be initiated. Interest arbitration is "initiated" when the Commission, by its Investigator or on its own, determines that there is "impasse." Thus, within the context of the interest arbitration process, "impasse" is a dynamic, rather than static, concept.

In summary, the "impasse" that is declared by the act of filing an interest arbitration petition is an impasse in the bilateral discussions of the parties. It is not the declaration of "impasse" that provides either party with the right to proceed to interest arbitration. By responding to Kuhnmuench's December 20, 2002 statement that the parties were at impasse by claiming that the parties were not at impasse, but rather, were in mediation/ arbitration, Burnick did not engage in unlawful abusive delay in the interest arbitration process. Rather, Burnick recognized the reality of the interest arbitration process.

The Union objected to the Investigator's determination of impasse and requested the Commission review this determination. As Burnick's testimony demonstrates, the Union's objection was that there was a pending prohibited practice claim that, by unilaterally implementing the health insurance changes, the County was not bargaining in good faith. (T. at 139). The Commission ultimately determined that there was no merit to the Union's objection. OZAUKEE COUNTY DEC. NO. 30561-A, 30562-A (WERC, 7/03). Neither espousing an erroneous legal position to the Commission, nor seeking to have the merits of that position decided by the Commission is, in and of itself, unlawful dilatory behavior.

The record provides no reasonable basis to conclude that Burnick's claim to the Investigator that the parties were not at impasse was made in bad faith. Nor does the record provide a reasonable basis to conclude that the Union acted in bad faith when it sought a Commission determination of whether or not the parties were at impasse. Notwithstanding the County's argument to the contrary, the Union has not engaged in "unlawful abusive delay" that permitted the County to unilaterally implement its health insurance plan design changes on January 1, 2003.

The County argues that the Union 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).

Conclusion

The Union 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 Union'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).

The Union has not established a violation of Sec. 111.70(3)(a)5, Stats. Accordingly, the Examiner has dismissed this claim of the Union.

Dated at Madison, Wisconsin, this 26th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CAB/gjc
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