STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 703
No. 69311
MP-4551

Decision No. 33001-C

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 697
No. 69221
MP-4541

Decision No. 32912-D

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 698
No. 69222
MP-4542

Decision No. 32913-D

No. 32912-D
No. 32913-D
No. 33001-C

Appearances:

Mark Sweet, Attorney at Law, Sweet & Associates, LLC, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of District Council 48.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

William C. Houlihan, Examiner: On October 5, 2009, the above named Complainant, Milwaukee District Council #48, filed with the Commission a complaint, alleging that the above named Respondent, Milwaukee County, violated the provisions of Ch. 111.70, MERA, when the County allegedly reneged on a tentative agreement to a collective bargaining agreement, by failing to present the tentative agreement for ratification by the County Board as previously agreed (Case 698). On that same date, the Complainant filed Case 697, repeating the same factual allegations, but further alleging that County Board Supervisor Johnny Thomas personally reneged by failing and refusing to support the tentative agreement and by announcing public support for privatization plans that had not been proposed in bargaining or discussed with the Union.

The two cases were assigned to Daniel J. Nielsen, Examiner, and were consolidated for the purposes of hearing and decision. A hearing was scheduled for December 16, 2009. On November 6, the Complainant filed Case 703, alleging that the County had violated MERA when the Milwaukee County Executive ordered employee furloughs and a thirty-five hour work week, and when the County Board of Supervisors and County Executive thereafter adopted a furlough program without first bargaining the issue with the Union, both of which adversely affected employees based on the length of their membership in the union and thereby discouraged membership in a labor organization, and interfered with the exercise of protected rights.

Case 703 was consolidated with the two prior cases for the purpose of hearing, and the December 16th hearing was rescheduled to January 25th. Prior to that time, the Union gave notice that it would file an amendment to Case 703, adding assertions that the County had unilaterally established policies and procedures for administering the furlough plan previously adopted by the County Board, and that the County Executive had made statements denigrating the Union's status and informing employees that support for the Union and its activities were futile, and had thereby engaged in bad faith bargaining, refusal to bargain, discrimination and illegal interference with protected rights. The January 25th hearing was postponed with the concurrence of the parties in order to review the amendment, and to allow the County to answer the amended complaint, and to reassert, revise or withdraw its pending Motions to Dismiss.

On February 5th the County submitted its Answer to the amended complaint and reasserted its Motions to Dismiss. With respect to Case 697, the County alleged that the complaint was defective in form for: not having been sworn, not asserting that the appropriate fee was paid, failing to state a claim, and was substantively deficient in that County Supervisor Johnny Thomas was not the County's collective bargaining representative and that the County did not act through Supervisor Thomas. With respect to Case 698, the County asserted that the complaint failed to state a claim, that there was no portion of the tentative agreement that required a ratification vote by a date certain, that the complaint was barred by a prior ruling of the WERC, and that the complaint was defective in form. With respect to the amended complaint in Case 703, the County alleged that the complaint was defective in form, that the claim related to a thirty-five hour work week was moot, since the shortened week was never implemented, and that the complaint against the furloughs was subject to preclusion since the Milwaukee County circuit court had already heard and dismissed a complaint by the Union related to that program.

On March 15, 2010 Examiner Nielsen denied the County's Motion to dismiss case 698, denied the County's motion to dismiss Case 703, and directed the Complainant to amend its pleadings in Case 697 to specify how and in what capacity supervisor Thomas is alleged to have personally violated MERA or have Case 697 dismissed. Examiner Nielsen subsequently became unavailable to preside over this matter, and on March 23, 2010, the Wisconsin Employment Relations Commission issued an order substituting William C. Houlihan as Examiner.

On March 25, 2010, an amended Complaint was filed on Case 697, which alleged that Supervisor Johnny Thomas was a member of the County Personnel committee and also a member of the County Finance and Audit Committee; that Thomas and the Personnel Committed voted in favor of the tentative agreement entered into between the Union and the County and that he subsequently failed and refused to support the tentative agreement and that he also failed and refused to bargain in good faith by publicly announcing support for privatization proposals that were never negotiated. The County filed an Answer to the Amended Complaint, received May 17, 2010, in which it denied that Thomas was the collective bargaining representative for the County and raised a number of Affirmative defenses.

The undersigned conducted a pre-hearing conference with Counsel on April 13, 2010, the substance of which was made a part of the record.

At hearing Counsel for Milwaukee County moved to have any claim that the collective bargaining agreement has been violated deferred to grievance arbitration.

A hearing was held on June 17 and 22, 2010, in Milwaukee, Wisconsin. A transcript of the proceedings was taken and distributed by July 1, 2010. Post-hearing briefs were submitted and exchanged by August 27, 2010.

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

FINDINGS OF FACT

1. Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO (hereinafter the Union or District Council 48), is an employee organization in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

2. Milwaukee District Council 48 is the certified and exclusive bargaining agent for certain municipal employees, within the meaning of Section 111.70(1)(i), Wis. Stats., of Milwaukee County in a bargaining unit that includes "the employees of Milwaukee County in accordance with the certification of the Wisconsin Employment Relations Commission."

3. Respondent Milwaukee County, is a political subdivision of the State of Wisconsin, and a body corporate organized and existing under Chapter 59, Wis. Stats., which engages the services of employees.

4. District Council 48 and Milwaukee County were signatories and parties to a collective bargaining agreement that had a term of January 1, 2007 through December 31, 2008.

5. District Council 48 and Milwaukee County had not executed a successor agreement to the collective bargaining agreement that expired on December 31, 2008, as of the date of the hearings in this matter. However, the 2007-2008 collective bargaining agreement, including the grievance arbitration provision, continues in effect while the parties are in the process of negotiating and/or arbitrating a successor agreement.

6. District Council 48 and Milwaukee County met and conducted negotiations sessions on August 20, October 1, October 2, November 20, December 9, 2008, January 8, February 10, April 22, April 23, September 2 and September 4, 2009 in an attempt to bargain a successor collective bargaining agreement.

7. As a part of their negotiations, the parties entered into a series of groundrules regulating their bargain. Those groundrules included the following:

GROUNDRULES

1. The bargaining teams shall be comprised as determined by the Union for the Union's bargaining team and the County for the County's bargaining team. Other Union members and officers and technical support staff shall attend bargaining sessions as determined necessary by the Union. Other County officials and technical support staff shall attend bargaining sessions as determined necessary by the County.

2. The respective bargaining teams have the authority to enter into tentative agreements on all items. Such tentative agreements shall be subject to ratifications by the respective authorities (i.e. the Local Union members and the County Board of Supervisors).

. . .

5. Bargaining sessions shall be closed to the public and the press. There shall be no press releases issued or statements made to the public during collective bargaining by either party. The agreement not to issue press releases or make statements to the public shall terminate if the parties reach impasse. This provision shall not restrict either party regarding internal communications.

8. District Council 48 bargained with Milwaukee County for a successor agreement through the County's negotiating committee, which consisted of Gregory Gracz, Director of Labor Relations, and the County's chief spokesman, Mike Bickerstaff, and Fred Bau. Bickerstaff and Bau are on the County's Labor Relations staff. The structure of the County's Department of Labor Relations is established by Chapter 79, Milwaukee County Ordinances, and includes the following:

Chapter 79

DEPARTMENT OF LABOR RELATIONS

79.01 Created; director.

There is hereby created a "department of labor relations" for the county, the departmental policies of which shall be subject to the jurisdiction of the county executive and the committee on personnel of the county board. The department shall be under the administrative authority of the director of the department of administration to provide administrative support and back up, as well as managerial support on an as-needed basis. The department shall be in charge of an administrator designated as "director of labor relations" who shall

be appointed by the county executive and whose appointment shall require confirmation by the county board. The director of labor relations may be dismissed at any time by the county executive with concurrence by the majority of the members of the county board, or by the county board with concurrence by the county executive. . . .

79.02 Responsibilities of the director.

The director of labor relations shall be responsible for:

(1) The negotiation of all collective bargaining agreements with certified bargaining representatives of the employees of the county conducted along policy lines established by the county executive and the committee on personnel. The director of labor relations shall not agree, on behalf of the county, to any terms or provisions of a negotiated contract without prior direction and approval from the committee. Prior to agreeing to any tentative contract, the director of labor relations shall provide the director of human resources with a copy of the proposed agreement for review relative to administration of said proposal.

(2) The administration of all collective agreements during their term. In order to discharge this responsibility, the county executive, when necessary, shall direct compliance by operating department heads with the provisions of such agreements.

. . .

(4) The conduct, on behalf of the county, of all proceedings ordered by the state employment relations commission, the U.S. Department of Labor, the state department of industry, labor and human relations or, as provided for by contract, relative to certification and decertification of bargaining representatives, bargaining unit structure, employee disputes and grievances, and all administrative and judicial proceedings including mediation, factfinding, and arbitration relating to the negotiation or administration of existing or prospective collective agreements.

. . .

79.05 Departmental cooperation

In order to accomplish the purposes of this chapter, all departments in county government shall cooperate fully with the department of labor relations and its director in all areas of responsibility set forth herein. The county executive or his/her designee shall be permitted to attend all closed sessions of the committee on personnel of the county board where the subject of such closed session is the negotiation and/or the administration of proposed or existing collective bargaining agreements.

9. The Milwaukee County Personnel Committee is primarily responsible for conducting collective bargaining consistent with Chapter 79, set forth above and also pursuant to Chapter 80, Milwaukee County ordinances, the relevant portions of which provide:

Chapter 80

PROCEDURES IN EMPLOYMENT RELATIONS

80.01. Function of the committee on personnel.

In addition to the duties prescribed in section 1.11(c)(1), the committee on personnel shall have charge of all matters arising under ch. 111, Wis. Stats.

. . .

80.03. Collective bargaining.

Collective bargaining with certified bargaining units shall be carried on by the committee and personnel which shall adopt, and thereafter may amend, rules and procedures governing the conduct of such bargaining not in conflict with section 1.13(c) of the Code. . .

80.04. Agreement.

The agreements reached at the conclusion of such collective bargaining shall be reduced to writing by the committee on personnel and submitted in the form of a proposed ordinance or resolution to the county board for its approval or rejection.

10. At all relevant times Scott Walker was, and is, the County Executive of Milwaukee County within the meaning of Sec. 59.17(1)(a), (2), and (5), Wis. Stats. The County Executive's role in collective bargaining is as set forth in Chapter 79 above. Additionally, the County Executive has veto authority over any proposed Ordinance or

Resolution which seeks to ratify a tentative agreement between the County and a Union over the terms and conditions of a collective bargaining agreement.

11. During the period of negotiations between District Council 48 and Milwaukee County, Gracz took direction from the County Personnel Committee, and regularly advised the County Executive as to the direction the Personnel Committee was steering him. Gracz did not take direction from the County Executive. Gracz is a member of the County Executive's cabinet.

12. In its initial offer to the Union, dated August 20, 2008, Milwaukee County proposed the following:

MILWAUKEE COUNTY
INITIAL PROPOSALS
for a
SUCCESSOR LABOR CONTRACT
with
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
AND ITS APPROPRIATE AFFILIATED LOCALS
AUGUST 20, 2008

. . .

Section 1.05 MANAGEMENT RIGHTS
Delete last two (2) paragraphs of Section, page 5, lines 8-25.

PART 2
The County will propose a comprehensive wage and fringe benefit package at a subsequent negotiating session addressing Sections 2.01 through and including Section 2.39, except for Section 2.19.

Section 2.19 EMPLOYEE HEALTH BENEFITS
Amend language to reflect the following changes in benefit levels to be effective January 1, 2009:

1. Increase Deductibles for all Plans
2. Increase Monthly Plan Contributions
3. Increase Network Steerage from 90% in network/80% out of network to 90% in network/70% out of network
4. Increase Annual Out of Pocket (OOP) Limits to the PPO Plan
5. Increase Emergency Room Visit Co-Insurance (Currently $50 per ER visit)
6. Increase Mail Order Rx Co-Pay

7. Move to Percent of Cost Co-Pay for Rx
8. Eliminate Medical Plan Buy Out
9. Amend language to reflect the change in the number of Providers/Plans

13. In its November 20, 2008 offer to the Union, Milwaukee County proposed the following:

MILWAUKEE COUNTY
PROPOSAL
for a
SUCCESSOR LABOR CONTRACT
with
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
AND ITS APPROPRIATE AFFILIATED LOCALS
November 20, 2008

. . .

Section 1.05 MANAGEMENT RIGHTS
Delete last two (2) paragraphs of Section, page 5, lines 8-25.

Part 2
Section 2.01 Wages
Effective Pay Period Eight (8) 2009 (April 05, 2009) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period Fourteen (14) 2009 (June 28, 2009) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period One (1) 2010 (December 27, 2009) wages of bargaining unit employees shall be increased by one and one quarter percent (1.25%).
Effective Pay Period Fourteen (14) 2010 (June 27, 2010) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period One (1) 2011 (December 26, 2010) wages of bargaining unit employees shall be increased by one and one quarter percent (1.25%).
Effective Pay Period Fourteen (14) 2011 (June 26, 2011) wages of bargaining unit employees shall be increased by one percent (1%).

Section 2.19 EMPLOYEE HEALTH AND DENTAL BENEFITS
SEE ATTACHED

. . .

2.19 EMPLOYEE HEALTH BENEFITS

(3) All eligible employees enrolled in the PPO or HMO shall pay a monthly amount toward the monthly cost of health insurance as described below:

. . .

