STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF STEVENS POINT, Respondent.

Case 131
No. 63164
MP-4006

Decision No. 30911-A

Appearances:

Jack B. Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of the Complainant.

Louis J. Molepske, City Attorney, City of Stevens Point, 1515 Strongs Avenue, Stevens Point, Wisconsin 54481-3594, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Complainant, on January 2, 2004, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Stevens Point, hereinafter the Respondent, had committed prohibited practices by refusing to bargain with the representative of the majority of its employees, in that it unilaterally changed the wages, hours and conditions of its employees represented by Complainant. On June 21, 2004, the Respondent filed its Answer wherein it denied it had committed prohibited practices and raised an affirmative defense. The Complainant subsequently filed amended complaints on September 8, 2004 and September 13, 2004.

The Commission appointed a member of its staff, David E. Shaw, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on September 14, 2004 in Stevens Point,

Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by December 22, 2004.

Based upon consideration of the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Complainant or Union, is a labor organization with its offices located at 8033 Excelsior Drive, Madison, Wisconsin. At all times material herein, Complainant, through its affiliate local unions, has been the recognized exclusive collective bargaining representative for the Respondent's employees in the following bargaining units:

> all regular full-time and regular part-time employees of the Department of Public Works and Department of Parks, Recreation and Forestry, except the Director of Public Works, Street Supervisor, Director of Parks, Recreation and Forestry, Assistant Street Supervisor, Park Supervisor, Recreation Facilities Supervisor, clerical and administrative aides, summer, seasonal and temporary employees.
>
> *(Local 309 – Department of Public Works Unit)*
>
> . . .
>
> all regular full-time and regular part-time bus operators employed by the City of Stevens Point Transit System, excluding supervisory, managerial, executive and confidential and all other employees. . .
>
> *(Local 309 – City Transit Unit)*
>
> . . .
>
> all regular full-time and regular part-time employees of the City engaged in clerical and related occupations. . .Specifically excluded from the bargaining unit are systems specialist, elected officials, supervisors, managerial employees, confidential employees, police officers, part-time employees (working less than twenty (20) hours per week), temporary employees (hired for less than ninety (90) calendar days) and employees covered by other collective bargaining agreements.
>
> *(Local 348 – Clerical Unit)*
>
> . . .

2. The City of Stevens Point, hereinafter the Respondent or City, is a municipal employer with its principal offices at 1515 Strongs Avenue, Stevens Point, Wisconsin. Lisa Jakusz has held the position of Personnel Director for Respondent for approximately 6½ years, and was employed by the Respondent for approximately 13 years prior to becoming the Personnel Director. At all times material herein, Louis J. Molepske has held the position of City Attorney for the Respondent and has represented the Respondent in collective bargaining with the Complainant and its affiliates, Locals 309 and 348.

3. Respondent and Complainant's affiliates were party to a series of collective bargaining agreements covering Respondent's employees in the Department of Public Works unit, Transit unit, and the Clerical unit, the last of which agreements expired on December 31, 2002. Said agreements are silent on the matters of Workers Compensation or a Workers Compensation supplement.

The 2001-2002 agreement covering the Clerical unit and the Transit unit contained the following provision:

Article 25 – Entire Memorandum of Agreement 1/

A. This agreement constitutes the entire Agreement between the Employer and the Union. Amendments or addendums to this agreement shall not be binding unless such changes are in writing, executed by the Employer and the Union, and attached to this agreement as a permanent part of it.

. . .

The 2001-2002 agreement covering the Department of Public Works unit contained the following provision:

SECTION 26 – ENTIRE MEMORANDUM OF AGREEMENT

A. This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The City recognizes the right of the Union to discuss and/or negotiate changes in working conditions affecting the bargaining unit.

. . .

1 Article 28 in the Clerical Unit's agreement.

4. For at least 20 years prior to 2003, the Respondent provided employees who qualified for Worker's Compensation with their regular salary from the time they were injured on the job through the period in which they qualified to receive Worker's Compensation, by supplementing the Worker's Compensation payment to make up the difference. All three of the collective bargaining agreements covering the employees in the Department of Public Works, Clerical and Transit units are, and have been, silent on the issue of Worker's Compensation or the supplement to Worker's Compensation. Prior to January 1, 2003, the practice of Respondent's providing the supplement to Worker's Compensation, so that employees in these bargaining units continued to receive their regular pay during the period they qualified for Worker's Compensation, was long-standing, unambiguous and mutually-accepted, and had continued in force and effect from contract to contract over the years.

