STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WESTERN RACINE SPECIAL EDUCATION ASSOCIATION, PROFESSIONAL UNIT, Complainant,

vs.

RACINE COUNTY, Respondent.

Case 210
No. 64634
MP-4142

Decision No. 31377-B

WESTERN RACINE SPECIAL EDUCATION ASSOCIATION, SPECIAL EDUCATION AIDES UNIT, Complainant,

vs.

RACINE COUNTY, Respondent.

Case 211
No. 64635
MP-4143

Dec. No. 31378-B

Appearances:

Lucy Brown, Legal Counsel, Wisconsin Education Association Council 33 Nob Hill, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainants.

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 complaints in Cases 210 and 211, above, were initially filed by the respective Complainants on March 21, 2005, and later amended on May 12, 2005, to allege that the above Respondent violated Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA) by making unilateral changes in insurance benefits for active employees and retirees. On June 28, 2005, the Commission appointed the undersigned as Examiner in each, and, over the Respondent's objections, the Commission ordered the instant cases consolidated for hearing with a third complaint (Case 212 involving the same employer and a different labor organization). Respondents filed answers in Cases 210 and 211 on July 30, 2005.

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 Western Racine Special Education Association, Professional Unit (Professionals Association), has been a labor organization with an address for purposes of this complaint of c/o Mark J. Simons (Simons), Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, Wisconsin. At all material times the Professional Association has been the sole and exclusive bargaining representative for all permanent professional Racine County employees employed under individual contract with Board, and Simons has been the Professionals Association's principal representative.

2. At all material times, Complainant Western Racine Special Education Association, Special Education Aides Unit (Aides Association), has been a labor organization with an address for purposes of this complaint of c/o Mark J. Simons, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield. At all material times, the Aides Association has been the sole and exclusive bargaining representative for all permanent full-time and permanent part-time Racine County special education aides under individual contract with the Board, and Simons has been the Aides Association's principal representative.

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

4. The County and the Professionals Association have maintained and enforced a series of collective bargaining agreements covering the professional employees of the Board for the years 1988-l991, 1991-1993, 1993-1995, 1995-1997, 1997-1999, 1999-200l, 2001-2003.

5. The County and the Aides Association have maintained and enforced a series of collective bargaining agreements covering the special education aide employees of the Board for the years 1988-1990, 1990-l992, 1992-1993, 1993-1995, 1995-1997, 1997-1999, 1999-2001 and 2001-2003.

6. The nominal terms of County's the most recent respective contracts (2001-03 Agreements) with Professionals Association and Aides Association (jointly referred to as the Associations) were July 1, 2001-June 30, 2003. The parties have stipulated that that those contracts expired on September 1, 2003. Negotiations and interest arbitrations were on-going for successor contracts as of October 17, 2005.

7. All relevant contracts between the Associations and the County, dating back to at least 1988, provide for health insurance coverage for 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" with higher employee contributions required of employees working less than 75% of full time. 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%

8. In the past, the County offered various choices of health insurance coverage for the Associations' 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)

9. 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." Because 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.

10. 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."

11. 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%

12. 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%

13. Both before and after January 1, 2005, retirees and active employees in Plan 6 have received the same health insurance coverage.

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

15. The County did not inform, discuss with or bargain with either of the Associations about the change in the manner of calculating health insurance premiums for retirees and active employees described in Finding of Fact 10.

16. On October 14, 2004, each of the Associations filed grievances on behalf of its retirees and its active members 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 grievances through the grievance and arbitration procedure contained in the 2001-03 Agreements.

17. The October 14, 2004, grievances each were filed by Simons as group grievances. Each read, in part, as follows:

> STATEMENT OF GRIEVANCE: On or about October 20, 2004, the Association learned that the employer has intent to change the insurance pool for those employees who have retired that are currently in Wausau Plan Six. This change would also impact current employees who are covered by Wausau Plan Six. This unilateral change in working conditions was done without approval from the Association nor was this change bargained with the Association. Such change is a violation of the contract, Article XI Section D of the Association contract. In addition, this [is a] violation of Art XXVII, Section D, and Article XXIX of the Association contract.
>
> REMEDY SOUGHT: The County will cease and desist with the intent to change the insurance pool of current and retired employees in Wausau Plan Six until the County and the Association have bargained such change. In addition, any other relief that may be necessary to make the grievants whole from the impact of this proposed change or the unilateral implementation of such a change.

