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-C

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

vs.

RACINE COUNTY, Respondent.

Case 211
No. 64635
MP-4143

Dec. No. 31378-C

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 Western Racine Education Association, Professional Unit, and the Western Racine Special Education Association, Special Education Aides Unit.

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 9, 2005, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matters, concluding that Racine County (County) had unilaterally changed 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, in violation of Sec. 111.70(3)(a)4 and 1, Stats. As a remedy, he

ordered, inter alia, that the County restore the status quo in effect prior to the County's unilateral change and negotiate in good faith about the issue. As part of restoring the status quo, the Examiner ordered the County to make whole individuals whose premium contributions were greater than they would have been under the status quo, and to recoup monies from individuals whose contributions were less than they would have been under the status quo.

On January 27, 2006, the Western Racine Special Education Association, Professional Unit and the Western Racine Special Education Association, Aides Unit (collectively, the Association) filed a timely petition seeking review of the Examiner's decision insofar as the Examiner ordered that funds be recouped from individuals whose premium contributions were less than they would have been if the County had maintained the status quo. On or before March 13, 2006, both parties filed briefs in support of or in opposition to the Association's petition for review. For the reasons set forth in the Memorandum that follows, the Commission sets aside that portion of the Examiner's remedy that required recoupment of funds from individuals. In all other respects, the Examiner's Order is affirmed.

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

ORDER

1. The Examiner's Findings of Fact 1 through 20 are affirmed.

2. The Examiner's Conclusions of Law 1 and 2 are affirmed.

3. Paragraph 1(a) of the Examiner's Order is affirmed.

4. Paragraph 1(b), subparagraphs (1) through (4), of the Examiner's Order are affirmed.

5. Paragraph 1(b), subparagraph (5), of the Examiner's Order is set aside.

6. Paragraph 1(b), subparagraph (6), of the Examiner's Order is renumbered subparagraph (5) and affirmed, except that the Notice set forth on Appendix "A" of the Examiner's Order is modified to eliminate enumerated paragraph 6. The Notice as modified is attached hereto as Appendix "A."

7. Paragraph 1(b), subparagraph (7), of the Examiner's Order is renumbered paragraph (6) and affirmed.

8. Paragraphs 1(c) and (d) of the Examiner's Order are affirmed.

9. Paragraph 2 of the Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

APPENDIX "A"

**NOTICE TO 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.

Dated this _____ day of _____, 2006.

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 ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts and Issue on Review

Neither party has challenged the Examiner's Findings of Fact, and we have affirmed those Findings. In a nutshell, since at least 1998 the County and the Association have maintained a self-funded health insurance plan ("Plan 6") in which the premiums were established with all County participants in that plan, both active and retired, in the same insurance "pool" for purposes of actuarially estimating claims. Hence premiums for both retirees and active employees were the same. (Coverage and benefits were also the same). Beginning January 1, 2005, the County changed the way it established the premium for the plan by placing the active employees in one actuarial pool and the retirees in a separate actuarial pool. Predictably, this resulted in a lower premium for active employees than for retirees, a lower premium contribution for active employees than they would have paid if the pool had remained combined, and a higher premium contribution for retirees than they would have paid if the pool had remained combined. The County did not inform, discuss with or bargain with the Association about this change in the method of calculating premiums.

The Examiner properly held that the method of calculating premiums affected bargaining unit members' wages and benefits – including benefits active employees would receive after they retired – and was therefore a mandatory subject of bargaining. CITY OF BROOKFIELD, DEC. NO. 25517 (WERC, 6/88). By implementing a change in a mandatory subject of bargaining without offering the Association an opportunity to bargain, the County refused to bargain in good faith in violation of Sec. 111.70(3)(a)4 and 1, Stats. JEFFERSON COUNTY V. WERC, 187 WIS.2D 646 (CT. APP. 1994); ST. CROIX FALLS SCHOOL DIST., 186 WIS.2D 671 (CT. APP. 1994).

To remedy the unilateral change violation, the Examiner issued the standard remedy for such a violation: a cease and desist order, an order to restore the *status quo ante* regarding the method for calculating premiums, an order to make whole those individuals who suffered out of pocket losses, an order to negotiate in good faith on the subject, and an order to post the customary Notice to Employees as set forth in Appendix "A."

In addition to the foregoing conventional remedial components, the Examiner ordered that the County recoup the difference in amount from those individuals who had paid a lower premium than they would have paid if the County had maintained the status quo. The Union has challenged this element of the Examiner's remedy. No other issues have been raised on review.