(a) Effective January of 2009, employees enrolled in the PPO shall pay seventy-five dollars ($75.00) per month toward the monthly cost of a single plan and one hundred fifty dollars ($150.00) per month toward the monthly cost of a family plan.

(b) Effective January of 2009, employees enrolled in the HMO shall pay thirty-five ($35.00) per month toward the monthly cost of a single plan and seventy dollars ($70.00) per month toward the monthly cost of a family plan.

(c) Effective January of 2010, employees enrolled in either the PPO or HMO shall pay twelve percent (12%) toward the monthly cost of either a single or family plan.

. . .

(13) All eligible employees enrolled in the PPO shall have a deductible equal to the following:

. . .

(c) Effective January of 2010, the in-network deductible shall be two hundred fifty dollars ($250.00) per insured, per calendar year; seven hundred fifty dollars ($750.00) per family, per calendar year.

(d) Effective January of 2010, the out-of-network deductible shall be five hundred dollars ($500.00) per insured per calendar year; one thousand five hundred dollars ($1,500.00) per family, per calendar year.

(15) All eligible employees and/or their dependents enrolled in the PPO shall be subject to a co-insurance payment after application of the deductible and/or office visit co-payment.

. . .

(c) Effective January of 2010, the out-of-network co-insurance payment shall be equal to thirty percent (30.00%) of all charges subject to the applicable out-of-pocket maximum.

(16) All eligible employees enrolled in the PPO shall be subject to the following out-of-pocket expenses including any applicable deductible and percent co-payments to a calendar year maximum of

. . .

(e) Effective January of 2011, two thousand dollars ($2,000.00) in-network under a single plan.

(f) Effective January of 2011, three thousand dollars ($3,000.00) out-of-network under a single plan.

(g) Effective January of 2011, four thousand dollars ($4,000.00) in-network under a family plan.

(h) Effective January of 2011, six thousand dollars ($6,000.00) out-of-network under a family plan.

. . .

(17) All eligible employees and/or their dependents enrolled in the PPO shall pay a fifty dollar ($50.00) emergency room co-payment in-network or out-of-network. Effective January of 2011, the emergency room co-payment in-network or out-of-network shall increase to one hundred dollars ($100.00).

. . .

(22) All eligible employees and/or their dependents enrolled in the HMO shall pay a fifty dollar ($50.00) emergency room co-payment (facility only). Effective January of 2011, the emergency room co-payment (facility only) shall increase to one hundred dollars ($100).

14. In its March 30, 2009 offer to the Union, Milwaukee County proposed the following:

MILWAUKEE COUNTY
PRELIMINARY FINAL OFFER
for a
SUCCESSOR LABOR CONTRACT
with
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
AND ITS APPROPRIATE AFFILIATED LOCALS
March 30, 2009

. . .

Part 2
Section 2.01 Wages

Effective Pay Period Eight (8) 2009 (April 05, 2009) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period Fourteen (14) 2009 (June 28, 2009) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period One (1) 2010 (December 27, 2009) wages of bargaining unit employees shall be increased by one and one quarter percent (1.25%).
Effective Pay Period Fourteen (14) 2010 (June 27, 2010) wages of bargaining unit employees shall be increased by one percent (1%).
Effective Pay Period One (1) 2011 (December 26, 2010) wages of bargaining unit employees shall be increased by one and one quarter percent (1.25%).
Effective Pay Period Fourteen (14) 2011 (June 26, 2011) wages of bargaining unit employees shall be increased by one percent (1%).

. . .

2.19 EMPLOYEE HEALTH BENEFITS

(3) All eligible employees enrolled in the PPO or HMO shall pay a monthly amount toward the monthly cost of health insurance as described below:

. . .

(a) Effective January of 2009, employees enrolled in the PPO shall pay seventy-five dollars ($75.00) per month toward the monthly cost of a single plan and one hundred fifty dollars ($150.00) per month toward the monthly cost of a family plan.

(b) Effective January of 2009, employees enrolled in the HMO shall pay thirty-five dollars ($35.00) per month toward the monthly cost of a single plan and seventy dollars ($70.00) per month toward the monthly cost of a family plan.

(c) Effective January of 2010, employees enrolled in either the PPO or HMO shall pay twelve percent (12%) toward the monthly cost of either a single or family plan.

. . .

(13) All eligible employees enrolled in the PPO shall have a deductible equal to the following:

. . .

(c) Effective January of 2010, the in-network deductible shall be two hundred fifty dollars ($250.00) per insured, per calendar year; seven hundred fifty dollars ($750.00) per family, per calendar year.

(d) Effective January of 2010, the out-of-network deductible shall be five hundred dollars ($500.00) per insured, per calendar year; one thousand five hundred dollars ($1,500.00) per family, per calendar year.

(15) All eligible employees and/or their dependents enrolled in the PPO shall be subject to a co-insurance payment after application of the deductible and/or office visit co-payment.

. . .

(c) Effective January of 2010, the out-of-network co-insurance payment shall be equal to thirty percent (30.00%) of all charges subject to the applicable out-of-pocket maximum.

(16) All eligible employees enrolled in the PPO shall be subject to the following out-of-pocket expenses including any applicable deductible and percent co-payments to a calendar year maximum of

. . .

(e) Effective January of 2011, two thousand dollars ($2,000.00) in-network under a single plan.

(f) Effective January of 2011, three thousand dollars ($3,000.00) out-of-network under a single plan.

(g) Effective January of 2011, four thousand dollars ($4,000.00) in-network under a family plan.

(h) Effective January of 2011, six thousand dollars ($6,000.00) out-of-network under a family plan.

. . .

(17) All eligible employees and/or their dependents enrolled in the PPO shall pay a fifty dollar ($50.00) emergency room co-payment in-network or out-of-network. Effective January of 2011, the emergency room co-payment in-network or out-of-network shall increase to one hundred dollars ($100.00).

. . .

(22) All eligible employees and/or their dependents enrolled in the HMO shall pay a fifty dollar ($50.00) emergency room co-payment (facility only). Effective January of 2011, the emergency room co-payment (facility only) shall increase to one hundred dollars ($100).

15. County Executive Walker conducted a budget listening session in May, 2009. Included in that session was a projected 2010 budget gap of $90.0 m.

16. On May 14, 2009, the *Milwaukee Journal-Sentinel* ran an online article, which reported the following:

Walker orders unpaid furloughs for county workers

Posted: May 14, 2009

. . .

Walker's payroll cut was aimed at salvaging this year's budget, but he is also warning that the county faces a budget gap of $90 million in 2010.

At the same time, Milwaukee's budget chief warned Common Council leaders that the city will also face at least a $90 million shortfall next year, and making up that gap is likely to require a mix of tax and fee increases, as well as spending cuts that could involve reduced services, sacrifices by city workers or both.

17. On May 29, 2009, the *Milwaukee Journal-Sentinel* ran an online article, which reported the following:

Walker calls for freezing all county salaries through 2010

Posted: May 29, 2009

Milwaukee County Executive Scott Walker on Friday added an employee wage freeze to his growing arsenal of tools aimed at avoiding large budget shortfalls.

But as with other ideas he's broached – most notably a 35-hour work week and accompanying pay cuts – the county executive ran into immediate resistance and accusations he's playing politics with people's lives.

Walker said he's not bluffing about the need for the cutbacks and the likely alternative – layoffs. All county department heads have been asked to draft layoff plans in case the freeze and his other efforts are rebuffed, Walker said.

"Freezing salaries is a much better alternative than having layoffs or big budget cuts," Walker said. Even if he gets the County Board and unions to agree to the freeze, he can't promise there won't be any job cuts, he said.

. . .

The County is projected to face shortfalls of nearly $15 million this year and $90 million next year. Walker had no estimate of savings linked to a wage freeze. Nonetheless, every 1% increase in county wages costs about $2.5 million a year, according to county budget officials.

The county's last offer to its AFSCME-represented workers called for phased-in wage increases totaling 3.25% this year and 2.25% next year, said Richard Abelson, the head of the county's largest union.

Abelson criticized the freeze announcement as politically motivated and said Walker broke his promise not to bargain in public. All county labor contracts expired at the end of last year, and an agreement on a new pact has eluded both sides.

"If Walker really wanted to accomplish something positive, he'd sit down at the bargaining table and bargain," said Abelson, executive director of District Council 48 of the American Federation of State, County and Municipal Employees.

Seeking Support

The Republican candidate for governor issued a memo late Thursday to county supervisors calling on them to support the wage freeze. He also urged members of the County Board's Personnel Committee to formally adopt a 2009-'10 wage freeze in negotiations.

. . .

Walker telegraphed his interest in a pay freeze in March, when he told the Journal-Sentinel that the county's unions should consider a freeze as a way to avoid layoffs.

18. On July 9, 2009, the *Milwaukee Journal-Sentinel* ran an online article, which reported the following:

Walker's call for pay freeze said to confuse talks

Posted: July 9, 2009

Stalled labor negotiations in Milwaukee County have prompted increasingly bitter complaints that County Executive Scott Walker's public calls for a two-year freeze on union workers' pay have undercut bargaining efforts.

Union officials and some county supervisors point to Walker's pay freeze talk as contradicting what his representatives have been saying at the bargaining table, as well as behind closed doors with the County Board's Personnel Committee.

"He's publically saying wage freezes when in fact they've already made (wage increase) offers," said Richard Abelson, executive director of District Council 48 of the American Federation of State, County and Municipal

Employees. It is the county's largest union, representing more than 1,800 workers.

The issue also has become entwined in a dispute over who said what during closed sessions of the Personnel Committee, which is charged with setting labor negotiation strategy. Some supervisors want records kept of those secret proceedings as a way to avoid disputes over shifting positions.

Walker acknowledged changing his view to reflect the impact of the recession on the county. Contract talks started late last year.

"Since then, the financial position of the county – and all levels of government – have changed dramatically," Walker said in e-mail responses to questions. That prompted him to call for "a more aggressive position" in bargaining, he said. After seeing other governmental units pushing for wage freezes, it was "my hope that we could get that in Milwaukee County," he said.

As early as March, Walker publicly pushed the idea of a freeze. He's mentioned it in news interviews, suggested it during three May public workshops on the county's 2010 budget and asked the County Board to back him on the idea in a May 28 memo.

"My position is clear," he said.

Critics say his recent public words on the subject are out of sync with what they're hearing in bargaining and strategy sessions. Walker blamed confusion on supervisors.

Abelson and others say Walker's push for a freeze should have been presented in private bargaining sessions. Walker's public remarks violated bargaining ground rules the county agreed to, Abelson said.

"They've had money on the table for a year," he said. Contracts with county workers expired at the end of last year and negotiations have been on hold for about two months, Abelson said.

Neither union nor county officials would give details of the county's earlier offer.

At his budget workshops, however, Walker included an estimate of 2010 wage increases for county workers of $14.2 million as part of a projected $90 million shortfall the county could face. That would translate to a pay raise of more than

9%, which included money for so-called "step" increases based on seniority. Walker has called for abolishing step increases.

19. On, or about July 15, 2009, the County made the Union the following proposal:

1.05 MANAGEMENT RIGHTS

For the period of ~~January 1, 2007~~ July 1, 2009 through December 31, ~~2007~~ 2010, there shall be no layoff reduction in hours or furloughs of bargaining unit employees unless the State and/or Federal government fails to provide the funding mechanism and/or program dollars, or if the State and/or Federal government enact legislation limiting or prohibiting the County from maintaining current (December 31, ~~2006~~ 2008) funding levels. The County will not privatize work currently being performed by those bargaining unit employees who are current incumbents in such positions. This provision shall expire on December 31, ~~2007~~ 2010.

. . .

2.19 EMPLOYEE HEALTH BENEFITS

(3) All eligible employees enrolled in the PPO or HMO shall pay a monthly amount toward the monthly cost of health insurance as described below:

. . .

(a) Effective January of 2009, employees enrolled in the PPO shall pay seventy-five dollars ($75.00) per month toward the monthly cost of a single plan and one hundred fifty dollars ($150.00) per month toward the monthly cost of a family plan.

(b) Effective January of 2010, employees enrolled in the PPO shall pay ninety dollars ($90.00) per month toward the monthly cost of a single plan and one hundred eighty dollars ($180.00) per month toward the monthly cost of a family plan.

(c) Effective January of 2011, employees enrolled in the PPO shall pay one hundred ten dollars ($110.00) per month toward the monthly cost of a single plan and two hundred twenty dollars ($220.00) per month toward the monthly cost of a family plan.

(d) Effective January of 2009, employees enrolled in the HMO shall pay thirty-five ($35.00) per month toward the monthly cost of a single plan and seventy dollars ($70.00) per month toward the monthly cost of a family plan.

(e) Effective January of 2010, employees enrolled in the HMO shall pay fifty dollars ($50.00) per month toward the monthly cost of a single plan and one hundred dollars ($100.00) per month toward the monthly cost of a family plan.

(f) Effective January of 2011, employees enrolled in the HMO shall pay seventy dollars ($70.00) per month toward the monthly cost of a single plan and one hundred forty dollars ($140.00) per month toward the monthly cost of a family plan.

. . .

(15) All eligible employees and/or their dependents enrolled in the PPO shall be subject to a co-insurance payment after application of the deductible and/or office visit co-payment.

. . .

(c) Effective January of 2010, the out-of-network co-insurance payment shall be equal to thirty percent (30.00%) of all charges subject to the applicable out-of-pocket maximum.