The County responded by letter from Long to Simons dated October 1, 2004, which read as follows:

> I am writing in response to your letter of October 21, 2004, which was addressed to Karen Galbraith. Since the letter included four grievances related to retiree health insurance, I am responding for Racine County. The grievances include a demand that the County bargain the change in the accounting for the retiree insurance pool (for both the professionals and aides) and the change for retirees in the Humana Plan (for both the professionals and aides).
>
> It is the County's position that the two Associations have no standing to represent the retirees since they are not part of the bargaining unit as described in Article I - Recognition of the two collective bargaining agreements. As a

> result, the County will be taking no further action in response to your grievances.

Simons sent Galbraith grievance appeals dated November 18, 2004, January 25, 2005, and March 8, 2005. Long replied by letters to Simons dated February 24 and March 14, 2005, basically reiterating the County position as stated in Long's letter of October 1, 2004, above. Long's March 14, 2005, letter stated, in part, "The County's position remains unchanged that the issue is the establishment of an insurance pool for retirees and that the two Associations have no standing to pursue a grievance regarding this matter. As a result, the County will be taking no further action in response to your grievances."

18. The 2001-03 Agreements both provide, in part, as follows:

> ARTICLE I
> RECOGNITION
>
> [Professionals Association agreement:] The Board hereby recognizes Western Racine County Special Education Association as the sole and exclusive collective bargaining agent on wages, hours, and conditions of employment for all permanent full-time and permanent part-time professional employees under individual contract with Racine County. The unit shall include teachers, speech pathologists, social workers, and psychologists. The unit shall exclude managerial, supervisory and confidential employees, substitute teachers, aides, temporary employees, and any other employees not classified as permanent professional employees.
>
> [Aides Association agreement:] The Board hereby recognizes Western Racine County Special Education Association as the sole and exclusive collective bargaining agent on wages, hours, and conditions of employment for all permanent full-time and permanent part-time special education aides under individual contract with the County. The unit shall include special education aides. The Union shall exclude teachers, speech pathologists, social workers, psychologists, managerial, supervisory and confidential employees, substitute teachers, aides, temporary employees, and any other employees not classified as permanent professional employees.
>
> . . .

ARTICLE IV
GRIEVANCE PROCEDURE

A. Definitions

1. A "grievance" shall constitute only matters involving the interpretation, application or enforcement of the terms of this agreement.

2. An "aggrieved person", is the person or persons making the grievance.

3. A "party of interest" is the aggrieved person and any person, or the County, who might be required to take action or against whom action might be taken in order to resolve the grievance.

. . .

B. Purpose

The purpose of this procedure is to secure at the lowest possible level equitable solutions to problems which may from time to time arise affecting wages, hours or working conditions of employees.

. . .

D. Initiation and Processing

2. Level Two . . . the aggrieved person shall submit the grievance in writing to the Administrator. . . . the Administrator will respond in writing. . . . .

3. Level Three [appeal for review by the County Labor Negotiator]

4. Level Four [appeal for review by the County Board Personnel Committee]

5. Level Five Within the (10) days after receipt of the Committee's response the Association must notify the County Labor Negotiator of its intent to arbitrate. 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 here is but one left. The parties may mutually agree to an alternate means of selecting an arbitrator. The decision of the Arbitrator shall be binding upon the parties. . . .

6. Initiation of Group Grievances

If in the judgment of the Association, a grievance affects a group or class of employees, the Association may submit such grievance in writing to the Administrator directly and the processing of such grievances will be commenced at Level Two. The grievance shall be filed within ten (10) days after the known occurrence of the event giving rise to the grievance.

. . .

ARTICLE Xl
TERM OF AGREEMENT

A. This Agreement shall be in full force and effect from July 1, 2001, through June 30, 2003.

. . .

C. In the event that the parties do not reach a written successor agreement to this Agreement by the expiration date of this Agreement, the provisions of this Agreement shall remain in full force and effect during the pendency of negotiations and until a successor agreement is executed.