DISCUSSION

The Association argues that recouping funds from employees whose premiums were reduced through no fault of their own, but rather solely because of the County's unlawful conduct, is inappropriate because (1) it punishes innocent employees for the County's wrongdoing; (2) it so minimizes the cost to the County as to eliminate any deterrent effect for violating the law in this manner; and (3) the injustice is exacerbated by the inherent difficulty and inexactitude of reconstructing the premiums so long after the fact. In sum, the Association argues that recoupment from employees is inconsistent with the Commission's standard remedial goals in unilateral change cases.

The County, for its part, contends that recoupment does not "punish" any employees, but merely returns them to the situation they would have been in had the County complied with the law. The County also argues that, contrary to the Association's assertions, the County will experience negative costs from the Examiner's remedy even if the County recoups premium underpayments from employees, because the County must still post a notice of its wrongdoing and must undertake substantial administrative work in order to recalculate the premium and redistribute the funds. The County asserts that it can recalculate the premiums accurately enough to implement the recoupment fairly. In sum, the County argues that recoupment serves the purposes of the Municipal Employment Relations Act (MERA) by restoring the true *status quo ante* without imposing punitive sanctions on the County.

As the Association points out, the Commission "has a great deal of latitude in devising its remedies and may tailor them to the facts of a specific case." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), citing EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). The Association also correctly notes that the Commission has long adhered to the following articulation of its remedial goals in cases where a public employer has unilaterally changed wages, hours, or working conditions rather than negotiating such changes with the union:

> The conventional remedy for a unilateral change refusal to bargain includes an order to reinstate the status quo existing prior to the change and to make whole affected employes for losses they experienced by reason of the unlawful conduct. The purposes of reinstatement of the status quo ante is to restore parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations.

GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

In GREEN COUNTY and a companion case, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission recognized that there are some unilateral change situations where conferring make-whole relief may provide employees a benefit to which they would not have been entitled if the employer had never violated the law. In each of those cases, the employer had implemented a change while the parties were awaiting an interest arbitration award that would set the hours and working conditions retroactively, covering the time during which the employer had implemented its changes. In BROOKFIELD, the arbitrator ultimately established a retroactive contract with the very same schedule of hours that the employer had unilaterally implemented. Nonetheless, the Commission remedied the unilateral change in BROOKFIELD by giving the employees additional pay for the hours they worked beyond the previous work schedule, noting that such somewhat anomalous relief was necessary in order to deter similar unlawful conduct in the future.

Thus, as a general matter, it has long been clear that, where appropriate, the Commission's remedies may place employees in a better position than they would have been if the employer had not violated the law.

OZAUKEE COUNTY, SUPRA, presents a remedial situation directly on point here. In that case, the employer had changed the health insurance plan while the parties were awaiting an interest arbitration award which inevitably would retroactively implement that very plan, since both parties had proposed the same plan to the arbitrator. The new plan would retroactively change the distribution of costs among employees, resulting in lower costs for some employees and greater costs for others. The employer argued that make-whole relief was not appropriate in those circumstances, since it made some employees better off than they would have been if the employer had not unilaterally changed the plan. In rejecting the employer's argument the Commission made two points that support our conclusion in this matter. First, the Commission noted that, even though "employees would not be entitled to such monies under the retroactive contract eventually adopted, [w]ithout the make-whole remedy, employers would have little if any incentive to comply with law." Second, the Commission refused to order a literal restoration of the *status quo ante*, which, in that case would restore the old plan itself, finding such a remedy neither necessary nor practical, in part because it could be "detrimental to some employees." ID. at 12.

Accordingly, the Commission in OZAUKEE COUNTY, confronting an out-of-the-ordinary set of circumstances, built upon its reasoning in GREEN COUNTY and BROOKFIELD and tailored a remedy that uncoupled the make-whole component of its traditional unilateral change remedies from the restoration of the *status quo ante*. This is precisely what the Association urges the Commission to do in this case. Indeed, as the Commission observed in the foregoing excerpt from GREEN COUNTY, these two components serve distinct remedial goals. As such, they are not inherently linked. Under traditional labor law principles, sanctioned by the United States Supreme Court in NLRB V. KATZ, 369 U.S. 736 (1962), unilateral changes undermine the union's negotiating authority and power; generally, therefore, the change must be undone

in order to restore the level playing field for negotiations. Thus restoring the status quo (undoing the change) is a corollary to the central remedial order, which is to bargain in good faith *going forward*. Hence restoring the status quo is *prospective* in purpose and effect. The retrospective make-whole component has different purposes. It is designed to make sure the employer does not benefit from its wrongdoing, on the one hand, and to compensate the innocent parties for their losses, on the other. Certainly there can be no remedial requirement that the wrongdoing employer be "made whole" for the results of its own wrongdoing.