20. On September 4, 2009, District Council 48 and Milwaukee County, acting through their respective agents reached a tentative agreement on a successor agreement to that which had expired on December 31, 2008; the tentative agreement between District Council 48 and Milwaukee County provided for a collective bargaining agreement to have an effective date of January 1, 2009 and an expiration date of December 31, 2010.

21. County Executive Scott Walker was aware of the terms of the tentative agreement prior to September 4, 2010.

22. On September 11, 2009, the *Milwaukee Journal-Sentinel* ran an online article, which reported the following:

Walker warns of layoffs, pay cuts

Posted: Sept. 11, 2009

It's not just a matter of no more raises for Milwaukee County's 5,000 workers, according to County Executive Scott Walker. Pay cuts or layoffs may also now be necessary, he said.

He said he'll press for benefit reductions as a way to help balance the 2010 budget, shaping up to be the worst in years.

"There is no way we can be looking at any further contracts that have a wage and benefit increase because we just can't afford it," Walker said Friday.

If he's unable to win labor concessions, then he could be forced to lay off employees, the county executive said.

The ongoing recession and a looming $90 million Milwaukee County budget shortfall is spawning the gloomy talk. Walker's remarks came as negotiations with unions representing county workers appeared to be winding down.

. . .

As he has done for years, Walker said for next year he'll again propose privatizing some county services as a way to balance the budget without raising property taxes. He didn't spell out his latest outsourcing ideas, but parks workers and housekeepers fear their jobs could be on the line.

Walker said he'll release more details on employee trims soon. His 2010 budget plan is due Sept. 24.

. . .

Pension contribution

The biggest element in the $90 million deficit prediction for next year is the $22 million taxpayer contribution to the pension fund. Walker did not rule out the possibility of providing less funding or of seeking pension benefit givebacks.

Richard Abelson, who heads the largest union representing county workers, said Walker's talk of concessions differed from what had been discussed in bargaining sessions.

. . .

> Walker said he won't accept a labor deal that includes a pay freeze linked to a no-layoff guarantee, one idea that's been raised. That would bind the county to something that might be unaffordable if the recession lingers, Walker said.
>
> "There's no way you can give away that (layoff) option," he said. "What do you do if things get bad?"

23. On September 15, 2010, the parties signed off on the tentative agreement previously arrived at on September 4. As the parties were signing the terms of the tentative agreement, the Milwaukee County Personnel Committee was assembled. The Committee authorized the director of Labor Relations to enter into the agreement. Members present for the meeting included supervisors Larson, Borkowski, DeBruin, Weishan, Dimitrijevic, Thomas, and Cesarz.

24. Supervisor Johnny Thomas is a member of the County Personnel Committee and also the Finance and Audit Committee. In September of 2009 supervisor Thomas presented, and caused to be distributed a document titled "ROAD MAP FOR MILWAUKEE COUNTY'S FUTURE". That 10 page document included the following within its provisions:

Milwaukee County

Supervisor Johnny L. Thomas, 18th District

Vice-Chair, Finance & Audit Committee

September, 2009

Dear residents of Milwaukee County,

According to the March 2009 report from the Public Policy Forum, *Milwaukee County's Fiscal Condition, Crisis on the Horizon?* "Long-term solvency, as measured by commonly used indicators, is questionable at best." The report suggested all alternatives should be considered, including:

- Implementing new or enhanced local revenue sources to reduce its reliance on external sources and augment flexibility.

- Eliminating, transferring or outsourcing programs and services that are not essential to its core mission and that could be performed just as well by others.

- Selling or leasing assets to generate capital as a means of paying down liabilities or re-investing in other assets that must be retained.

Here at the County Board, my colleagues and I have begun to consider a number of alternatives in Milwaukee County. While final decisions have not yet been made, we have put some ideas on the table. We must be bold and progressive in formulating the most effective long-range strategic goals for Milwaukee County. We must put policies in place that ensure the best possible scenario for future generations.

The attached document details some ideas that have been forwarded thus far. These ideas are intended to spark a public discussion from a broader viewpoint. Instead of focusing efforts on a 4-year political term, some of these policy decisions could be implemented now, even prior to the 2010 budget process.

We should not narrow our options to only cutting spending or raising taxes. There are a multitude of other options out there. Costs can be offset with smart choices that bring in more revenue. That's how businesses work, and we must do the same in Milwaukee County. We must creatively explore these possibilities and determine the impact they could have on budgets in Milwaukee County.

Sincerely,

Johnny L. Thomas /s/
Supervisor Johnny L. Thomas
Vice-Chair, Finance & Audit Committee

. . .

5. Privatization

The County Executive's 2010 Recommended Budget will likely contain a number of privatization initiatives. The County Board's consideration of these proposals should be grounded in a rational public policy discussion on whether privatization is appropriate and, if so, how it should be accomplished.

Any decision to move forward on privatization should be based on complete and accurate financial data. Past proposals have not uniformly addressed full costs of privatization (e.g. unemployment compensation costs) and a thorough

analysis of critical items like revenue offsets and the affect of overhead costs. Careless approaches to management of these initiatives should be avoided. In addition, debates regarding privatization should focus on the County's level of control over services and the extent to which private vendors will be held accountable for outcomes. Other factors include risks of becoming overly reliant on vendors. This is of particular concern if a privatization results in shedding capital assets (e.g. vehicles, equipment, and structures) that are costly to replace if a privatization is to be reversed. The impact on users should also be considered. In Parks programs, for example, consideration should be given to whether private operators would be willing to operate programs with fee structures appropriate to the public purpose for providing the program.

If a decision is made to move forward with a private sector provider, it is essential that a credible, transparent procurement process be used. Competition, which may include the ability of County program management to participate, is fundamental to a successful privatization. Working with a specific vendor to initiate a privatization is unacceptable. The process should also incorporate solid contract language that fully addresses the need for accountability for outcomes, services levels, pricing and any other relevant issues. Finally, consideration should be given to the impact on existing employees. There is a broad continuum of options ranging from straight out layoffs to requiring potential vendors to retain existing employees at existing compensation levels.

25. Upon reaching an agreement with District Council 48, Director of Labor Relations Gracz requested that the tentative agreement be placed on the September 23 agenda for the Special Joint meeting of Personnel and Finance/Audit Committee. Gracz advised the Union that it needed to ratify the contract by September 23. The following Resolution, summarizing the tentative agreement, was submitted for adoption:

A RESOLUTION

WHEREAS, the negotiation staff of the Personnel Committee of the Milwaukee County Board of Supervisors and Milwaukee District Council 48, AFSCME, AFL-CIO, and its appropriate affiliated Locals, have reached agreement on all issues relating to wages, hours, and conditions of employment for employees in the bargaining unit represented by Milwaukee District Council 48, AFSCME, AFL-CIO, and its appropriate affiliated Locals, and for the period January 1, 2009 through December 31, 2010, modifying the previous agreement in the following respects:

(1) Providing for the termination of the Agreement on December 31, 2010.

(2) Providing for no across the board general wage increases for any members.

(3) Providing for all employees that are in a "Red-Circled" position will stay at their current rate of pay until the maximum pay step of the pay range that the employees' job classification is assigned to meets or exceeds the employees' rate of pay, the employees' rate of pay will be adjusted to the maximum step in the pay range. All employees that are in a "red-circled" position will have all transfer and bumping rights, as well as those employees that are in the clerical groups will be eligible for the 2% clerical performance bonus.

(4) Providing for all employees enrolled in the PPO health insurance plan shall pay ninety dollars ($90.00) per month toward the monthly cost of a single plan and one hundred eighty dollars ($180.00) per month toward the monthly cost of a family plan effective January of 2010.

(5) Providing for all employees enrolled in the HMO health insurance plan shall pay fifty dollars ($50.00) per month toward the monthly cost of a single plan and one hundred dollars ($100.00) per month toward the monthly cost of a family plan effective January of 2010.

(6) Providing for all employees and/or their dependents enrolled in the PPO health insurance plan the out-of-network co-insurance co-payment shall be equal to thirty percent (30.00%) of all charges subject to the applicable out-of-pocket maximum effective January of 2010.

(7) Providing as soon as administratively practicable after the ratification and adoption of this agreement, The Milwaukee County Direct Deposit Program shall be utilized by all employees in the bargaining unit.

(8) For the period of July 1, 2009 through December 31, 2010, there shall be no layoff of bargaining unit employees, reduction in hours or furloughs of bargaining unit employees except as set forth below, unless the State and/or Federal government fails to provide the funding mechanism and/or program dollars, or if the State and/or Federal government enact legislation limiting or prohibiting the County from maintaining current (December 31, 2008) funding levels. The County will not privatize work currently being performed by those bargaining unit employees who are current incumbents in such positions. This provision shall expire on December 31, 2010. However, the County Board, by appropriate resolution, may elect to reduce the hours of

bargaining unit employees to thirty-five (35) hours per week, limited to no more than thirty (30) work days or six calendar weeks, only if such reduction in hours is uniformly applied to all employees under the jurisdiction of the County Executive and the County Board, excluding those employees who work in a 24 hour/seven day a week operations and employees under the jurisdiction of the other elected officials of the County, pursuant to the terms and conditions of the Arbitrator's July 1, 2009 decision (Case No. 1805, Grievance No. 44710).

(9) Effective on the execution date of this agreement excused shall mean any paid sick leave hour that a licensed physician or authorized Christian Science practitioner has certified as being under his/her care for the employee or immediate family. Excused time charged against sick leave for this purpose shall not be used for disciplinary actions, except when the Employer is able to identify an employee who has a patterned use of sick leave.

(10) Providing in a Addendum Memorandum a new policy that dictates what shall happen to any employee who loses his/her CDL due to an off-duty non-commercial motor vehicle conviction.

(11) Providing a list of all collateral agreements that are in full force and effect.

26. The Milwaukee County Controller, Scott Manske, provided a fiscal note relating to the tentative agreement. That note indicated no cost related to wages, a $1,121,510 savings related to health insurance changes, and discussed and analyzed the various other elements of the agreement, but did not include those provisions in the final fiscal summary.

27. On September 22, 2009 Milwaukee District Council 48 and its appropriate affiliated local unions ratified the tentative agreement.

28. On September 22, 2009 County Executive Walker sent the following memo to Lee Holloway, chairman of the County Board:

September 22, 2009

To: Lee Holloway, Chairman, County Board of Supervisors

From: Scott K. Walker, County Executive skw /s/

Subject: 2009 Corrective Action

Earlier today I met with staff from the Department of Administrative Services (DAS) to review 2009 fiscal projections and potential reductions to departmental budgets. Cabinet department directors were asked to submit reduction plans by last Friday to address a projected countywide deficit of $6.2 million. Based on the information I received at this meeting, I directed DAS to implement approximately $3.1 million in cabinet department budget restrictions that will have no direct impact on services provided to the public. These reductions will not result in any employee layoffs.

However, additional action is necessary to close the remaining gap. Last week I asked the Board to consider implementation of a 35-hour workweek for four weeks in order to reduce the deficit by $1.3 million. The 35-hour workweek would apply to all represented and non-represented employees, except deputy sheriffs, correctional officers and health care personnel in the House of Correction and the Office of the Sheriff.

In addition, I believe it will be necessary to implement five furlough days for all non-represented employees. The furlough days would apply to all departments and would have to be taken by December 26, 2009. DAS estimates five furlough days applied to all non-represented employees would reduce the deficit by $750,000.

Finally, I have directed DAS to work with the Department of Transportation and Public Works and the Parks Department to utilize 14 individuals who are currently in Park Maintenance Worker 2 positions as temporary Highway Maintenance Workers. The Park Maintenance Worker 2 positions, which hold commercial driver licenses, will assist with snow and ice control operations from November through March. In April, these employees will return to their previous positions in the Parks Department. This initiative will reduce the County's projected 2009 deficit by $100,000.

I am requesting that the County Board schedule a special meeting of the Finance & Audit Committee as soon as possible to consider the implementation of 35-hour workweeks for four weeks for employees as well as five furlough days for non-represented employees in both constitutional and non-constitutional departments. Taking these actions quickly will not only contribute to a reduction in the County's 2009 deficit, but also create more flexibility for managers to reduce any impact these cuts would have on services and on County employees.

29. Greg Gracz, and the other members of the County negotiations team, recommended ratification of the tentative agreement. On September 23, 2009 both the County

Personnel Committee, on a vote of 5-2 (Borkowski and Cesarz voting no) and the County Finance and Audit Committee voted in favor of the resolution approving the tentative agreement. Supervisor Johnny Thomas voted in favor of the resolution as a member of each Committee.

30. On September 23, 2009, the *Milwaukee Journal-Sentinel* ran an online article, which reported the following:

> **County union OKs pact with pay freeze, no-layoff guarantee**
>
> Posted: Sept. 23, 2009
>
> A showdown on labor contracts started to play out Wednesday between Milwaukee County Executive Scott Walker and the County Board as Walker retooled a furlough plan to help balance this year's budget and prepared to announce deep cuts for 2010.
>
> Two board panels endorsed a new contract with the county's largest union that calls for a two-year pay freeze in exchange for a guarantee of no layoffs and no privatization of county services through 2010. The pact also would save $1.1 million for the county in health insurance costs.
>
> If the full County Board approves the deal – as is considered likely – Walker said he'll veto it.
>
> "Just a freeze without the ability to contract out (privatize services) or potentially to lay off is not enough," Walker said. The county simply can't afford to continue with the same size payroll – some $250 million – next year," he said.

