STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME Local 310, Complainant,

vs.

RACINE COUNTY, Respondent.

Case 212
No. 64671
MP-4145

Decision No. 31329-B

Appearances:

Thomas Berger, Staff Representative, AFSCME Council 40, PO Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of Complainant AFSCME Local 310 and **Jack Bernfeld**, Assistant Director, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903 and

Victor Long, Consultant, Long and Halsey Associates, 8338 Corporate Drive, Racine, Wisconsin 53406, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint in Case 212, above, was initially filed by the above Complainant on April 4, 2005, and later amended on June 1, 2005, to allege that the above Respondent violated the Municipal Employment Relations Act (MERA) by refusing to participate in the processing of a grievance challenging the County's announced intention to unilaterally create separate pools of active employees and retirees for premium or premium equivalent rate determinations. On May 5, 2005, the Commission appointed the undersigned Marshall L. Gratz as Examiner in Case 212, and the Examiner noticed a hearing for June 1, 2005. The County filed its answer in the matter on May 12, 2005. The hearing scheduled for June 1 was subsequently cancelled pending Commission disposition of a motion for consolidation filed by the Complainants in Cases 210 and 211 involving the same employer and different labor organizations. On June 28, 2005, the Commission appointed the undersigned as Examiner in Cases 210 and 211, and, over the Respondent's objections, the Commission ordered the three complaints consolidated for hearing.

The Examiner noticed a consolidated hearing in the three cases for August 23, 2005. That hearing was later cancelled at the request of all parties to permit the parties to complete and submit a stipulation of facts in lieu of a hearing. The Examiner received the parties' signed fact stipulation on October 17, 2005. All parties then submitted briefs and Complainants submitted reply briefs, with briefing completed on December 7, 2005, marking the close of the hearing.

Based upon the record, the Examiner issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. At all material times, Complainant Local 310, AFSCME, AFL-CIO (Local 310) has been a labor organization with its principal office at 8033 Excelsior Drive, Madison, Wisconsin. At all material times, Local 310 has been the sole and exclusive bargaining representative for all full-time employees, including Licensed Practical Nurses, office clerical employees and regular part-time employees at Ridgewood Care Center.

2. At all material times, Respondent Racine County (County) has been a municipal employer with offices located at 730 Wisconsin Avenue, Racine, Wisconsin, and Victor Long has been the County's outside labor relations consultant. Among the services provided by Racine County is education for children with disabilities through the Racine County Children with Disabilities Education Board, established by the County pursuant to Sec. 115.817, Stats.

3. The County and Local 310 have maintained and enforced a series of collective bargaining agreements covering all full-time employees, including Licensed Practical Nurses, office clerical employees and regular part-time employees at Racine County's Ridgewood Care Center for the years 1988-1989, 1989-1991, 1991-1993, 1993-1995, 1995-1997, 1997-1999, 1999-2001, 2001-2003, and 2003-2005 (2003-05 Agreement).

4. All relevant contracts between the Local 310 and the County, dating back to at least 1988, provide for health insurance coverage for certain bargaining unit members employed by the County (employees, active employees or actives), as well as certain former bargaining unit members after retirement from County employment (retirees). Active employees who choose to take County health insurance are required to contribute "ten percent (10%) of the premium." To obtain and continue County health insurance coverage, retirees are required to make contributions to the cost to the County of such health insurance coverage, as well. The amount of the contribution depends on the particular retiree's years of service to the County. The following schedule of "percentage of the premium" contributions for retirees is established through the various collective bargaining agreements for all retirees:

25 & over years of service -- 5%
20 & 5 over to 25 years of service -- 10%
15 & over to 20 years of service -- 20%
10 & over to 15 years of service -- 25%
5 & over to 10 years of service -- 40%
Less than 5 years of service -- 50%

5. In the past, the County offered various choices of health insurance coverage for Local 310 bargaining unit employees and Retirees through private insurers and through County self-funded plans; in the early 1990s the County began to phase out the private insurance plans for Union employees, although private plans remained available to Retirees who retired while the private plans were still offered to active employees. The last private plan for Retirees was discontinued as of January 2005. Those retirees in the private plan were placed in the County's self-funded "Plan 6" (Plan 6).

