STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, AND ITS AFFILIATED LOCALS 2085, RICHLAND COUNTY COURTHOUSE EMPLOYEES AND 2085-C, RICHLAND COUNTY PROFESSIONAL EMPLOYEES, Complainants,

vs.

RICHLAND COUNTY, Respondent.

Case #173
No. 69949
MP-4595

(Furloughs)

Decision No. 33079-A

Appearances:

Laurence S. Rodenstein, Staff Representative at Large, AFSCME District Council 40, 8033 Excelsior Drive, Suite B, Madison WI 53717, appearing on behalf of the Complainant.

Daniel J. Finerty, Attorney at Law, Godfrey & Kahn, S.C., 780 North Water Street, Milwaukee WI 53202-3590, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel Nielsen, Examiner: On June 22, 2010, the above named Complainants, AFSCME District Council #40 and its affiliated Richland County locals, filed with the Commission a complaint, alleging that the above named Respondent, Richland County, violated the provisions of Ch. 111.70, MERA, by implementing a furlough program among county employees.

A hearing was held on September 15, 2010 at the Richland County Courthouse, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearing was transcribed and a transcript was prepared. The parties submitted briefs and reply briefs, the last of which were exchanged through the Examiner on December 6, 2010, whereupon the record was closed. On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Richland County (hereinafter referred to as either the County or the Respondent) is a municipal employer, which provides general governmental services to the citizens of the County. The County's business address is 181 West Seminary Street, Richland Center, Wisconsin.

2. Wisconsin District Council 40, AFSCME, AFL-CIO (hereinafter referred to as either the Union or the Complainant) is a labor organization and is the exclusive bargaining representative for four County bargaining units – Courthouse, Professionals, Highway and Health Care Center.

3. The County and the Union have been parties to a series of collective bargaining agreements, which address the wages, hour and working conditions of bargaining unit members. At the time of the events giving rise to this complaint, the County's bargaining units each had a contract in place for calendar years 2007-2009.

4. The 2007-2009 collective bargaining agreement between the County and AFSCME Local 2085 (Courthouse) included the following provisions:

AGREEMENT

THIS AGREEMENT is entered into by and between Richland County, hereinafter referred to as the "Employer" or "County," and the Richland County Employees' Union, Local 2085, District Council #40 of the American Federation of State, County, and Municipal Employees, AFL-CIO, hereinafter referred to as the "Union."

ARTICLE I - RECOGNITION AND UNIT OF REPRESENTATION

1.01 The Employer recognizes the Union as the exclusive collective bargaining representative for all employees of Richland County, in the Courthouse and related departments, who are regularly employed for seventeen and one-half (17½) or more hours per week, excluding elected officials, professional, supervisory, managerial and confidential employees, employees in other certified or recognized bargaining units, and all other employees, for the purpose of collective bargaining with the above-named municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment, pursuant to a certification of the WERC, Case 115, No. 52699, ME-3474, Decision No. 28502-A, dated October 13, 1995.

This provision only describes the bargaining representative and the bargaining unit covered by the terms of this collective bargaining agreement and is not to be interpreted for any other purpose.

ARTICLE 2- MANAGEMENT RIGHTS

2.01 The management of Richland County and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction, shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, and promote. The Employer shall have the right to suspend, demote, discharge and otherwise discipline employees subject to the provisions of Article 6 hereof and to relieve employees from duty because of lack of work or for any other legitimate reason. Further, the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify, operational methods or controls, and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement. The Employer agrees to exercise these rights in a fair and reasonable manner, and shall not exercise these rights with the intent or effect of discriminating against the Union or any of its members.

. . .

ARTICLE 10 - LAYOFF

10.01 Layoff: The Employer shall have the right to reduce the number of jobs in any classification in the event of a lay off, the least senior employee(s) within the classification selected for layoff shall be laid off, provided the more senior employees are qualified to perform the remaining work. Employees who have been laid off shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified. Such junior employees) who have lost their position(s) as a result of a bump shall have the right to exercise their seniority in the same manner as if they had been laid off. Employee(s) who are without job(s) as a result of a bump or a reduction in the number of positions shall have the option to accept layoff and may decline to exercise bumping rights, if any Laid off employees shall have recall rights as provided in this agreement.