D. The impact of changes in County decisions, rules, practices or policies which occur during the term of this Agreement and which affect employee wages, hours or conditions of employment shall be subject to negotiations between the parties at reasonable times during the term of this Agreement.

When such negotiations are required, this Agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations. If said negotiations result in an impasse, the impasse shall be resolved pursuant to the provisions of section 111,70(4)(cm), Wis. Stats.

. . .

ARTICLE XXVII
INSURANCE

. . .

D. Health Insurance

1. Effective September 1, 1991, employees will contribute ten percent (10%) of the premium for this coverage selected by the employee. The payment will be made through payroll deduction from the first two paychecks of each month.

2. The County will implement a IRS Section 125 plan to allow future premium deductions to be taken on a pre-tax basis, if the employee chooses to participate. and subject to IRS regulations.

. . .

4. For those employees hired prior to July 1, 1991, the County will provide the following additional benefits under the Section 125 plan: . . .

This benefit is not available to current or future retirees.

. . .

For those employees hired on, or after, July 1. 1991, and before March 1, 2002, the County will offer the following additional benefits under the Section 125 plan if the employee voluntarily enrolls in the WAUSAU PLAN 7 . . . .

The benefit is not available to current or future retirees.

5. Employees who retired prior to September 1, 1991, and under the provisions' of Article XXIX of the agreement will continue with whatever coverage the individual has in effect on September 1, 1991. If they choose to change coverage in the future, they may select only the self-funded plan

(WAUSAU PLAN). Employees who retire on or after September 1, 1991, and under the provisions of Article XXIX of the agreement may select only the self-funded plan (WAUSAU PLAN).

. . .

8. Upon death of an active employee or an employee who retired on or after July 1, 1997, and 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).

9. Upon the death of either an active employee or a former employee who retired on or after October 1, 1999, 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 October 1, 1999, 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. Employees who are eligible for the insurance benefit coverages specified in this article must complete and return proper enrollment forms within thirty (30) days of the date of eligibility. Employees failing to enroll within this thirty (30) day period can only subsequently enroll during the County's annual open enrollment period.

. . .

ARTICLE XXVIII
BENEFITS FOR PART TIME EMPLOYEES

Permanent part-time employees will be eligible for insurance . . . based upon contract days as a percent of the full time benefit.

. . .

Contract Days as % of Full Time & County Contribution

0% through 49% -- 0%
50% through 74 % -- 50%
75% or greater -- 100%

ARTICLE XXIX
RETIREE INSURANCE

A. Health Insurance

The retiree contribution for health insurance coverage will be based upon years of service according to the following schedule:

25 & over years of service 5%
20 & 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%

Any employee retiring under the Wisconsin Retirement System shall be entitled to be continued under Racing County's group health insurance plan by paying a percentage of the premium based on years of service. Such retired employees are also required to purchase coverage under the Medicare Part B plan for themselves and their spouse upon eligibility at age sixty-five (65). Any such 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 Racine County Treasurer at least thirty (30) days prior to the due date of the insurance premium.

B. Retiree Life Insurance

For employees retiring under the Wisconsin Retirement System after September 1, 1988, the County will pay the full premium for a $5,000 life insurance policy. Employee[s] who retire under the Wisconsin Retirement System on or after January 1, 2002. will receive a $750 lump sum payment in lieu of a life insurance policy. The payment will be included in the final payroll check issued by the County.

C. Employees retiring on or after July 1, 1997, will be eligible for the survivor's benefit as specified in Article XXVII (D) (8) (9).

. . .

19. The allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees is a subject primarily related to wages, hours and other conditions of employment of active employees represented by the Associations.

20. The 2001-03 Agreements do not reserve to the County the right to alter the allocation of the cost of health insurance as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

CONCLUSIONS OF LAW

1. The allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations is a mandatory subject of bargaining between the County and the Associations.

2. The County's January 1, 2005, unilateral change in the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Association constituted refusals to bargain collectively with the Associations and prohibited practices within the meaning of Sec. 111.70(3)(a)4, and (derivatively) 1 of MERA.