6. At all relevant times prior to January 1, 2005, the premiums for each County health insurance plan were established with all County recipients of that insurance plan, active employees and retirees, in the same insurance "pool." Under this system, premiums for the retirees and active employees who had the same coverage were the same. At present there are four County self-funded plans: "Plan 2," "Plan 3," "Plan 6." and "Plan 7." As there are only retirees in Plans 2 and 3, the premiums for Plans 2 and 3 are not at issue in this proceeding. The majority of County retirees and active employees are in Plan 6; there are presently no retirees in Plan 7.

7. Pursuant to the 2003-2005 Agreement, active County employees in Local 310 who were enrolled in Plan 6 began to pay higher drug co-pays beginning May 1, 2003 (actives pay $10/$15, retirees $5/$10).

8. Beginning January 1, 2005, for each of the self-funded plans with active employees (Plan 6 and Plan 7) the County created two "pools," one for retirees and the other for active employees. The County then established separate premiums for retirees and active employees in each plan (Plan 6 and Plan 7); these premiums are based on actuarial estimates of claims for each "pool."

9. The changes in health insurance premiums in the County's self-funded Plan 6 and Plan 7 from January 2002 to January 2005 are set forth below (percentages are premium increases from the previous year).

	Jan. 2002	Jan. 2003		Jan. 2004		Jan. 2005	
Premiums – Single							
Plan 6							
retirees	$313	$385	23%	$496	29%	$991	100%
Actives	$313	$385	23%	$496	29%	$553	11%

	Jan. 2002	Jan. 2003		Jan. 2004		Jan. 2005	
Premiums – Single							
Plan 7							
retirees	$285	$332	16%	$462	39%	$919	99%
Actives	$285	$332	16%	$462	39%	$513	11%

	Jan. 2002	Jan. 2003		Jan. 2004		Jan. 2005	
Premiums – Family							
Plan 6							
retirees	$877	$1,003	14%	$1,385	38%	$2,132	54%
Actives	$877	$1,003	14%	$1,385	38%	$1,602	16%

	Jan. 2002	Jan. 2003		Jan. 2004		Jan. 2005	
Premiums – Family							
Plan 7							
retirees	$799	$931	17%	$1,293	39%	$1,978	53%
Actives	$799	$931	17%	$1,293	39%	$1,486	15%

10. The changes in total monthly premium rates for the Plan 6 coverage offered to active employees and retirees by the County from those effective on January 1, 2004, to those effective on January 1, 2005, were as follows:

Coverage	Plan 6 2004 total monthly premiums	Plan 6 2005 total monthly premiums	% increase 2005 over 2004
Single	$496	$553	11%
Family	$1388	$1602	15%
retiree single	$496	$991	100%
retiree family	$1388	$2132	54%
1 over 65	$380	$411	8%
2 over 65	$765	$822	7%
1 over/1 under 65	$876	$1402	60%
2 over + dependents	$1156	$974	-16%

11. Both before and after January 1, 2005, Retirees and active employees in Plan 6 have received the same health insurance coverage, except that active employees represented by Local 310 have, since May 1, 2003, paid higher drug co-pays than Local 310 retirees.

12. The County announced its change in the "pool" for determining the health insurance rates for Retirees and Union employees at a meeting attended by some Retirees on October 4, 2004, and in a letter to Retirees dated October 11, 2004.

13. The County did not inform, discuss with or bargain with Local 310 about the change in the manner of calculating health insurance premiums for retirees and active employees described in Finding of Fact 8.

14. On November 1, 2004, Local 310 filed a grievance (November 1, 2004, grievance) regarding the actions of the County in creating separate pools for retirees and active employees to establish health insurance rates. The County refused and continues to refuse to process said grievance through the grievance and arbitration procedure contained in the 2003-05 Agreement.

15. The November 1, 2004, grievance consisted of a letter from Berger to the County which read in part as follows:

> The Union has learned from our retirees that the County intends to change the insurance pool for those employees who have retired that are currently in Wausau Plan Six. This change could also impact current employees who are covered by Wausau Plan Six.
>
> This unilateral change in working conditions was done without approval from AFSCME Local 310 nor was this change bargained with the Union. Such change is a violation of the contract, Article 18 Section 18.04 (a)(b)(c) of the labor agreement.
>
> The adjustment required is that the County cease and desist with the intended change the insurance pool of current and retired employees in Wausau Plan Six until the County and the Union has bargained such change. In addition, any other relief that may be necessary to make the grievants whole from the impact of the proposed change or the unilateral implementation of such a change.