The Worker's Compensation benefit had been identified in the Respondent's Administrative Policies as follows:

6. Worker's Compensation

A. While on the job, employees are covered by the Worker's Compensation Law which provides protection for medical expense and loss of salary for illness and/or injury connected with work.

B. For maximum effectiveness of the Worker's Compensation program, the employee has a responsibility to report all accidents and incidents to his/her supervisor promptly. The supervisor has the responsibility to arrange for medical attention and to file an injury report with the Personnel Office. The employee has the right to consult a qualified doctor and/or hospital of his/her choice.

C. All Worker's Compensation payments should be sent in care of the Personnel Office so the Accounting/Data Processing Manager can be informed of the amount of the payment. The employee will then be issued a City check for the difference between his/her normal gross wage and the Worker's Compensation payment.

5. The Respondent's Administrative Policies address a number of matters, such as income continuation insurance, continuation of health insurance coverage for employees called up to active military service, that are mandatory subjects of bargaining. Respondent's City Council has reserved the right to revise, and has revised, the Administrative Policies from time to time with regard to such mandatory subjects of bargaining, where those subjects are not covered in a union contract, and has done so without input from Complainant or its local affiliates and without notifying the Complainant or its local affiliates. Such revisions in the

policies are sent to Respondent's department heads and each department has a copy of the Administrative Policies, which employees may review, if they choose, but they are not required to do so. To the extent the Complainant and its local affiliates have been aware of such revisions in the policies affecting mandatory subjects of bargaining in the past, they have not objected to the changes or demanded to bargain in that regard.

6. By the following letter, dated December 30, 2002, Respondent's City Attorney, Louis Molepske, notified Complainant's Staff Representative, Gerald Ugland, that it was discontinuing the practice of providing the Worker's Compensation supplement:

> December 30, 2002
>
> Jerry Ugland
> Staff Representative, AFSCME
> PO Box 35
> Plover WI 54467
>
> Dear Mr. Ugland:
>
> As you may be aware, the City has a long-standing practice of making up the difference between an employee's regular pay and the benefit they receive from the City's worker's compensation carrier when they are off work due to a work related injury.
>
> By way of this letter, I am informing you that the City intends to cease this practice at the end of the contract term (12/31/2002) for the three City bargaining units you represent (Streets & Parks, Clerical and Related and Transit).
>
> Sincerely,
>
> Louis J. Molepske /s/
> Louis J. Molepske
> City Attorney

Effective January 1, 2003, the Respondent ended its practice of providing the Worker's Compensation supplement to employees in the three bargaining units represented by Complainant. Employees in those bargaining units who had been receiving the supplement prior to that date, continued to receive the supplement after January 1, 2003 until they no longer qualified for Worker's Compensation. Employees in those bargaining units who were injured on the job and became eligible for Worker's Compensation after January 1, 2003, were

notified they would not receive the supplement and the Respondent did not supplement their Worker's Compensation benefit so that they would continue to receive their regular pay during the period they qualified for Worker's Compensation. The employees were allowed to use accrued paid leave to make up the difference between Worker's Compensation and their regular pay, if they wished, or if applicable, to use Income Continuation Insurance. The Respondent also has not paid those employees injured on the job after January 1, 2003 their regular pay for the days they are off work during the three-day waiting period for Worker's Compensation, as it had prior to that date. Scott Plaski, an employee in the Department of Public Works unit, was injured on the job on January 8, 2003. His was the first injury to occur in any of the three bargaining units in 2003 and the Respondent did not supplement Plaski's Worker's Compensation payments, or those of any other employees in these bargaining units injured on the job after January 1, 2003.