ORDER

1. By way of remedy for the violations noted in Conclusion of Law 2, above, Respondent Racine County, its officers and agents, shall immediately:

(a) Cease and desist from unilaterally changing the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

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

(1) Restore the status quo that was in effect prior to January 1, 2005, as regards the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

(2) Upon request, bargain collectively with the respective Associations regarding the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

(3) Make whole, with interest at 12 percent per year[1], individuals who were retirees from the Associations' bargaining units on or after January 1, 2005, for the amount, if any, by which the individual's contributions toward County health insurance as a retiree on or after January 1, 2005, exceeded what the individual would have contributed had the County not committed the violations noted in Conclusion of Law 2, above.

(4) Notify individuals who were retirees from the Associations' bargaining units on or after January 1, 2005, and who terminated County health insurance benefits after the County's October 11, 2004, notice to retirees of changes in insurance pool and premiums, that they have a right to re-enroll in the County health insurance plan at premium rates determined by use of a pool combining active employees and retirees, and a right upon re-enrollment to be made whole, with interest, for financial losses caused them by the County's violations noted in Conclusion of Law 2, above; and honor such re-enrollment requests received from any such individuals; and make whole such re-enrollees, if any, for such losses, with interest at 12% per year.

(5) Recoup without interest, over a reasonable period of time, by paycheck deduction or otherwise, from individuals who were

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[1] The interest rate noted is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaints were initially filed with the agency on March 21, 2005. SEE, WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83), CITING, ANDERSON V. LIRC , 111 WIS.2D 245 (1983), AND MADISON TEACHERS, INC., V. WERC, 115 WIS.2D 623 (CT. APP. IV, 1983)

active employees in the Associations' bargaining units on or after January 1, 2005, the amount, if any, by which the individual's contributions toward County health insurance were exceeded by what the individual would have contributed had the County not committed the violations noted in Conclusion of Law 2, above.

(6) Notify all of its employees in the bargaining 6by the Associations, by posting in conspicuous places where employees are employed in those units, 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.

(7) 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.

(c) For purposes of complying with this Order, treat individuals receiving County insurance as survivors of active employees as this Order requires that active employees be treated.

(d) For purposes of complying with this Order, treat individuals receiving County insurance as survivors of retirees as this Order requires that retirees be treated.

2. The requests by the Associations for an order requiring the County to pay the Associations' attorneys fees and costs are denied.

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 the Western Racine County Special Education Association--Professional Unit
and by the Western Racine County Special Education Association Unit--Special Education
Aides Unit (Associations)**

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 restore the status quo that was in effect prior to January 1, 2005, as regards the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

2. WE WILL NOT unilaterally change the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

3. WE WILL, upon request, bargain collectively with the respective Associations regarding the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

4. WE WILL make whole, with interest at 12 percent per year, individuals who were retirees from the Associations' bargaining units on or after January 1, 2005, for the amount, if any, by which the individual's contributions toward County health insurance as a retiree on or after January 1, 2005, exceeded what the individual would have contributed had the County not violated Sec. 111.70(3)(a)4, Stats.

5. WE WILL notify individuals who were retirees from the Associations' bargaining units on or after January 1, 2005, and who terminated County health insurance benefits on or after the County's October 11, 2004,

notice to retirees of changes in insurance pool and premiums, that they have a right to re-enroll in the County health insurance plan at premium rates determined by use of a pool combining active employees and retirees, and a right, upon re-enrollment, to be made whole, with interest, for financial losses caused them by the County's violations of Sec. 111.70(3)(a)4, Stats.; and we will honor such requests and make such re-enrollees whole with interest for such losses.

6. WE WILL recoup without interest, over a reasonable period of time, by paycheck deduction or otherwise, from individuals who were active employees in the Associations' bargaining units on or after January 1, 2005, the amount, if any, by which individual's contributions toward County health insurance was exceeded by the amount the individual would have contributed had the County not violated Sec. 111.70(3)(a)4, Stats.

Dated this _____ day of _____, 200_____.

RACINE COUNTY

_____
County Executive

THIS IS 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

In their complaints, as amended, the Associations allege that the County violated Sec. 111.70(4) of MERA when, during the contract hiatus in each unit, the County changed the insurance benefits of active employees and retirees in a manner inconsistent with the status quo; that the County changed the status quo by placing retirees in a health insurance pool that included only persons who had retired from County service and placing active employees, who had been in the same pool with retirees, in a separate insurance pool from retirees; that as a consequence, the monthly premiums for active employees and retirees changed from what they would otherwise have been; and that the change was done without approval of or bargaining with the Associations. The complaint requests declarative, cease and desist, make whole, attorneys fees and costs relief and reinstatement of the status quo ante including an offer to reinstate the County's self-funded WAUSAU PLAN for any retiree who desires reinstatement and who dropped that plan since the County announced the change.

