STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2150,
Complainant,

vs.

CITY OF PRINCETON, Respondent.

Case 14
No. 63606
MP-3051

Decision No. 31041-A

Appearances:

Yingtao Ho, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of IBEW Local 2150.

William Bracken, Davis & Kuelthau, S.C., P.O. Box 1278, Oshkosh, WI 53903-1278, appearing on behalf of the City of Princeton.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: On April 26, 2004, the above-named Complainant, IBEW Local 2150, filed with the Commission a complaint, alleging that the above-named Respondent, the City of Princeton, violated the provisions of Ch. 111.70, MERA, by unilaterally implementing a new health care plan. The Commission appointed Daniel Nielsen, an examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. A hearing was scheduled for September 8, 2004, but prior to the hearing, the parties stipulated to the relevant facts and exhibits. Written arguments were submitted, the last of which was received by the Examiner on October 4, 2004, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following Findings of Fact.

FINDINGS OF FACT

1. Local 2150 of the International Brotherhood of Electrical Workers, hereinafter referred to as either the Union or the Complainant, is a labor organization within the meaning of Section 111.70(1)(h),Wis. Stats., and is the exclusive collective bargaining representative for all regular full-time and regular part-time Public Works, Clerical and Utility employees of the City of Princeton ("City"), excluding confidential, supervisory, managerial and professional employees. Its offices are located at N8 W22520 Johnson Drive, Unit H, Waukesha, Wisconsin 53186, and its telephone number is (262) 547-1033 or (800) 551-1151.

2. The City of Princeton, hereinafter referred to as either the City or the Respondent, is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats. Its mailing address is P.O. Box 53, 438 West Main Street, Princeton, Wisconsin 54968 and its telephone number is (920) 295-6612.

3. The City and the Union were parties to a collective bargaining agreement for the years 2000-2002, covering employees in the Utility and Public Works Department.

4. In negotiation over a successor to the 2000-2002 collective bargaining agreement, the Union was represented by Business Representative Michael Chartier and the City was represented by William Bracken, Employment Relations Service s Coordinator for the law firm of Davis & Kuelthau, S.C.

5. During negotiations, the parties were able to reach agreement on all issues in dispute other than wages. Among the tentative agreements was one addressing a change in insurance plans. Number 4 in the list of tentative agreements dated July 14, 2003 states:

> **Article XVII (Insurance)** (Not in Contract)
>
> **The Union agrees to change to the Network HMO Plan 2 effective May 1, 2004.**

The list of tentative agreements included a summary of benefits for the Network HMO Plan 1/Advantage, representing the plan provided under the prior contract, which remained in effect during negotiations, as well as a summary of benefits for the Network HMO Plan 2 which was the subject of the tentative agreement. Employee costs, in the form of co-insurance, deductibles and co-pays, were higher under the HMO Plan 2 than they were under Plan 1, while the premium for Plan 2 would be lower.

6. On July 15, 2003 Bracken sent a letter to Chartier stating the City's final offer:

. . .

> Pursuant to the agreement between the parties, here is the City's final offer in the above captioned case:

All provisions of the 2000-2002 collective bargaining agreement shall continue except for any tentative agreements reached and the final offer below:

Appendix A – Wage Rates: 2003 – 1 percent across the board increase; 2004 – 2 percent across the board increase; and 2005 – 2 percent across the board increase.

. . .

7. On August 26, 2003 Chartier replied to Bill Bracken stating the Union's final offer:

Pursuant to the agreement between the parties, listed below is the Union's final offer in addition to the signed tentative agreements.

All provisions of the 2000-2002 collective bargaining agreement shall continue except as modified by our tentative agreements, and with the change below:

1. Appendix A – Wage Rates: 2003 – 3 percent increase; 2004 – 3 percent increase; 2005 3 percent increase.

. . .

8. The dispute was processed to interest arbitration, and Arbitrator June Weisberger conducted a hearing on January 21, 2004. At the conclusion of the hearing, the parties agreed to file briefs, postmarked by February 27th, and agreed that reply briefs would not be filed except by motion to the arbitrator based on extraordinary circumstances.