The County responded by letter from Long to Berger dated November 10, 2004, which read as follows:

> I am writing in response to your letter of November 1, 2004, ... Since the topic of the letter deals with a labor relations matter, I am responding for Racine County. Your letter includes a demand that the County bargain the change bargain the change in the accounting for the retiree insurance pool and gives the impression that the letter constitutes the filing of a grievance.
>
> It is the County's position that Local 310 has no standing to represent the retirees since they are not a part of the bargaining unit as described in Article I-Recognition of the collective bargaining agreement. As a result, the County will be taking no further action in response to your letter.

Berger responded by letter dated January 27, 2005, as follows:

> We received your letter regarding the insurance changes which was meant as a grievance and sent to the Ridgewood administrators Please be advised that your response is unsatisfactory. The changes the County has made modify the premium for ALL retirees current and future as we understand what the County has done.
>
> Therefore the grievance is both proper and necessary. Since: the County made unilateral changes to the retiree coverage it affects both our retired members and our members yet to retire and as such MUST be addressed by the County. Refusal to address this grievance by the County will force AFSCME Local 310 to file a prohibited practice charge against the County.

Long replied to Berger by letter dated February 24, 2005, as follows:

> I am writing in response to your letter of January 27, 2005. Your letter indicates that my response dated November 16, 2004 is "unsatisfactory" and that "the grievance is both proper and necessary." The County's position remains unchanged that Local 310 has no standing to represent the retirees since they are not a part of the bargaining described in Article 1-Recognition of the collective bargaining agreement.
>
> As stated in my earlier letter, the County will be taking no further action in response to your complaint.

Berger replied by letter dated February 28, 2005, reiterating the Union's previously stated position, and the instant complaint was filed on April 4, 2005.

16. The 2003-05 Agreement provides, in part, as follows:

AGREEMENT

[The County] and [Local 310], for and on behalf of themselves and the employees in the bargaining unit hereinafter described; such Agreement to commence on January 1, 2003 and shall remain in effect through December 31, 2005.

ARTICLE I
RECOGNITION

1.01 Racine County recognizes Local 310 . . . as the sole and exclusive bargaining agency for all full time employees, including Licensed Practical Nurses, office clerical employees and regular part-time employees as herein defined at Ridgewood Care Center, but excluding supervisory employees, professional employees, Dietitian, Personnel Coordinator, and the Secretary to the Administrator.

. . .

ARTICLE VII
GRIEVANCE PROCEDURE

7.01 A grievance is a difference of opinion between an employee and employees and the Management, or between the Union and the Management, concerning the meaning and application of the terms of this Agreement. . . .

7.02 The following procedure shall be used for the adjustment of grievances.

Step 1 [grievance brought to attention of Department Supervisor either by affected employee and/or the affected employee's Department Steward]

Step 2 If the grievance is not satisfactorily resolved . . . in Step 1 above and the Union wishes to appeal the grievance further, the grievance shall be reduced to writing and presented to the Administrator, or his/her designee within three (3) working days of receipt of an unsatisfactory answer in Step 1 above.

A meeting will then be scheduled . . .

Step 3 [appeal to the Labor Relations Director]

Step 4 [appeal to the County Personnel & Community Services Committee]

Step 5 If the answer of the Personnel & Community Services Committee still does not satisfactorily resolve the grievance, the Union may appeal the grievance further to arbitration.
. . .

7.03 If a grievance is not answered within the time limits specified at any step of the procedure, the grievance will be automatically advanced to the next step.
. . .

7.04 The arbitrator shall be selected from a list of five (5) names obtained from the Wisconsin Employment Relations Commission, each party alternately striking names until there is but one left, that person shall be the arbitrator.

7.05 The decision of the arbitrator shall be binding upon the parties. . . .

. . .

ARTICLE XVIII
INSURANCE

18.01 New employees who are eligible for the insurance benefit coverages specified in Article will receive such coverage on the first day of the month following the first thirty (30) calendar days of their employment. Employees hired after the effective date of this Agreement will have the self-funded plan as their health insurance.