In its answer, the County denies that it violated MERA and denies that the County has engaged in conduct that would warrant the relief requested in the complaint.

Positions of the Parties

Associations' Position

In its post-hearing arguments, the Associations assert that the County violated the status quo and Arts. XXVII and XXIX of its prior collective bargaining agreements when it altered the make up of the health insurance pool previously used for establishing the premiums for the health insurance plans for active and retired members of the Associations' bargaining units; that although the County does not have to bargain over benefits for persons already retired, under accepted contract principles the Associations have a legitimate interest in protecting the rights of retirees and are entitled to seek enforcement of the applicable contract provisions, with arbitration the appropriate forum where, as here, the retirement insurance benefits provided to retirees under the expired Association-County agreements dating back to 1998 were clearly intended to vest and to survive the expiration of those various agreements; those various agreements contain grievance and arbitration procedures applicable to the instant disputes, with no provision specifically limiting a grievance to the time period of the specific agreement pursuant to which the person retired.

The Associations further assert that they have a right to challenge the County's actions as a unilateral change in the status quo of a mandatory subject primarily affecting the wages, hours and other conditions of employees of active employees; that County's changes in the computation of active employees' prospective retirement benefits affect the value of the active employees' future benefits for which they have bargained and have a right to continue to bargain; that the County's change is inconsistent with: the contract language in Arts. XXVII and XXIX providing for a "group health insurance plan" (not a plan in which the employer is free to unilaterally establish subgroups based on the subgroup's predicted health insurance costs), a single insurance "plan" with one and the same "premium" for active and retired employees (not one plan and premium for actives and another for retirees); and with the longstanding practices since at least 1988 of treating active employees and retirees in one pool in order to establish one "premium" for all. The Associations assert that what, prior to January 1, 2005, was a reasonably priced retirement benefit specifically provided for in a series of prior agreements has become a benefit of significantly less monetary value to the retirees and active employees contemplating retirement because of the County's change in the pool; that the record does not establish whether the County saved money by its action; and whether it did or not, the County's change without bargaining with the Associations violated the status quo and MERA.

By way of remedy, the Associations request that the County be ordered to immediately cease separating active employees and retirees into different pools for purposes of calculating health insurance premiums; that the County be ordered to reimburse all retirees who paid health insurance premiums to the County for coverage on or after January 1, 2005, for all overpayments that resulted from the County's violations of the status quo by changing to separate pools for determining health insurance premiums; and that the County be ordered to (1) contact all retirees who ceased coverage under a County health insurance plan following the County's October 2004 notification to retirees of the pool and premium changes, (2) to notify such retirees that they are entitled to re-enroll in the County health insurance plan at premium rates to be determined by use of a pool consisting of active employees and retirees, and (3) to make such retirees who choose to re-enroll in the County plan whole for financial losses suffered because of the County's actions.

In its reply brief, the Associations argue that the County's suggested remedy of referring the disputes to the contractual grievance procedures is not reasonable or appropriate because: the County's repeated refusals to process the Associations' grievances waived any County right to arbitrate those grievances; the dispute has been fully litigated and briefed in the complaint proceedings such that it would be grossly unfair to further delay relief to retirees who continue to pay significantly higher premiums or who have been forced to drop the County's insurance altogether; and because under current Commission case law, the Associations have no right to arbitration regarding the change because the change was made during a contract hiatus. The Associations encourage the Commission to reconsider its prior holdings in that regard in the context of this case, but only for prospective application.

County's Position

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; negatively affected only the retirees who all are outside the bargaining unit defined in the recognition language in Art. I; resulted in no modification of any provision of the 2001-03 Agreements; 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 [2001-03 Agreements], there is no violation of State Statutes. . . ."