9. On February 26, 2004, Yingtao Ho, an attorney with the law firm representing the Union, wrote to Arbitrator Weisberger advising her of a mutual agreement to extend the briefing deadline to March 9th.

10. On March 13, 2004, Arbitrator Weisberger inquired about the Union's brief, as she had not yet received it. Three days later, she was advised that the brief would forthcoming shortly. The Union's brief was not received by the Arbitrator until March 23, 2004, whereupon she exchanged the briefs and closed the record.

11. On March 2, 2004, Bracken sent a fax to Mike Chartier regarding correspondence from Network Health Plan, which set a deadline of May 1, 2004, to implement HMO Plan 2, which had been included in the tentative agreements. The health insurance carrier advised the City that it would be unable to make any changes to the plan thereafter, until May 1, 2005. Bracken sought the Union's agreement to implementation of the new health plan by May 1st, even if the interest arbitration award was not yet received.

12. On March 3, 2004, Chartier responded to Bracken, advising him that the Union would not agree to implementation of the new health plan prior to the award.

13. On March 10, 2004, Bracken replied to Chartier, and informed him that the City would proceed to implement the new health plan on May 1st, without regard to whether the interest arbitration award had been issued by that time. Bracken characterized this step as required "to honor the tentative agreement reached between the parties, and for business necessity reasons."

14. On March 15, 2004, Scott D. Soldon, one of the Union's attorneys, wrote Bracken cautioning him that implementation of a tentative agreement prior to receipt of the Arbitrator's Award would be a prohibited practice, citing Commission decisions in WASHBURN PUBLIC SCHOOLS, Dec. No. 28941-B (WERC, 1998) and SAUK COUNTY, Dec. No. 22552-B (WERC, 1987).

15. On March 17, 2004, Bracken responded to Soldon, asserting that the implementation was warranted by business necessity and was consistent with the tentative agreement. He noted that the delay in briefing the arbitration was due to the Union's request for an extension and subsequent late submission.

16. Soldon replied on March 29, 2004, rejecting Bracken's contention that the Union's delay in briefing somehow contributed to the problem, and reiterating that the City would act at its peril if it chose to move forward with implementation prior to receiving the Arbitrator's award.

17. On April 26, 2004, the instant complaint was filed, alleging that the threatened implementation of the new health plan, if carried out, would constitute a change in the *status quo ante*, and seeking an Order directing the City to refrain from unilateral changes, to restore the *status quo ante*, to defer any change in insurance until May 1, 2005, to make all employees whole for any losses, and to pay the Union's costs and attorneys fees.

18. On May 1, 2004, the City implemented Network HMO Plan 2.

19. On May 3, 2004, Arbitrator Weisberger issued her Award, selecting the City's final offer.

20. The former Network HMO 1 Plan premiums, as of May 1, 2004, would have totaled $4,296.85 per month for the bargaining unit represented by the Union. The Network HMO 2 Plan monthly premiums totaled $3,996.07, a difference of $300.78 per month. The City pays 95% of the premium on behalf of the employees.

21. Health insurance benefits are a matter primarily related to compensation.

22. The announcement by the City's insurance carrier that it would not accept any changes to the policy after May 1, 2004, was not anticipated by the parties.

23. The announcement by the City's insurance carrier that it would not accept any changes to the policy after May 1, 2004, cannot be attributed to any act or request by the City.

24. The announcement by the City's insurance carrier that it would not accept any changes to the policy after May 1, 2004, was a material change in circumstances relating to the tentative agreement on health insurance.

25. The announcement by the City's insurance carrier that it would not accept any changes to the policy after May 1, 2004, did not render the City unable to maintain Network HMO Plan 1 after May 1, 2004.

26. The statement in the tentative agreement on health insurance that "The Union agrees to change to the Network HMO Plan 2 effective May 1, 2004" did not constitute a knowing and/or voluntary waiver of the Union's right to insist on the maintenance of the *status quo ante* on health insurance in the period between May 1, 2004, and the issuance of the interest arbitrator's award.

