

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MONROE COUNTY HIGHWAY EMPLOYEES,  
LOCAL 2740, AFSCME, AFL-CIO, Complainant,**

vs.

**MONROE COUNTY, Respondent.**

Case 159  
No. 62182  
MP-3911

**Decision No. 30636-A**

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Appearances:

**Mr. Daniel R. Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appeared on behalf of the Complainant.

**Mr. Kenneth Kittleson**, Personnel Director, Monroe County, 14345 County Highway "B", Room 3, Sparta, Wisconsin 54656-4509, appearing on behalf of the Respondent.

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

On March 6, 2003, Monroe County Highway Employees, Local 2470, AFSCME, AFL-CIO filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission in which it alleged that Monroe County had committed prohibited practices in violation of Section 111.70(3)(a)1, 4 and 5, Stats., by unilaterally changing health insurance benefits of employees represented by the Complainant. On June 6, 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 as provided in Section 111.70(4)(a), Stats., and Section 111.07(5), Stats. A hearing on the complaint was held in Sparta, Wisconsin on August 1, 2003. The final post-hearing written argument was received on December 10, 2003. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

No. 30636-A

### FINDINGS OF FACT

1. Monroe County Highway Employees, Local 2470, AFSCME, AFL-CIO, hereafter Complainant or Union, is the exclusive collective bargaining representative for certain Monroe County highway employees. The Union's principal offices are located at 18990 Ibsen Road, Sparta, Wisconsin 54656-3755. At all times material hereto, Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, has represented the Union for purposes of collective bargaining.

2. Monroe County, hereafter County or Respondent, is a municipal employer with principal offices located at 14345 County Highway "B", Sparta, Wisconsin 54656-4509. At all times material hereto, Mr. Ken Kittleson, Monroe County Personnel Director, has represented the County for purposes of collective bargaining.

3. The Union and the County are parties to a collective bargaining agreement that, by its terms, is effective from January 1, 2001 through December 31, 2002. At all times material hereto, the parties' collective bargaining agreements have provided that the County pays 87% of the monthly health insurance premium and the bargaining unit member pays 13% of the monthly health insurance premium. In 2002, two HMO's provided health insurance coverage to County employees, *i.e.*, Gundersen Lutheran and Health Tradition. In 2002, the Health Tradition monthly premiums were \$915.08 for a family plan and \$378.61 for a single plan. In 2002, the Gunderson Lutheran monthly premiums were \$814.45 for a family plan and \$346.43 for a single plan. At the time of the expiration of the parties' 2001-2002 collective bargaining agreement, the health insurance benefits of County employees, including those employees represented by the Union, included a drug card co-pay of \$5.00 generic/\$10.00 brand name; an office visit charge of \$10.00; and an emergency room co-pay of \$25.00.

4. Prior to the end of calendar year 2002, Gundersen Lutheran and Health Tradition each advised the County that it would not be offering a \$5.00 generic/\$10.00 brand name drug card and County representatives discussed this information, as well as other health insurance information, with the bargaining representatives of its various collective bargaining units, including the Union. Prior to the expiration of the Union's 2001-2002 collective bargaining agreement, the County decided to continue its health insurance contract with Gundersen Lutheran and to not continue its health insurance contract with Health Tradition because Blue Cross had quoted a less expensive rate. In December of 2002, Blue Cross rejected the County's application for health insurance. Thereafter, the County renewed its contract with Health Tradition. Prior to the expiration of the parties' 2001-2002 collective bargaining agreement, three of the County's collective bargaining units agreed that, effective January 1, 2003, their bargaining unit members enrolled in the Gundersen Lutheran health insurance plan would have a drug card co-pay of \$10.00/\$15.00/\$30.00 and their bargaining unit members enrolled in the Health Tradition health insurance plan would have a drug card

co-pay of \$10.00/\$20.00/\$30.00. These three bargaining units also agreed that, effective January 1, 2003, their bargaining unit members would have an office visit charge of \$30.00 and an emergency room co-pay of \$50.00. The members of these three bargaining units, together with the nonrepresented County employees, comprise a majority of County employees.