Employee Joe Pliska was injured on the job on May 20, 2003 and was thereafter sent the following letter of May 22, 2003 by Respondent's Personnel Director, Lisa Jakusz, which letter reads, in relevant part, as follows:

> Dear Joe:
>
> I have been advised by your department that you sustained an injury at work on May 20, 2003 that will require you to miss work.
>
> I wanted to inform you that notification was given to your Union Representative, Gerald Ugland, and Union President, Steve Louis that effective January 1, 2003, the City would no longer make up the difference between your workers compensation benefit and regular earnings. This includes the three-day waiting period under workers compensation in the state of Wisconsin. If you wish you can supplement workers compensation benefits you receive with accrued sick leave or vacation. In order to do this, submit your time off requests through your department.
>
> Sincerely,
>
> Lisa Jakusz /s/
> Lisa Jakusz
> Personnel Specialist

7. The Respondent and Complainant's local affiliates commenced negotiations in the Fall of 2002 for successor agreements to their 2001-2002 agreements, and those negotiations continued at the time of hearing in this matter. The Respondent has made no proposals regarding Worker's Compensation during those negotiations beyond notifying Complainant's representative that it was ending the practice of supplementing Worker's Compensation. On January 21, 2003, Complainant's affiliate Local 309, representing the Department of Public Works unit, included the following in proposals for that unit:

RESPONSE TO EMPLOYER'S REPUDATION OF WORKER'S COMPENSATION SUPPLEMENT

SECTION 17 – INSURANCE

. . .

E. Worker's Compensation. When an employee misses work due to injury or illness from activities of employment with the City, the employee shall receive the employee's regular rate of pay, decreased by any Worker's Compensation to which the employee may be entitled.

Local 348, representing the Clerical unit, included the same proposal in its proposals to Respondent of the same date. Local 309, representing the Transit unit, included the same proposal in its proposals to Respondent February 28, 2003.

The Complainant and its affiliated local unions have not reached agreement with the Respondent with regard to the issue of the Worker's Compensation supplement, and the matter continues to be an issue in their negotiations for successor agreements to the parties' 2001-2002 agreements.

8. The Respondent's decision to discontinue the practice of supplementing the Worker's Compensation benefit so that an employee would continue to receive his/her regular pay from the time the employee is injured on the job through the period the employee is eligible for Worker's Compensation, and the impact of that decision, is primarily related to wages, hours and conditions of employment.

9. By unilaterally ending the practice of providing the Worker's Compensation supplement so that an employee would continue to receive his/her regular pay from the time an employee is injured on the job through the period the employee is eligible for Worker's Compensation, in the bargaining units in question, following the expiration of the 2001-2002 collective bargaining agreements covering the employees in those units, the Respondent has failed to maintain the *status quo* with regard to that benefit.

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

CONCLUSIONS OF LAW

1. The issue of the Respondent making up the difference between an employee's regular pay and the Worker's Compensation benefit an employee receives when injured on the job, is a mandatory subject of bargaining.

2. The failure of the Complainant or its local affiliates to object or demand to bargain in the past with regard to revisions in the Respondent's Administrative Policies which affected mandatory subjects of bargaining, does not constitute a waiver of their right to bargain with regard to a subsequent change in those Policies affecting Respondent's providing the Worker's Compensation supplement.

3. Section 26, A, in the 2001-2002 Agreement covering the employees in the Department of Public Works unit, Article 25, A, in the 2001-2002 Agreement covering the employees in the Transit unit, and Article 28, A, of the 2001-2002 Agreement covering the employees in the Clerical unit, did not entitle the Respondent, during the term of those Agreements, to discontinue the practice of supplementing the Worker's Compensation benefit.

4. The Respondent's desire to save money with regard to employees injured on the job does not constitute a business necessity.

5. The Respondent City of Stevens Point is required to maintain the practice that existed prior to January 1, 2003 with regard to Respondent's making up the difference between an employee's regular pay and the Worker's Compensation benefit the employee receives when injured on the job. Therefore, by unilaterally ending the practice during the contract hiatus with respect to those employees represented by Complainant, the Respondent City of Stevens Point, its officers and agents, has refused to bargain collectively with Complainant AFSCME Council 40, and its local affiliates, in violation of Secs. 111.70(3)(a)4, and derivatively, (3)(a)1, of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the Respondent City of Stevens Point shall:

A. Cease and desist from unilaterally implementing, during the contract hiatus, changes to the Worker's Compensation supplement benefit as it existed upon expiration of the parties' 2001-2002 collective bargaining agreements in the bargaining units represented by the Complainant Wisconsin Council 40, AFSCME, AFL-CIO.

