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-D

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

vs.

MILWAUKEE COUNTY, Respondent.

Case 697
No. 69221
MP-4541

Decision No. 32912-E

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

vs.

MILWAUKEE COUNTY, Respondent.

Case 698
No. 69222
MP-4542

Decision No. 32913-E

No. 33001-D
No. 32912-E
No. 32913-E

Appearances:

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On October 21, 2010, Examiner William C. Houlihan issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matters, concluding that the Respondent Milwaukee County (County) had violated its duty to bargain in good faith with the Complainant Milwaukee District Council 48, AFSCME, AFL-CIO (Union) during negotiations for a successor to the 2007-2008 collective bargaining agreement between the County and the Union. The Examiner dismissed the Union's allegations that the County violated the law when members of the County's Personnel Committee failed to support and vote for a tentative successor agreement and that the County's across-the-board furloughs in 2009 and 2010 had discriminated against employees for their union activity. The Examiner declined to assert jurisdiction over the Union's claims that the County had failed to bargain in good faith by unilaterally implementing reduced work weeks and/or furloughs for bargaining unit members, on the ground that the parties had agreed to arbitrate those matters and it was appropriate to defer to those arbitration proceedings.

On November 9, 2010, the Union filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition. On February 28, 2011, the Union filed a Motion to Supplement Record with supporting argument and, on March 15, 2011, the County submitted a Response in Opposition to Complainant's Motion. By e-mail sent on March 2, 2011, the Commission asked the County to clarify that it was waiving any objections to arbitrability and was willing to have an arbitrator decide the merits of the alleged contractual violations with regard to the furloughs. The County did not respond to that request. By e-mail dated March 21, 2011, the Commission advised the parties as follows:

> Attached to Attorney Sweet's March 21 letter to Attorney Vetter was a copy of Attorney Vetter's March 18, 2011 letter to Arbitrator Greco. Based on the letter to Greco, it seems the County is not currently willing to arbitrate some or all of the furlough grievances which Examiner Houlihan ordered deferred to grievance arbitration.

> Unless the County advises otherwise on or before close of business this Friday, WERC will proceed with its deliberations as to Cases 697, 698 and 703 on the assumption that deferral is no longer an available option.

The County did not respond, and the record was closed on March 25, 2011.

For the reasons explained in the accompanying memorandum, the Commission affirms the Examiner's Findings of Fact with modifications as noted below. The Commission affirms the Examiner's dismissal of the Union's claim that the County violated Sec. 111.70(3)(a)3, Stats., as well as the Examiner's dismissal of the Union's contention that the County failed to bargain in good faith when Supervisor Thomas published his "Road Map For Milwaukee County's Future." The Commission affirms the Examiner's decision to defer to arbitration the Union's claim regarding the work week reduction. The Commission denies the Union's Motion to Supplement Record.

Given the County's refusal to arbitrate the furlough grievance, the Commission sets aside the Examiner's order deferring to arbitration the Union's claim regarding the alleged unilateral imposition of furloughs and concludes that the County's action in that regard changed the status quo during a contract hiatus in violation of the County's duty to bargain in good faith. The Commission also concludes, contrary to the Examiner, that, under the circumstances present here, the County's Personnel Committee had a duty to support the tentative agreement the parties had reached regarding the successor agreement, and that thus the County violated its duty to bargain in good faith when three members of the Personnel Committee voted against ratification of the tentative agreement. The Commission affirms the Examiner's conclusion that, in the totality of the circumstances, the County failed to bargain in good faith with the Union over a successor to the 2007-08 collective bargaining agreement. The Commission remedies these violations as provided in the Order, below.

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

ORDER

A. The Examiner's Findings of Fact 1 through 4 are affirmed.

B. The Examiner's Finding of Fact 5 is set aside and the following Finding of Fact 5 is made:

> 5. At all relevant times, District Council 48 and Milwaukee County had not executed a successor agreement to the collective bargaining agreement that expired on December 31, 2008. Although the parties had not formally extended the predecessor contract subsequent to its expiration, for some period

of time the parties agreed to arbitrate grievances that arose after that contract had expired; in particular, the parties arbitrated the Union's grievance challenging County Executive Scott Walker's Executive Order issued May 14, 2009, reducing the work week for bargaining unit employees. The County has not agreed to arbitrate the Union's grievance challenging the County's imposition of furlough days in 2009 and 2010.

C. The Examiner's Findings of Fact 6 through 22 are affirmed.

D. The Examiner's Finding of Fact 23 is set aside and the following Finding of Fact 23 is made:

23. On September 15, 2009, the County and the Union met to sign off on a tentative agreement for a successor to the 2007-08 contract. The County's Personnel Committee met in closed session and informed the County's Director of Labor Relations that he was authorized to enter into the tentative agreement. The County did not inform the Union whether or not any member(s) of the Personnel Committee was (were) opposed to the tentative agreement.

E. The Examiner's Findings of Fact 24 through 38 are affirmed.

F. The Examiner's Finding of Fact 39 is set aside.[1]

G. The Examiner's Findings of Fact 40 through 46 are affirmed.

H. The Examiner's Finding of Fact 47 is set aside and the following Finding of Fact 47 is made:

47. On December 21, 2010 the Court of Appeals issued its decision reversing the decision of the Circuit Court, which had vacated the Greco work week reduction arbitration award, and instead confirmed that award. This decision was published as MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO V. MILWAUKEE COUNTY AND SCOTT WALKER, 331 WIS. 2D 188, 2011 WI APP 14 (CT. APP. 2010).

I. The Examiner's Findings of Fact 48 through 54 are affirmed.

[1] The Examiner's Finding of Fact 39 stated, "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." Although we agree with this statement, we view it as a statement of law rather than a finding of fact.

J. The following Finding of Fact 55 is made:

> 55. At all relevant times, based upon the language in the expired contract and arbitration awards construing same, the status quo regarding implementing a reduction of hours and wages related to a non-layoff reduction in services, including furloughs, was that the County was permitted to implement such reductions up to 45 hours within a calendar year.