5. In 2003, the County provided its employees, including those employees represented by the Union, with a choice of two HMO plans, *i.e.*, Gundersen Lutheran and Health Tradition. On January 1, 2003, the County changed the drug card co-pay, the office visit charge and the emergency room co-pay of all County employees, including those represented by the Union, with the effect that employees enrolled in the Gundersen Lutheran health insurance plan had a drug card co-pay of \$10.00/\$15.00/\$30.00; that employees enrolled in the Health Tradition health insurance plan had a drug card co-pay of \$10.00/\$20.00/\$30.00; that employees enrolled in either the Gundersen Lutheran health insurance plan or the Health Tradition insurance plan had an office visit charge of \$30.00; and that employees enrolled in either the Gundersen Lutheran health insurance plan or the Health Tradition insurance plan had an emergency room co-pay of \$50.00. On January 1, 2003, the Union had not agreed to these changes to the drug card co-pay, the office visit charge and the emergency room co-pay of its bargaining unit members. On the date of this hearing, *i.e.*, August 1, 2003, the parties had exchanged final offers in the Interest Arbitration process and had requested that the Investigator close the Interest Arbitration Investigation. Each of these final offers contained the drug card co-pay, office visit charge and emergency room co-pay implemented by the County on January 1, 2003, retroactive to January 1, 2003. Following the date of this hearing, the Union and the County agreed upon a collective bargaining agreement that included the drug card co-pay, office visit charge and emergency room co-pay implemented by the County on January 1, 2003, retroactive to January 1, 2003. After January 1, 2003, the County reached a voluntary agreement with two other collective bargaining units. Each of these voluntary agreements included the drug card co-pay, office visit charge and emergency room co-pay implemented by the County on January 1, 2003, retroactive to January 1, 2003.

6. After January 1, 2003, Gundersen Lutheran and Health Tradition advised the County that it was possible for each plan to provide County employees with a \$5.00 generic/\$10.00 brand name drug card. In 2003, the Health Tradition monthly premium for a family plan is \$1098.10 and for a single plan is \$454.33. In 2003, the Gundersen Lutheran monthly premium for a single plan is \$366.00 and for a family plan is \$860.00. Had the County maintained the drug card co-pay, the office visit charge and the emergency room co-pay in effect on December 31, 2002, the 2003 monthly premiums for the Gundersen Lutheran health insurance plan and Health Tradition health insurance plan would have been more expensive. Health insurance premium costs have increased significantly from 1980, when the family premium was \$104.87.

7. At the time of the expiration of the parties' 2001-2002 collective bargaining agreement, the *status quo* on the Union's collective bargaining unit members' health insurance drug card co-pay was \$5.00 generic/\$10.00 brand name. At the time of the expiration of the parties' 2001-2002 collective bargaining agreement, the *status quo* on the Union's collective bargaining unit members' health insurance office visit charge was \$10.00. At the time of the expiration of the parties' 2001-2002 collective bargaining agreement, the *status quo* on the Union's collective bargaining unit members' health insurance emergency room co-pay was \$25.00. On January 1, 2003, during the contract hiatus period and without a valid defense, the County unilaterally changed the *status quo* on the drug card co-pay, office visit charge and emergency room co-pay of the Union's bargaining unit members' health insurance.