B. Take the following affirmative action which the Examiner concludes will effectuate the policies and purposes of the Municipal Employment Relations Act:

1. Immediately restore the *status quo ante* during the contract hiatus with regard to the Worker's Compensation supplement benefit by making all affected employees in the bargaining units represented

by the Complainant whole, by paying them the difference between their regular wages and the amount of the Worker's Compensation benefit they received from the time they were injured on the job through the period they were (are) eligible to receive Worker's Compensation, to the extent those employees have not received that difference through the use of other benefits, plus interest at the rate of twelve per cent (12%) per year, as set forth in Sec. 814.04(4), Stats., from the time they were entitled to such a supplement under the *status quo ante* until the monies are received. To the extent those employees used accrued paid leave time to make up the difference, such leave time is to be restored to those employees.

2. Notify all employees represented by Complainant, by posting in conspicuous places in Respondent's 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 City Attorney or other City official with responsibility for labor relations 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.

3. 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 16th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

APPENDIX "A"

**NOTICE TO CITY OF STEVENS POINT
EMPLOYEES REPRESENTED BY WISCONSIN
COUNCIL 40, AFSCME, AFL-CIO**

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

1. WE WILL NOT refuse to bargain in good faith and interfere with the exercise of employee rights under Sec. 111.70(2), Stats., by failing to maintain, during the contract hiatus period, the status quo with respect to the Worker's Compensation supplement benefit.

2. WE WILL make all affected employees whole by paying them the difference between their regular wages and the amount of the Worker's Compensation benefit they received from the time they were injured on the job through the period they were eligible for Worker's Compensation, to the extent those employees did not receive that difference through the use of other benefits, plus interest at the rate of twelve per cent (12%) per year from the time they were entitled to such a supplement until the monies are received.

CITY OF STEVENS POINT

By _____
City Representative

Date _____

CITY OF STEVENS POINT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that Respondent violated Sec. 111.70(3)(a)4, and derivatively, (3)(a)1, Stats., by refusing to bargain collectively with Complainant by unilaterally implementing changes in the wages, hours and working conditions of employees the Complainant represents, in that Respondent failed to continue the practice of providing the supplement to the Worker's Compensation benefit during the contract hiatus after the parties' collective bargaining agreements covering those employees had expired.

The Respondent filed an answer wherein it denied it had committed a prohibited practice and alleged as an affirmative defense that the collective bargaining agreements covering those employees do not provide for any Worker's Compensation benefit.

Complainant

While conceding that all three collective bargaining agreements covering the bargaining units in issue are, and always have been, silent on the issue of Worker's Compensation or the supplement thereto, Complainant asserts that it is undisputed that there has been a long-standing, unambiguous, and mutually-accepted practice of providing the supplement to employees represented by Complainant. The practice predated the Respondent's Administrative Policies Manual, which was first created in the late 1980's. The practice was then codified in that manual under Section 6, Worker's Compensation.

It is undisputed that the City unilaterally eliminated the benefit, indicating that it was going to do so in the December 30, 2002 letter to Union Representative Jerry Ugland. This occurred while the parties were in negotiations for successor agreements to their 2001-2002 agreements. The first employee to suffer a compensable injury in 2003 was Scott Plaski, an employee in the Public Works Unit, on January 8th. Other employees have subsequently suffered a compensable injury and Respondent has likewise failed to provide them with the Worker's Compensation supplemental benefit. The City also amended its Administrative Policies Manual in August of 2003 to reflect the change. By unilaterally eliminating the benefit, the City altered the *status quo*.

Respondent erroneously argues that since the agreements between the parties are silent on the subject of Worker's Compensation, and since the benefit was identified in its Administrative Policies Manual, it had the unilateral right to change or eliminate the benefit at its whim. The Commission has long held that parties may not unilaterally change the *status quo* at the expiration of a collective bargaining agreement. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). In BROOKFIELD, the Commission stated ". . .That where, as here, there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or

necessity, constitutes a *per se* refusal to bargain. . ." In GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84), the Commission determined that where arbitration is available to resolve a negotiations dispute, the law does not permit unilateral changes in mandatory subjects of bargaining, absent a showing of necessity, waiver or specific unconditional agreement to implement the change. This was recently reaffirmed in its decision in OZAUKEE COUNTY, DEC. NO. 30551-B (WERC).