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

L. The Examiner's Conclusions of Law 3 and 4 are set aside and the following Conclusions of Law 3 and 4 are made:

> 3. The County's Personnel Committee had a duty to support the tentative agreement which they had authorized on September 15, 2010, including voting in favor of ratification, and, when three members of that Committee voted against the tentative agreement at the ratification vote on October 14, 2010, the County refused to bargain in good faith with the Union, in violation of Secs. 111.70(3)(a)4 and 1, Stats.
>
> 4. Supervisor Thomas, a member of the County's Personnel Committee, did not refuse to support the tentative agreement by publishing his "Road Map for Milwaukee County's Future" and the County did not thereby refuse to bargain in good faith with the Union in violation of Secs. 111.70(3)(a)4 and 1, Stats.

M. The Examiner's Conclusion of Law 5 is affirmed.

N. The Examiner's Conclusion of Law 6 is set aside and the following Conclusions of Law 6 and 7 are made:

> 6. Across-the-board reductions in hours of bargaining unit members, in the form of reduced work weeks or furloughs, are a mandatory subject of bargaining within the meaning of Secs. 111.70(1)(a), Stats., provided they do not limit the County's ability to reduce services by means of layoff.
>
> 7. By unilaterally imposing furloughs on bargaining unit members during 2010 that exceeded 45 hours, the County changed the status quo during a contract hiatus and thereby refused to bargain in good faith with the Union regarding a mandatory subject of bargaining, in violation of Secs. 111.70(3)(a)4 and 1, Stats.

O. The Examiner's Conclusions of Law 7 and 8 are renumbered Conclusions of Law 8 and 9 and are affirmed.

P. The Examiner's Order is set aside and the following Order is issued:

1. The allegations of the Complaint relating to Conclusions of Law 4 and 5, above, are dismissed.

2. The Union's Motion to Supplement the Record is denied.

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

a. Cease and desist from refusing to bargain with the Union by having members of its Personnel Committee, which had specifically authorized the County's bargaining team to enter into a tentative agreement, fail to support and vote in favor of the tentative agreement during the ratification process.

b. Cease and desist from refusing to bargain with the Union by changing the status quo on mandatory subjects of bargaining during a contract hiatus, specifically, by unilaterally imposing furloughs upon bargaining unit members exceeding 45 hours during a temporary period of time up to one year.

c. Cease and desist from refusing to bargain with the Union by a totality of conduct during negotiations for a successor agreement.

d. Upon request of the Union, promptly submit the tentative collective bargaining agreement for 2009-10 to the County Executive for approval or rejection.

e. Make bargaining unit members whole with interest for any lost compensation owing to furlough time they were compelled to take during 2010 in excess of 45 hours.

f. Notify employees represented by the Union by posting in conspicuous places in all County facilities where those employees work, copies of the Notice attached hereto as 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 successor collective bargaining agreement. Reasonable steps shall be taken by the County to ensure that said notices are not altered, defaced, or covered by other material.

g. 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.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

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

Chairman James R. Scott did not participate.

APPENDIX "A"

NOTICE TO MILWAUKEE COUNTY EMPLOYEES REPRESENTED BY MILWAUKEE COUNTY 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 County District Council 48, AFSCME, AFL-CIO by:

1. Supporting tentative agreements during the ratification process;

2. Conducting negotiations in good faith in the totality of circumstances during negotiations for successor agreements;

3. Upon request of the Union, promptly submitting the tentative collective bargaining agreement for 2009-10 to the County Executive for approval or rejection;

4. Maintaining the status quo on mandatory subjects of bargaining following the expiration of the 2007-08 contract and specifically by not unilaterally imposing furloughs upon bargaining unit members exceeding 45 hours during a temporary period of time up to one year;

5. Making bargaining unit members whole for furlough time they were compelled to take during 2010 in excess of 45 hours.

Dated this _____ day of _____, 2011.

_____
For Milwaukee County

THIS NOTICE MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

We have largely affirmed the Examiner's Findings of Fact, with the modifications set forth in the Order, above, and those facts can be summarized as follows.

The County and the Union have been parties to a long series of collective bargaining agreements covering nonprofessional employees of Milwaukee County in various departments. The most recent agreement expired on December 31, 2008. At all relevant times, those agreements included the following language:

> **1.05 MANAGEMENT RIGHTS**
>
> The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices which are mandatory subjects of bargaining and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action *and the right to release employees from duties because of lack of work or lack of funds*;
>
> . . .

(Emphasis added). In March 2004, an arbitrator issued an award construing the above-referenced language, in conjunction with other provisions of the collective bargaining agreement, to allow the County "the right to release employees from duties by reducing the work week from 40 to 35 hours per week on a temporary basis due to lack of funds." The same award stated, "the Employer may not unilaterally and permanently reduce the hours of full time employees. The operative term is temporary. At the request of the parties the Arbitrator has not defined that term."

At all relevant times Scott Walker was Milwaukee County Executive, and the seven-member Personnel Committee of the County Board of Supervisors was charged with carrying out collective bargaining on behalf of the County and submitting the written agreements reached to the Board for approval or rejection. Johnny Thomas was a member of the County Board of Supervisors and a member of the Board's Personnel Committee. Greg Gracz served as the County's Director of Labor Relations and he, along with two other members of the County's Labor Relations Department, served as the County's negotiating team. Gracz took authorization and direction from the Personnel Committee in conducting such negotiations. Gracz kept Walker informed about the status of the negotiations and the general content of the parties' proposals.

The parties began negotiations for a successor to the 2007-08 collective bargaining agreement in or about August 2008. Over approximately the following 12 months, the parties met on 11 occasions without reaching agreement. Until at least May 2009, the County's proposals always included wage increases along with changes in health insurances. The parties' ground rules included a ban on press releases.

In May 2009, Walker stated publicly that the County faced a projected $14.9 million deficit in the 2009 budget and a projected 2010 budget shortfall of $90 million. He called for a wage freeze for County employees. On May 14, 2009, Walker issued an executive order implementing an across the board five-hour reduction in the work week of County employees, "temporarily ... until further order of the Milwaukee County Executive." The directive was not preceded by prior notice to the Union nor an opportunity to bargain. The County had not proposed the work week reduction during ongoing successor contract negotiations. The directive was not approved or ratified by the County Board.