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

### CONCLUSIONS OF LAW

1. Respondent Monroe County is a municipal employer within the meaning of Section 111.70(1)(j), Stats.
2. Complainant Monroe County Highway Employees Local 2470, AFSCME, AFL-CIO, is a labor organization within the meaning of Section 111.70(1)(h), Stats.
3. On January 1, 2003, Complainant's and Respondent's unresolved dispute over the terms and conditions of the collective bargaining agreement to succeed that which had expired on December 31, 2002 was subject to the interest-arbitration process provided for in Section 111.70(4)(cm)6, Stats.
4. The drug card co-pay, the office visit charge and the emergency room co-pay of the health insurance of Complainant's collective bargaining unit members primarily relate to the wages, hours and working conditions of these bargaining unit members and, thus, are mandatory subjects of bargaining.
5. By implementing changes to the drug card co-pay, the office visit charge and the emergency room co-pay of the health insurance of Complainant's bargaining unit members on January 1, 2003, Respondent unilaterally changed the *status quo* on mandatory subjects of bargaining during a contract hiatus period, without a valid defense, and, therefore, has refused to bargain in good faith with Complainant in violation of Section 111.70(3)(a)4, Stats., and, has committed a derivative act of interference in violation of Section 111.70(3)(a)1, Stats.

6. By implementing changes to the drug card co-pay, the office visit charge and the emergency room co-pay of the health insurance of Complainant's bargaining unit members on January 1, 2003, Respondent has not violated a collective bargaining agreement in violation of Section 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 Monroe County violated Section 111.70(3)(a)5, Stats., is dismissed in its entirety.

2. IT IS ORDERED that Respondent Monroe 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, changes to health insurance benefits that are mandatory subjects of bargaining.
- b. Reimburse the Complainant for the \$40.00 filing fee that Complainant paid to process this complaint, together with the applicable statutory interest of twelve percent (12%) *per annum*, set forth in Section 814.04(4), Stats., effective from the March 6, 2003 date on which this complaint was filed.
- c. Notify all employees represented by Complainant, 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 the Respondent's Personnel Director and shall be posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced, or covered by other material.

- d. 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 21st day of January, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

**APPENDIX "A"**

**NOTICE TO MONROE COUNTY HIGHWAY EMPLOYEES,  
LOCAL 2470, AFSCME, 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 reimburse the bargaining unit members of Monroe County Highway Employees, Local 2740, AFSCME, AFL-CIO, its \$40.00 filing fee, together with the applicable statutory interest of twelve percent (12%) *per annum* as set forth in Section 814.04(4), Stats.
2. WE WILL NOT refuse to bargain in good faith and interfere with the exercise of employee rights guaranteed in Section 111.70(2), Stats., by failing to maintain, during the contract hiatus period, the *status quo* with respect to health insurance benefits that are mandatory subjects of bargaining.

MONROE COUNTY

By \_\_\_\_\_  
County Personnel Director

THIS NOTICE WILL BE POSTED IN LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY MONROE COUNTY HIGHWAY EMPLOYEES, LOCAL 2470, AFSCME, AFL-CIO, FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

**MONROE COUNTY**

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

On March 6, 2003, the Union filed a complaint of prohibited practices alleging that the County had violated Sections 111.70(3)(a)1, 4 and 5, Stats., by unilaterally changing the drug card co-pay, office visit charge and emergency room co-pay of its bargaining unit members. At hearing before the Examiner on August 1, 2003, the County responded to this Complaint and acknowledged that it had unilaterally changed the drug card co-pay, office visit charge and emergency room co-pay of the Union's bargaining unit members.

**POSITIONS OF THE PARTIES**

**Union**

The County's only justification for its action was that the majority of other bargaining units in Monroe County had agreed to the change in the co-pay and, therefore, the County unilaterally changed the co-pay for this bargaining unit to save money on health insurance premiums. Prior Commission decisions establish that economic savings do not justify a unilateral change in wages, hours and conditions of employment.

Inasmuch as the County has clearly committed a prohibited practice, the only issue that remains is the appropriate remedy. Because of the County's apparent disregard for the provisions of the law, the Union believes that the County should be penalized to the full extent of the Commission's authority. Therefore, the Union requests the following:

1. That the previous drug co-pay of \$5.00/\$10.00; the previous office visit co-pay of \$10.00 and the previous emergency room co-pay of \$25.00 be reinstated until such time as the parties have reached a voluntary agreement or received an interest-arbitration award.
2. That employees be reimbursed for any payment made for drugs, office visits, and emergency room visits above the amount set forth in 1. above.
3. That the employees be given interest on any reimbursements.
4. That employees not be required to reimburse the County for any premium savings the employees may have incurred because of lower health insurance premium costs. (The employees pay 13% of the premium).