27. The City's May 1, 2004, implementation of Network HMO Plan 2 was a unilateral change in the *status quo* during the contract hiatus.

CONCLUSIONS OF LAW

1. Respondent City of Princeton is a municipal employer within the meaning of Section 111.70(1)(j), Stats.

2. Complainant IBEW Local 2150 is a labor organization within the meaning of Section 111.70(1)(h), Stats.

3. On May 1, 2004, Complainant's and Respondent's unresolved dispute over the wage provisions 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 health insurance provided to the Complainant's collective bargaining unit members primarily relates to the wages, hours and working conditions of these bargaining unit members and, thus, is a mandatory subject of bargaining.

5. The announcement by the City's health insurance carrier that it would not accept any changes to the policy after May 1, 2004, did not create a necessity for the City to implement Network HMO Plan 2 on May 1, 2004.

6. By implementing changes to the health insurance benefits provided to the Complainant's bargaining unit members on May 1, 2004, 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.

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

ORDER

It is ORDERED that:

The City of Princeton shall immediately:

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. Make all affected employees whole by reimbursing them for any out of pocket costs incurred on May 1 and/or 2, 2004, by reason of the City's unilateral implementation of Network HMO Plan 2, together with the applicable statutory interest of twelve percent (12%) per year, set forth in Section 814.04(4), Stats.

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 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.

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 Racine, Wisconsin, this 22nd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

APPENDIX "A"

**NOTICE TO EMPLOYEES REPRESENTED BY
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2150**

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

1. WE WILL make all affected employees whole by reimbursing them for any out of pocket costs incurred on May 1 and/or 2, 2004, by reason of the City's unilateral implementation of Network HMO Plan 2, together with the applicable statutory interest of twelve percent (12%) per year, 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.

CITY OF PRINCETON

By _____
City Representative

THIS NOTICE WILL BE POSTED IN LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY IBEW LOCAL 2150, 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.

CITY OF PRINCETON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issue in this case is whether the implementation of a tentative agreement on changing health insurance plans prior to receiving the interest arbitrator's award on a wage dispute constitutes an illegal change in the *status quo ante*, and thus a refusal to bargain and/or an independent act of interference. Each party agrees that the basic law on unilateral implementation of tentative agreements generally forbids implementation prior to ratification of the overall agreement, or issuance of the interest arbitrator's award, as the case may be. SAUK COUNTY, DEC. NO. 22552-B (WERC, 6/87); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). The parties agree that the City did, in fact, implement the new insurance plan on May 1, while the Award was not issued until May 3rd. However the City argues that implementation of the new insurance plan is permissible for five reasons:

(1) The need for implementation two days prior to the Award was occasioned by the Union's disregard of the briefing schedule in the interest arbitration;
(2) The alleged violation – implementation two days early – was *de minimis*;
(3) The specific wording of the tentative agreement on insurance changes represents a waiver of objections by the Union;
(4) There was a business necessity requiring implementation on or before May 1, 2004;
(5) Failure to implement would have resulted in greater harm to the bargaining process than did implementation. 1/

1/ For purposes of narrative flow, I have changed the order in which the City's arguments were made in the brief.

These arguments are addressed in turn.

A. Abusive Delay

First addressing the City's argument that the implementation was justified by the Union's delaying tactics in the arbitration process, there is precedent for the notion that "unlawful abusive delay" might justify unilateral implementation of a tentative agreement prior to receipt of an Award. GREEN COUNTY, DEC. NO. 20308-B (WERC, 1984); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2004). The briefing deadline was originally set at February 27th. On the 26th, the Union advised the Arbitrator that the City had agreed to extend

the deadline to March 9th. March 9th came and went without receipt of the Union's brief. One week later, after an inquiry by the Arbitrator, the Union's counsel represented that the brief would be forthcoming. The Arbitrator did not receive the brief until March 23rd, two weeks past the extended deadline.