The Union grieved the work week reduction and, although the contract had expired, the parties submitted the matter to binding arbitration pursuant to the contractual grievance procedure. On July 1, 2009, the parties' permanent umpire issued a written award finding that the "planned reduction in hours is permanent because it was slated to greatly exceed 45 days since the County's Department of Administrative Services has acknowledged that the reduction in hours can last until the end of the year ... ." The umpire also concluded that the proposed work week reduction violated the contract because it had not been approved by the County Board as the umpire concluded was required by County ordinance. On January 15, 2010, the Milwaukee County Circuit Court issued an order vacating the umpire's award and also declaring that the Executive Order was valid without any need for approval by the County Board. On December 21, 2010 the Court of Appeals reversed the decision of the Circuit Court as to vacating the arbitration award and instead confirmed that award. DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO v. MILWAUKEE COUNTY AND SCOTT WALKER, 331 WIS. 2D 188, 2011 WI APP 14 (CT. APP. 2010). For all practical purposes, the 35 hour work week was not actually implemented.

On September 4, 2009, the negotiating teams for the County and the Union reached a tentative agreement for a successor contract covering calendar years 2009-2010. Walker had prior knowledge of the terms to which the County had tentatively agreed. Those terms included a general commitment, as long as current levels of state and federal funding were maintained, not to privatize current employees' work or to lay off, reduce hours, or furlough bargaining unit employees unless the County Board elected to do so on a uniform across-the-board basis (with limited exceptions), and even then up to five hours per week for no more than six calendar weeks. The tentative agreement included a wage freeze and certain health insurance concessions by the Union.

In September 2009, Supervisor Johnny Thomas, a member of the County's Personnel Committee, distributed a document titled "Road Map for Milwaukee County's Future." This ten-page document suggested that the County should consider various long term means of maintaining fiscal solvency, including privatization of some programs and services and the possibility of layoffs as a result.

On September 11, 2009, Walker conducted a press conference in which he was reported to have stated that the anticipated budget shortfalls might necessitate pay cuts or layoffs during the period of time that was covered by the tentative agreement. He was also reported to have stated that he would not agree to a labor contract that included a no-layoff guarantee in exchange for a pay freeze.

On September 15, 2009, representatives of the County and the Union met to sign the terms of the tentative agreement. All seven members of the County's Personnel Committee were present and the Committee voted to authorize Gracz to enter into the agreement. The Union representatives were informed that the Personnel Committee had authorized the deal but were not informed about the nature of the vote (whether it was split and if so which Supervisors voted against the agreement). The County representatives informed the Union representatives that the Union would need to ratify the agreement by September 23 in order to accommodate the County's schedule for committee approvals and Board ratification. On September 22, 2009, the Union and its affiliated locals ratified the tentative agreement.

On September 22, 2009, Walker sent a memorandum to the Chairman of the County Board, stating that, in addition to implementing a 35-hour work week for County employees for four weeks, he believed it would be necessary to implement five furlough days before December 26, 2009, for all *non-represented* County employees. (Emphasis added). On September 23, 2009, the *Milwaukee Journal-Sentinel* reported in an on-line article that Walker had stated he would veto the pending tentative agreement because it would inhibit the County from privatizing services and/or layoffs.

On September 23, 2009, the County Board's Personnel Committee and its Finance and Audit Committee voted in favor of a resolution approving the tentative agreement. The vote in the Personnel Committee was 5 to 2, with Supervisors Borkowski and Cesarz voting against the resolution. Supervisor Johnny Thomas was a member of both committees and voted in favor of the resolution in both votes. The resolution was placed upon the agenda for the County Board meeting the following day, September 24, 2009.

At the September 24, 2009 County Board meeting, Walker presented his recommended budget for 2010, which included a number of items affecting mandatory subjects of bargaining that were inconsistent with, in conflict with, or not addressed in the tentative agreement and/or had not been proposed by the County during the negotiations for that agreement. These included the definition of overtime, health insurance, privatization of work, freezing of pay steps, and pension contributions. At the Board meeting, Supervisor Jursik, who was not a member of the Personnel Committee, moved to lay the ratification vote over. Supervisor Thomas voted in favor of that motion, which, based upon the Board's "Minority Rules," passed 8 to 10. The record does not indicate whether the motion would have passed if Thomas had voted against it, thus making the vote 7 to 11.

On October 14, 2009, the County Board voted 11 to 6 to reject the tentative agreement. Personnel Committee members Thomas, Jursik, and Cesarz voted against ratification. On or about that same date, Walker and the Board directed that most County employees, including those represented by the Union, take four unpaid furlough days during the remainder of 2009. Subsequently, two of those furlough days were cancelled and two were actually implemented .

On or about November 18, 2009, the County adopted a budget for 2010 that required most County employees, including those represented by the Union, to take 12 unpaid furlough days during 2010. On or about February 25, 2010, the County imposed an additional ten unpaid furlough days upon most County employees, including those represented by the Union.

The Union filed grievances challenging the furloughs. Before the Examiner, the County asked that those grievances be deferred to arbitration, even though the contract had expired. At present, the County is unwilling to arbitrate the furlough grievances.

The County's fiscal projections for 2009 varied over the course of the year. In April 2009, the County's Fiscal and Budget Administrator projected a $7 to $14 million shortfall. Mid-2009, the deficit estimate was in the $650,000 range. On November 10, the projection was some $1.7 million in deficit, but a week later the estimate was $539,039. When the books were closed for fiscal year 2009, they reflected that the County ended the year with an $8 million surplus.

The Examiner's Decision and the Issues on Review

The Examiner addressed six issues. First, he concluded that the members of the County Board's Personnel Committee were not part of the County's bargaining team and, despite having authorized the bargaining team to enter into the tentative successor agreement in September 2009, had no duty to vote in favor of ratifying the agreement. Hence, the County did not violate the law when three members of the Personnel Committee voted against ratification, including one member (Supervisor Thomas) who had earlier voted to recommend the agreement. The Union has sought review of this conclusion of the Examiner's. For reasons discussed in the following section of this Memorandum, we reverse the Examiner's conclusion.