31. On September 24, 2009 the County Board of Supervisors met to consider a number of matters. On that date the County Executive presented his recommended budget. That recommended budget included the following descriptive summary:

> **BUDGET HIGHLIGHTS**
>
> This non-departmental presents the proposed wage and benefit modifications that are recommended for 2010. The total tax levy savings resulting from the reforms is $32,027, 379. Figures are presented here for illustrative purposes as the reductions are budgeted within each County department. Many of these modifications will require agreement with collective bargaining units for represented employees.

Salary Reform

- To provide long-term structural relief to the County's budget, employees' wages are reduced in 2010 by three percent and step increases are eliminated.

- All employees except deputy sheriffs, correctional officers and patient care under the Sheriff will be required to take either up to 12 furlough days (unpaid leave) or work up to 21 weeks on a reduced 35-hour weekly work schedule.

Overtime Reform

- Overtime pay will not be paid for hours in excess of eight during the weekday unless the employee has exceeded 40 hours in the workweek. This is consistent with federal law and will provide consistency among Milwaukee County labor agreements.

- Employees will only receive overtime pay for hours worked instead of credited. This is consistent with federal law and will provide consistency among Milwaukee County labor agreements.

- Management will be provided with the discretion to either pay out overtime or allow deputy sheriffs and nurses to accrue the overtime as paid time off to provide staffing flexibility and reduce overtime cost.

- Amend Chapter 17.16(1)(b) to eliminate overtime for salaried non-represented employees in positions that are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA).

Health Benefit Reform

- Employees currently contribute $35-$75 per month towards healthcare costs. Employees will contribute 15% of the County's health care premium. The level of cost sharing is consistent with other counties that currently require employee contributions ranging from 10% to 15% and state government that currently requires employee healthcare contributions up to 16.75%

- The out-of-network co-insurance co-payment will be increased from 20% to 30%. The County's HMO plan is less costly and migration from the PPO to the HMO will decrease health care costs long term.

- Deductibles for the PPO plan will increase by $100 for a single and $300 for a family plan.

- Out-of-pocket maximums for the PPO plan will increase by $500 for single plans and $1000 for family plans.

- Emergency room co-pays will increase to $100 to reduce County costs associated with emergency room visits.

- The CarePlus Dental Plan currently has unlimited benefits. Participants enrolled in the Care Plus DMO Dental Plan will have a $1,500 annual limit on services consistent with the County's other dental plan.

- Participants who purchase 90-days (3 months) of prescription medication through mail order will pay 2½ co-pays rather than 1 co-pay. Participants will continue to receive a discount over retail pharmacy costs.

Pension Benefit Reform

- Employees eligible for pension benefits (regardless of vesting status) will contribute 5 percent of their annual salary to the County's pension system. This contribution is consistent with the national average for the public sector of 5 percent. Milwaukee County employees currently make no contribution towards pension benefits.

32. Elements of the proposed County Executive Budget, including the definition of overtime, health insurance, privatization of work, freezing of pay steps, and pension contribution, were inconsistent with the terms of the tentative agreement. Some of the components of the Executive Budget were never raised in the negotiations which led to the tentative agreement. Some of the components of the Executive Budget were raised and tentatively resolved in the negotiations which led to the tentative agreement, in a manner contrary to the terms of the proposed County Executive budget.

33. The September 24, 2009 County Board agenda also included a resolution to approve the tentative agreement. On a motion by Supervisor Jursik, and a vote of 8-10, the ratification vote was held over. Supervisor Johnny Thomas voted in favor of the motion to lay the ratification vote over.

34. On October 14, 2010, the County Board of Supervisors voted to reject the tentative agreement entered into between Milwaukee County and District Council 48. Supervisor Johnny Thomas voted to reject the tentative agreement.

35. The County subsequently, in November, adopted a budget which included the following descriptive summary:

BUDGET HIGHLIGHTS

The 2010 Recommended Budget established this non-departmental account to propose wage and benefit modifications totaling $32,027,379. This amount was distributed to each department as a lump sum wage and benefit reduction. An analysis by the Department of Audit indicates that these wage and benefit reductions averaged 13 to 16 percent, or $6,800 to $8,400 for an average employee. The County Executive's Director of Labor Relations was not consulted on the likelihood that these concessions could be achieved either through arbitration or negotiation.

To provide a more credible approach for labor negotiations, the 2010 Adopted Budget reduces the $32,027,379 by approximately $12 million, to $20,102,254. In addition, several initiatives are outlined below to reduce the wage and benefit reductions even further than those that are budgeted within each department. While the terms listed below may not mitigate the entire $20,102,254 wage and benefit reduction, they will collectively minimize the impact to County programs, services and operations.

Many of these modifications will require agreement with collective bargaining units for represented employees. To the extent that they are not achieved beginning January 1, 2010, the corrective actions that will be necessary to balance the 2010 budget may be severe.

Salary

Milwaukee County faces severe fiscal challenges due in part to rising employee/retiree benefit costs and reduced state aids for mandated programs and services. The fiscal shortfall has been exacerbated by an economic recession that has significantly reduced countywide revenues. To address these issues, the following will be enacted for 2010:

- All step increases, as provided for in Chapter 17 of the Milwaukee County General Ordinances are eliminated for 2010.

- Furlough days are budgeted for 2010. Four non-specific furlough days will be April 2, May 28, December 23 and December 30. Resolution File No. 09-398, adopted by the County Board on October 14, 2009, shall govern the application of the furloughs for these date-specific days. In addition, all employees, except elected officials and members of boards and commissions, shall take "floater" furlough days. 1/ The employee with the approval of the appointing authority will determine these floater furlough days. Part-time or partial year service shall be prorated accordingly.

1/ The County Board Adopted Budget (prior to vetoes) included four floater furlough days. However, the County Executive's sustained veto deleted the reference to "four" flexible furlough days and adjusted the related dollar amount to reflect the savings from eight flexible furlough days. As a result, the 2010 Adopted Budget includes 12 total furlough days, four of which are specific days and eight of which will be scheduled by the employee with the approval of the appointing authority. The savings associated with all 12 furlough days are included in the budgeted amount for org. 1972.

Overtime

- Overtime pay will not be paid for hours in excess of eight during the workday unless the employee has exceeded 40 hours in the workweek. This is consistent with federal law and will provide consistency among Milwaukee County labor agreements.

- Employees will only receive overtime pay for hours worked instead of credited. This is consistent with federal law and will provide consistency among Milwaukee County labor agreements.

- Management will be provided with the discretion to either pay out overtime or allow deputy sheriffs and nurses to accrue the overtime as paid time off to provide staffing flexibility and reduce overtime cost.

- Modifications to Chapter 17.16(b) will reduce the cost of overtime for salaried non-represented employees in positions that are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) by reducing the amount of overtime earned and limiting pay out to compensatory time off.

Health Benefits

- Employees currently pay monthly premiums for healthcare costs in addition to deductibles and co-payments. The 2009 monthly premiums are $35 single and $70 family for the HMO and $75 single and $150 family for the PPO plan. For 2010, these premiums will increase to $50/$100 for the HMO and $90/$180 for the PPO plan.

- The out-of-network co-insurance co-payment will be increased from 20% to 30%. Increasing the patient co-insurance obligation will reduce County PPO costs through better provider discounts.

- Deductibles for the PPO plan will increase by $100 for a single and $300 for a family plan.

- Out-of-pocket maximums for the PPO plan will increase by $500 for single plans and $1,000 for family plans.

- Emergency room co-pays will increase to $100 to reduce County costs associated with emergency room visits not resulting in an in-patient admission.

Pension Benefits

- Projected annual costs of the current pension benefit are simply not sustainable. To lower these costs while still providing an attractive pension benefit, the annual "multiplier" will be reduced beginning in 2010. All members, other than a deputy sheriff or elected official, shall have future years of pension service credited at a 1.6 percent annual multiplier rather than 2 percent. No diminishment of pension service credit already earned will occur. In addition, all new hires after 12/31/09, other than a deputy sheriff or elected official, shall have a normal retirement age of 64 instead of 60.

Pursuant to County Ordinance, ordinance amendments effectuating these changes shall be brought forward and reviewed by the Pension Study Commission and Pension Board and approved by the County Board prior to January 1, 2010.

Additional Analysis

- The Employee Benefits Workgroup will conduct a cost/benefit analysis on a consumer-driven health plan featuring a low-premium/high deductible structure complimented with a health savings account model. The Workgroup will report its findings and recommendations to the Committees on Personnel and Finance and Audit no later than July 1, 2010.

- The Employee Benefits Workgroup will consult with the Pension Board actuary to consider the advantages and disadvantages of capping the ERS defined benefit plan and replacing it with a defined contribution alternative, and will report findings and recommendations to the Pension Board and the Committees on Personnel and Finance and Audit no later than July 1, 2010.

36. Elements of the adopted budget, including elimination of steps, overtime changes, health insurance deductibles and out-of-pocket maximums, emergency room co-pays and pension changes, were inconsistent with the terms of the tentative agreement. Some of the components of the adopted budget were never raised in the negotiations which led to the tentative agreement. Some of the components of the adopted budget, such as premium contributions and out-of-network payments, were consistent with the tentative agreement.

37. Following rejection of the tentative agreement, District Council 48 and Milwaukee County have returned to the collective bargaining process to attempt to negotiate and/or arbitrate the terms of a successor agreement.

38. On November 30, 2009, Milwaukee County submitted the following as its preliminary final offer in negotiations with District Council 48:

MILWAUKEE COUNTY
PRELIMINARY FINAL OFFER
for a
SUCCESSOR LABOR CONTRACT
with
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
AND ITS APPROPRIATE AFFILIATED LOCALS
November 30, 2009

PART 1

1.04 DURATION OF AGREEMENT

1. Amend dates to reflect a two (2) year agreement, January 1, 2009 through December 31, 2010.

. . .

PART 2

2.01 WAGES

The 2% Clerical Bonus Program shall be eliminated as of January 1, 2010.

2.03 SALARY INCREMENT

All step increases are eliminated for 2010.

2.04 OVERTIME

Amend language to reflect the following:

1. Overtime pay will not be paid for hours in excess of eight (8) during the workday unless the employee has exceeded forty (40) hours in the workweek.
2. Employees will only receive overtime pay for hours worked instead of credited.

2.17 RETIREMENT BENEFITS

Amend language to reflect the following:

1. Effective on the execution date of this agreement all members shall have future years of pension service credited at one point six percent (1.6%) annual multiplier.

2. Effective January 1, 2010, all new hires shall have a normal retirement age of sixty-four (64).

2.19 EMPLOYEE HEALTH BENEFITS

SEE ATTACHED

COLLATERAL AGREEMENTS

Any and all Collateral Agreements that the County has entered into with the Union, prior to August 20, 2008, will expire on December 31, 2008, except for those with specific expiration dates after December 31, 2008.

2.19 EMPLOYEE HEALTH BENEFITS

(3) All eligible employees enrolled in the PPO or HMO shall pay a monthly amount toward the monthly cost of health insurance as described below:

. . .

(a) Effective January of 2009, employees enrolled in the PPO shall pay seventy-five dollars ($75.00) per month toward the monthly cost of a single plan and one hundred fifty dollars ($150.00) per month toward the monthly cost of a family plan.

(b) Effective January of 2009, employees enrolled in the HMO shall pay thirty-five ($35.00) per month toward the monthly cost of a single plan and seventy dollars ($70.00) per month toward the monthly cost of a family plan.

(c) Effective January of 2010, employees enrolled in the PPO shall pay ninety dollars ($90.00) per month toward the monthly cost of a single plan and one hundred eighty dollars ($180.00) per month toward the monthly cost of a family plan.

(d) Effective January of 2010, employees enrolled in the HMO shall pay fifty dollars ($50.00) per month toward the monthly cost of a single plan and one hundred dollars ($100.00 per month toward the monthly cost of a family plan.

. . .

(c) Effective January of 2010, the in-network deductible shall be two hundred fifty dollars ($250.00) per insured, per calendar year; seven hundred fifty dollars ($750.00) per family, per calendar year.

(d) Effective January of 2010, the out-of-network deductible shall be five hundred dollars ($500.00) per insured per calendar year; one thousand five hundred dollars ($1,500.00) per family, per calendar year.

(15) All eligible employees and/or their dependents enrolled in the PPO shall be subject to a co-insurance payment after application of the deductible and/or office visit co-payment.

. . .

(c) Effective January of 2010, the out-of-network co-insurance payment shall be equal to thirty percent (30.00%) of all charges subject to the applicable out-of-pocket maximum.

(16) All eligible employees enrolled in the PPO shall be subject to the following out-of-pocket expenses including any applicable deductible and percent co-payments to a calendar year maximum of

. . .

(e) Effective January of 2010, two thousand dollars ($2,000.00) in-network under a single plan.

(f) Effective January of 2010, three thousand dollars ($3,000.00) out-of-network under a single plan.

(g) Effective January of 2010, four thousand dollars ($4,000.00) in-network under a family plan.

(h) Effective January of 2010, six thousand dollars ($6,000.00) out-of-network under a family plan.

. . .

(17) All eligible employees and/or their dependents enrolled in the PPO shall pay a fifty dollar ($50.00) emergency room co-payment in-network or out-of-network. Effective January of 2010, the emergency room co-payment in-network or out-of-network shall increase to one hundred dollars ($100.00).

. . .

(22) All eligible employees and/or their dependents enrolled in the HMO shall pay a fifty dollar ($50.00) emergency room co-payment (facility only). Effective January of 2010, the emergency room co-payment (facility only) shall increase to one hundred dollars ($100).