18.02 Part time employees eligible for insurance benefits under the provisions of Article XIX who select family coverage shall pay forty (40%) percent of the premium, the County's portion to be sixty (60%) percent of the total premium, but in no event less than ninety (90%) percent of the single premium. Part time employees who are in at least a two (2) day per week position will be eligible for the following prorated benefits: . . . . Such employees will also be eligible for single health insurance coverage by paying ten percent (10%) of the premium, ...

. . .

18.04

(a) Effective May 1, 1990, employees will contribute ten (10) percent of the single or family premium for the coverage selected by the employee. The payment will be made through payroll deduction from the first two paychecks of each month.

The County will establish an IRS Section 125 plan to allow the deductions to be taken on a pre-tax basis, if the employee chooses to participate, and subject to IRS regulations. Implementation of Section 125 option to be effective no later than the 1st payroll period in June of 1990. The gross salary of employees who utilize this option shall not be reduced for purposes of Wisconsin Retirement System (WRS) or other contractual purposes. however, such option shall affect Social Security payments and benefits. Each eligible employee shall have the following options regarding health care packages:

(b) Effective January 1, 1995, the current self-funded health plan (WAUSAU II MOD) hereinafter referred to as the WAUSAU plan (Plan 6) shall continue in full force and effect except as modified by Appendix A. The benefit year for health insurance claims will be January 1 - December 31. No later than June 1, 1996, vision care coverage will be added to the WAUSAU plan. Effective May 1, 2003, the WAUSAU PLAN will be modified by increasing the prescription drug co-payments to $15 for brand drugs and $10 for generic. Employees hired on, or after, May 1, 2003 will be offered a modified health insurance plan, Plan 7, and will not be eligible to participate in Plan 6. The modifications from the existing WAUSAU PLAN 6 a-e contained in Appendix A that is hereby incorporated into this agreement and will be referred to as Plan 7.

(c) Employees who retired prior to June 1, 1990, under the provisions of Article 22.02 of this agreement. will continue with whatever coverage is in effect as of May 1, 1990. If they choose to change coverage in the future, they may select between the WAUSAU plan or the HMO. Employees who retire after June 1, 1990 under the provisions of Article 22.02 of this agreement will have the option of the WAUSAU plan or the HMO during each open enrollment period.

(d) For those employees hired prior to July 1, 1991 and enrolled in the self-funded plan, the County will provide the following additional benefits under the Section 125 plan:

The County will establish a flexible spending account and annually will allocate $600 for those with family coverage and $300 for those with single coverage.

This account may be used to pay plan deductibles and coinsurance and may also be used by the employee for reimbursement for such items as optical exams and eye glasses, non-covered dental expenses, prescription drug coinsurance and other qualified medical expenses. This benefit is not available to current or future retirees.

All employees will be allowed to make their own pre-tax contributions to the plan for the payment of child care expenses, subject to IRS limitations and regulations.

For those employees hired on, or after, July 1, 1991 and before May 1, 2003, the County will offer the following additional benefits under the Section 125 plan if the employee voluntarily enrolls in the WAUSAU PLAN 7 outlined in Appendix A. The employee will have the opportunity to make this election each year during open enrollment but once me election is made, the employee will not be able to return to the prior plan.

The County will establish a flexible spending account and annually will allocate $400 for those with family coverage and $200 for those with single coverage. This account may be used to pay plan deductibles and coinsurance and may also be used by the employee for reimbursement for such items as optical exams and eyeglasses, non- covered dental expenses, prescription drug coinsurance and other qualified medical expenses.

This benefit is not available to current or future retirees.

(e) As part of the WAUSAU health insurance plan, the County will provide coverage for vision care, including examinations and lenses, within plan limits.

(f) Upon the death of either an active employee or a former employee who retired on or after January 1, 2000, who was enrolled in the County's health insurance program at the time of death, the spouse of said employee or former employee may elect, within 60 days of said death, to continue to receive family

or single health insurance coverage. If the spouse elects to continue to receive health insurance coverage, the premium share charged to the spouse shall be at the same percentage of the total cost of the insurance that the employee or former employee was paying at the time of death. Such coverage will end upon the death or remarriage of the surviving spouse.

For employees hired by the County who begin employment on or after January 1, 2000, health insurance coverage will terminate:

1. Upon the termination of employment unless continued pursuant to any federal mandates.

2. If the employee is retired and the retiree has single health insurance coverage, upon the retiree reaching the age of eligibility for Medicare or any successor program.