Second, the Examiner concluded that the County did not violate the law when Supervisor Thomas, who as a member of the Personnel Committee had voted to recommend the tentative agreement, published his "Road Map," even though that document suggested that the County should seriously consider privatizing and the tentative agreement had generally limited the County's right to privatize. The Examiner reached this conclusion on two grounds: first, that Thomas did not have a duty to support the tentative agreement in his capacity as a member of the Personnel Committee who had voted to recommend it; second, that, even if Thomas had such a duty, said duty would not sweep "so broadly that it restricts his expression of views of the nature of those in the ROAD MAP." (Examiner's Decision at 50). The Union has not sought review of this conclusion We do not agree with the Examiner's conclusion that Thomas, as a member of the Personnel Committee, did not have a duty to support the tentative agreement through ratification, as discussed in a subsequent section of this Memorandum. However, we do agree with the Examiner that it is not unlawful for an elected policy-maker to encourage public consideration of policies that touch upon mandatory subjects of bargaining and/or matters addressed in a collective bargaining agreement especially where, as here, nothing in Thomas' "Road Map" urges the County to violate either the County's duty to bargain in good faith or its duty to comply with a collective bargaining agreement. Accordingly, we affirm the Examiner's conclusion that Thomas' publishing his "Road Map" did not violate the law.

Third, the Examiner dismissed the Union's claim that the County had refused to bargain in good faith by unilaterally changing the status quo on a mandatory subject of bargaining in or about May and June 2009, when the County decreed a reduced work week from 40 to 35 hours for bargaining unit members. The Union has not sought review of this conclusion. At the time of the Examiner's decision, the work week reduction issue had been submitted to arbitration, the arbitrator (umpire) had ruled that the reduction violated the collective bargaining agreement, and the circuit court had vacated the arbitration award. In vacating the award, the circuit court had interpreted the contract contrary to the arbitrator in two respects: first, that, while a work week could be reduced temporarily, the court interpreted "temporary" to mean up to one year, while the arbitrator had interpreted it to mean

45 days; second, the court interpreted the County's ordinances, as incorporated into the contract, to permit the County Executive to implement the work week reduction without first obtaining County Board approval, whereas the arbitrator had interpreted those ordinances, as incorporated into the agreement, as requiring Board approval. Since, "in this proceeding, the status quo claim is predicated on the right of the parties under the terms of the collective bargaining agreement, ... [a]s a practical matter, the analysis of the arbitrator and the Court dispose of all claims made under the status quo theory of the Union." Examiner's Decision at 52. The Examiner's analysis largely focused upon his view that the court's holdings on the two issues (i.e., the meaning of "temporary" and the proper construction of the ordinance) should have preclusive effect for purposes of the nearly identical issues that are before the Commission in the instant claim (unilateral change in status quo).

We concur in the Examiner's determination that this issue should be dismissed, but we do so on the basis of the Commission's longstanding deferral doctrine rather than issue or claim preclusion principles. The Commission's deferral doctrine allows the Commission to withhold its jurisdiction over alleged "unilateral change" violations of Sec. 111.70(3)(a)4, Stats., if (a) the employer is willing to arbitrate the merits of the dispute, (b) the collective bargaining agreement clearly addresses the dispute, and (c) the dispute does not involve overridingly important issues of law or policy. BROWN COUNTY, DEC. NO. 19314-B (WERC 6/83). As noted in the Order, above, we have amended the Examiner's Findings of Fact to note that, subsequent to the Examiner's decision, the Appeals Court reversed the Circuit Court and confirmed the arbitration award. Thus, the traditional deferral elements are clearly satisfied here: an arbitrator – with court confirmation – has determined that the reduced work week issue is addressed in the contract, that the County's action violated the contract, and that certain relief should be awarded. Determining what the nature of the status quo as to the County's authority to reduce the work week, while clearly important to these parties, is specific to the parties' contract and bargaining relationship and not an issue of overriding policy importance as contemplated by the third prong of the deferral test. Accordingly, the Commission affirms the Examiner's conclusion, i.e., that this claim should be dismissed because it has been fully addressed in arbitration, without further discussion.

Fourth, the Examiner deferred to grievance arbitration the Union's claim that the County unilaterally changed the status quo, in violation of its duty to bargain, by imposing two unpaid furlough days upon the bargaining unit in the latter part of 2009 and a total of 22 unpaid furlough days in 2010. The Union has sought review of this determination. As noted in the introduction to this decision and set forth in amended Findings of Fact, above, the County has withdrawn any willingness it may have had to arbitrate the merits of the Union's grievance in this regard. Such willingness is a prerequisite to application of the Commission's deferral doctrine. BROWN COUNTY, *supra*. Hence, we have set aside the Examiner's deferral and we address the merits of the unilateral change allegation in a subsequent section of this Memorandum.

Fifth, the Examiner dismissed the Union's claim that the furloughs discriminated against employees on the basis of their union membership, in violation of Sec. 111.70(3)(a)3, Stats. The Union has sought review of this conclusion, arguing that across-the-board furloughs inherently discourage union membership by exacting a harsher toll upon higher wage earners, who, because pay scales reward longevity, are often the employees who have been members of the bargaining unit (and therefore Union) for the longest period of time. The Examiner pointed out that one of the elements needed to establish a violation of Section (3)(a)3 is animus – i.e., persuasive evidence that the County harbored ill will toward Union members. See generally, MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS. 2ND 540 (1967). We agree with the Examiner that a mere correlation between longevity and pay does not satisfy that element. Accordingly, we affirm the Examiner's dismissal of this claim without further discussion.

Sixth, the Examiner reviewed the County's overall conduct in conducting the negotiations for the successor agreement and concluded that said conduct was inconsistent with the County's fundamental statutory duty "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." Sec. 111.70(1)(a), Stats. In an extensive discussion, with which we wholly concur, the Examiner essentially reasoned that Walker – after knowingly permitting the County's negotiators to make certain proposals which were accepted by the Union and recommended for ratification by the County's Personnel Committee – had intentionally and unjustifiably thrown a monkey wrench into the settlement by proposing an Executive Budget on September 24, 2009, that conflicted with the tentative settlement in several crucial ways. The introduction of that Executive Budget led to the Board's rejection of the tentative agreement on October 14, 2009. As the Examiner said:

> 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*).