The County argues that the October 14, 2004, grievances are invalid because: they deal with the impact of the County change on retirees whom the Associations do not represent "in a relationship that allows for such a grievance"; there were no benefit changes implemented; no provisions of the 2001-03 Agreements were modified; and the percentage paid by the active employees and the retirees remained as specified in the 2001-03 Agreements. 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 October 14, 2004, grievances pursuant to the grievance and arbitration procedure in the 2001-03 Agreements, 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

As noted, the only MERA violations alleged in the complaints are unilateral change refusals to bargain violative of Section 111.70(3)(a)4., Stats., which provides, in relevant part,

that it is a prohibited practice for a municipal employer, "To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit."

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission stated:

> It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFF'D MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFF'G DEC. NO. 6845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA. (AT PP. 5-6)

In WASHBURN, SUPRA, the Commission went on to note that:

> [A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA. (AT P. 8)

Under MERA, the standard for determining mandatory or permissive status with respect to subjects of bargaining is whether the subject matter is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formulation an choice of public policy; the former subjects are mandatory and the latter permissive. CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS. 2D 89 (1977); AND BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS. 2D 43 (1976).

Under that standard, both health insurance benefits in general and retiree health insurance benefits in particular have been held to be mandatory subjects of bargaining. E.g., MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); AFF'D MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (CT. APP. 1995)(health insurance benefits); CITY OF BROOKFIELD, DEC. NO. 25517 (WERC, 6/88)(insurance benefits payable to employees after they retire held mandatory subject of bargaining). However, the Commission has also held that "proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining." CITY OF MILWAUKEE, DEC. NO. 19091 (WERC, 10/81) AT 8, CITING, SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 17877 (WERC, 6/80)(relating to restrictions on pay of non-contract, substitute or casual employees) AND CITY OF MADISON, DEC. NO. 16590 (WERC, 10/78)(relating to evaluation of experience and training of non-bargaining unit employees applying for positions within the bargaining unit. The Commission has also stated in CITY OF MILWAUKEE, SUPRA, at 8, that an individual who is no longer employed due to retirement and without an expectation of further employment is not an "employee" within the meaning of MERA, nor is that person a member of the bargaining unit.

Application of Legal Standards

Issues to be Decided

The sole legal issues joined by the complaints and answers in this case are whether the County committed a unilateral change refusal to bargain violative of Sec. 111.70(3)(a)4, Stats., and, if so, what the appropriate remedy is for any such violation found.

The Associations' initial brief also seems to assert that, independent of the alleged refusals to bargain, the County's conduct also violated the terms of various collective bargaining agreements. However, the complaints contain no allegation of a violation of Sec. 111.70(3)(a)5, Stats., and there is no pleaded allegation putting the County on fair notice of that the Association is advancing such a contract violation claim in these cases. It would therefore be inappropriate and inconsistent with principles of fair play for the Examiner to make findings of fact, conclusions of law and order regarding the Associations' reply brief claim that the County committed independent violations of collective bargaining agreement arguments. SEE, GENERAL ELECTRIC V. WERB, 3 WIS.2D 227, 243 (1958)(fair play principles require that the Commission avoid "mak[ing] a finding with respect to a situation that is not in issue." Accordingly, the Examiner has not done so.

Claimed Unlawful Change in Mandatory Subject of Bargaining

It is undisputed that the County has unilaterally changed the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions for Plan 6 insurance to be made, before and after retirement, by active employees. It did so by changing from a Plan 6 cost allocation in which actives and retirees were in a combined pool for premium calculation to one in which actives and retirees were treated as separate pools for that purpose. As a result, the dollar amounts payable by both actives and retirees for Plan 6 insurance were different from one another for the first time since at least 1988 and different -- in some cases dramatically higher -- than they would have been if the change had not been made.

Those changes directly altered the wages, hours and other conditions of employment of active employees both by changing (decreasing) the dollar amounts that they are required to contribute toward County health insurance, and by changing (in most instances increasing) the dollar amounts that they will be required to contribute toward County health insurance after they retire. The fact, that the changes also significantly impacted the dollar amounts required of individuals who retired from Association bargaining unit positions before the January 1, 2005, change, does not negate or render "indirect" the effects of the change on active employees wages, hours and conditions of employment. The County's contention that the change did not result in any cost savings to the County is not confirmed by any evidence of record in this case; and even if it were, that would not negate the fact that the County has unilaterally changed a significant determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations.