The Worker's Compensation supplement is a substantive economic benefit and is clearly a mandatory subject of bargaining. At the time the City eliminated the benefit, the parties were, and remain, in negotiations regarding successor agreements. The City offered no evidence that it eliminated the benefit out of necessity or a substantial need, nor does it claim that the Complainant waived any right, such that Respondent was permitted to eliminate the benefit. Rather, Respondent wants the Commission to deviate from long-standing law because the practice was incorporated in its Administrative Policy Manual. While the Respondent avers that it can change the contents of said manual at will, the manual is irrelevant to the dispute. The Respondent cannot avoid its duty to bargain and its duty to maintain the *status quo* during contract hiatus periods simply by changing the manual. The unilateral elimination of the benefit by the Respondent was, and is, a refusal to bargain in violation of Sec. 111.70(3)(a)1 and 4, Stats. Complainant requests that Respondent be ordered to cease and desist from unilaterally implementing the changes and from refusing to bargain about matters related to wages, hours and conditions of employment, and further be ordered to restore the *status quo* with respect to the Worker's Compensation supplement benefit and make all employees adversely affected by its illegal actions whole with interest, as well as to post a notice regarding the violation.

Respondent

Respondent asserts that the issue in this case is whether or not it can unilaterally amend its Administrative Policies, which affect both represented and non-represented personnel, relating to the Worker's Compensation supplement. It is undisputed that the Union contracts did not include this right, nor was it ever bargained for by the Union. The Administrative Policies have been unilaterally amended in the past and did not confer any "right" to the Worker's Compensation supplemental payments because the City has always reserved the right to amend or terminate the practices.

The cessation of benefits under the Worker's Compensation policy affected both represented and non-represented employees, and was based on a necessity to reduce excessive payments on Worker's Compensation claims and extended absences based on alleged Worker's Compensation injuries. The testimony of Respondent's Personnel Specialist indicated that there has subsequently been a substantial reduction in claims with the elimination of the supplementary benefit.

The unilateral decision to amend the Administrative Policies with regard to the Worker's Compensation issue was implemented during the term of the collective bargaining

agreements. The parties did not meet until January 21, 2003 to exchange any proposals for the 2003-2004 agreement, notwithstanding the stipulation that it occurred in the Fall of 2002. Normally, the "*status quo*" rule applies when a contract has expired or negotiations are ongoing for a new agreement. The first notice that Respondent had that Complainant wished to bargain the issue of Worker's Compensation supplemental pay occurred on February 28, 2003. The elimination of the benefit had taken place January 1, 2003, per the December 30, 2002 letter from the City Attorney to the Union Representative. While on its face it would appear that Respondent changed the *status quo* during negotiations, when reviewing the actual facts and dates, it is apparent that such action was taken before the contract expired or negotiations were entered.

The Respondent concludes that the benefit was eliminated based on fiscal necessity, considering the exorbitant number of hours lost under the supplemental policy. If Complainant had any rights with respect to this issue in the form of past practice, the same should have been litigated in the grievance forum, not in a prohibited practice charge. Further, the Local 309 agreement in part, specifically provides in Section 26, A:

> ". . .This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. . ."

Respondent requests that the complaint be dismissed.

Complainant's Reply

In its reply brief, Complainant responds that the issue here is not whether Respondent can amend its Administrative Policies, as the continuation of the Worker's Compensation benefit is not dependent upon whether it is stated therein. The benefit preceded the creation of the Administrative Policies Manual. While the Respondent can change its policies whenever it chooses, such changes cannot alter wages, hours or conditions of employment, either specifically identified in the applicable agreements, nor those benefits and conditions that have been established as a binding practice. Respondent is obligated to maintain the *status quo* with respect to the written benefits and those adopted by practice.

The fact that Respondent may have been able to reduce its Worker's Compensation claims by eliminating the benefit might be germane in an interest-arbitration proceeding, but it is irrelevant here. Even legitimate considerations by Respondent for its desire to eliminate the benefit does not absolve it of its statutory obligation to maintain the *status quo* and to bargain with the Complainant in good faith.

Further, contrary to Respondent's new assertion, it is the stipulation of the parties, supported by the testimony of Complainant's witness, that the parties began negotiations for a successor agreement during the Fall of 2002, and presently continue those negotiations. There

is no evidence as to when Respondent notified Complainant of its intention to change the benefit, other than sometime after the letter dated December 30, 2002, was received. However, it is known that the benefit was changed after January 8, 2003, with the injury to Plaski. In fact, no change was made until Plaski was denied the long-standing benefit after his injury. While a grievance may have determined that there was a contract violation, Complainant's complaint is not that Respondent violated the agreement, but that it unilaterally changed the *status quo* and refused to bargain.