39. Since December 31, 2008 Milwaukee County had and has a duty to maintain the wages, hours and terms and conditions of employment as they existed on December 31, 2008 until a successor to the collective bargaining agreement that expired on December 31, 2008 is finalized.

Reduced Workweek and Furloughs

40. On May 14, 2009, County Executive Walker issued the following executive order unilaterally and without prior discussion or negotiation with District Council 48:

COUNTY OF MILWAUKEE
REDUCED WORKWEEK – 2009
EXECUTIVE ORDER

Whereas, Milwaukee County government is facing a fiscal crisis due to a projected $14.9 million deficit in the 2009 budget, and

Whereas, it is imperative that urgent emergency action be taken to reduce expenditures for 2009 within the remainder of the budget year, and

Whereas, reduction in labor costs are necessary, and

Whereas, the temporary reduction of 5 hours of work each week commencing June 28, 2009 for all employees is required to cut the deficit for 2009, and

Whereas, this order applies to those departments under my direction, and

Whereas, this order does not apply to positions working in direct patient care or correctional/detention staff;

NOW, THEREFORE, pursuant to sec. 59.17(2)(a), Wis. Stats., and as County Executive of the County of Milwaukee,

IT IS HEREBY ORDERED that all Milwaukee County department heads schedule the employees who report to them to temporarily work 5 hours less each week commencing June 28, 2009 during the course of this fiscal emergency.

This Order shall take effect upon the signing thereof and shall remain in full force and effect until further order of the Milwaukee County Executive.

Dated and signed at Milwaukee, Wisconsin, this 14th day of May, 2009.

Scott Walker /s/
SCOTT WALKER
Milwaukee County Executive

41. On May 28, 2009, David Eisner, president of AFSCME Local 594, filed a grievance on behalf of "all bargaining unit member" contending that the reduced workweek violated various provisions of the parties collective bargaining agreement, County ordinances, civil service rules, the Municipal Employment Relations Act, and past practice.

42. The grievance was denied, and appealed to Arbitration. On June 24, 2009 a hearing was conducted before Amedeo Greco, the permanent umpire designated to hear grievances pending between the parties. On June 29, 2009 Arbitrator Greco advised the parties electronically that "…the County had violated Section 1.05 of the agreement; that it had to immediately restore the 40-hour work week for affected bargaining unit employees; and that it had to take certain remedial action." The full text of the Award was issued on July 1, 2009.

43. Implementation of the 35 hour workweek was immediately halted. Any employee adversely impacted was made whole.

44. On June 17, 2009 Milwaukee District Council 48 filed a Motion for a Temporary Injunction, a Motion for Declaratory Ruling, and a Motion for Permanent Injunction in Milwaukee County Circuit Court relating to the 35 hour work week.

45. Following issuance of the Greco Arbitration Award, Milwaukee District Council 48 filed a Motion to Confirm the Arbitration Award. Milwaukee County and Scott Walker opposed the confirmation and Defendant Walker filed Motions to Vacate the Arbitration Award.

46. On January 14, 2010 Reserve Circuit Judge Dennis J. Flynn issued a Decision which denied the Permanent Injunction, and which concluded that the Executive Order did not exceed the powers and authority of the Milwaukee County Executive, and was a valid Executive Order. On that same date, Judge Flynn also issued a Decision wherein he vacated the Arbitration Award on the grounds that the Arbitrator lacked jurisdiction to hear the matter and also that the Award represents a perverse misconstruction of the law.

47. The finding of the Court was appealed to the Wisconsin Court of Appeals, where it was pending as of the date of this proceeding.

48. On or about October 14, 2009 Milwaukee County, by its Board of Supervisors and by its County Executive established a mandatory 4 day furlough program in November and December, 2009. Under the terms of the mandatory furlough program certain County employees, including those in bargaining units represented by District Council 48 were to be placed in non-pay and non-duty status on November 13 and 25, and December 4 and 24, 2009.

49. Employees served the furlough days on November 13 and 25, but the December 4 and 24 furlough days were cancelled.

50. On, or about November 18, 2009 Milwaukee County adopted a furlough plan, as a part of its 2010 budget, which required 12 non-pay, non duty status days in 2010. On, or about February 25, 2010 Milwaukee County added 10 furlough days to the existing 12 to be served in 2010.

51. A furlough day is a scheduled work day where an employee is directed not to come to work and is not paid. Under the terms of the collective bargaining agreement employees progress on the pay schedule as they gain experience. More senior employees tend to earn more money as compared to less senior employees. More senior employees, who are members of the Union, tend to have been members longer than less senior employees.

52. On January 28, 2010 Kurt Zunker, President of AFSCME Local 8882, filed a grievance, on behalf of "all bargaining unit employees" relative to the furlough day policy. That grievance is accompanied by lists of county employees seeking to be included.

53. On April 30, 2010 David Eisner filed a grievance on behalf of "all bargaining unit employees, D.C. 48" following the announcement of "an $8.9 million budget surplus" claiming that the 2 furlough days were unnecessary. On April 30, 2010 Kurt Zunker filed a grievance on behalf of "all bargaining unit employees- D.C. 48" alleging that the 10 additional days of furlough announced on February 25, 2010 violated several provisions of the collective bargaining agreement.

54. The County's budget projections varied throughout calendar 2009. On April 6, 2009 Steven Kreklow, Fiscal and Budget Administrator, estimated that there would be a $7 - $14 million budget shortfall. On May 12, 2009 Scott Manske, Controller estimated that there would be a $14.9 million deficit. On June 15, 2009 the deficit estimate was $650,000, provided a land sale involving $5 m. went through and was booked in the 2009 fiscal year. As it turned out the timing of the land sale could not be completed in the fiscal year. However, the $650,000 figure remained a point of discussion. On June 22, 2009 Kreklow provided a fiscal update which projected a $4.4 m. shortfall. On July 22, 2009 Manske issued a Fiscal Report projecting a $3.8 m. shortfall for 2009. On September 9, 2009 Manske issued a fiscal report projecting a shortfall of $6.2 m. On October 28, 2009 Manske issued a fiscal report projecting a $3.0 m. deficit for the year. By November 10, 2009 the updated projection was for a $1,716,926 shortfall. By November 17 the shortfall was projected at $539,039. By April 12, 2010 Kreklow and Manske issued a fiscal update indicating that the County had an $8.9 m. surplus for 2009. The number was subsequently adjusted to $8.0 m. in June of 2010.

CONCLUSIONS OF LAW

1. Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO is a Labor Organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent, Milwaukee County, is a Municipal Employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. Members of the County Personnel Committee were not members of the County bargaining team, and were not required to support and vote for the tentative agreement, and so did not violate Sec. 111.70(3)(a)4 or 1, Wis. Stats.

4. Supervisor Johnny Thomas was not a member of the County bargaining team, and was not required to support and vote for the tentative agreement, and so did not violate Sec. 111.70(3)(a)4 or 1, Wis. Stats.

5. The Commission will not assert its jurisdiction under Sec. 111.70(4)(a), Wis. Stats., to hear the claim that the County violated Sec. 111.70(3)(a)4 and 1, Wis. Stats., by unilaterally promulgating the reduced work week memorandum.

6. The Commission will not assert its jurisdiction under Sec. 111.70(4)(a), Wis. Stats., to hear the claim that the County violated Sec. 111.70(3)(a)4 and 1, Wis. Stats. by unilaterally promulgating furloughs.

7. The County did not violate Sec. 111.70(3)(a)3 or 1, Wis. Stats. by its actions in furloughing employees.

8. The County did not bargain in good faith with its employees and so violated Sec. 111.70(3)(a)4 and 1, Wis Stats.

ORDER

1. Those complaints addressed by Conclusions of Law 3 through 6 above are dismissed in their entirety.

2. The County's motion to defer the furlough claims to grievance arbitration is granted.

3. To remedy its violation of Secs. 111.70(3)(a)4 and 1 Wis. Stats., the County shall:

a. immediately cease and desist from refusing to bargain with the majority representative of its employees;

b. Notify the employees represented by the Union, by posting in conspicuous places in all County facilities where employees represented by Complainant work, copies of the Notice marked "Appendix A". The

Notice shall be signed by a representative of the County, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted until such time as the parties have a collective bargaining agreement for the years 2009 and 2010. Reasonable steps shall be taken by the County to ensure that said notices are not altered, defaced, or covered by other material;

c. 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 it.

Dated at Madison, Wisconsin, this 21st day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

It is the position of the Union that the entire Personnel Committee of the County Board was standing in the wings monitoring the course of the memorializing and initialing of the previously reached Tentative Agreement. The Personnel Committee provided direction and gave its authorization to proceed with the initialing of the tentative agreement. It is the view of the Union that there is no evidence that any member of the Personnel Committee reserved the possibility of voting against the Tentative Agreement when the Tentative Agreement was presented for approval to the Joint Meeting of the Personnel and Finance/Audit Committees or for ratification by the full County Board of Supervisors.

On October 14, 2009 the County Board considered and then rejected ratification of the Tentative Agreement by a vote of 6 for and 11 against ratification. Voting against ratification were the following members of the Personnel Committee who had authorized Gracz to initial it on September 15: Borkowski, Cesarz, and Thomas. Had these three voted in favor of the Tentative Agreement, it would have been ratified by the County Board of Supervisors by a vote of 9 to 8.

The Union contends that the reduction in hours announced in Walkers' Reduced Workweek Memorandum was not referenced in the County's 2009 budget, which was adopted by the Milwaukee County Board of Supervisors. The Union contends that Walker issued his Executive Order without seeking prior approval from the County Board which has never ratified his actions and it has not ordered or authorized any decrease in hours for bargaining unit employees.

It is the position of the Union that the County violated MERA in that members of the Personnel Committee, who were part of the bargaining team that had directed the initialing of the Tentative Agreement, refused to support it for ratification by the County Board. The Union cites authority for the proposition that it is a refusal to bargain prohibited practice for a municipal employer's bargaining representatives to fail to follow through on their agreement to present and recommend ratification of tentative agreements reached in collective bargaining to the municipal employer's governing body. [CITY OF COLUMBUS, DEC. NO. 27853 B (WERC 6/95); OCONTO COUNTY, DEC. NO. 26289-A (Gratz, 7/90), *aff'd. by operation of law*, DEC. 26289-B (WERC, 8/90); CITY OF GREEN BAY, DEC. NO. 21785-A (Roberts, 10/84), *aff'd by operation of law*, DEC. NO. 21785-C (WERC, 11/84); FLORENCE COUNTY, DEC. NO. 13896-A (McGilligan, 4/76), *aff'd. by operation of law*, DEC. NO. 13896-B (WERC, 5/76); JT. SCHOOL DISTRICT NO. 5, CITY OF WHITEHALL, DEC. NO. 10812-A (Torosian, 9/73), aff'd. DEC. NO. 10812-B (WERC, 12/73).]

The Union argues that bargaining team members who are present when a tentative agreement is reached are presumed to have participated in decision making and are bound to support the decision and to vote for the tentative agreement (WAUNAKEE COMMUNITY SCHOOL DISTRICT, DEC. NO. 27837-B(WERC 6/95)

The Union cites WAUNAKEE for the following:

> Any member of either bargaining team...who either opposes or has reservations about any tentative agreement the parties appear to be reaching has only to say so to the other side to preserve a continuing individual right to oppose the tentative agreement at ratification time. What is not permissible under any circumstance, however, is attack by ambush-that is, apparent concurrence (express or implied) to the proposed tentative agreement by a bargaining team member who subsequently opposes it at ratification time. Such conduct, of course serves only to create a bargaining relationship of distrust and chicanery between the parties, and is destructive of collective bargaining.

The Union acknowledges the question for the Commission then is whether the members of the Personnel Committee at the investigation and bargaining session on September 15 were part of the County's "bargaining team". It asks "Are players who stand on the sidelines, participate in the development of strategy during time-out huddles and at half-time, not part of the team simply because they do not participate in the fray on the field with the opponent?" The Union answers the question by declaring "Of course not. So too, just because the members of the Personnel Committee stood on the side line, often huddled and caucused with Greg Gracz and then gave him instructions on how to play the negotiating game with the Union on September 15 ought to be considered part of the bargaining team on that date."

The union concludes that each of the Personnel Committee members who subsequently voted against the tentative agreement violated Sec. 111.70(3)(a)4, Wis. Stats., and derivatively Sec. 111.70(3)(a)1, Wis. Stats.. The Union goes on to assert that the subsequent announcement by Supervisor Thomas of his support for privatization also violated Sec. 111.70(3)(a)1, Wis. Stats.

It is the view of the Union that the County violated MERA in ordering furloughs of unit employees to reduce labor costs during the period of contract hiatus because the furloughs unilaterally changed hours and wages of unit employees. The Union cites authority for the proposition that the employer is not permitted to change the existing wages, hours, or working conditions of employees represented by a Union without exhausting its obligation to bargain in good faith with the union. [ST. CROIX FALLS SCHOOL DISTRICT V. WERC, 186 Wis. 2nd 671 (Ct. App. 1994); JEFFERSON COUNTY V. WERC, 187 Wis. 2nd 647 (Ct. App. 1994); MAYVILLE SCHOOL DISTRICT. V. WERC, 192 WIS. 2ND 379 (CT. APP. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 Wis. 2nd 352 (Ct. App. 1997); SCHOOL DISTRICT OF

WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), GREEN COUNTY, DEC. NO. 10308-B (WERC, 11/84)]. It is the view of the Union that during a period of contract hiatus the employer is required to maintain the existing wages, hours, and working conditions until a new contract is finalized. [GREEN COUNTY, DEC. NO. 10208-B; OZAUKEE COUNTY, DEC. NO. 30551-B; VILLAGE OF SAUKVILLE, DEC. NO. 28032-B.]