3. If the employee is retired and the retiree has continued family health insurance coverage, upon either the retiree or the retiree's spouse reaching the age of eligibility for Medicare or any successor program; provided that the younger of the retiree and the retiree's spouse shall be able to continue under single health insurance coverage until that person reaches the age of eligibility for Medicare or any successor program at which time all health insurance coverage shall terminate.

4. If the employee or retiree is deceased and the surviving spouse has elected to continue health insurance coverage, upon the surviving spouse reaching the age of eligibility for Medicare or any !successor program or upon remarriage whichever comes first.

18.05 At no cost to the employee, the County shall provide a life insurance policy in the amount of $5,000 for persons who have retired and employees who will retire under the Wisconsin Retirement Plan.

18.06 Upon the death of an active employee or an employee who retired on or after January 1, 1998 and who is enrolled in the County health insurance plan at the time of death, the County shall provide the following survivor's benefit: The surviving family members who were enrolled in the County's health insurance

plan at the time of the employee's or retiree's death may continue to receive such benefit for a period of twenty-four (24) months by paying the same percentage of health insurance premium that the active or retired employee was paying at the time of death, Continuation of coverage after twenty-four (24) months will be in accordance with the remaining twelve (12) months allowed by the Consolidated Omnibus Budget Reconciliation Act (COBRA).

. . .

ARTICLE XXII
RETIREMENT PROGRAM

. . .

22.02 Effective January 1, 1989, any employee retiring under the Wisconsin Retirement Plan and having reached age 55 shall be entitled to be continued under the County's group health insurance plan by paying a percentage of the premium based on years of service regardless of date of retirement.

Any employee who exercises his/her right to continue under said group policy as stated in this provision, shall be required to pay his/her share of the cost of such insurance coverage to the County Clerk at least thirty (30) days prior to the date of the insurance premium. Such retired employees are also required to purchase coverage under the Medicare Part B plan for themselves and their spouse, when the employee and/or spouse is age sixty-five (65.)

The following premium requirements apply to all current and future retirees:

25 & over years of service -- 5%
20 & 5 over to 25 years of service -- 10%
15 & over to 20 years of service -- 20%
10 & over to 15 years of service -- 25%
5 & over to 10 years of service -- 40%
Less than 5 years of service -- 50%

. . .

ARTICLE XXIX
DURATION

29.01 This Agreement shall become effective January 1, 2003 and remain in effect through December 31, 2005 and shall continue in effect from year to year thereafter, unless either party gives written notice to the other party indicating a desire to terminate or amend the Agreement. . . .

29.02 By mutual consent evidenced by a written agreement duly executed by the parties, this Agreement can be modified or changed by adding new provisions or deleting existing provisions.

. . .

17. The 2003-05 Agreement does not contain express language that would exclude from the scope of the grievance and arbitration procedure grievance claims, such as those contained in the November 1, 2004, grievance, asserting that the County violated Arts. 18.04(a), (b) and (c) of that agreement.

18. The County's refusal to process the November 1, 2004, grievance through the grievance and arbitration procedure of the 2003-05 Agreement constituted a violation of Secs. 7.02 and 7.05 of that agreement.

CONCLUSIONS OF LAW

1. By its refusal to process the November 1, 2004, grievance through the grievance and arbitration procedure of the 2003-05 Agreement the County committed a prohibited practice violative of Sec. 111.70(3)(a)5, and (derivatively) 1, Stats.

ORDER

1. By way of remedy for the violation noted in the Conclusion of Law, above, Respondent Racine County, its officers and agents, shall immediately:

(a) Cease and desist from refusing to process through the applicable grievance procedure, including final and binding arbitration, grievances that are subject to the grievance and arbitration procedure of is collective bargaining agreement with Local 310.

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Process the November 1, 2004, grievance in accordance with the terms of the 2003-05 Agreement, including the provisions for final and binding arbitration.

(2) Notify all of its employees in the bargaining unit represented by Local 310 by posting in conspicuous places where employees are employed in that unit, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the County Executive of Racine County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Racine County that those notices are not altered, defaced, or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Shorewood, Wisconsin, this 9th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES
OF THE RACINE COUNTY CHILDREN WITH DISABILITIES EDUCATION BOARD
represented by Local 310, AFSCME, AFL-CIO

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

1. WE WILL immediately process the November 1, 2004, grievance filed by Local 310, AFSCME, AFL-CIO (concerning change in the insurance pool of current and retired employees in Wausau Plan 6) in accordance with the terms of the 2003-05 Agreement.