Examiner's Decision at 60.

We therefore affirm without further discussion the Examiner's conclusion that, in the totality of the circumstances present here, the County failed to conduct itself in good faith in negotiating the successor agreement, for the reasons he articulated.

On February 28, 2011, while the Union's petition for review was pending before the Commission, the Union submitted a Motion to Supplement Record, asking that the Commission receive into the record in this matter the audio recording and transcript of a February 22, 2011 interview of Scott Walker, arguing that Walker's statements during that interview indicate that he "used the threats of layoffs and actual layoffs to pressure the Union at the table, " and that he "used the tactic of imposing furloughs as a method of forcing the Union to concede to his demands." The Union did not specify which of Walker's comments during that interview allegedly evidenced an intention to violate the law during the period of time when he was County Executive for Milwaukee County. Walker's comments during the interview appear to refer to the situation that pertained to state government and Walker's role as state governor, that existed at the time of the interview, not to the events at issue in the instant case. Accordingly, the Union's motion is denied.

We turn now to a more thorough discussion of the reasons on which we have altered the Examiner's decision on the first and fourth issues described above.

Duty of Personnel Committee to Support the Tentative Agreement

It is well-settled that individuals who comprise a party's bargaining team, even if they are also policymakers such as members of a county board of supervisors, have a duty to support a tentative agreement into which the team has entered, including a vote to ratify, unless such an individual has expressly informed the other party of an intention to vote otherwise. The Commission long ago determined that imposing this restriction upon a policymaker's voting rights is a permissible intrusion because it is necessary to effectuate the collective bargaining law and prevent wasteful or sham negotiations. HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 11002-A (Fleischli, 2/74), AFF'D DEC. NO. 11002-B (WERC, 9/74); JOINT SCHOOL DIST. N.S. CITY OF WHITEHALL, DEC. NO. 10812-A (Torosian, 9/73), AFF'D, DEC. NO. 10812-B (WERC, 12/73). Neither party takes issue with this principle.

The Union argues that, under the circumstances present here, the County's Personnel Committee had a duty to support and vote for the tentative agreement at the ratification meeting on October 14, 2009. Analogizing the Personnel Committee to members of a football team who "participate in the development of strategy during time-out huddles and at half-

time," but "do not participate in the fray on the field with the opponent," the Union contends that "the members of the Personnel Committee present on September 15 were part of the bargaining team on that date that gave rise to the parties' written tentative agreement." Hence, argues the Union, since "none of them reserved the ability to oppose ratification," all members of the Personnel Committee had a duty to vote in favor of ratification on October 14, 2009. The County responds that the County's "bargaining team was formally established by county ordinance as the director of labor relations and his staff. No [County] supervisor ever participated in bargaining." The Examiner ruled for the County on this issue, reasoning that (1) it is well-settled that each party may establish its own bargaining team, citing WAUNAKEE COMMUNITY SCHOOL DISTRICT, DEC. NO. 27837-B (WERC, 6/95); (2) in the instant case, the County's formally established bargaining team comprised only Labor Relations Director Gracz and his two staff; and (3) in the Examiner's view, CITY OF COLUMBUS, DEC. NO. 27853-B (WERC, 6/95) stands for the proposition that County agents who are not formally members of a bargaining team (if there is one) have no duty to support a tentative agreement even if they are present at the time the agreement is reached.

We agree with the Examiner that each party may establish its own bargaining team without interference or agreement from the other party. We also agree with the Examiner's factual finding that the County's formally constituted bargaining team was limited to Gracz and his staff. However, we think the Examiner overdrew the boundaries of the COLUMBUS decision in concluding that it controlled the outcome of the instant case. A close reading of COLUMBUS and its precedents – and common sense concepts of good faith bargaining – make it clear that agents of either party who have actually authorized a tentative agreement and whose authorization was instrumental in reaching that tentative agreement generally are bound to support the agreement during the ratification process, regardless of their status as titular members of a bargaining team.

COLUMBUS concerned, in pertinent part, the obligation of the city's mayor to vote in favor of a tentative agreement, where the mayor was not a member of the formally constituted bargaining team but was present at the time the tentative agreement was reached. The parties disputed whether the mayor had made a statement to the effect that, if the ratification vote were tied, he would vote in favor of the tentative agreement. Ultimately the ratification vote was tied and the mayor voted against ratification. Nothing in either the examiner's decision or the Commission's decision in COLUMBUS suggests that the mayor had any formal role in collective bargaining negotiations for the city or had any role in authorizing the city's negotiating team to enter into the tentative agreement in question. In dismissing the union's claim that the mayor's vote against ratification was unlawful, the Commission stated:

> … 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 publicly taken a position one way of [sic]

> 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. … Thus we are not persuaded that the Association acted in reasonable reliance on the Mayor's alleged statement.

ID. at 17. While the Commission's language could be read to mean that only a titular member of a formally constituted bargaining team could ever have a duty to support a tentative agreement, such a reading would extend the Commission's holding considerably beyond the circumstances actually under review in that case. The Commission was not considering whether or not the mayor had played an actual role in negotiations such that, like the formal negotiating team, he might have had a duty to support the tentative agreement at ratification. Nothing in the decision indicates that the Commission intended to pronounce upon that situation. Moreover, had the Commission meant to limit the duty to support to formal bargaining team members, the second prong of the Commission's reasoning – that the union clearly had not entered into the tentative agreement in reliance upon anything the mayor said – would have been completely immaterial. Instead, the Commission signaled that a participant, even if not a formal member of the team, could, in some circumstances, play a role in reaching a tentative agreement such that the agent would indeed be bound to maintain its support during ratification.

