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-B

Appearances:

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On February 22, 2005, Examiner Daniel Nielsen issued Findings of Fact, Conclusions of Law and Order concluding that the City of Princeton (City) had violated Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally changing the health insurance plan affecting the employees represented by IBEW Local 2150 (the Union) on May 1, 2004, during the pendency of an interest arbitration proceeding, in which the parties had stipulated that the change in insurance plan would take effect during the time period covered by the interest arbitration award. To remedy this violation, the Examiner ordered that the City make whole the affected employees by reimbursing them for any out of pocket costs they incurred as a result of the plan change, between the date of the change and the date the arbitration award was issued, together with 12% statutory interest. Since the interest arbitration award was issued on May 3, 2004, the remedial time period under the Examiner's order comprised two days, i.e., May 1 and May 2, 2004.

On March 9, 2005, pursuant to Secs. 111.07(5)and 111.70(4)(a), Stats., the Union filed a timely petition seeking review of the Examiner's remedy together with a brief in support of its petition. The City filed a brief in response on March 28, 2005, challenging the Examiner's conclusion that the City had violated the law but, if a violation were found, supporting the Examiner's remedy. The Union filed a reply brief on April 12, 2005. For the reasons set forth in the Memorandum, below, the Commission affirms the Examiner's findings, conclusions, and order except as modified in our Order, below.

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

ORDER

1. The Examiner's Findings of Fact 1 through 24 are affirmed.

2. The Examiner's Finding of Fact 25 is modified as follows and as modified is affirmed:

> 25. The refusal of the City's health insurance carrier to accept any changes to the policy after May 1, 2004 may have required the City to enter into an agreement with that carrier for HMO Network Plan 2 to take effect on May 1, 2004, in order for the City to implement the tentatively agreed upon changes in health insurance provisions prior to issuance of the interest arbitration award, but did not render the City unable to maintain the benefits the employees enjoyed under Network HMO Plan 1/Advantage, including the coinsurance, deductibles, and co-payments of Plan 1, until said arbitration award was issued.

3. The Examiner's Finding of Fact 26 is affirmed.

4. The Examiner's Finding of Fact 27 is modified as follows and as modified is affirmed:

> 27. The City's May 1, 2004, change in the benefits the employees enjoyed under Network HMO Plan 1/Advantage, including the coinsurance, deductibles, and co-payments thereunder, was a unilateral change in the *status quo* during the contract hiatus.

5. The Examiner's Conclusions of Law 1 through 4 are affirmed.

6. The Examiner's Conclusion of Law 5 is modified as follows and as modified is affirmed:

> 5. A refusal of the City's health insurance carrier to accept changes to the policy after May 1, 2004, did not render the City unable to maintain the benefits the employees enjoyed under Network HMO Plan 1/Advantage, including the coinsurance, deductibles, and co-payments under Plan 1, until the pending interest arbitration award was issued.

7. The Examiner's Conclusion of Law 6 is affirmed.

8. The Examiner's Order is affirmed except as to paragraph (b), which is modified as follows, and except as to paragraph (1) of the Notice that is set forth on Appendix "A" attached to the instant Order:

> 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 change in the benefits the employees enjoyed under Network HMO Plan 1, including coinsurance, deductibles, and co-payments, together with the applicable statutory interest of twelve percent (12%) per year, set forth in Section 814.04(4), Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO 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 change in the benefits the employees enjoyed under Network HMO Plan 1, including coinsurance, deductibles, and co-payments, 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 _____ Date_____
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 ORDER

Summary of the Facts

The parties stipulated to the facts and (except as discussed in footnote 1, below) have not challenged the Examiner's findings, which we summarize in salient part as follows.

The Union and the City were parties to a collective bargaining agreement for the years 2000-2002 covering employees in the City's Utility and Public Works Department. During that contract period, the bargaining unit employees were covered for health insurance purposes by Network HMO Plan 1/Advantage. In negotiations for a successor agreement, the parties reached agreement on all issues except wages, which became the subject of an interest arbitration proceeding. Among the tentative agreements submitted in connection with the arbitration was the following agreement regarding health insurance:

> **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 under both Plan 1/Advantage and Plan 2. Employee costs, in the form of coinsurance, deductibles, and co-payments, were higher under Plan 2 than under Plan 1/Advantage, but the premium for Plan 2 would be some $300.78 per month lower in the aggregate. The City pays 95% of the premium. The City's final offer contained general wage increases of 1% in 2003, 2% in 2004, and 2% in 2005. The Union's final offer proposed general wage increases of 3% in each year of the three year successor agreement.

The interest arbitration hearing took place on January 21, 2004 after which the parties agreed to file briefs by February 27. On February 26, the parties mutually agreed to extend the briefing deadline to March 9. The City's brief was filed on time, but, without mutual consent to extend the deadline, the Union's brief did not reach the Arbitrator until March 23.