When carefully considered, therefore, it is clear that no legitimate remedial purpose is served by recouping money from individual employees that an employer unlawfully and on its own volition provided them. Such is not required in order to reestablish fair conditions for bargaining, nor can the County claim to be "punished" by not being made whole for its own unlawful conduct.

Our conclusion is consistent with longstanding precedent developed under the analogous provisions of the National Labor Relations Act (NLRA). Although the NLRA differs from MERA in some important respects and the Commission is not bound to follow or even consider NLRA precedent, the Commission may find guidance there in appropriate situations. Here we find instruction in how the National Labor Relations Board (NLRB) has handled similar situations (unilateral changes that benefit rather than harm employees), because, in contrast to the Commission's limited experience with such cases, it appears that the NLRB has confronted them dozens if not hundreds of times. Indeed, the seminal United States Supreme Court decision regarding unlawful unilateral changes, NLRB v. KATZ, SUPRA, itself involved a unilateral wage increase. In such cases, the NLRB routinely allows the union to decide whether or not the benefit should be rescinded, even prospectively. See, e.g., HARRISON MFG. CO., 253 NLRB 675 (1980), enf'd, 682 F.2D 580 (6TH CIR. 1982). Where some changes are beneficial and some are not, the NLRB allows the union to pick and choose. See, e.g., NLRB v. KEYSTONE STEEL & WIRE, 653 F.2D 304 (7TH CIR. 1981). KEYSTONE involved an employer's unilateral change in health insurance carrier, which provided better benefits in some ways but greater costs in others. The court enforced the NLRB's order requiring the employer to keep the new plan in effect, including its greater benefits, but to make employees whole for any out-of-pocket losses they would not have suffered under the former plan. The court observed, "That some employees ultimately may receive greater benefits than they would have received if the Company had not acted illegally is not, therefore, the result of any defect in the Board's order. Rather, any potential for greater benefits is due entirely to the Company's unfair labor practice." 653 F.2D at 308. Accord, STONE BOAT YARD v. NLRB, 715 F.2D 441 (9TH CIR.1983), enf'ing 264 NLRB 981 (1983), where the court rejected the employer's claim that the NLRB's order was "punitive" in requiring reimbursement of contributions to a union's health and welfare fund without also offsetting those amounts for benefits provided through the unilaterally-imposed alternative plan.

For the foregoing reasons, an order requiring the County to recoup funds from individuals whose premiums were reduced by the employer's unlawful unilateral change does not serve an appropriate remedial purpose. It is not punitive for the County to make whole those individuals whose premiums the County unlawfully increased without (in effect) making itself whole by recouping any premiums that were unlawfully reduced. Therefore the Examiner's remedy is modified to reflect this conclusion.[1]

Dated at Madison, Wisconsin, this 26th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

[1] The outcome in this case does not necessarily indicate that the Commission, in its remedial discretion, would never find appropriate circumstances for an order to rescind and recoup a unilaterally-conferred wage increase or other benefit. For example, in RACINE UNITED SCHOOL DISTRICT, DEC. NO. 28614-D (WERC, 1/98), the Commission dealt with a situation where the employer had bypassed the union and given a wage increase to certain employees. The Commission imposed a unilateral change remedy which required that the employer not only rescind the wage increase but recoup funds from the individuals. As discussed above in the context of NLRB precedent, the prevailing union's point of view on the recoupment issue would play a role in determining the appropriate remedy. Absent any such explicit union request in the RACINE case and absent any elaboration regarding the Commission's reasons for ordering recoupment, the Circuit Court overturned the Commission's order, finding that it was not "reasonable to punish the beneficiaries of the employer's unlawful action since indeed recoupment of past wages paid and spent is punitive, has no reasonable relationship to deterring the District from violating in the future, actually confers a benefit on the offending party by restoring money to it and will directly cause labor disharmony and discord. . . ." RACINE UNITED SCHOOL DISTRICT V. WERC, CASE NO. 98-CV-752, DEC. NO. 28614-E (CIR. CT. RACINE COUNTY, 11/98).