10.02 Notice of Layoff: Employees whose positions are being eliminated shall be given written notice of the action not less than seven (7) calendar days prior to the effective date of the layoff. In the case of a senior employee displacing a junior employee, the junior employee shall receive seven (7) calendar days notice.

10.03 Notice of Bumping: A senior employee electing to displace a junior employee under Section 10.01 must give written notice to the Employer of such action within five (5) working days of the senior employee's receipt of notice of layoff.

10.04 Notice to the Union: The Union shall be given a copy of all layoff and/or recall notice(s) at the time said notice(s) is (are) given to the employee(s).

10.05 Recall from Layoff: In recalling, the employee(s) on layoff with the greatest seniority shall be recalled first, provided they are qualified to perform the duties of the available position(s). Notice of recall shall be sent by the Employer to the laid off employee's last known address, certified mail, return receipt, and the laid off employee shall be required to respond within one (1) week (7 days) from the first attempted delivery date of the notice. A laid off employee shall have recall rights for a period of twelve (12) months from the date of the most recent layoff.

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ARTICLE 20- NO STRIKE / NO LOCKOUT

20.01 The Employer agrees that there will be no lockout during the term of this Agreement. The Union, in consideration of this Agreement, agrees that there will be no strikes, slowdowns or other complete or partial cessation of work during the term of this Agreement.

. . .

The agreement further contained a grievance procedure, including a provision for the final and binding arbitration of grievances.

5. The 2007-2009 collective bargaining agreement between the County and AFSCME Local 2085C (Professionals) included the following provisions:

AGREEMENT

THIS AGREEMENT is entered into by and between Richland County, hereinafter referred to as the "Employer" or "County", and Richland County Professional Employees' Union, Local 2085-C, AFSCME, AFL-CIO, hereinafter referred to as the "Union".

ARTICLE I - RECOGNITION AND UNIT OF REPRESENTATION

1.01 The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time professional employees of the Richland County Health and Human Services Department, and Richland County Courthouse, excluding managerial, supervisory and confidential employees, non-professional employees, and all other employees, for the purpose of collective bargaining with the above-named municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment, pursuant to a certification of the WERC, Case XVII, No. 26357, ME-1855, Decision No. 18004, dated September 30, 1980 (amended February 28, 1991 and further amended September 30, 1998).

ARTICLE II- MANAGEMENT RIGHTS

2.01 The management of Richland County and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, promote, demote, discipline, suspend or discharge and to relieve employees from duty because of lack of work or for any other reason. Further, the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify operational methods or controls, and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement.

. . .

ARTICLE V – SENIORITY

. . .

5.02 In laying off employees, the employee(s) with the least seniority shall be laid off first, providing that those remaining are qualified to perform the required duties of the available position(s); In re-employing, the employee(s) with the greatest length of service shall be called back first, provided they are qualified to perform the required duties of the available position(s). Employee(s) laid off shall retain all seniority rights while laid off for one year.

. . .

ARTICLE XVIII- WORK STOPPAGES

> 18.01 The Employer agrees that there will be no lockout during the term of this Agreement. The Union, in consideration of this Agreement, agrees that there will be no strikes, slowdowns or other complete or partial cessation of work during the term of this Agreement.
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> . . .

The agreement further contained a grievance procedure, including a provision for the final and binding arbitration of grievances.

6. In July, 2009, Jon Anderson, the County's outside labor counsel, contacted AFSCME Staff Representative Michael Goetz, and told him that the County wanted a meeting with its labor organizations to discuss financial problems with the County budget for 2009 and 2010. The meeting was scheduled for Friday, July 24.

7. On July 24, representatives of the County met with representatives and members of the AFSCME locals and the deputy sheriffs, represented by WPPA, to discuss the budget situation. Jon Anderson explained that the County was experiencing unanticipated shortfalls in revenues and increases in expenses, and that as a result the 2009 budget was out of balance. The County projected that the 2010 budget would also likely be out of balance unless steps were taken to reduce costs. Anderson noted that the County had the right to engage in layoffs and reductions in hours, and that it would not waive those rights, but said he was seeking cooperation in addressing the labor costs contained in the 2007-2009 collective bargaining agreements. Anderson invited any and all suggestions that the employees and the labor organizations might have for reducing costs, and presented the County's proposal for them to consider. The County proposed that the unions agree to a modification of their contracts, extending the agreements through the end of 2010, reducing wage rates by 5% across the board effective July 1, 2009, increasing the employee health insurance contribution to 15%, and freezing the level of the County's pension contribution. The County did not seek an immediate answer to its proposals.