Last, Respondent's reliance on a "zipper clause" is misplaced, as such a clause does not grant it license to eliminate benefits and is irrelevant to the issue in this case. Thus, Complainant requests that Respondent be found in violation of Sections 111.70(3)(a)1 and 4, Stats., by its elimination of the benefit.

DISCUSSION

There is no dispute that there was a long-standing practice, spanning at least twenty years, of Respondent providing the supplement to the Worker's Compensation benefit for the employees in these bargaining units. There is also no dispute that the matter is a mandatory subject of bargaining and that the Respondent unilaterally ended that practice. However, the parties do dispute when the latter occurred. In that regard, there is a dispute as to whether this case involves an alleged contract violation that should have been grieved or an alleged change in the *status quo* following expiration of the parties' agreements. The Complainant asserts the practice was ended when the Respondent refused to pay the supplement to employee Scott Plaski, who was injured on the job on January 8, 2003. The Respondent asserts the practice was ended during the term of the parties' 2001-2002 agreements by virtue of Molepske's letter of December 30, 2002 to Complainant's representative.

Contrary to the Respondent's assertion that the change occurred in term, Molepske's letter expressly states that Respondent intended to cease the practice "at the end of the contract term (12/31/02)." Further, Jakusz's letter to Pliska states the change was effective January 1, 2003. 2/ Therefore, it has been concluded that the change in practice as to the Worker's Compensation supplement occurred after the agreements expired.

This case therefore involves an alleged change in the *status quo* as to wages, hours and working conditions during the hiatus following expiration of the parties' 2001-2002 collective bargaining agreements in violation of Sec. 111.70(3)(a)4, Stats.

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

---

2 The Respondent acknowledges in its brief that, "The elimination of the Worker's Compensation supplemental pay had taken place January 1, 2003. . ."

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

In its decision in WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission summarized the law in this area:

> 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.

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.

It is undisputed that the expired 2001-2002 agreements were silent with regard to the subject of Worker's Compensation and that this was the case in prior agreements as well. The only written reference to Worker's Compensation is, and has been, in the Respondent's Administrative Policies. The evidence indicates that the parties have never negotiated the substance of those policies and that the Respondent has unilaterally altered those policies over the years without notice to, or discussions with, the Complainant or its local affiliates. This has included policies establishing economic benefits to employees that are not included in the collective bargaining agreements covering those units, e.g., income continuation insurance.

Contrary to the Respondent's assertion, however, even assuming the Complainant or its local affiliates were nevertheless aware of such changes in the policies in the past, failure to demand to bargain in those prior instances, i.e., waiver by inaction, does not establish a blanket waiver of the right to bargain as to any subsequent changes in mandatory subjects of

bargaining. While the Respondent is free to amend its administrative policies as to its non-represented employees, absent a clear and unmistakable waiver, it has the duty to bargain, upon the Complainant's demand, as to changes in mandatory subjects of bargaining. Further, the unilateral reservation of rights in the policies that Respondent may change them from time to time would also not constitute a waiver on Complainant's part.

Nor is the Respondent's argument that it had the right to eliminate the Worker's Compensation supplement as a matter of business necessity persuasive. While the Commission has recognized a "necessity" defense to a charge of refusing to bargain regarding a unilateral change in a mandatory subject of bargaining, 3/ it has rejected such a defense where the municipal employer made the change merely to save some money:

> [E]ven assuming the Village's view of savings is correct, the opportunity to obtain some operational savings cannot be equated with "necessity". Therefore, we reject the Village's argument in this regard. 4/

The Respondent also cites Section 26, A, of the expired Local 309 Agreement covering the employees in the Department of Public Works unit:

> **SECTION 26 – ENTIRE MEMORANDUM OF AGREEMENT**
>
> A. This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The City recognizes the right of the Union to discuss and/or negotiate changes in working conditions affecting the bargaining unit.

There is a similar, but not identical, provision in the expired Transit and Clerical agreements:

> A. This agreement constitutes the entire Agreement between the Employer and the Union. Amendments or addendums to this agreement shall not be binding unless such changes are in writing, executed by the Employer and the Union, and attached to this agreement as a permanent part of it.