This reading of COLUMBUS is consistent with other Commission cases. WAUNAKEE COMMUNITY SCHOOL DISTRICT, *supra*, which was issued on the same day as COLUMBUS, discusses in more detail the ratification obligations of opposing parties' bargaining team members. The question in WAUNAKEE was whether bargaining team members should be bound to vote in favor of ratification if they were not actually present at the time the tentative agreement was reached and also did not pre-authorize the agreement or delegate that authority to other team members. The Commission first noted that it does not offend democratic principles to require a policymaker who also serves as a "policy implementor (as a bargaining team member)" to vote in favor of "a tentative bargaining agreement to which he or she was a party." ID. at 19. The Commission further pointed out that any such policymaker need only express his/her reservations openly to the opposing side in order to preserve the right to oppose the tentative agreement during ratification. ID. The Commission ultimately held, however, that bargaining team members who were not present and had not otherwise preauthorized the tentative agreement could not be said to have been a party to the agreement such that they would have a duty to vote in its favor during ratification. ID. at 20. Especially instructive for the case at hand is the following observation by the Commission in WAUNAKEE:

> What is not permissible under any circumstances, 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.

ID. at 19-20.

WAUNAKEE tells us is that an individual who does not actually participate in reaching an agreement is not bound to support it, regardless of titular membership on a bargaining team. The obverse question presented here, i.e., whether an agent who actually participates in reaching an agreement without being a titular member of the team may be bound to support it. The inference from the holdings and the dicta in both WAUNAKEE and COLUMBUS is that the focus should be practical rather than formalistic. Both cases stand for the principle that an agent who was not instrumental in securing a tentative agreement – regardless of formal membership on a team – has made no good faith commitment to vote in favor of ratification. By the same token, the obverse is also implied: regardless of formal team membership, agents who have played a clearly instrumental role in securing the tentative agreement are bound to support it at ratification unless they have specifically notified the other party of reservations or an intention to oppose.

We conclude that the implication from both COLUMBUS and WAUNAKEE is that agents of either party who are present and play an actual role in overseeing and/or authorizing a tentative agreement, whether or not they are formally designated members of a "bargaining team," have a duty to support the agreement thus authorized through ratification, unless they have expressly stated their personal opposition or reservations to the opposing party at a relevant point in the process of reaching the tentative agreement. Here, unlike the situation in either COLUMBUS or WAUNAKEE, the County's Personnel Committee was tasked by ordinance with the duty to negotiate collective bargaining agreements. Although the County argues that "No supervisor ever participated in bargaining" and it is true that supervisors were not literally "at the table" during most if not all bargaining sessions prior to September 15, Gracz testified that he took his authority and direction from the Personnel Committee. When Gracz offered the central elements of the proposal that formed the basis for the tentative agreement, he did so with prior authority of the Personnel Committee. In addition, unlike the situation in either COLUMBUS or WAUNAKEE, the full Personnel Committee was present at the September 15 meeting and specifically authorized Gracz to "sign off" on the tentative agreement with the Union. The record does not indicate whether the Personnel Committee's authorization was unanimous or even whether a vote was taken on September 15. Given the precedent cited above, however, it is crucial to point out that the record is devoid of any suggestion that any member of the Personnel Committee expressed to the Union (either directly or through Gracz) a reservation about the tentative agreement or an intention to withhold support. In addition, since the County's formally constituted bargaining team had already reached agreement with the Union's bargaining team at the mediation session on September 4, 2009, the purpose of the Personnel Committee's presence at the September 15 meeting was specifically to give or withhold authority for Gracz to sign the tentative agreement. Clearly, therefore, the Personnel

Committee's authorization, which carried with it the implied support of its members, was instrumental in finalizing the tentative agreement on September 15. Basic principles of good faith bargaining, as succinctly stated in the quoted portion of the COLUMBUS decision, above, required the Committee members to carry out the commitment they thus made, including a vote in favor of ratification.[2]

In its brief to the Examiner, the County argued that ratification failed because of the national economic downturn of 2009. The Commission has occasionally noted the possibility that some unanticipated intervening event or other "good cause" could justify reneging upon a commitment to support a tentative agreement.[3] The Examiner dismissed the asserted justification in the instant case, noting that the tentative agreement was authorized on September 15 and rejected on October 14, a timeline that bore no reasonable relationship to the economic downturn: "The economy did not tank overnight. The potential budget shortfall was announced months earlier." Examiner's Decision at 61. We agree.

Implicitly, perhaps, the County meant by this argument to contend that Walker's September 24 introduction of his Executive Budget – which, as the Examiner pointed out, was "the one intervening event" between the tentative agreement of September 15 and the rejection of the contract on October 14 – constituted a material change in circumstances that would justify three members of the Personnel Committee in voting against ratification. The Executive Budget was indeed, in the Examiner's words, "a repudiation of the tentative agreement." However, nothing in this record explains, much less excuses, the Personnel Committee's failure to acquaint themselves with and/or take into account the County Executive's views prior to offering the Union the proposal that led to the tentative agreement and prior to explicitly authorizing Gracz to sign off on that agreement. The record does not suggest that any extrinsic or unforeseen events led to the September 24 clash between the Executive Budget and the tentative agreement. If misunderstandings, miscommunications, or policy disagreements led to the Personnel Committee reaching a tentative agreement that the Executive would not sign or support, these cannot justify the Personnel Committee's failure to

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[2] The County cites an examiner decision, VILLAGE OF ALLOUEZ, DEC. NO. 32701-A (McLaughlin, 8/09), AFF'D BY OPERATION OF LAW, DEC. NO. 32701-B (WERC, 9/09), in support of its position in the instant case. We note that examiner decisions that are affirmed purely by operation of law carry limited precedential value. WAUNAKEE, *supra*, AT 26 N. 6; CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). In addition, the issue in ALLOUEZ was whether Village Board members were bound to execute a collective bargaining agreement, even though it had not been ratified by the Board, without any evidence that any Board members, let alone a majority, had participated in the bargaining or pre-authorized the tentative agreement. Here, in contrast, the seven Personnel Committee members actively participated in authorizing and finalizing the tentative agreement. Accordingly, ALLOUEZ offers no persuasive instruction in the present situation.