Whether a delay is abusive depends on the circumstances in each case. The original extension of the briefing deadline to March 9th was done before the parties knew that changes to the insurance plan had to be implemented before May 1st, and it is therefore impossible to find that it was done for tactical advantage or was in any way abusive. Whether the Union was playing for a tactical advantage in then filing its brief two weeks after the extended deadline is difficult to say, but it is certainly a reasonable inference from the City's point of view, since by that time the Union knew that the City faced a firm deadline for implementation of the new insurance plan. However, once the postmark date for briefs was moved to March 9th, it became foreseeable that the Award might well not issue until the May 1st insurance anniversary date had passed. The standard for issuance of interest arbitration awards is sixty days after the close of the record. ERC 32.15(12), Wis. Administrative Code, provides that:

> **(12) ISSUANCE OF AWARD.** The arbitrator shall issue the arbitration award in writing as expeditiously as possible following the receipt of final arguments or briefs, if any. If the award is issued by a tripartite panel, each member thereof must execute the award, either affirming or dissenting. Upon the execution and signing of the award, copies thereof, as well as a statement reflecting fees and expenses, if any, shall be submitted to the parties and to the commission. *Arbitrators who repeatedly or egregiously fail to issue their decision within 60 days following receipt of final arguments or briefs, if any, shall be subject to removal from the commission's list of qualified arbitrators following notice and an opportunity to be heard.* Reinstatement to the list may be granted where the commission is satisfied that the individual will be able to consistently issue timely awards under s. 111.70(4)(cm)6.d., Stats.
> [emphasis added].

Assuming a day for mailing, timely exchange of the briefs on March 10th would still have meant a due date of May 9th for Arbitrator Weisberger's Award. While she issued her Award within 40 days, rather than the 60 allowed in the Administrative Code, there is no reason to think that the parties relied on a 40-day timeline when they originally agreed to extend the date for filing briefs.

The GREEN COUNTY reservation of the possibility for unilateral implementation in the face of unlawful, abusive delay was contemplated as an answer to an "extreme case." ID, at 16. As noted above, each case must be evaluated on its own facts, but the two week delay in filing the Union's brief here cannot be termed an extreme case, given that the agreed upon filing deadline would have raised the same problems for the City.

B. The Implementation Two Days Early was a *De Minimis* Action

Neither can the City's *de minimis* argument be accepted as a defense to liability for the unilateral change. Unilateral change is a *per se* statutory violation. An argument can be made in any case where the Employer seeks to implement a tentative agreement carrying retroactivity that the violation is *de minimis*, because it would have been made in any event, and identical costs would have been incurred or identical benefits conferred. Likewise, once the matter is before the arbitrator and a decision can be reasonably expected within 60 days, any implementation could be argued as having been *de minimis*, since even if the provision was not intended to be retroactive, the change in the *status quo* would be only for a relatively brief duration. Where the issue is a unilateral change in the *status quo ante*, the practical impact of the violation is a relevant consideration in crafting a remedy, but it cannot be a defense to the issue of whether the statute was violated. The *status quo* to be maintained is the *status quo* as to all mandatory topics, not simply those that the employer views as being significant, and the Union's status as an equal voice in negotiations does not diminish because a final award is imminent.

C. Waiver

The parties' tentative agreement states that "The Union agrees to change to the Network HMO Plan 2 effective May 1, 2004." The City asserts that the specific wording of the agreement constitutes a waiver of the *status quo* by the Union. This argument ignores the long-standing principle that waiver of statutory rights must be clear and knowing. Effective dates are commonly included for the economic provisions of contracts, with the parties' understanding that those dates may well pass before a final resolution is achieved through bargaining or arbitration. Yet, absent specific agreement of the parties, those provisions are not treated as grants of permission to change the *status quo*. The fact that a target date for an insurance change, coinciding with the annual insurance anniversary date, is included in the tentative agreement cannot, without more, be understood as a knowing waiver of the Union's right to insist on maintaining the *status quo ante*. There is no suggestion that early implementation was ever discussed or contemplated. Indeed, at the time the tentative agreement was made, it was not an issue as neither party knew that the insurer would not entertain changes for the 2004-2005 insurance year made after May 1, 2004.