8. The AFSCME locals and the WPPA met jointly on August 17 to discuss the County's proposals. On August 26, 2009, Staff Representative Goetz and WPPA Business Agent Jerry Tomczak wrote a joint letter to Anderson advising him that the unions had rejected the County's proposal to modify the contracts, "and instead prefer to focus on bargaining successor Agreements to be effective January 1, 2010 and forward..." In response, Anderson asked for dates for negotiations over the successor agreements. There were no further discussions about reopening the 2009 agreements.

9. In September and October, the County Board engaged in formulating the 2010 budget. In calculating personnel expenses, the Finance and Personnel Committee used a placeholder figure of $500,000 in concessions by the County's unions.

10. Negotiations with AFSCME commenced on November 2, when the County sent its initial proposals to Goetz. The Union responded with its initial proposals in a face to face meeting on November 30. Two other face to face meetings were held, on December 16 and January 4, and petitions for interest arbitration were filed by the County on January 8th. The County's preliminary final offers for both units proposed a 5% reduction in wages from the 2009 levels, effective January 1, 2010, and no change in wages for 2011. The County also proposed a 10% employee premium share for health insurance for full-time employees, and a reduction in the pro-rated amounts paid on behalf of part-time employees.

11. On January 19, 2010, the Richland County Board of Supervisors considered a resolution brought by the Personnel Committee requiring, inter alia, employees in the Professionals and Courthouse bargaining units to take ten unpaid furlough days on specified dates in 2010. In explaining the need for the resolution, Personnel Committee Chairman Jeanetta Kirkpatrick told the Board that the 2010 County Budget had been formulated on the basis of a 15% employee premium contribution for health insurance, but that negotiations were deadlocked, and savings had to be found elsewhere. Following discussion, the Board voted 13 to 6 in favor of the resolution:

RESOLUTION NO. 10-15

A Resolution Approving Making Certain Changes To The Conditions Of Employment Of Union And Non-union County Employees

WHEREAS it is necessary for the County to make certain reductions in the employment conditions of its union and non-union employees in order to make up a substantial budget shortfall in the 2010 County budget, and

WHEREAS the Personnel Committee has carefully considered this situation and has received the advice of the County labor attorney, Jon Anderson, and is now presenting this Resolution to the County Board for its consideration.

NOW, THEREFORE BE IT RESOLVED by the Richland County Board of Supervisors that the following changes in the conditions of employment of the County's union and non-union employees are made:

1. Starting the next pay period, all non-union employees, except as otherwise stated in this Resolution, shall pay 10% of the cost of the health insurance premium. The County will pay 90% of the lowest cost plan;

2. Good Friday, the Fourth of July, the day after Thanksgiving and Memorial Day are designated as non-paid holidays for all non-union employees, except non-union employees at Pine Ridge Healthcare & Rehabilitation Center for whom the following shall be non-paid holidays: Memorial Day, July 4th, Easter and Veterans Day;

3. All Courthouse and Professional Union members shall take 10 layoff days in 2010, with the actual days to be designated by the Personnel Committee.

4. The Highway Department shall lay off one union position and the Sheriff's Department shall not fill one union position that is currently vacant, and

BE IT FURTHER RESOLVED that this Resolution does not apply to County officers who are elected by the voters, and

BE IT FURTHER RESOLVED that, except as otherwise stated above, this Resolution shall be effective immediately upon its passage and publication.

The Sheriff's Department and the County Health Care Center were not made subject to unit-wide layoff days because they are staffed 24 hours per day, 7 days per week. The Highway Department was not made subject to unit-wide layoff days because the expired collective bargaining agreement for Highway workers included a 40 hour per week wage guarantee.