By letter dated February 25, 2004 (Exhibit 11), the insurance carrier provided the City with the unanticipated information that the carrier would not permit changes in plans after May 1, 2004 until the next anniversary date of May 1, 2005. On or about March 2, 2004, the City notified the Union of the insurance carrier's letter and asked the Union to agree that the tentatively-agreed upon Plan 2 could be implemented on May 1 even if the arbitration award had not yet been issued. On March 3 the Union advised the City that it would not agree to

implementation of any changes prior to the award. On March 15 the Union's attorney supplied the City with Commission precedent indicating that changes during pendency of an interest arbitration would be unlawful. The City nonetheless signed an agreement with the carrier changing to Plan 2 effective May 1 and implemented the changes in benefits consistent with that plan.

Discussion

Neither party challenges the Commission's longstanding rule that an employer generally must maintain the *status quo* on mandatory subjects of bargaining, including those on which the parties have reached tentative agreement, during a hiatus between collective bargaining agreements all the way through to the conclusion of the interest arbitration process. GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). There are certain recognized exceptions to this general rule and the City in this case relies on all of them.[1] First, a change is permitted if both parties have specifically and unconditionally agreed to the early implementation of the change. GREEN COUNTY at 18; OZAUKEE COUNTY at 9-10. Second, GREEN COUNTY acknowledged in dictum the "extreme" possibility that a party could engage in "unlawful abusive delay" of the arbitration process so as to prolong a beneficial *status quo*. ID. at 16. Third, theoretically a unilateral change could be "necessary" owing to conditions outside the employer's control. CITY OF BROOKFIELD, DEC. NO. 11406-A (RUBIN, 2/84), AFF'D DEC. NO. 11406-B (WERC, 9/73). The City adds a fourth defense that has not been recognized, i.e., that a two-day change is too insubstantial ("*de minimus*") to be unlawful. The Examiner rejected each defense and, as briefly discussed below, we largely concur in his thoughtful conclusions. Our analysis diverges from that of the Examiner on the "necessity" issue in a manner that also undercuts the foundation of the Union's remedial argument.

As to whether the Union agreed to the early implementation, the City argues on review that, because the tentative agreement on insurance included the words "Not in contract," the process for resolving the contract was irrelevant. Even if that novel interpretation were correct, it begs the pivotal question, i.e., did the Union expressly agree that the health insurance change could be implemented during hiatus before the interest

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[1] The Union argues that the Commission should not entertain the City's challenges to the Examiner's decision, because the City did not file a petition for review within the requisite 20 days. However, "It is well settled that 'a petition for review opens the entire Examiner decision for affirmation, modification or reversal. See Secs. 111.07(5) and 111.70(4)(a), Stats.; TRANS AMERICA INSURANCE CO. V. DILHR DEPARTMENT, 54 WIS.2D 252 (1971) STATE V. INDUSTRIAL COMMISSION, 233 WIS. 461 (1940); GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/92).' CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 12." EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) at 22 n.7. Accordingly, we will respond to the City's challenges even though they were raised in response to the Union's petition for review.

arbitration proceeding had been concluded? We agree with the Examiner that the tentative agreement alone, although it contains an effective date, is not the requisite clear and explicit agreement to alter the *status quo* during a contract hiatus. OZAUKEE COUNTY at 9-10. Moreover, the City's action in soliciting the Union's acquiescence to the May 1 plan change undermines the City's position that the Union had already agreed to that change, as does the Union's immediate and forceful refusal to acquiesce.

Regarding the abusive delay issue, the City's central argument is that the Union's two-week delay in filing its arbitration brief, undertaken with the knowledge that the City could not change plans after May 1, was purposefully designed to delay the award until after May 1, thus requiring the City to maintain the preferable benefits under Plan 1 for another year, i.e., until May 1, 2005. The City argues that this was "unlawful abusive delay" that would justify a unilateral change during hiatus within the meaning of the dictum in GREEN COUNTY, SUPRA, at 16. While noting that the City's inference was reasonable, the Examiner concluded that the stipulated evidentiary record did not support a finding that the Union's motives for filing its brief two weeks late were "unlawful" or "abusive" and we agree. Such an inference merely from the fact of a two week delay is simply too strained. The Examiner also noted that the City itself, having agreed to extend the briefing deadline from February 27 to March 9 with awareness that arbitration awards have a 60-day guideline for issuance after receipt of briefs, could not have expected the award to have issued before May 9. On that point, the City also challenges the Examiner, claiming that the City did indeed expect the award sooner than May 9, because the City knew that "Arbitrator Weisberger usually issues her Award much sooner than the sixty (60) days standard." (City Br. at 4). Again, the stipulated evidentiary record does not reflect what the City's information or understanding was at the time the City agreed to the extension. More importantly, however, the issue turns on the Union's state of mind, rather the City's. In addition, whatever the Union's motive, the issue has lost considerable relevance given our ultimate conclusion that, in this case, entering into the carrier's contract did not compel the City to implement changes in benefits.

On whether a two-day unilateral implementation is legally *de minimus*, the Examiner correctly concluded:

> 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.

Examiner's decision at 11.

We turn then to the City's principal argument, i.e., did the insurance carrier's refusal to permit a change in plans except on the May 1 anniversary date give the City no choice but to change to Plan 2 as of that date? As reflected in the Examiner's recitation of the Commission's precedent at page 12 of his decision, the Commission has not squarely defined the scope of a "necessity" defense in a unilateral change case.[2] In the context of this case, we adopt the Examiner's description of its elements and its limited scope as follows:

> "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. ... 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.