5. That the County reimburse the Union the \$40.00 filing fee.
6. That the County be required to post, in conspicuous places, the actions ordered by the Commission.
7. Any other action that the Commission believes to be in order.

### County

In 2002, the County was bargaining successor 2003-2004 contracts with seven bargaining units. During these bargains, the County indicated that the two HMO's that were providing health insurance coverage to County employees would not offer the existing drug card co-pay, i.e., \$5.00 generic/ \$10.00 brand name, but rather, these two HMO's would be offering a three tier drug card co-pay. Therefore, from the first bargaining session, the *status quo* was unavailable and the Employer explained to all bargaining units that changes were needed in the plan structure of both HMO's.

The Employer offered two percent (2%) wage splits for 2003 and 2004, with the higher wage increases funded by the change in the health insurance plan. Three AFSCME units agreed to this combination by the end of October 2002.

Monroe County acknowledges that it unilaterally changed the Union's health insurance plan design effective January 1, 2003. The County had a clear internal settlement pattern (including a majority of the AFSCME units) and had to make difficult decisions prior to the Dual-Choice enrollment period required in November of each year.

After Blue Cross pulled their bid, the only option was the Health Tradition plan. Health Tradition included the provision that it could pull their quote if it did not receive a 25% participation rate of all eligible employees. Since the normal breakdown of participation is 70% Gundersen Lutheran and 30% Health Tradition, this provision meant that that the County had to act as a County-wide group and could not split out small groups for separate treatment. If Health Tradition had failed to reach the 25% threshold and pulled their quote, the County would have had to move all employees into Gundersen HMO, which would have been in clear violation of the bargaining agreement requirements that the County offer the choice of two HMO's.

The Union's final offer included the health insurance changes that were implemented by the County and the parties' voluntarily settled their successor agreement with the health insurance benefit changes implemented on January 1, 2003, retroactive to January 1, 2003. In this case, the County's unilateral implementation does not have an impact on either party.

If the County were required to return to the *status quo* until either the parties' voluntarily agreed to a successor agreement, or an Interest Arbitration Award is issued, then the employees would have to provide the County with copies of explanations of benefits and receipts from highway employees to substantiate that they paid co-payments in excess of the *status quo* and then the County would need to recoup any reimbursed overpayments when the retroactivity provisions are put into place. Additionally, the County would have to bill employees for the higher premium contribution that would be due if the County were required to provide the same level of benefits that existed in 2002.

In conclusion, the County contends that when it comes to spiraling health insurance costs, drastic times call for drastic measures. The County can ill afford to jeopardize the County-wide health insurance contract because one bargaining unit out of seven decides to dig in its heels and not accept the reality of the situation. Any attempt to punish the employer for dealing realistically with spiraling health insurance costs will ultimately be a reflection upon the Union and the Wisconsin Employment Relations Commission. The County requests the Commission to dismiss the complaint, or hold this complaint in abeyance pending the arbitration resolution in this case.

### DISCUSSION

The Union alleges that the County violated Sec. 111.70(3)(a)1, 3 and 5, Stats., by unilaterally implementing the following health insurance changes:

1. Increase the drug card co-pay from \$5 generic/ \$10 brand name to \$10/\$15/\$30 for the Gunderson Lutheran plan and \$10/\$20/\$30 for the Health Tradition plan
2. Increase the office visit charge from \$10 to \$30
3. Increase the emergency room co-pay from \$25 to \$50

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

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

...

Section 111.70(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. . . .

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).

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.”