The union argues that the existing wages, hours and conditions of employment must be established based upon relevant contract language, bargaining history, and the parties actual practice. The Union notes that while the expired language plays an important role it is crucial to note that since the contract no longer exists, the duty to maintain the status quo is not contractual, but rather a function of the collective bargaining law. (SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06)

The parameters of the furlough order are not in dispute. The County directed employees not to report to work, and to forego pay for some unilaterally determined number of days. As to the reduced workweek the Union contends that the reduction was to continue at will. It thus cannot be regarded as temporary. It was never discussed with the Union. Most, if not all bargaining unit employees were working a 40 hour workweek. That was the work norm. It is against that norm that the reduction to 35 hours must be measured. The Union contends that the action to reduce hours and pay was unilateral.

As to the furlough, it is the position of the Union that there is no contractual basis which permits the County to unilaterally change the status quo during the contractual hiatus by reducing hours, and thus pay. The Union cites authority from other jurisdictions for the premise that as a matter of sound labor policy furloughs cannot be unilaterally implemented.[KING COUNTY, DECISION NO. 10547-A (PECB, May 19, 2010) WASHINGTON; TOWN OF FARMINGTON, DECISION NO. 3237 (August 31, 1994) Connecticut]

It is the view of the Union that the totality of Milwaukee County's course of conduct between September 4 and through the end of February 2010 violated Sec. 111.70(3)(a)4, Wis. Stats. The Union contends that by submitting a budget that did not accommodate the tentative agreement Walker cut the legs out from under the tentative agreement. The Union contends that the budget virtually guaranteed that the tentative agreement would be rejected. The Union cites the unilateral implementation of furloughs which reduced the wages and hours of employees, the claim that the furloughs violated the law, the failure of Personnel Committee members to vote for ratification of the tentative agreement, the rejection of the tentative agreement by the full County Board, the "regressive proposals" made by the County post contract rejection, and the actions of supervisor Thomas. Taken together, these actions are alleged to constitute a cumulative refusal to bargain.

It is the view of the Union that the unilateral furloughs of unit employees discouraged Union membership by discrimination because they imposed greater reductions in weekly pay on more senior members of the bargaining unit. The Union contends that such disparate treatment is inherently destructive of employee rights under MERA. The Union contends that those who had the greatest seniority and longest membership with the Union suffered the greatest loss of pay since they had advanced further on the pay scale.

It is the position of Milwaukee County that the decision of the Milwaukee County Circuit Court remains the law of the case. It is the view of the County that the reduced workweek and furlough claims advanced by the Union have already been decided.

It is the view of the County that the failure to ratify claim falls under the Commission's VILLAGE OF ALLOUEZ, DEC. NO. 32701-A (McLaughlin, 8/12/09).

With respect to the claim that there was a violation of Sec. 111.70(3)(a)1, Wis. Stats. it is the view of the County that there is nothing in the record to suggest a threat of reprisal or promise of benefit. The county argues that the Union ignores that the ratification vote took place in front of a County Board impacted by financial implications of a world wide economic downturn and how that dose of economic reality altered the ratification process.

The County argues that the County's bargaining team, as a matter of law, lacks the authority to bind the County in the absence of a ratification vote. The County denies that there was ever a mutually agreed upon timetable mandating ratification.

The County argues that Sec. 19.85(3), Wis. Stats., requires Milwaukee County to ratify a tentative agreement at an open session. The County board rejection of the tentative agreement can only be regarded as infirm if it violated some provision of MERA. It is the view of the County that there was no such violation.

As to the alleged violation of Sec. 111.70(3)(a)3, Wis. Stats., the County cites WISCONSIN RAPIDS SCHOOL DISTRICT, DEC. NO. 30965-B (WERC, 1/09) and MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 Wis. 2nd 540 (1967); and EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2nd 132 (1985) for the proposition that proof of a violation of Sec. 111.70 (3)(a)3, Wis. Stats,

> "requires that four elements be established by a clear and satisfactory preponderance of the evidence: a) that the employee has engaged in lawful concerted activity...(b) that the employer was aware of ...such activity at the time of the adverse action;(c) that the employer bore animus toward the activity; and (d) that the employer's adverse action against the employee was motivated at least in part by that animus, even if other legitimate factors contributed to the employer's adverse action.

It is the view of the County that there is no indication of employer animus in this proceeding.

The County argues that the existence of the tentative agreement, and Gracz's support of it, manifest good faith. The rejection of the tentative agreement, standing alone, fails to establish union animus.

As to the alleged violation of Sec. 111.70(3)(a)4, it is the view of the County that negotiations were protracted. The duty to bargain does not compel either party to agree to a proposal or make a concession. The County cites the definition of Collective Bargaining as " the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement." It is the view of the County that there is no dispute that the parties mutually met this duty up to the point of the Board's October 2009 vote.

The County points out that Gracz supported the ratification. Gracz further testified that no elected official was a part of the negotiating team. Gracz further testified that the County Executive was not at all a part of the negotiating process. Gracz testified that he took direction from the Personnel Committee and not from the Executive. It is the view of the County that the role of the County Executive is best summed up in the Commission holding in CITY OF COLUMBUS (DEC. NO. 27853-B):

> First and foremost, it is clear that the [County Executive] was not a member of the [County's] bargaining team. Thus, we are satisfied that he was free to support or not support the tentative agreement, and equally free to change his mind as to support or opposition even if he had publicly taken a position one way or another.

The County goes on to cite COLUMBUS:

> Team members who do not participate in the decision to reach a tentative agreement are functionally no different than members of the bargaining unit or elected officials not on the team. Their lack of participation in the decision-making of the collective bargaining process frees them to vote as they see fit as to contract ratification.

As to the claim against Supervisor Thomas, it is the view of the County that there is no basis in the record to sustain any such claim.

The County argues that the reduction of hours case has been both previously litigated and arbitrated and is moot. The County contends that its actions are supported by the collective bargaining agreement. As to the furlough related claims, the County takes the position its

actions are authorized by the collective bargaining agreement. It cites arbitral authority, including an Award issued by me as an Arbitrator, which sustained an employers right to furlough an entire bargaining unit.

The County cites the Circuit Court decision that derived from the parties litigation over the reduced work week. It is the County's view that the doctrine of issue preclusion is applicable.

The County argues that:

> "The union complained that Milwaukee County did not bargain relative to either a 35-hour week or furloughs. In one sense this is false since the collective bargaining agreement already recognized Milwaukee County's management rights. In another way, Milwaukee County was not obligated to further bargain in the first instance. The decision to layoff, reduce the workweek or furlough employees based on budgetary restraints is a matter of public policy upon which a municipal employer like Milwaukee County is not required to bargain."

The County construes the balancing test set forth in City of Beloit by BELOIT SCHOOL BOARD V. WERC, 73 Wis. 2nd 43, 242 N.W. 2nd 231 (1976) as supporting a conclusion that suspending operations for a day, so as not to provide governmental services, is a managerial prerogative or public policy.

DISCUSSION

DUTY OF THE PERSONNEL COMMITTEE TO RECOMMEND TENTATIVE AGREEMENT

The Union cites prior WERC caselaw for the proposition that bargaining team members who are present when a tentative agreement is entered into have an obligation to support that agreement. There is no dispute in this proceeding as to the duties and responsibilities of bargaining team members relative to supporting a tentative agreement through the ratification process. The dispute in this proceeding is whether or not the Personnel Committee should be deemed to be a part of the County bargaining team.

The County bargaining team, as formally constituted, consisted of Gregory Gracz, Mike Bickerstaff, and Fred Bau. The record supports a conclusion that the members of the bargaining team supported the tentative agreement throughout. The Union contends that the Personnel Committee members should be treated as members of the bargaining team due to the fact they oversaw and approved the positions advanced by the County and approved the initialing of the tentative agreement. The County takes the position that the Personnel Committee members were not members of the bargaining team and should not be held to the rules regulating the bargaining table conduct of members of the bargaining team.

Sec. 111.70(1)(a) defines "collective bargaining" as"...the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement..." It is a core principle of labor law that parties select the officers and agents and representatives for purposes of collective bargaining. The designation of members of a bargaining team is a matter reserved to the respective parties "...because they are so central to the strategic control each party must have over how it pursues a bargaining agreement." (WAUNAKEE COMMUNITY SCHOOL DISTRICT, DEC. NO. 27837-B, 6/15/95)

The Commission has historically respected the designation of the bargaining team by the parties in regulating the ratification responsibilities of the team members. In CITY OF COLUMBUS, DEC. NO. 27853-B, (6/15/95) the Commission refused to require that the Mayor, who was not a member of the formally constituted bargaining team, but who was present at the time the tentative agreement was achieved, support the agreement. In COLUMBUS, the Examiner found that there was a dispute of fact as to whether the Mayor stated that he would vote in favor of the tentative agreement if his vote was needed. He subsequently voted against the agreement. In its review of the Examiner's decision the Commission deleted references to the disputed facts. The Commission deleted the factual reference to the Mayor's alleged comments because it concluded that the Mayor had no obligation to support the agreement. In doing so, the Commission wrote:

> The parties dispute exactly what the Mayor said at the end of the August 18, 1992 meeting which produced the tentative agreement. The Association claims, and the City denies, that the Mayor stated he would cast his vote in favor of the tentative agreement if there was a tie vote before the Common Council. We need not and do not resolve this dispute because we are satisfied the Mayor was not bound by any such statement and thus that his conduct when casting a negative vote was not violative of Sec. 111.70(3)(a)4 or 1, Stats.
>
> We reach this conclusion for several reasons. First, and foremost, it is clear that the Mayor was not a member of the city's bargaining team. Thus, we are satisfied that he was free to support or not support the tentative agreement, and equally free to change his mind as to support or opposition even if he had publically taken a position one way or the other. Further, if the Mayor made the alleged statement, it was not a statement upon which the Association relied when deciding whether it should reach a tentative agreement with the City.
>
> . . .

It is unclear in this proceeding what, if any, reliance the Union placed on the fact the County Personnel Committee was caucused and supportive of the tentative agreement. In light of the per se character of the rule set forth in CITY OF COLUMBUS any such reliance is not relevant to the disposition of this matter.

In this case, the County bargaining team was formally created and presented to the Union. The Union was aware of the identity of the County bargaining team because that team faced the Union in the formal bargaining sessions. This is not a circumstance where there was no formal bargaining team, and a search for responsible parties became necessary. In CITY OF PARK FALLS, DEC. NO. 30207-A (4/2/02) the Union had no formal bargaining team. Whoever showed up for a bargaining session could participate. One question which arose was who, if anyone, was required to support a tentative agreement. The Commission sustained an Examiner finding that those who were in attendance on the day the tentative agreement was created constituted a de facto bargaining team. No such dilemma is posed here.

The line drawn in COLUMBUS recognizes the reality that parties at the bargaining table frequently go back and communicate with their respective principals as to authority or reactions to developments in bargaining. Such testing falls along a continuum, from informal conversations to inviting others to attend the bargain or caucus. At times that testing can be critical to the success of the bargain.

In COLUMBUS, the tentative agreement was tabled when certain concerns were raised by the City Attorney. An Aldermanic member of the bargaining team supported the motion to table the vote on the agreement for two weeks. The Commission rejected the claim that the act of postponing the vote by two weeks violated the duty to bargain, reasoning:

> A delay of two weeks, in light of the City Attorney's opinion, for the City Council to consider it further does not appear to constitute bad faith bargaining with respect to the bargaining committee's duty to sponsor and support ratification of the tentative agreement.

In this dispute, it appears that the matter was postponed to permit the County Board supervisors to consider the agreement in the context of the simultaneously introduced budget. The prudence reflected in that decision does not appear to constitute bad faith.

The facts giving rise to this claim are that the Personnel Committee was assembled on September 15 and authorized Gracz to sign off on the tentative agreement. There is no indication as to whether the Committee acted by consensus or by vote, and if by vote, what the vote was. At a minimum, this complicates identifying who is to be held responsible. Given the analysis set forth above this may not be relevant, but the September 23 vote of the Personnel Committee recommending approval was 5-2, which suggests the possibility the Personnel Committee was divided before the introduction of the budget.

DUTY OF SUPERVISOR JOHNNY THOMAS TO SUPPORT AND VOTE FOR TENTATIVE AGREEMENT

In light of the foregoing analysis I do not believe that supervisor Thomas, who was not a member of the County bargaining team, had an obligation to continue to support the tentative agreement.

It is the view of the Union that Supervisor Thomas' issuance of the ROAD MAP FOR MILWAUKEE COUNTY'S FUTURE violated Thomas' responsibility to support the tentative agreement in that the tentative agreement set limits on privatization of County work and Thomas ROAD MAP is alleged to have supported such privatization to a degree not contemplated by the tentative agreement.

I do not read Thomas' publication to undermine the tentative agreement. Its introductory letter cites the Public Policy Forum for certain observations about how Milwaukee County should approach long term solvency. Outsourcing is mentioned. The source of the idea is the Public Policy Forum, not Thomas. He does address Privatization in the context of a likely budget initiative from the County Executive. His reaction to such an initiative is that it should be subject to a critical analysis and review.