2. WE WILL NOT refuse to process grievances that are subject to the grievance and arbitration in collective bargaining agreements between Racine County and Local 310, AFSCME, AFL-CIO.

Dated this _____ day of _____, 200_____.

RACINE COUNTY

_____
County Executive

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

RACINE COUNTY

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Pleadings and Parties' Arguments

In its complaint, as amended, Local 310 alleges that the County violated MERA, and particularly Secs. 111.70(5) and (1) thereof, when it made unilateral changes in the insurance benefits contained in the parties 2003-05 Agreement by announcing its intention to create separate pools of active employees and retirees for premium or premium equivalent rate determinations, and when it refused to process Local 310's November 1, 2004, grievance challenging the County's announced intentions to make those changes. In its answer, the County denies that it violated MERA in any way.

In its post-hearing arguments, Local 310 asserts that the County's change to separate active and retiree pools changed the previously-uniform premiums on which active employees' and retirees' health contributions were calculated to different premiums for actives and retirees, causing severe comparative increases in retiree contributions that would not have occurred but for the County's unilateral actions; that those changes altered the contractual insurance benefits of both actives and retirees and violated the 2003-05 Agreement in both respects; that the claims to those effects in the November 1, 2004, grievance clearly involve the interpretation, application or enforcement of express contract terms, fall well within the broad contractual definition of grievable and arbitrable disputes in Sec. 7.01, are not specifically excluded from that definition anywhere in the contract, and therefore clearly meet the applicable decisional standard requiring only that it cannot be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the claims asserted in the grievance. Local 310 disputes the County's assertion that Local 310 has no standing to bring the instant, asserting that the County's actions affected both retired and active employees (including actives who are eligible to retire); that the Union has advocated for the interests of both active and retiree groups in the negotiations leading to the parties series of agreements providing for retiree insurance benefits; and that all of the Union's correspondence beginning with the November 1, 2004, grievance has objected to the impact of the County's actions on both actives and retirees. Local 310 asserts that, even if the decision to change the pooling method is a permissive subject of bargaining, the impact of that decision on the employees covered by the agreement is a mandatory subject of bargaining which the County cannot unilaterally change as it has done in this case. By way of remedy, Local 310 requests a declaration that the County violated Sec. 111.70(3)(a)5 and 1, a requirement that the County post a remedial notice, and either an order that the County submit the November 1, 2004, grievance to the contractual final and binding grievance arbitration process or a WERC determination of the merits of the grievance and an order that the County restore the status quo and make whole all persons adversely affected.

In its post-hearing arguments, the County acknowledges that, as of January 1, 2005, it began for the first time to separate active employees and retirees for the purpose of calculating the cost of the health insurance benefit, resulting in a higher cost allocation to the retiree group because of higher health care utilization by that group, and a lower cost allocation to active employees. The County asserts that the change: produced a more accurate distribution of the health insurance costs but no cost savings to the County; adversely affected only the retirees, who are outside the bargaining unit defined in the recognition language in Art. I; resulted in no modification of any provision of the 2003-05 Agreement; and left the actives and retirees paying the same percentages that were in effect prior to January 1, 2005. The County argues that decisions regarding an employer's methods of cost allocation to groups within the health insurance system is not a mandatory subject of bargaining and is a management decision over which the County has sole authority. The County further asserts that "The County clearly has the right to establish accounting practices that do not change any contractually specified benefit. There are any number of changes in accounting practices that can affect the employee benefit costs that may cause a change in the amount paid by an employee. In this circumstance, as long as the percentage paid by the employee or the retiree remains as specified in the [2003-05 Agreement], there is no violation of State Statutes. . . ." The County argues that the November 1, 2004, grievance is invalid because: it deals with the impact of the County change on retirees whom Local 310 does not represent "in a relationship that allows for such a grievance"; there were no benefit changes implemented; no provision of the 2003-05 Agreement was modified; and the percentage paid by the active employees and the retirees remained as specified in the 2003-05 Agreement. On those grounds, the County asks that the complaint be dismissed in all respects. In any event, the County argues that if a MERA violation is found, the appropriate remedy is to require that the County proceed with the processing of the November 1, 2004, pursuant to the grievance procedure in the 2003-05 Agreement, and that an order requiring the County to pay the Union's costs and attorneys fees would not be justified in the circumstances. The County notes that if the County is ultimately ordered to undo the change in accounting cost allocation retroactive to January 1, 2005, "there would be a beneficial impact for retirees but a negative impact for active employees."