D. Business Necessity

The principle argument for the City's implementation is business necessity. The parties agreed to a change in the insurance to Plan 2 "effective May 1, 2004." The insurance company subsequently notified the City that if changes were not implemented by May 1, 2004, the City would have to maintain Plan 1 for the following 12 months, until May 1, 2005. The asserted necessity for early implementation in this case has three intertwined components: (1)

the loss of the benefit from the negotiated change to Plan 2 for 12 months if implementation was not accomplished by May 1; (2) the impossibility of complying with the ultimate contract in the 2004-2005 insurance year if implementation was delayed; and (3) the need to balance the damage to the bargaining process if the tentative agreement on insurance was frustrated against the damage to the process from implementation a few days prior to receipt of the arbitrator's award. 2/

2/ These arguments are broken out separately in the City's brief, but all go to the same essential point.

Business necessity has been mentioned as an available defense to the making of unilateral changes in prior Commission cases. In RACINE UNIFIED SCHOOL DISTRICT NO. 1, DEC. NOS. 13696-C, 13876-B (FLEISCHLI, 4/78), the Examiner, acting with final authority, noted the potential of a defense based upon "Whether the actions of" [the District] "in relation to the starting dates for school, were justified in terms of the compelling need to establish opening dates for school . . ." ID, at 56. In the CITY OF BROOKFIELD, DEC. NO. 11406-A (RUBIN, 2/84), the Examiner noted that necessity had been found where the imminent start of a school year required unilateral action to put in place student evaluation systems and school calendars, an observation endorsed in the Commission's affirmance [CITY OF BROOKFIELD, DEC. NO. 11406-B (WERC, 9/73)]. In this vein, Examiner Bielarczyk found that the need to establish a sensible schedule for classes warranted a unilateral decision to keep school in session adjacent to the Thanksgiving holiday during a contract hiatus. SCHOOL DISTRICT OF TURTLE LAKE, DEC. NO. 24686-A (BIELARCZYK, 2/88). Other than TURTLE LAKE, however, no MERA case has been cited which expressly found that business necessity justified a unilateral change in the *status quo ante*. 3/ Cost savings have been found insufficient to prove business necessity [VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96)], as have the difficulty of offering equivalent insurance plans during the hiatus [MONROE COUNTY, DEC. NO. 30636-A (BURNS, 1/04)], a desire to avoid delays in payments of state aids [RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23904-B (WERC. 9/87)], deficits in a lunch program [WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-B (SHAW, 4/90), affirmed DEC. NO. 25997-C (WERC 8/90)], a desire for uniformity of contract administration [ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93)] and the need to recruit and retain specialized personnel to provide legally mandated services [RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 28614-D (WERC, 1/98)].

3/ MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NOS. 15829-D and 15829-E (YAEGER, 3/80) discusses the possibility of the defense, but that early case turned on the existence of an impasse in negotiations rather than a business necessity. The impasse defense was subsequently discarded in light of the availability of interest arbitration. CITY OF BROOKFIELD, SUPRA.

While the cases are silent as to the specific elements of a valid business necessity defense, by negative implication necessity cannot be based upon the employer's desire to avoid losing money (VILLAGE OF SAUKVILLE, WISCONSIN DELLS SCHOOL DISTRICT, SUPRA), nor the employer's desire to maximize efficiency (ST. CROIX FALLS SCHOOL DISTRICT, SUPRA), nor the marketplace difficulties of maintaining the *status quo*, (MONROE COUNTY, RACINE UNIFIED SCHOOL DISTRICT, SUPRA). "Necessity" by definition is something more than a belief that the contemplated course of action is more economical, more practical, or for whatever reason more desirable than would be maintenance of the *status quo*. Keeping in mind that "necessity" is offered as an excuse for a *per se* violation of the statutes, and a serious derogation of the exclusive bargaining representative's role in determining wages, hours and conditions of employment, the situation giving rise to the necessity cannot be one in which the employer simply has a choice to make between the *status quo* and the other course of action. In order to qualify as a "necessity," the implementation of the change must be occasioned by an unanticipated material change in circumstances imposed upon the employer by outside forces, which renders the *status quo* untenable. Thus a school calendar specific to the dates in the expired contract year must give way to a calendar suited to the new year, not because the employer wishes it but because the realities of time demand it. Moreover, since necessity is a defense to the actual change made, it follows that the deviation from the *status quo* should be limited to that which is required to meet the necessity. In the school calendar case, for example, the fact that a calendar must be implemented does not give the employer *carte blanche* to completely change the format and structure of the prior calendar.