The County acknowledges that, on January 1, 2003, it unilaterally changed the drug card co-pay, the office visit charge, and the emergency room co-pay of the Union’s collective bargaining unit members. 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 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 period. By changing the drug card co-pay, the office visit charge and the emergency room co-pay of the Union’s bargaining unit members on January 1, 2003, the County has not violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., as alleged 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). Employee health insurance benefits 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 bargaining history or practice and the County does not argue that the language of the expired agreement provides the County with the right to make the health insurance benefit changes. Rather, the County acknowledges that it unilaterally changed the drug card co-pay, office visit charge, and emergency room co-pay of the Union's bargaining unit members on January 1, 2003. Inasmuch as the drug card co-pay,

office visit charge, and emergency room co-pay are health insurance benefits that are mandatory subjects of bargaining, the County's unilateral implementation of a change to these health insurance benefits violates Sec. 111.70(3)(a)4, Stats., and, derivatively violates Sec. 111.70(3)(a)1, Stats., unless the County has asserted a valid defense.

In arguing that it should be permitted to unilaterally change the Union's bargaining unit members' health insurance benefits, the County asserts that the *status quo* was not available. 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 period. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).

In 2002, two HMO's provided health insurance benefits to County employees, *i.e.*, Gundersen Lutheran and Health Tradition. When these HMO's bid for 2003, they advised County Personnel Director Kittleson that they were discontinuing the two tier drug card. It is not evident, and the County does not argue, that either HMO was unwilling, or unable, to continue the existing office visit charge or the emergency room co-pay. Thus, the record does not establish that the change in the office visit charge and emergency room co-pay was necessary because the *status quo* was not available.

County Personnel Director Kittleson acknowledges that, following January 1, 2003, each of the HMO's indicated that they would be willing to write an exception that would allow County employees to keep the two tier drug card, albeit at higher premiums. Given this acknowledgment, as well as the County's ability to self-fund the difference between the *status quo* two tier drug card and the three tier drug cards that the County believed were the only options available, the record does not establish that the change in the drug card co-pay was necessary because the *status quo* was not available.

As the County argues, and County Exhibit #1 demonstrates, health insurance premium costs have increased significantly from 1980, when the family premium was \$104.87. As the County further argues, it is reasonable for the County to want to contain health insurance costs. Economic savings, however, 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).

To be sure, as the County argues, Blue Cross' ultimate rejection of the County's application for 2003 health insurance coverage placed the County in a difficult situation. The County, however, was able to return to Gundersen Lutheran. While it may be that this late return to Gundersen Lutheran caused confusion, it is not evident that this late return prevented the County from continuing the *status quo* on the Union's bargaining unit members' drug card co-pay, office visit charge and emergency room co-pay during the contract hiatus period by either self-funding, or paying higher insurance premiums.

The County asserts that the Health Tradition quote included a provision that it could pull its quote if it did not receive a 25% participation rate and that, based upon historical experience, 30% of employee's choose Health Tradition and 70% choose Gundersen. Relying upon these assertions, the County argues that it could not split out different groups for separate treatment without jeopardizing the County's ability to offer Health Tradition as an insurance option. The record, however, is devoid of any evidence with respect to the reasons that County employees chose one HMO over another. The County's argument that it could not maintain the *status quo* without jeopardizing its ability to provide the two HMO's required by its collective bargaining agreements is speculative.

At the time that the County implemented the changes that are the subject of this dispute, three other bargaining units had agreed to these changes. As the County argues, the employees in these three units, together with the nonrepresented employees, comprise a majority of County employees. However, neither the existence of an internal settlement pattern on health insurance benefit changes, nor the fact that the County had the right to implement these health insurance changes for a majority of its employees, provides the County with the right to unilaterally impose these health insurance benefit changes upon the Union's bargaining unit members.