Had Supervisor Thomas been a member of the bargaining team, he would be held to the obligation to support the tentative agreement he was a part of creating. I do not believe that duty sweeps so broadly that it restricts his expression of views of the nature of those in the ROAD MAP.

ALLEGATION THAT EXECUTIVE ORDER REDUCING WORKWEEK VIOLATES Sec. 111.70(3)(a)4 and 1, Wis. Stats.

The parties treat the reduction in workweek and the identification of unpaid days off as furloughs. They will be analyzed separately in this Decision.

As noted, on May 14 the County Executive issued a memorandum declaring a reduced workweek. That memorandum prompted a grievance which was Arbitrated. On June 29, 2009 Arbitrator Amedeo Greco issued an Award which sustained the grievance and concluded that the County had violated Section 1.05 of the parties' collective bargaining agreement. It was the view of the Arbitrator that the County Executive could not reduce hours without a County Board resolution supporting the reduction. Arbitrator Greco reviewed a prior Award by Arbitrator Malamud which held that the County could reduce the workweek from 40 to 35 hours on a temporary, but not a permanent basis, and concluded that the reduction called for in the May 14 memorandum was not temporary within the meaning of the collective bargaining agreement.

The Greco Award was appealed to Circuit Court. On January 14, 2010 Judge Flynn vacated the Greco Award. In the decision vacating the Greco Award, the Court came to a number of conclusions. The Court concluded that since no employee, but rather a Union representative, filed the grievance, the grievance was procedurally defective and the Arbitrator lacked jurisdiction over the matter. The Court concluded that the Malamud Award governed the dispute, and that that Award had concluded that the Executive had the authority, in the absence of the County Board, to reduce the workweek on a temporary basis. The Court concluded that the collective bargaining agreement addressed and permitted the temporary reduction in the workweek, and that Arbitrator Greco committed error in limiting temporary to 45 days.

Judge Flynn issued the Declaratory Ruling the same day. That Ruling concluded that the Executive Order is a legitimate Executive action, which is not a legislative action. He ruled that County Executive Walker had the authority under Sec. 59.17 Wis. Stats. to issue the Executive Order. He further concluded that the temporary reduction period cited in the Malamud Award was 1 year.

It is the view of the County that the Circuit Court decision is the law of the case. The County argues that the work week was never implemented and so the matter is moot. The County argues for the doctrines of preclusion to be applied.

The Circuit Court decision is the law of this case. As to the meaning of the collective bargaining agreement that decision controls this proceeding.

In NORTHERN STATES POWER CO. V. BUGHER, 189 Wis. 2nd 541, 550, 525 N.W. 2D, 723 (1995), the Wisconsin Supreme Court adopted the term "claim preclusion" to replace the term "res judicata". The doctrine holds that:

> … under claim preclusion a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings.…

In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties and their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.

The Commission has previously addressed the doctrine of claim preclusion as applied to matters pending before the agency. RACINE UNIFIED SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B, (10/21/98).

In this proceeding there is an identity between the parties and there is also a final judgment in a court of competent jurisdiction. The question presented is whether or not there is an identity between the causes of action. The question submitted to the Court was a question as to whether or not the grievance arbitrator appropriately construed the collective bargaining agreement. The question that was the subject matter of the Declaratory Judgment was whether the County Executive had authority, independent of the County Board, to promulgate the reduced workweek order. Neither of those actions raised the question of whether the reduced workweek memorandum violated MERA.

In applying the doctrine of claim preclusion, the Wisconsin Supreme Court adopted a "transactional approach" relative to the identity of the causes of action. The concept is to inquire whether or not the claim arises out of a single transaction or a series of facts related in time, space, origin, or motivation. A pragmatic determination is to be made. Here, the unilateral change claim arises out of the identical facts which form the basis for the claim that the contract was violated. There is certainly a difference between a claim that the contract was violated and a claim that the law was violated. However, in this proceeding, the status quo claim is predicated on the rights of the parties under the terms of the collective bargaining agreement. There is no hiatus. There is no claim that either the elements or the standard of proof under the status quo analysis are different than those tried to the arbitrator.

As a practical matter, the analysis of the arbitrator and the Court dispose of all claims made under the status quo theory of the Union.

ALLEGATION THAT FURLOUGH DAYS VIOLATE SEC. 111.70(3)(A)4 AND 1, WIS. STATS.

At hearing, the three grievances alleging that the furloughs violated the collective bargaining agreement were admitted into evidence over the objection of the County. Following their admission, the County moved to have the matters deferred to arbitration. The parties have extended the collective bargaining agreement, including the grievance arbitration provision.

The Union is correct when it argues that during a contract hiatus the status quo with respect to mandatory subjects of bargaining must be maintained. However, much of the analysis of hiatus law has developed in the context of the evaporation of the grievance arbitration provision. As a consequence, the law speaks to the preservation of the status quo as a matter of law, and not as a matter solely of contract interpretation.

One of the defenses to a refusal to bargain charge is that the matter has been bargained. In essence, that is the defense in this proceeding. It is the position of the County that a provision of the collective bargaining agreement authorizes the furloughs.

In CITY OF RACINE, DEC. NO. 32085-A, (5/18/07) the parties were signatories to a collective bargaining agreement whose term was 2003-2005. In 2006 the Union filed charges alleging a change in the status quo. The Examiner concluded that the collective bargaining agreement remained in effect beyond its expiration date. In that context she cited Commission precedent on the duty to bargain while the collective bargaining agreement is in effect.

> [The] employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. . ."

The parties extended the terms of the collective bargaining agreement. They continue to operate under the terms of that agreement. The County's right to furlough is alleged to be authorized by the collective bargaining agreement. The Union claims the contract has been violated.

These parties have a grievance procedure with final and binding arbitration. The Commission will defer assertion of its jurisdiction over a Sec. 111.70(3)(a)4 refusal to bargain charge that arises during the term of a collective bargaining agreement when the employer is willing to arbitrate the merits of the dispute, it is clear that the bargaining agreement addresses the dispute, and the dispute does not involve important issues of law or policy. VILLAGE OF POYNETTE, DEC. NO. 31178-A, (Burns, 3/16/05) citing ROCK COUNTY, DEC. NO. 29970-B (WERC, 7/01) The parties have a duty to exhaust the grievance procedure.

The arbitrator will determine the parties' rights under the current agreement. The parties are in the process of bargaining a successor agreement. Each is free to make proposals regarding the prospective application of furloughs.

ALLEGATION THAT THE FURLOUGHS DISCRIMINATE AGAINST EMPLOYEES ON THE BASIS OF UNION MEMBERSHIP

In its essence, this claim alleges that employees who have been on the payroll for a longer period of time earn more money because their pay is in part a product of their longevity. Those employees are also likely to have been members of the Union for a longer period of time. The record in this case does no more than draw a correlation between longevity and pay. The County points to the seminal case on discrimination based on protected concerted activity, MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 Wis. 2nd 540 (1967) for the four elements that need be satisfied to sustain such a claim. The County argues that there is no evidence in the record that the furloughs were motivated by animus. The County is right. The furloughs were applied across the board to represented and non-represented employees alike.

Certain employees were excluded, but not on the basis of their affiliation with, or participation in, protected activity.

ALLEGATION AS TO THE TOTALITY OF EMPLOYER CONDUCT

As noted above, the duty to bargain is derived from the statutory definition of collective bargaining. Sec. 111.70 (1)(a) Wis. Stats. provides:

> Collective bargaining means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, with respect to wages, hours and conditions of employment,…

Since the inception of MERA, the Commission has applied a totality of circumstances test in analyzing whether employers or unions have discharged their statutory obligation to bargain in good faith. ADAMS COUNTY, DEC. NO. 11307-A, (Schurke, 4/73), CITY OF GREEN BAY, DEC. NO. 18731-B, (WERC, 6/15/83), CITY OF JANESVILLE, DEC. NO. 22981-A, (Honeyman, 3/28/86) CITY OF BELOIT, DEC. NO. 29738-A (Burns, 3/17/00), NORTHCENTRAL TECHNICAL COLLEGE, DEC. NO. 29999-A, (Gallagher, 11/6/01), MARQUETTE COUNTY, DEC. NO. 31257-A, (Gratz, 10/3/05), EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-A and 30686-B, (WERC, 2/9/05), SCHOOL DISTRICT OF CLEAR LAKE, DEC. NO. 31627-B, (WERC, 10/31/06), KETTLE-MORAINE SCHOOL DISTRICT, DEC. NO. 30904-C, (McLaughlin, 1/26/06), WASHINGTON COUNTY, DEC. NO. 32185-B (WERC, 1/20/09)

ADAMS COUNTY, *supra*, arose as MERA was enacted. Those parties had experienced long negotiations, a rejected fact finder recommendation, and a dispute as to the existence of a tentative agreement in the context of a County Board rejection vote. The Union believed that a full agreement had been reached on all issues, and presented that agreement to the County. No objection was raised by the County. The County ratified portions of the agreement and rejected others. In the first case arising under the newly created duty to bargain, the Examiner found:

> Determinations concerning the good faith aspect of the bargaining obligation are, of necessity, subjective in nature. The Commission has looked in the past to the totality of employer conduct in making such determinations, …"

In assessing the purpose of the protracted bargaining between the parties, the Examiner concluded:

> There can be little doubt that the intended result of the collective bargaining process, as established by MERA, is a voluntary collective bargaining agreement between the parties. Negotiations here began as early as August,

> 1971. The negotiations continued for eight or more months up to the session involved, by which time the impasse procedures of fact finding had already been exhausted. The issues were well defined. As the parties approached and apparently crossed the threshold of agreement, the County had a clear obligation to contra-indicate the appearance of agreement if such was its intent. …"

This core concept, that a party who believes that an agreement entered into does not reflect a meeting of the minds has an obligation to come forward and say so, has not changed under the cases cited above.

A number of cases have arisen under the duty to bargain relating to employer free speech and the employer's right to communicate with employees. While there is no allegation of direct dealing in this proceeding, the core principle underlying these cases is that the employer is not free to ignore the collective bargaining representative in its attempt to secure changes in the terms of the collective bargaining agreement.

> If Respondent wants to seek to modify the wages, hours and conditions of employment of the employees Complainant represents for the purposes of collective bargaining over these matters, Respondent is obligated to make the offer only to Complainant. It is then up to Complainant to decide how to respond to the offer. (SCHOOL DISTRICT OF CLEAR LAKE, *supra*)

The duty to bargain exists notwithstanding the good faith, but erroneous, belief that there is no such obligation. (MARQUETTE COUNTY, *supra*; NORTHCENTRAL TECHNICAL COLLEGE, *supra*.)

In EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-A, (McLaughlin, 7/20/04), the Examiner reviewed a pattern of bargaining table behavior which he concluded amounted to a refusal to bargain. Included in that analysis was the following:

> "… Significantly, the district voiced no concern to the Association, even though these deliberations posed significant issues regarding lay off and the economics of the Association's proposal. Hellendrung's presentation of budget options at the Board's June 5 meeting presumed that the cost of the Association's proposal could be meaningfully assessed by comparing a District proposal that was never made to the Association's initial proposal and halving the difference. That the District had not made a proposal, had not sought Association movement, and had not even alerted the Association to the possibility of terminating unit positions for economic reasons cannot be squared with a desire to reach an agreement. Rather, it painted the Association into a corner from which the three positions would not emerge."

The Examiner's conclusion as to bad faith bargaining was reversed by the Commission. (EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/9/05) It was the view of the Commission that the record did not support a claim of refusal to bargain because the Union had not pursued negotiations such that the record would support that the employer had evaded the union's call to bargain. However, as to the Examiner's conclusion set forth above, the Commission offered the following:

> We also share the Examiner's dim view of the District's approach to the economic concerns that allegedly led to eliminating the positions at the June 5 Board meeting, including its failure to apprise the Union of the concerns and/or make any effort to negotiate a solution and its unwarrantably precipitous action. As discussed in more detail below, what the Examiner saw as indicia of bad faith bargaining we see as indicia of unlawful animus-two sides of the same unlawful coin, but with different remedial consequences."

The duty to bargain in good faith under the Municipal Employment Relations Act includes a requirement that, where appropriate, municipal employers provide the collective bargaining representative of their employees with information which is relevant and reasonably necessary to bargaining a successor contract or administering the terms of an existing agreement. MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-B (WERC, 9/88) In CITY OF MARSHFIELD, WASTE WATER TREATMENT PLANT, DEC. NO. 28973-B (WERC, 3/23/98). The Commission applied that duty to include any potential link between wage settlement levels and possible layoffs. The purpose of such a requirement is to permit the representative of the employees to consider, weigh and balance the desire for higher wages against the potential threat to job security.

Where an employer ignores its duty to bargain and proceeds to act unilaterally and only belatedly, and after its actions are deemed a fait accompli, expresses a willingness to bargain, it has violated the duty to bargain. The subsequent willingness to bargain does not cure the prior conduct. CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/15/83)

In WASHINGTON COUNTY, DEC. NO. 32185-B (WERC, 1/20/09, affd. Washington Co. Circuit Court, Case No. 09-CV-232, 1/4/10) the Commission found that the employer had an obligation to disclose to its Union its intentions to contract out certain work. The decision provides both analysis and perspective on the collective bargaining process.

> Turning to the County's obligation to inform the Union that it was seriously considering subcontracting, we begin with the language of the statute itself regarding the County's bargaining obligation:
>
> "Collective bargaining" means the performance of the mutual obligation . . .