For those reasons, the Examiner is persuaded that the allocation of the cost of health insurance between active employees and retirees as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees represented by the Associations is primarily related to the wages, hours and other conditions of employment of active employees represented by the Associations, and hence a mandatory subject of bargaining between the County and the Associations. Cf. MISSISSIPPI POWER COMPANY V. NLRB, 284 F.3D 605, 613-616 (5TH CIR. 2002)("changes in the computation of [retirement] benefits" held to be mandatory subjects of bargaining under the National Labor Relations Act.)

There is no evidence concerning bargaining history, but both the language of 2001-03 Agreements and the past practice since 1988 persuasively establish that the change at issue constituted a change in the dynamic status quo in effect prior to January 1, 2005. While the County's actions did not change the percentages that actives and retirees are respectively required to pay under Secs. XXVII.D.1 and XXIX.A. of the various Agreements, they did change the basis for calculating "the premium" by which the dollar amount of contributions in each of those sections is determined. The County's January 1, 2005, change is inconsistent with the parties use

of the identical term, "the premium," in each of those sections, and with the longstanding and uniform practices of determining "the premium" referred to in each of those sections based on a combined pool of actives and retirees and of the same "premium" applying for retirees as for actives.

If the parties intended the County have the right it claims -- i.e., to unilaterally divide the historically combined pool of actives and retirees into subgroups that allocate costs on a more accurate basis -- that would mean, in the extreme, that the parties intended to authorize the County to separate each active employee and each retiree into a subgroup of one and to calculate the individual premiums on the basis of each active's or retiree's predicted health insurance costs. That claimed right would therefore be inconsistent not only with the references to "the premium" noted above, but also inconsistent with the Sec. XXIX.A. requirement that retirees shall be eligible for the "County's group health insurance plan."(emphasis added). It is true that the record establishes that, since at least January 1, 2002, there have been Plan 6 and Plan 7 premiums not only for "family" and "single" insurance, but also for the various categories of insureds with one or more over age 65. Exh. 5 and, e.g., the table in Finding of Fact 12. However, those additional categories appear to reflect coverage differences arising from Medicare eligibility, and, in any event, the record does not establish that those over 65 categories were created or modified unilaterally by the County.

The Examiner has therefore concluded: that the 2001-03 Agreements do not reserve to the County the right to alter the allocation of the cost of health insurance as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees; and that the County's change in that allocation effective on January 1, 2005, constituted unilateral County action as to a mandatory subject of bargaining in a manner inconsistent with its rights under the dynamic status quo.

The fact that retirees are not members of the bargaining unit defined in Art. I of the 2001-03 Agreements does not affect the Associations' to file and process the instant complaint. The complaints, in part, allege violations of the County's statutory duty to bargain with the Associations about insurance benefits for active employees both before and after they retire from County employment. It is undisputed that the County has been and is the exclusive representative of the active employees in each of the Association's bargaining units. As such the Associations have the right to bargain with the County about the allocation of the cost of health insurance as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees. The Associations also have the concomitant right to enforce the County's statutory duty to bargain by means of complaints such as those filed in these cases.

For the foregoing reasons, the Examiner has concluded that the County committed a unilateral change refusal to bargain violative of Sec. 111.70(3)(a)4, and (derivatively) 1, Stats., by its January 1, 2005, change in the allocation of the cost of health insurance as a determinant of the dollar cost of contributions to be made, before and after retirement, by active employees.

Remedy

The remedy ordered by the Examiner is an effort to achieve the conventional purposes of relief for a Sec. 111.70(3)(a)4, Stats., unilateral change refusal to bargain violations: restoring of the status quo that was in effect prior to the January 1, 2005, violations; prohibiting such violations in the future; and financially returning the individuals affected by the violations (in these cases active employees in and retirees from the Association bargaining units) to the position they would have been in had the violations not occurred.

To achieve those ends, the Examiner has found it appropriate, in most respects, to adopt the remedy requested by the Associations. However, the Examiner's Order adds paragraph 1.(b)(5), to return active employees who experienced a reduction in their health insurance contributions as a result of the violations, to the position they would have been in had the violations not occurred. In that regard, the Examiner finds persuasive the County's contention that an order requiring the County "to undo the change in accounting cost allocation retroactive to January 1, 2005" needs to undo both the adverse impact of the unilateral change on retirees but also the beneficial impact of the change for active employees.