Applicable Legal Standards

Section. 111.70(3)(a)5, Stats. provides, in relevant part, that it is a prohibited practice for a municipal employer,

> To violate any collective bargaining agreement previously agreed upon by the parties . . . , including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award where previously the parties have agreed to accept such award as final and binding upon them.

Wisconsin law with respect to enforcing an agreement to arbitrate is well-settled. In DENHART V. WAUKESHA BREWING COMPANY, INC., 17 WIS.2D 44 (1962), the Wisconsin Supreme Court adopted the U.S. Supreme Court's view, expressed in its decisions in the "Steelworker's Trilogy" [1], that in determining arbitrability, the court (or other arbitration agreement enforcement forum such as WERC) has a limited function. In its decision in JT. SCHOOL DISTRICT NO. 10, CITY OF JEFFERSON V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977) the Wisconsin Supreme Court explained that limited function as follows:

> "When the court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. . . . The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it."

Id. 78 Wis.2d at 111.

The Court went on to adopt the test formulated by the U.S. Supreme Court in its decision in WARRIOR AND GULF, SUPRA, AT 583, that: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." ID. 78 WIS.2D AT 112.

Application of Legal Standards

In this case, Sec. 7.01 defines a grievance as including both "a difference of opinion between an employee or employees and the Management . . . concerning the meaning and application of the terms of this Agreement," and "a difference of opinion . . . between the Union and the Management, concerning the meaning and application of the terms of this Agreement."

The November 1, 2004, grievance asserts that the County's announced intention to change the insurance pool of current and retired employees in Wausau Plan 6 violates Sec. 18.04(a), (b) and (c) of the 2003-04 Agreement. Each of those three subsections of Sec. 18.04 is a "term of this Agreement" within the meaning of Sec. 7.01, and, the question of whether the County's change in the insurance pool of current and retired employees violated those provisions is "a difference of opinion . . . between the Union and Management . . .

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[1] UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 U.S. 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593 (1960).

concerning the meaning and application of the terms of this Agreement." It is undisputed that the County's change in the insurance pool of current and retired employees in Wausau Plan 6 resulted in "the . . . premium" for active employees' family and single Plan 6 coverage referred to in Sec. 18.04 (a) being different than it would have been had the disputed change in the insurance pool of current and retired employees not been made. It is also undisputed that the County's change in that pool resulted, for the first time, in a difference between "the . . . premium" for active employees' family and single Plan 6 coverage referred to in Sec. 18.04 (a) and "the premium" for retirees' family and single Plan 6 coverage referred to in Sec. 22.02. In those contexts, the question of whether the County's change in the insurance pool of current and retired employees in Wausau Plan 6 violated Sec. 18.04 (a) is clearly a "difference of opinion . . . between the Union and the Management, concerning the meaning and application of the terms of this Agreement" within the meaning of Sec. 7.01 of the 2003-05 Agreement.

The fact that retirees are not members of the bargaining unit defined in Art. I of the 2003-05 Agreement does not affect Local 310's right to process and arbitrate the November 1, 2004, grievance. The 2003-05 Agreement contains various unequivocal provisions of insurance benefits to retirees or survivors of retirees. See, e.g., Secs. 18.04 (c) and (f), 18.05, 18.06, and 22.02. The parties' inclusion of those provisions in the 2003-05 Agreement makes it irrelevant -- for purposes of contract enforcement during the term of that agreement -- whether the retirees or their survivors are members of the bargaining unit defined in Art. I of the 2003-05 Agreement or whether Local 310 would have a statutory right to insist on inclusion of those provisions in a successor agreement.[2] Section 7.01 makes a "difference of opinion . . . between