Examiner's decision at 13.

Applying the foregoing analysis, the Examiner concluded that the change in this case was occasioned by an unanticipated material change in circumstances imposed upon the employer by outside forces, i.e., the insurance carrier's insistence upon making changes only on the anniversary date of May 1. Since renewal of an insurance contract, like any contract, presumably is susceptible to negotiation between the parties, we would like to approach with caution an employer's assertion that the insurance carrier compelled the employer to implement a plan change at a certain date, if that assertion were controverted. However, on this stipulated record, we accept the parties' tacit agreement that the insurance carrier's letter of April 25, 2004 represented an unequivocal and non-negotiable insistence by the carrier that it would not permit plan changes after May 1.

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[2] We note that the National Labor Relations Board articulates the availability of a similar "economic exigency" defense in unilateral change cases. The Board has characterized such an exigency as "'extraordinary events which are "an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action. '" RBE ELECRONICS OF S.D., INC., 320 NLRB 80 (1995), citing BOTTOM LINE ENTERPRISES," 302 NLRB 373 (1991), ENF'D, 15 F. 3D 1087 (9TH CIR. 1994). See discussion in GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW (2D ED. THOMSON-WEST 2004) at 606-07.

In determining whether the carrier's ostensibly non-negotiable action made the *status quo* untenable, the Examiner as well as the parties assumed that entering into a revised contract with the insurance carrier in and of itself would alter the *status quo* regarding employee benefits. On the contrary, however, we view the City's relationship with its employees as distinct from the City's contractual relationship with an insurance carrier. In this situation, the contractual plan change by the third party insurance company apparently carried only financial effects. Whatever its contract with the carrier, the City could have maintained the financial benefits of Plan 1, in terms of co-pays, deductibles, and co-insurance and otherwise held the employees harmless for the results of the new insurance contract between the carrier and the City. We emphasize that there may be situations where changing the insurance contract would *ipso facto* change employee benefits in a manner that the employer could not deflect, as, perhaps, changing the carrier or the plan administrator. Such changes could affect the employees' choice of provider, the manner in which claims are processed, or other matters that are not tangibly financial but are nonetheless elements which contribute toward the long-standing determination that the identity of the insurance carrier is a mandatory subject of bargaining However, in the instant circumstances, the unilateral change did not flow inexorably from changing the contract with the carrier, but rather lay in the City's having failed to maintain the full benefits of Plan 1 until the interest arbitration was resolved.[3]

Since the unlawful unilateral change in this case was a failure to maintain the benefits of Plan 1 during the contract hiatus, this is not a situation in which it is impracticable to restore the *status quo ante,* i.e., the economic structures of Plan 1, with attendant reimbursement of out of pocket costs, from the time of the unilateral change until the time the interest award took effect. CF. OZAUKEE COUNTY, SUPRA, at 12. Contrary to the Union's argument, restoring the *status quo ante* does not require the parties to maintain these benefits until the following May 1, because in this case the *status quo* as between the City and bargaining unit employees was not coterminous with the contact between the City and the insurance carrier. Although the amounts in question are probably small, given the happenstance that only two days lapsed between the City's change in benefits and the arbitration award, restoration of the *status quo ante* along with make-whole relief has traditionally served the deterrence as well as compensatory purposes of the Commission's remedial scheme. Indeed, as we conceive the violation here, the Union and its members would gain a windfall if the City were compelled to reinstate the Plan 1 benefits for nearly a year beyond the date on which both parties agreed (presumably for consideration given) that Plan 2 would become effective.

Having concluded that make whole relief is sufficient to redress the unilateral change in benefits here, we nonetheless acknowledge the Union's contention that make whole relief spanning as little as two days may not deter future violations of this nature, in that public employers may feel free to take the calculated risk where little money is likely to be at stake.

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[3] We also emphasize that the City's action in this case ostensibly represented the only way the City could implement the insurance plan that inevitably would be the outcome of the pending interest arbitration award. The competing equities might very well compel a different result if an employer entered into a third party contract that was potentially at odds with the outcome of collective bargaining and/or interest arbitration.

The Union argues that employers can only be deterred from such conduct by an extraordinary remedy, such as attorney's fees. Cf. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 19. We agree with the Examiner that this case is not appropriate for attorney's fees, as the issue addressed here (the contours of a necessity defense) had not been well elucidated in previous Commission decisions.

However, the Commission's case law is now well developed that unilateral changes in the *status quo* regarding health insurance during a contract hiatus are unlawful, even if the changes are consistent with both parties' tentative agreements, unless the parties have specifically agreed that a change may be implemented prior to receiving an interest arbitration award or otherwise concluding negotiations. The parties are free to try to negotiate over handling foreseeable contingencies during a hiatus, but they are expected to know by now that they may not impose unilaterally a solution that suits their own sense of practicalities. Accordingly, the Commission is likely to look favorably at future requests for attorney's fees in cases of this nature, where the issues involve settled questions of law.

Dated at Madison, Wisconsin, this 2nd day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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