This statutory requirement of "good faith" in negotiating a labor contract, which mirrors language in the National Labor Relations Act, 29 U.S.C. Sec. 158(d), is an exception to the general law of contract formulation, which requires "good faith" in the performance and enforcement of contracts but (absent duress or fraud) does not regulate the negotiation process. See "Restatement (Second) Contracts", Sec. 205, Comment "C"; Calamari & Perillo, *The Law of Contracts* (4th Ed., West, 1998), at 458. Thus, for purposes of traditional business contracts, "the bargaining process [has been] treated as if it were a poker game." Calamari & Perillo at 336, but collective bargaining negotiations are subject to a higher standard of conduct and scrutiny. This important difference – the requirement of good faith in negotiations – underscores other fundamental differences between a typical business contract and the collective bargaining process. Two striking differences are that, in collective bargaining, parties are required by law to negotiate a contract with each other (once a union has been selected by a majority of the bargaining unit) and the contract they are negotiating covers third parties, i.e., the employees in the bargaining unit. Thus, the relationship between the union and the employer is an ongoing one, a "'partnership'" in determining wages and working conditions." Gorman & Finkin, *Basic Text on Labor Law* (2nd Ed.) (West, 2004) at 532, that transcends the contents or the duration of any particular contract. The meaning of "good faith" must be viewed in terms of this unique statutorily-imposed relationship and responsibility.

As the Commission has long held, "good faith" in the **conduct** of negotiations is a "fact-intensive, highly circumstantial" inquiry, in which the Commission examines the "**totality** of the circumstances" in each case. EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) at 26; CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83) at 11. Here a number of circumstances converge to compel the conclusion that the County's conduct regarding its subcontracting plans during the negotiations for the 2007-2008 contract was not consistent with good faith. First, the action the County contemplated, i.e., subcontracting the entire housekeeping and custodial operation, was one that would have a major impact on the bargaining unit. . . .Fifth, the County's sole purpose in subcontracting was to lower its labor costs – a purpose particularly well-suited for exploration and perhaps compromise during the bargaining process. . .

The pivotal implication from the foregoing combination of circumstances is that the Union, while negotiating the successor agreement, neither actually nor with reasonable imputation could have expected the County to implement a subcontracting decision on such a major scale during the term of the successor agreement. Although the County did not actively mislead the Union, the

County did intentionally withhold information about an actively formulated plan to investigate subcontracting that clearly would have been of major interest to the Union and the bargaining unit. Collective bargaining, unlike general business transactions, is governed by a "good faith" requirement; it is not a "poker game". In this situation, the County's "partnership" with the Union, its shared responsibility for the working conditions of the employees, required the County to disclose to the Union that the County was seriously considering subcontracting during the course of the successor agreement then under negotiation.

APPLICATION OF THE LAW TO THE FACTS OF THIS DISPUTE

It is the view of the County that the County Executive is required to submit a budget under Sec. 59.17 Wis. Stats. The County further argues that the County Board is obligated to ratify a collective bargaining agreement at an open session per Sec. 19.85(3) Wis. Stats. Neither of these statutory requirements are in dispute in this proceeding. The Wisconsin Supreme Court in GLENDALE PROF. POLICEMEN'S ASSO. V. GLENDALE, 83 Wis. 2^{D} 90 (1978) directed that statutes governing labor relations and collective bargaining be harmonized with those other statutes which impact upon those matters. The obligations of the Executive to budget and the County Board to ratify in public must be reconciled with the duty to bargain set forth in Sec. 111.70, Wis Stats.

Milwaukee County is subject to the duty to bargain. That duty is common to all Wisconsin municipalities. It does not attach solely to the executive or to the legislative branch of government. Virtually every municipal employer is governed by elected officials who either oversee and guide bargaining, or who actually participate in the process. It is not uncommon for those elected officials to have different views as to the appropriate management position. The norm is that those views are sufficiently reconciled in caucus before offers are made to the union.

Chapters 79 and 80 contemplate that process. However, it appears that as a practical matter the direction of negotiations comes from the Personnel Committee. Gracz testified without contradiction that he did not take direction from the County Executive. This is so despite the fact the County Executive is elected (i.e. does not report to the legislative body as would the typical school Superintendent), has veto power over the ratification of the contract, and is charged with administering the agreement. The County Executive is authorized to attend all closed sessions of the Personnel Committee which are devoted to bargaining. The record does not indicate what, if any participation occurred.

The parties met on 11 occasions spanning a period of just over one year. They set groundrules for their negotiations which included a no press release provision. In August the County opened bargaining with a proposal that sought to eliminate certain language related to

temporary employees, sought a number of changes in the health insurance benefit, and committed to a wage offer in the future. By November 20, 2008 the County had a wage offer on the table which lifted wages 6½% over 3 years, maintained the temporary employees proposal and continued to press for health insurance concessions. By March 30, 2009 the County submitted a preliminary final offer which mirrored the November 20 offer.

In May, 2009, the County Executive conducted a listening session where he projected a $90.0m deficit for 2010. There were also newspaper stories where the County Executive was quoted as calling for pay freezes, citing the potential budget gap of $90m. In a July 9 news story the Executive is again quoted as in search of a wage freeze citing a dramatic change in the financial position of the County. The projected $90 m. budget gap is referenced again, but is reported to consist, in part, of an anticipated 9% pay raise. The newspaper headline said the report was alleged to have confused the talks. However, the press releases seemed to foreshadow the July 15 County proposal which called for a 2 year contract, a pay freeze, modifications in the health insurance, and which provided protections relative to layoff, reduction in hours, furlough and privatization of work.

This was a County proposal. It followed on the heels of the County Executive calling for a pay freeze. The Union was justified in treating the offer as a serious proposal to resolve the contract. The offer represented a change in direction in the negotiations, and was tendered by the County's designated bargaining team. It appeared consistent with the newspaper stories relating the Executive's position.

The parties went on to enter into a tentative agreement which, at its core, grew out of the July County offer. Gracz testified, without contradiction, that the County Executive was aware of the terms of the tentative agreement before it was arrived at on September 4. The County Personnel Committee authorized the County to sign off on the agreement on September 15. On September 23 the Personnel Committee and the Finance and Audit Committee recommended ratification of the agreement.

The next day, September 24, the Executive budget was introduced. Its terms are completely at odds with the terms of the tentative agreement. The Executive Budget goes into line item detail as to how savings will be achieved. It contradicts a number of terms of the tentative agreement. It raises for the first time a number of issues which had not been a part of the parties negotiations. It is conceptually at odds with the framework of the tentative agreement, which at its core was a pay freeze and health insurance concessions exchanged for a measure of job protection. The Executive Budget was a repudiation of the tentative agreement. It ironically notes that "many of these modifications will require agreement with collective bargaining units for represented employees."

The County Board acted by first delaying the vote on the tentative agreement, and then rejecting it. The adopted budget was a similar repudiation of the tentative agreement. It is not

just that the contract was rejected. The budgets reflect dramatic differences from the terms of the tentative agreement. The budgets bear no relationship to the overall economic and job security content of the tentative agreement. The adopted budget makes the same reference to a need to secure agreements with the unions.

In the face of the repudiation of the tentative agreement, the question is posed: What was the purpose of all of the bargaining sessions which took place between August 20, 2008 and September 4, 2009? From this record it is impossible to conclude that the bargaining sessions were "in good faith, with the intention of reaching an agreement".

While the County was negotiating a tentative agreement with the union, it was simultaneously, and on a parallel track, developing a budget predicated on wage and benefit concessions which had never been presented to the Union.

If the County Executive believed that the agreement the County Director of Labor Relations was about to enter into was so flawed that it would be subject to his veto he had an obligation to make that known through the bargaining process. (ADAMS COUNTY, *supra*). The failure of the County to so advise the Union is inconsistent with the duty to bargain in good faith and permitted the ill-fated agreement to go forward. (EDGERTON FIRE PROTECTION DISTRICT, *supra*).

The County Executive prepared a budget which called for significant concessions from the Union. The Executive Budget specified a $6,800 - $8,400 (13 – 16%) wage and benefit reduction. Simultaneously the Director of Labor Relations, on behalf of the County, proposed a contract exchanging a pay freeze for a level of job security. The Union was advised that it could sign a contract along the lines proposed. The magnitude of the budgeted wage and benefit cuts are both philosophically and financially at dramatic odds with the County's position to the Union. During the course of bargaining the Union was not presented with the kinds of proposals assumed in either the Executive or the adopted Budgets. (EDGERTON FIRE PROTECTION DISTRICT, *supra*) This is a level of deception inconsistent with the notion of good faith. This represents the antithesis of an intent to reach an agreement.

The parties had a ground rule that "there shall be no press releases issued or statements made to the public during collective bargaining by either party." The County, including the Executive, is bound by the groundrule. The County Executives' press statements violate the rule. It is worth noting that Abelson, who was also bound by the groundrule, felt comfortable responding in the press. Bargaining in the press rarely contributes to settlement. It freezes parties positions, and invites misunderstanding. Here, the County Executive took positions at odds with the proposals of the County, urged the County Board to change its position on negotiations, and repeatedly declared he would not support the position taken by the County. In this respect, the County Executive behaved more like a third party observer of the negotiations. In fact, he was a necessary part of the management team. The County Executive

was bargaining in the press. His positions were not being bargained at the table. This undermines the bargaining process. It fractures and clouds the management position, in the face of a statute which requires the Union to deal with the representative at the table. The lack of discipline within County management compromised collective bargaining as a process capable of resolving disputes.

There is a difference between the duty to support and vote for ratification of a tentative agreement and the duty to come forward with proposals that intend to bring about an agreement. The duty to support an agreement is the obligation of those who have directly participated in the creation of the agreement to support it. The bargaining team is charged with the task of creating that agreement. The Milwaukee County bargaining team was authorized to represent the County in negotiations, and charged, by law, with negotiating with the union in a manner that was intended to bring about an agreement. At least by September, when the tentative agreement was achieved, that was no longer the case. The offer tendered by the County to settle the contract was an offer the County would not support. That fact was known by the County Executive at the time.

The County contends that the contract was rejected because of the state of the economy. No one testified to that fact. No County Board supervisor testified. The County Executive did not testify. It is certainly within the realm of the reasonable to believe that the budgets, and the rejection of the tentative agreement, were the product of the economy. However, the explanation does not address the timing of the events. The contract was agreed upon on September 4. It was authorized on September 15. It was recommended on September 23. It fell victim to the Executive Budget on September 24. The economy did not tank overnight. The potential budget shortfall was announced months earlier.

The one intervening event was the introduction of the Executive Budget. That appears to be the event that caused the County Board to initially postpone, and ultimately reject, the tentative agreement.

The record does not indicate what, if anything, the County Board members knew about the anticipated budget shortfall for 2010. The adopted budget also differs dramatically from the tentative agreement. If the County Board members were generally aware that the financial circumstances of the County were such that would lead to the adopted budget, the committees actions in authorizing and approving the tentative agreement are inexplicable. If the County Board members lacked any realistic idea as to the financial circumstances facing the County, until confronted by the Executive Budget, how could they provide any meaningful direction to the County bargaining team. As noted, it is unclear what contribution, if any, the County Executive made to the Personnel Committee's formulation of policy.

Taking the above described actions together under the totality of the circumstances, the County did not apply itself to the task of bargaining a contract. (CITY OF JANESVILLE, *supra*) If

the County wanted the changes reflected in its budgets it should have put those proposals to the Union. If layoffs, furloughs and the like were potential consequences of a failure to control or reduce wages and benefits that should also be brought to the bargaining table at a time when it can be meaningfully discussed. (CITY OF MARSHFIELD WASTE WATER TREATMENT PLANT, *supra*)

It is the view of the County that the matter can return to negotiations and be resolved by arbitration if necessary. While that will no doubt happen it does not operate to cure the bargaining conduct described above. (CITY OF GREEN BAY, *supra*) MERA is a collective bargaining statute. It is premised on the resolution of disputes through the collective bargaining process. It is only when the process cannot succeed that arbitration is invoked as a means of resolving disputes that cannot be resolved in bargaining. Arbitration was never intended as a substitute for collective bargaining.

As a practical matter, it appears that the Executive and the County Board could not agree on how to proceed with bargaining. That left the County's bargaining team to attempt to balance the impossible differences between the Executive and the Board to maintain a credible presence and to achieve an agreement. Given the swirling politics, and the harsh economy, it is amazing they accomplished what they did. However, they were undermined in their efforts to discharge the statutory duty of the County to bargain. It is not relevant to this decision whether that is a structural problem within County government or the product of personalities. Nothing in this decision should be read to reflect negatively on that team or on their efforts. To the contrary, following the rejection of the contract, they were sent back to continue to discharge the County's ongoing duty to bargain with a Union that would have no reason to accept the positions they advance as credible.

Conclusion

By the actions described above, the Respondents have failed to bargain in good faith as required by Sec. 111.70(3)(a) 4 and 1, Wis. Stats.

Dated at Madison, Wisconsin, this 21st day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/
William C. Houlihan, Examiner

WCH/gjc
33001-C

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

MILWAUKEE COUNTY
MILWAUKEE DISTRICT COUNCIL #48,
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

WE WILL bargain in good faith with Milwaukee District Council #48, AFL-CIO concerning the wages, hours and conditions of employment of employees of Milwaukee County represented by them .

Dated this _____ day of _____ 2010.

_____
On behalf of Milwaukee County

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