The necessity in this case does not meet this standard. Certainly, the announcement of a firm deadline for changes by the City's insurer was material to the insurance issue, and there is no evidence that the insurer was acting at the City's behest or was in some other way not an outside force beyond the City's control. Moreover, the announcement was plainly unanticipated. The first half of the test, going to the nature of the triggering event, is met. The issue then is whether this rendered the *status quo* untenable. It did not. This is not a case where an insurer suddenly goes out of business or stops writing a particular policy. The Plan A coverage was still available during the hiatus. The City's problem was that it had to choose between maintaining the *status quo* during the hiatus at the cost of losing the opportunity to implement the insurance change that was tentatively agreed on until the Spring of 2005, or – given that the Union refused to agree to early implementation – acting unilaterally. The City is correct that failing to implement would have been uneconomical, and would have changed the overall cost of the ultimate contract. However, an employer will presumably always be motivated by its view of economy and efficiency in implementing a change. The legality of choosing economy over the duty to bargain has been answered repeatedly over the years, and the answer has consistently been "no."

The City here strongly argues that the economies achieved by unilateral implementation – 363 additional days of lower insurance premiums – far outweighed the damage done by implementing – altering the *status quo* for two days. This type of cost-benefit analysis invites employers to make a guess in each case as to how much the exclusive bargaining

representative's status as co-equal in negotiations should be worth. There are very serious practical problems with this approach. If the hiatus period was to run for another two months, or four months, or six months, how would the balance of costs and benefits be struck? Again, it is almost always the case that delayed implementation of tentative agreements will cost someone money. The only distinguishing feature in this case is that the delay in implementation would be longer than expected. In addition to the length of the delay, the City's approach invites argument over how significant an item must be before it will justify violating the *status quo*. If the insurance policy at issue here was a life insurance change from $20,000 in coverage to $19,000 or $21,000, with minimal cost implications, would the City be entitled to act unilaterally? None of this is said to minimize the how unpalatable the choice facing the City was. Instead it highlights the fact that the City had a choice. It was not compelled to make the change – it weighed the costs and benefits and chose to make the change.

More important than the practical difficulties posed by engaging in ad hoc cost-benefit analyses in unilateral implementation cases is the fact that the statute makes its own judgment as to how best to pursue long term economy and efficiency, and what the value of collective bargaining is:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employees so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employees' own choice . . . §111.70(6), Stats.

The Commission has recognized that following the statutory process can involve an extended hiatus, and that this will sometimes put parties in a position where implementing their ultimate agreement, including the tentative agreements, will pose great practical difficulties. The consistent emphasis over the years has been on having the parties use the established process of bargaining to address those difficulties, rather than to allow one party to act alone:

> We recognize that in many instances where both parties are acting in exemplary good faith the statutory processes continue well beyond expiration of any predecessor agreement and that some changes will be difficult to implement retroactively. Nevertheless, we are persuaded that the underlying purposes of MERA and Sec. 111.77 are better served if the parties focus on achieving solutions to retroactivity problems and the rest of their bargaining objectives through bargaining and the statutory procedures rather than through unilateral action.
> GREEN COUNTY, SUPRA, at page 16.

In addition to the appeal to relative costs and benefits, the City makes the ingenious argument that necessity was established when it found itself in a classic no-win situation, since implementation before the Award exposed it to the instant claim of a prohibited practice, while failing to implement would force it to violate the clear terms of the collective bargaining agreement resulting from the interest arbitration award. The answer to this is that the Union, having refused to allow implementation with full knowledge that its refusal would make compliance with the insurance provision impossible for a year, would have been hard pressed to prosecute such a grievance. If it had, it would have been faced with explaining how its conduct did not constitute acquiescence, why the City should not be excused on the basis of impossibility of compliance, and why an arbitrator should provide an equitable remedy to the party whose decision made the contract violation inevitable.