Thus, while the expired agreements are silent as to the subject of Worker's Compensation, they are not necessarily silent as to whether the parties are bound by unwritten past practices. If the Respondent possessed the right during the term of the agreements to unilaterally end such an unwritten practice, as part of the dynamic *status quo* concept, that right continues during the contract hiatus. OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94). Citing

---

3 CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).

4 VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96) at p. 20.

MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 26816-C, 26817-C (WERC, 3/93).

As noted previously, in determining the *status quo* in this regard during a contract hiatus, the Commission considers the relevant language of the expired agreement as historically applied or as clarified by bargaining history. OUTAGAMIE COUNTY, *supra*, RACINE SCHOOLS, *supra*, MAYVILLE SCHOOL DISTRICT, *supra*. However, other than Respondent's raising the point, and the Complainant's discounting it as irrelevant, the parties have not provided the Examiner with any further guidance regarding these contractual provisions.

While Section 26, A, provides that any amendments or addendums are not binding unless they have been executed in writing by the parties, it also recognizes the right of Complainant to negotiate changes in working conditions. Thus, the wording is somewhat conflicting as to the parties' rights and obligations under this provision and not at all clear as to Respondent's right to unilaterally cease an unwritten practice in term. 5/

The only evidence in the record as to how the language of Section 26, A, and of the somewhat similar provision in the other agreements, has been historically applied is that which establishes that the practice of providing the Worker's Compensation supplement continued over the span of numerous agreements, despite its never having been reduced to writing by the parties. (The Respondent's unilaterally established policies would not constitute such a writing). This is the best evidence, and the most telling, as to how the parties have viewed their rights and obligations under these provisions as applied to the unwritten practice of providing this economic benefit.

For the foregoing reasons, the Examiner has concluded that the Respondent's providing of the Worker's Compensation supplement was the *status quo* that existed at the time the agreement expired, which the Respondent was obligated to maintain during the contract hiatus. However, as is the case with any practice that is without a basis in the written agreement 6/, the Respondent may place the Complainant on notice that it does not intend to continue the practice of providing the benefit in future agreements. The Complainant then has the right and the opportunity to bargain for continuation of the benefit in the parties' successor agreement; however, until the parties obtain a successor agreement, either through successful negotiations or through interest-arbitration, the Respondent is required to maintain the benefit as part of the *status quo*.

Remedy

As has been the case in recent decisions involving the application of the dynamic *status quo* doctrine, the appropriateness of the *status quo ante* as a remedy in this case is more than a

---

5 Unlike the circumstances the Commission found in CITY OF STEVENS POINT, DEC. NO. 26146-B (WERC, 8/85), where the practice conflicted with the clear contractual rights of the City.

6 This is in contrast to a practice which clarifies ambiguous contract language.

little problematic. For although the Respondent is obligated to maintain the *status quo* as to the Worker's Compensation supplement during the contract hiatus, it is also entitled to place the Complainant on notice that it will not continue the unwritten practice in the successor agreement. Thus, the paradoxical outcome may be that the Respondent is required to continue the benefit during the hiatus, and if Complainant is unsuccessful in obtaining the benefit's continuation in the successor agreement, and the new agreement is retroactive so as to cover the hiatus period, the employees in these bargaining units will have received a benefit that retroactively they were not entitled to receive. The Commission's recent decision in OZAUKEE COUNTY, Dec. No. 30551-B (WERC, 2/04) addresses this paradox:

> In both GREEN COUNTY and its companion decision, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission grappled with the problem of granting make-whole relief where the parties were in the process of obtaining an interest arbitration award that would or could implement the same change retroactively to the period of time covered by the prohibited practice complaint. The Commission concluded that make-whole relief was necessary to deter such unilateral changes, even if doing so conferred a benefit on employees that would not otherwise have been available to them.
>
> . . .
>
> . . .We nonetheless continue to endorse what the Commission concluded in GREEN COUNTY and BROOKFIELD, i.e., that, make-whole relief is necessary to remedy effectively the unilateral change violation, despite the possibility that the employees would not be entitled to such monies under the retroactive contract eventually adopted. Without the make-whole remedy, employers would have little if any incentive to comply with the law.

Based on the foregoing, the Respondent has been ordered to restore the *status quo ante* as to the Worker's Compensation supplement benefit until the parties obtain a successor agreement to their 2001-2002 agreement.

Dated at Madison, Wisconsin, this 16th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc

30911-A