[3] See, e.g., JOINT SCHOOL DIST. NO. 5, CITY OF WHITEHALL, DEC. NO. 10812-B (WERC, 12/73); HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 11002-A (Fleischli, 2/74) at 13, AFF'D, DEC. NO. 11002-B (WERC, 9/74). Although the Commission has discussed the theoretical possibility of a "good cause" exception to the general duty to support, it does not appear from our review of the cases that the Commission has ever decided a case on that basis.

follow through on the commitments they made, even if the ultimate result might have been (or might be) a veto by the County Executive.

Accordingly, under the circumstances present here, all members of the Personnel Committee had a duty to support and vote for the tentative agreement that the Committee expressly authorized on September 15, 2009. The County failed to bargain in good faith with the Union when three members of that Committee voted against ratification on October 14, 2009. The remedy for this violation is addressed in a subsequent section of this Memorandum.

Furloughs as a Unilateral Change in the Status Quo during Hiatus

It is by now axiomatic that, where employees are represented by a union, an employer may not change the existing wages, hours, or working conditions without first bargaining in good faith with the union over any such proposed changes. SCHOOL DISTRICT OF KETTLE MORAINE, DEC. NO. 30904-D (WERC, 4/07), at 15. Long ago the Commission summarized the reasons for this rule:

> Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.

SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, citing CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), and GREEN COUNTY, DEC. NO. 10308-B (WERC, 11/84). See also, NLRB V. KATZ, 396 U. W. 736 (1962).

Nearly as longstanding is the subsidiary principle that, during the "hiatus" between collective bargaining agreements (after the old contract has expired but before a new one is reached) the employer must maintain the "status quo" regarding mandatory subjects of bargaining (wages, hours, and working conditions) unless the union specifically agrees to the change. GREEN COUNTY, *supra*; OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). It is a violation of an employer's duty to bargain in good faith for the employer to implement a change in the status quo unilaterally during a hiatus.

In the instant case, the predecessor collective bargaining agreement expired on December 31, 2008, and at all times relevant to this proceeding no successor agreement had been reached. Thus, for purposes of MERA, the parties were in a hiatus between contracts at

the time of the events giving rise to this case.[4] In the latter part of 2009, the County implemented a requirement for most bargaining unit employees that they take two unpaid furlough days prior to December 31. During 2010, the County required most employees to take a total of 22 furlough days. The Union contends that the imposition of these furlough days changed the status quo as to a mandatory subject of bargaining (wages and/or hours). The County advances two principal defenses: first, that furloughs are akin to layoffs and therefore not a mandatory subject of bargaining; second and alternatively, that the status quo, as reflected in the expired contract, included management's right to implement these furlough days.

The question of whether furloughs are a mandatory subject of bargaining is resolved the Commission's recent declaratory ruling in MILWAUKEE COUNTY, DEC. NO. 33265 (WERC, 3/11). In that case, the Commission concluded that a proposal limiting the amount of an involuntary across-the-board reduction in hours – whether imposed in full or partial days – is a mandatory subject of bargaining as long as the proposal does not limit the employer's right to reduce services by means of layoffs. The Commission recognized that the Supreme Court's holding in CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979), protects the County's right to lay off employees, which in turn allows the County to "reduce services across-the-board or target only certain service areas for reduction or elimination while leaving other services intact." MILWAUKEE COUNTY, *supra*, at 6. The Commission further acknowledged that "placing limitations on how the County may implement non-layoff service reductions," such as furloughs, "does intrude into the ability of the County to fine tune its service reductions." However, balancing the interests of the County as employer against the interests of bargaining unit employees, as is required in determining whether a proposal is a mandatory subject of bargaining, the Commission concluded that, "as long as the fundamental freedom to lay off remains intact, the self-evident and substantial impacts on lost employee wages and hours created by non-layoff service level reduction options [such as furloughs] far outweigh this intrusion." ID. at 6-7.

The MILWAUKEE COUNTY declaratory ruling decision is consistent with the Commission's much earlier decision in GREEN COUNTY, DEC. NO. 20056 (WERC, 11/82), a case that also touched upon the interplay between BROOKFIELD's holding protecting an employer's right to lay off and a union's interests in protecting employees' hours and wages. In GREEN COUNTY the Commission held the following proposal to be a mandatory subject of bargaining: "All employees shall be guaranteed forty (40) hours work per week for Monday through Friday work week." Harmonizing this outcome with BROOKFIELD, the Commission wrote:

[4] See revised Finding of Fact 5, in Paragraph B of our Order, above.

> . . . It is undeniable that the provision here sought by the Union could impose costs for unworked time upon the County, or pay for time spent working at jobs which the County deems less than essential. But the same could be said about vacations and holidays, and the County's argument that the challenged language restricts its ability to lay-off employees, carried to its logical conclusion, would vitiate any set hours whatever in any labor contract, since by definition set hours restrict an employer's ability to lay-off an employee at one hour and call him back the next. The County's objection would thus expand vastly the rule of Brookfield and, in the process, eliminate, to all intents and purposes, the right to bargain hours, which is fundamental in the statute. And to the extent that the challenged language does not identify precisely what hours are to be worked, it both allows the County discretion, which the County presumably would desire, and identifies that forty hours per week shall be paid for. Accordingly, to whatever degree the proposal fails to relate directly to specified hours, it relates directly to specified pay. . . .

GREEN COUNTY, *supra*, at 6-7. Accordingly, as we have previously held, guaranteed hours as well as hours reductions, including furloughs, are mandatory subjects of bargaining.

The question remains, what was the prevailing status quo as to the County's right to impose hours reductions and furloughs at the time of the events giving rise to this dispute? Under traditional principles, the status quo on a particular issue is determined by examining "relevant language (if any) in the expired contract, bargaining history that may shed light on such contract language, and the parties' actual practices on the topic." KETTLE MORAINE, *supra*, at 16, citing, BROOKFIELD, *supra*.