In the Examiner's opinion, the make whole relief ordered is "necessary to remedy effectively the unilateral change violation[s because] . . . . Without the make-whole remedy, employers would have little if any incentive to comply with the law." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04) AT 12.

The Examiner has rejected the County's contention that the relief in this case should consist, instead, of an order requiring the County to process the instant grievances in accordance with the applicable contractual grievance and arbitration procedures. As the Associations point out in their reply brief, under current Commission case law, procedures requiring arbitration of contract grievances are not a part of the dynamic status quo that the MERA duty to bargain requires parties to abide by during a contract hiatus.[2]

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[2] E.G., CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77) AND RACINE SCHOOLS, DEC. NO. 29203-B (WERC, 10/98)("Because grievance arbitration is not part of the status quo, SEE, GREENFIELD, SUPRA, neither party can compel the other to arbitrate grievances which arise during the contract hiatus. However, agreement to use arbitration has the potential to provide the parties with a prompt and inexpensive resolution of contract hiatus grievances. ID. AT 14, N.1) Whatever the Commission's response may be (upon its review of this decision) to the Association's suggestion in its reply brief that those decisions be reconsidered on a prospective-only basis, the Examiner has followed those precedents for purposes of deciding these cases.

While both 2001-03 Agreements contain evergreen clauses in Art. XI.C. which, on their face would extend all provisions of the agreement -- including the grievance arbitration procedure -- for the full length of the hiatus, Commission case law clearly establishes that those evergreen clauses became unenforceable on and after December 31, 2004, the date three years after the initial date of the 2001-03 Agreements, January 1, 2001. SEE, E.G., MILWAUKEE COUNTY, DEC. NO. 30431 (WERC, 7/02) AT 8-9 AND CITY OF SHEBOYGAN, DEC. NO. 19421 (WERC, 3/82) (Sec. 111.70(3)(a)4, Stats., provision that "The term of any collective bargaining agreement shall not exceed 3 years" renders evergreen clause unenforceable beyond three years of beginning date of agreement.) Accordingly, under current WERC case law, since December 31, 2004, the Associations have had no right to compel arbitration about the October 14, 2004, grievances. For the same reason, the County has no right in this proceeding to impose that method of dispute resolution in the absence of mutual agreement with the Associations to do so.

To the extent that the October 14, 2004, grievances can be fairly read as asserting violations of retirees' vested rights under earlier Association-County agreements than the 2001-03 Agreements, current Commission case law also raises serious questions about whether the arbitration provisions in the various expired agreements provide a compellable forum for adjudicating such rights absent a current agreement of the parties to submit to arbitration. SEE, CITY OF BROOKFIELD, SUPRA, DEC. NO. 25517 (WERC, 11/88)("While the [statutory] 3 year limitation on the term of a contract and the non-employee status acquired by individuals upon their retirement may impact upon the manner in which the right to deferred compensation would be enforced, the 3 year limitation . . . does not . . . also constitute a prohibition against the otherwise mandatorily bargainable nature of deferred compensation proposals." ID AT 6.[emphasis added]) AFF'D, CITY OF BROOKFIELD V. WERC, 153 WIS.2D 238 (CT.APP., 1989) AND VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96)("As we held in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 24272-B (WERC, 3/88), to find that a three-year contract required arbitration of grievances concerning events occurring after its expiration would, in effect, extend the agreement beyond the statutory three-year limitation. . . . Thus, as we held in RACINE, the three-year limitation on the term of an agreement established by Sec. 111.70(3)(a)4, Stats., precludes a determination that post-expiration events remain arbitrable under the terms of an expired three-year agreement." ID. AT 26). CF. ROTH V. CITY OF GLENDALE, 237 WIS.2D 173 (2000)(Supreme Court implicitly finds a civil action filed by individual retirees to be an appropriate means of enforcing vested retiree rights under expired collective bargaining agreements).

Finally, the Examiner has denied the Association's request for litigation costs and attorneys fees because these cases do 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

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