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[2] The County's November 16, 2004 letter quoted in Finding of Fact 16 asserted that the relief requested by Local 310 in the November 1, 2004, grievance included "a demand that the County bargain the change in accounting for the retiree insurance pool . . ." and further asserted that "Local 310 has no standing to represent the retirees since they are not a part of the bargaining unit as described in Article I - Recognition." In that regard, the November 1, 2004, grievance requested that the County "cease and desist with the intent to change the insurance pool of current and retired employees in Wausau Plan Six until the County and Union has bargained such a change." That aspect of Local 310's relief request could be viewed as a demand that the County cease and desist from the change in the insurance pool of current and retired employees and an offer to bargain about such a change with the County, rather than as an unconditional demand to bargain. In any event, since it is undisputed that Local 310 is the exclusive representative of active employees in the bargaining unit described in Art. I, it follows that, in that capacity alone, Local 310 would be in a position to bargain with the County about whether and to what extent the insurance pool should be changed both for active employees and for active employees when and if they retire during the term of the agreement involved. SEE, E.G., CITY OF BROOKFIELD, DEC. NO. 25517 (WERC, 6/88)(proposal regarding compensation of active employees to be payable after their retirement held to be a mandatory subject of bargaining). Furthermore, a grievance arbitrator would be entitled to broad latitude in fashioning a remedy for a contractual violation, if one is found, E.G., CITY OF MILWAUKEE V. MILWAUKEE POLICE ASSOCIATION, 97 Wis.2d 15, 37 (1980), CITING ENTERPRISE WHEEL, SUPRA, NOTE 1, 363 U.S. 593 AT 596, and Local 310's right to arbitrate the November 1, 2004, grievance would not be defeated even if one portion of the relief requested in that grievance would exceed the authority of an arbitrator if it were ultimately ordered.

the Union and the Management" concerning the meaning and application of [those] terms of [the 2003-05] Agreement subject to the grievance and arbitration process, and there is no provision in the 2003-05 Agreement that expressly excludes claimed violations of Secs. 18.04 (a), (b) or (c) from the Art. VII grievance or arbitration processes.

The fact that the County's change in the insurance pool of current and retired employees in Wausau Plan 6 did not alter the percentages of "the . . . premium" to be contributed by active employees under Secs. 18.04(a) or by retirees under Sec. 22.02 does not render the November 1, 2004, grievance non-arbitrable. As noted above, it is undisputed that the County's change in insurance pool altered the premiums that active employees' and retirees' contribution percentages were multiplied by in determining the dollar amounts of their respective contributions. The question of whether the changes in dollar amounts of the contributions required of active and retired employees that resulted from the County's change in the insurance pool of current and retired employees in Wausau Plan 6 violated Sec. 18.04 (a) is clearly a "difference of opinion . . . between the Union and Management concerning the meaning and application of Sec. 18.04 (a) read in the context of Sec. 22.02 and the balance of the 2003-05 Agreement as a whole.

For those reasons, the Examiner has concluded that by refusing to process the November 1, 2004, grievance through the grievance and arbitration processes specified in Art. VII of the 2003-05 Agreement, the County violated committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and (derivatively) 1 of MERA.

Remedy

The Examiner has ordered the conventional remedies for a Sec. 111.70(3)(a)5 refusal to grievance arbitrate violation: declarative, notice posting, cease and desist, and an affirmative order requiring the County to process the November 1, 2004, grievance in accordance with the 2003-05 Agreement grievance and arbitration procedure. While it would unquestionably be more expeditious, the alternative affirmative order suggested by Local 310 -- WERC determination of the merits of the grievance and issuance of a remedial order, if any, based on that determination -- would, in the absence of mutual agreement of the parties, be inconsistent with: the parties' agreed-upon Art. VII procedures for resolving grievances, the strong policy favoring resolution of disputes in the manner agreed upon by the parties expressed in the DENHART and JEFFERSON cases, SUPRA, and the WERC's general deferral to arbitration criteria, SEE, E.G., CITY OF KENOSHA (FIRE), DEC. NO. 29715-B (NIELSEN, 5/00), AFF'D, DEC. NO. 29715-C (WERC, 8/00).

The Examiner has not ordered relief in the form of reimbursement of Local 310's litigation costs and attorneys fees. This case does not fall within the narrow scope of those in which the Commission has found such extraordinary remedies appropriate. SEE, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Dated at Shorewood, Wisconsin, this 9th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

MLG/gjc
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