In the instant situation, as in most situations, the expired contract provides the best indication of the parties' understanding of existing managerial prerogatives regarding involuntary reduction of hours, including furloughs. Section 1.05 of the expired contract, set forth more fully in the Summary of the Facts, above, reserves management's right "to release employees from duties because of lack of work or lack of funds." The contract as a whole, construed in light of past practice, also establishes a "normal work week" of 40 hours for full time employees. As explained in the Summary of the Facts, above, two arbitration awards have interpreted/reconciled these provisions in the parties' contract by concluding that the County may temporarily reduce the hours of full time employees in response to a lack of work or funds. In the first of those awards, issued in 2004, the arbitrator concluded that the County could reduce the work week and pay of full time employees from 40 to 35 hours on a temporary basis, but did not define "temporary." In the second award, issued July 1, 2009, the arbitrator interpreted "temporary" in light of other provisions in the agreement to permit the County to implement across-the-board reductions in the work week from 40 to 35 hours for a maximum of 45 days. The award did not specify whether "day" meant work days or calendar days. Although initially overturned by the circuit court, the July 1, 2009 arbitration

award was later confirmed by the Court of Appeals and therefore controls the interpretation of the agreement.

Neither prior award expressly addressed the scope of the County's right to impose "furloughs" as such. Therefore, we are compelled to discern the nature of the status quo as to furloughs by extrapolating from the parties' contract language as interpreted in the 2004 and 2009 arbitration awards. This task essentially replicates that of an arbitrator and is commonplace in the Commission's "unilateral change" jurisprudence, precisely because the status quo during a hiatus is commonly governed by the provisions of an expired agreement. See, e.g., KETTLE MORAINE, *supra*; CADOTT EDUCATION ASSOCIATION V. WERC, 197 WIS.2D 46 (CT. APP. 1995).

Here the two prior awards concerned the County's implementation of a reduced work week, while "furloughs" are often understood colloquially to mean reductions that are measured in full or partial segments of days, rather than reductions in hours per week. We do not find this distinction meaningful in terms of the language of Section 1.05 of the contract: both forms of reduction are methods of "release[ing] employees from duties because of lack of work or lack of funds." The prior arbitration awards have determined that the County may impose such reductions, provided they are "temporary," and we see no reason why that principle and the arbitrators' underlying analysis should not also apply to furloughs.

The distinction between a work week reduction and a furlough does assume some significance for purposes of determining what "temporary" should mean for furloughs as compared with work week reduction. The furloughs here were imposed on an intermittent basis, whereas the work week reductions addressed by the prior arbitration awards were implemented on a regular basis (every week). However, both methods were designed to accomplish the same goal – payroll cost savings – without being so steep as to trigger unemployment compensation benefits, on the one hand, or to deprive employees of contractual benefits related to full time status, on the other. In context of the regularly reduced work week, the 2009 award permitted the County to maintain a reduction of five hours per week up to a maximum of 45 days in 2009. We are persuaded that the only practical way to apply that award to the intermittent situation presented by the instant furloughs is to create a quantified equivalency between the two situations. Assuming 45 "days" means work days (although the arbitrator did not so specify), the 2009 award permitted a reduction of 5 hours per week for 9 weeks or 45 hours during a calendar year. Applying that quantified analysis to furloughs means the 2009 award – the status quo – would permit the County to impose up to 45 hours of furloughs in a calendar year.[5]

[5] See also KETTLE MORAINE, *supra*, where the Commission concluded that the status quo, as gleaned from the parties' expired agreement, permitted the employer to reduce full time employees' work hours on a finite basis that was not to exceed a year.

Here, the two furlough days the County imposed in 2009 did not exceed the permissible 45 hour limitation under the status quo and therefore were lawful. However, the County did exceed its authority under the status quo by imposing 22 furlough days (176 hours) in 2010. By doing so, the County unilaterally changed the status quo on a mandatory subject of bargaining during a contract hiatus, in violation of its duty to bargain in good faith.

Remedy

The basic purpose of the Commission's remedial authority is to effectuate the purposes of MERA by deterring future occurrences of unlawful conduct and restoring parties insofar as possible to the position they would have been in if the unlawful conduct had not occurred. The courts have long recognized the Commission's latitude in devising remedies to further these ends. CITY OF EVANSVILLE V. WERC, 69 WIS.2D 140 (SUP. CT. 1975); EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). The Commission has commented that "the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely …, and preventing or discouraging such violations." GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

As to the Personnel Committee's failure to support ratification of the successor collective bargaining agreement at the October 14, 2009 ratification meeting, the record is clear that, had all seven members of that Committee complied with their duty to vote in favor of ratification, the agreement would have been ratified by a majority vote of 9 to 8. Changes in County Board composition subsequent to October 14, 2009 as a result of intervening elections would make it difficult if not impossible to recreate the situation that existed at that time. In at least one prior case where policymakers with a duty to vote for ratification had failed to do so and their vote was outcome-determinative, the Commission has issued an order deeming the agreement to have been ratified constructively. JOINT SCHOOL DIST. NO. 5, CITY OF WHITEHALL, *supra*, DEC. NO. 10812-B (WERC, 12/73). Because the agreement in WHITEHALL did not require further action, such as executive approval subsequent to ratification, the Commission ordered the employer in that case "to approve, adopt and execute the collective bargaining agreement previously tentatively agreed upon." ID. at 8.

We conclude that an order similar to that in WHITEHALL is warranted in this case, especially given the impossibility of recreating the composition of the voting body as it existed on October 24, 2009. However, unlike WHITEHALL, the County Executive in Milwaukee County retains the authority to approve or reject (by veto) a ratified collective bargaining agreement. Accordingly, our Order requires the County, if the Union so requests, to submit the constructively ratified tentative agreement to the County Executive for his approval. The County Executive is under no legal obligation to approve the agreement.

As to the furlough violation, we have provided the standard remedy in cases involving a unilateral change violation: restore the *status quo ante* and make employees whole with interest [6] for their out of pocket losses attributable to the unlawful change. See, e.g., KETTLE MORAINE, *supra,* and cases cited therein.

Dated at Madison, Wisconsin, this 20th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

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

Chairman James R. Scott did not participate.

[6] See BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93) for guidance as to the applicable interest rate and calculation methodology.

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33001-D