At the time of hearing, the parties were in the process of requesting the WERC Investigator to close the Interest Arbitration Investigation. Each of the final offers provided to the Investigator included the change in the drug card co-pay, the office visit charge, and the emergency room co-pay that was implemented by the County on January 1, 2003, retroactive to January 1, 2003. The County argues that, inasmuch as each party's final offer contains the changes that were unilaterally implemented by the County on January 1, 2003, neither party has been harmed by the County's unilateral implementation. The Commission, however, has consistently maintained that, absent an agreement from the parties that expressly permits the implementation of a "parallel" provision of a final offer, the "parallel" provision does not become effective until the issuance of the Interest Arbitrator's Award. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93); AFF'D DEC. NO. 27215-D (WERC, 7/93), AFF'D (CTAPP III) 186 WIS.2D 671(1994); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-B (WERC, 5/89); SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87), AFF'D (CTAPP IV) 148 WIS.2D 392 (1988). The "harm" of an unlawful unilateral implementation of a "parallel" provision in a final offer is that it disregards the role and the status of the majority representative and undercuts the collective bargaining process, including the interest arbitration process.

The County argues that the Union acted unreasonably by digging in its heels on the issue of health insurance. In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29659-B(WERC, 4/00), this Commission recognized that there may be instances in which a union's unlawful abusive delay provides an employer with the right to unilaterally implement a change to a

mandatory subject of bargaining where, as here, the parties' contract dispute is ultimately subject to decision through the interest arbitration process. However, the record before this Examiner does not establish that this Union has engaged in such unlawful abusive delay.

In summary, the County has not demonstrated that it was not possible for the County to continue the *status quo* on the drug card co-pay, office visit charge and emergency room co-pay of the Union's bargaining unit members during the contract hiatus period. Nor has the County established that it has any other valid defense to the Union's unilateral change claim.

### **Conclusion**

The Union has established, by a clear and satisfactory preponderance of the evidence, that by implementing its health insurance 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 GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission stated that:

The conventional remedy for a unilateral change refusal to bargain includes an order to restore the status quo existing prior to the change and to make whole affected employees for losses they experienced by reason of the unlawful conduct. 26/ The purposes of reinstatement of the status quo ante is to restore the parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view, the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from the wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations in the future. (cites omitted)

Following the close of hearing, the County requested the Examiner to dismiss this Complaint on the basis that the parties have agreed upon a successor 2003 agreement that includes the health care changes that were implemented by the County on January 1, 2003, retroactive to January 1, 2003. Although the Union objected to this request, it did not contest the County's assertion that the parties have agreed upon a successor 2003 agreement that includes the health care changes that were implemented by the County on January 1, 2003, retroactive to January 1, 2003.

Given the evidence that the parties have voluntarily agreed to the health insurance plan changes, retroactive to January 1, 2003, it would not be appropriate to order the County to

restore the *status quo* that existed prior to January 1, 2003, nor would it be appropriate for the Examiner to order the County to reimburse the employees for the increased drug card co-pays, office visit charges and emergency room co-pays that were paid by the employees during the contract hiatus period. The reason being that such orders would have the effect of negating the parties' voluntary settlement.

Assuming *arguendo*, that the parties had not agreed upon their successor agreement, it would be appropriate to agree to the Union's request that the County return to the *status quo* on co-pays and charges that existed on December 31, 2002. However, contrary to the argument of the Union, the return to the *status quo ante* would permit the County to offset increased costs associated with the unilateral increase in the two co-pays and the office visit charge by the premium savings that resulted from these changes.

An appropriate remedy for the County's unlawful conduct is to order the County to cease and desist from unilaterally implementing, during a contract hiatus period and without a valid defense, changes to the health insurance benefits of the Union's bargaining unit members that are mandatory subjects of bargaining and to order the County to post the appropriate notice. To prevent the party that committed the unlawful change from benefiting from the wrongful conduct, to compensate those affected adversely by this unlawful change, and to prevent or discourage such violations in the future, it is also appropriate to order the County to reimburse the Union for the \$40 filing fee that the Union would not have been required to pay, but for the County's unlawful conduct, with interest at the statutory rate of 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). It is also appropriate to order that this interest be calculated from March 6, 2003, the date on which this complaint was filed.

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 21st day of January, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

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