It is a familiar legal axiom that hard cases can make bad law. In this case, the City has many equitable arguments available to explain why it felt the action it took was reasonable. Acceptance of those arguments would define the business necessity defense in such a way as to do considerable damage to the well settled law regulating unilateral implementation of tentative agreements. It would invite ad hoc judgments in each case based on each employer's best guess of how the Commission would view the relative efficiencies and economies to be gained from implementation, and how the Commission might strike the balance with the rights of the exclusive bargaining representative. The predictable outcome of this would be to destabilize and undercut the bargaining process, a result which is directly contrary to the stated purpose of MERA and the long term interests of the parties.

E. Remedy

The City violated its duty to bargain when it unilaterally implemented the tentative agreement on insurance two days prior to the receipt of the interest arbitration award. The Union argues that the appropriate remedy for such a violation must be restoration of the *status quo ante*. Since failure to implement would have locked in the Plan 1 insurance benefit for another year, the Union seeks restoration of that plan through April 30, 2005, and an order to make employees whole for expenses incurred because of the implementation of Plan 2. For its part, the City asserts that any remedy should be limited to making employees whole for the two day period during which the *status quo* was not maintained.

The Commission has recently discussed the range of remedial options available in unilateral change cases involving health insurance modifications which have been or shortly will be authorized by an interest arbitrator:

> In both GREEN COUNTY and its companion decision, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission grappled with the problem of granting make-whole relief where the parties were in the process of obtaining an interest arbitration award that would or could implement

the same change retroactively to the period of time covered by the prohibited practice complaint. The Commission concluded that make-whole relief was necessary to deter such unilateral changes, even if doing so conferred a benefit on employees that would not otherwise have been available to them. In BROOKFIELD, for example, where the City had unilaterally changed summer hours from 7:00 a.m. to 3:30 p.m. to 8:00 a.m. to 4:30 p.m., the Commission ordered the City to pay employees overtime pay for any hours worked beyond 3:30 p.m., even though, by the time the Commission issued its decision, an interest arbitrator had issued an award retroactively establishing the hours the City had implemented unilaterally, and even though the City argued that the make-whole relief "'deprives the City of this part of the award.'" ID. at 6. Similarly, in the present case, the County could contend that the arbitration award inevitably will implement the same health insurance changes retroactively (at least in theory), so that employees would have had suffered these out of pocket costs simply by virtue of the contract. Assuming *arguendo* that it would be practicable to implement these health insurance changes retroactively, we nonetheless continue to endorse what the Commission concluded in GREEN COUNTY and BROOKFIELD, i.e., that, make-whole relief is necessary to remedy effectively the unilateral change violation, despite the possibility that the employees would not be entitled to such monies under the retroactive contract eventually adopted. Without the make-whole remedy, employers would have little if any incentive to comply with the law.

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

Footnote 1 from Ozaukee County: 1/ Restoring the status quo ante was not an issue in Brookfield, because the interest arbitration award had already been issued at the time of the Commission decision.

OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), at 11-12.

Thus, while continuing to endorse the general appropriateness of restoring the *status quo ante* as a remedy, the Commission recognizes the practical difficulties of altering the health insurance plan already in place, and in each case weighs those difficulties against the scope of the order required to effectuate the purposes of the Act. In this case, the interest award was rendered two days after the implementation. Once the award was received, there was no legal impediment to the switch to Plan 2. The Union's appeal for restoration of Plan 1 is based solely on the peculiarity of the insurer's refusal to modify the plan once the anniversary date had passed rather than anything that was contemplated or intended during bargaining over health insurance. Given the extremely short period between implementation and the interest award, an Order restoring Plan 1 would be out of proportion to what is actually required to effectuate the purposes of MERA. On the specific facts of this case, I conclude that making employees whole is sufficient and I have limited my Order accordingly.

The Union has also requested payment of its attorneys' fees, and costs. "Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate." CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), at 19. There is nothing about this case that suggests the need for an extraordinary remedy.

Dated at Racine, Wisconsin, this 22nd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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