12. The Personnel Committee met on January 27, 2010 to discuss the implementation of the Resolution, including the selection of layoff days for members of the Professionals and Courthouse units. Following discussion with employees and managers, the Committee voted to safeguard sick leave and vacation accruals, and to avoid any pro-ration of insurance benefits that might otherwise result from employees working fewer hours over the course of the year. The Committee designated ten layoff days across the balance of the year for the two bargaining units:

Feb. 26th	March 26th	April 30th	May 28th	June 25th
July 16th	August 27th	Sept. 24th	Oct. 29th	Nov. 19th

No collective bargaining between the County and the exclusive bargaining representatives took place in the course of the discussions on January 27.

13. The initial layoff day took place on Friday, February 26th. On that same day, Goetz filed separate grievances on behalf of Local 2085 and 2085C, citing violations of the Management Rights and No Lockout provisions of each agreement. The basis for the grievance was described in essentially identical terms in both grievances, aside from the number of the Local:

Statement of Grievance *(Circumstances of Facts):*

The County approved its 2010 operating budget, building in an assumed fifteen percent (15%) cost-shift of County-paid health insurance premiums to its employees. The Union and the County are engaged in the collective bargaining process, but to date, the Union has not agreed to the County's demand(s) relative to covering the hole the County built into the 2010 operating budget.

> The bargain has progressed to the Mediation/Arbitration stage, but the process has not been concluded. Yet, while the statutory collective bargaining process has not been completed, the County has determined to implement ten (10) non-paid "LAYOFF DAYS" for 2010 for the members of Local 2085C. The County designated and implemented the "layoff days," beginning with the first of ten layoff days, Friday, February 26, 2010. The County has designated the remaining nine layoff days for 2010 as follows: March 26th, April 30th, May 28th, June 25th, July 16th, August 27th, September 24th, October 29th, and November 19th.

The grievance sought the rescission of the layoff days, and that employees be made whole for any losses by virtue of the layoff days.

14. The grievances were denied by the Finance and Personnel Committee, and were held in abeyance upon the filing of the instant complaint.

15. On June 22, 2010, the instant complaint was filed, asserting that the County's decision to impose intermittent unit-wide layoffs in the Professionals and Courthouse bargaining units violated Sections 111.70(3)(a) 1 and (3)(a) 4, MERA.

16. The implementation of the layoff days in the Professionals and Courthouse bargaining units reduced the annual compensation of unit employees by 3.85%, and reduced their earnings for purposes of the Wisconsin Retirement System, Social Security, Medicare and other wage drive benefits by the same amount.

17. No demand to bargain the impact of the intermittent unit-wide layoff days was made by the Union.

18. The intermittent unit-wide layoff days in the Professionals and Courthouse bargaining units were economically motivated, on the basis of the County Board's perception of a budget shortfall.

19. The intermittent unit-wide layoff days in the Professionals and Courthouse bargaining units did not violate the status quo ante for determining and implementing layoffs.

20. The process used by the County for deciding on the intermittent unit-wide layoff days in the Professionals and Courthouse bargaining units, and the manner in which the decision was communicated and implemented, did not have the reasonably foreseeable effect of interfering with, restraining or coercing employees in the exercise of their rights to form, join and assist labor organizations, to bargain collectively, and to engage in lawful concerted activity for the purpose of collective bargaining and other mutual aid and protection, nor did it denigrate the status of the Union as the exclusive bargaining representative of employees.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainants, Wisconsin Council 40, AFSCME, AFL-CIO and its affiliated Locals 2085 and 2085-C are labor organizations within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, Richland County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That by the acts described in the above and foregoing Finding of Fact, the County did not interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 111.70(2), MERA.

4. That by the acts described in the above and foregoing Finding of Fact, the County did not refuse to bargain with the Complainants, and did not violate Section 111.70(3)(a) 4, MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The instant complaint of prohibited practices be, and the same hereby is, dismissed.

Dated at Racine, Wisconsin, this 1st day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

RICHLAND COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves the decision of the Richland County Board to take unilateral actions to reduce personnel costs in 2010 in response to a reduction in revenues. The measures taken varied. In the Professionals and Courthouse bargaining units, which are the subject of this complaint, the reductions were accomplished by laying off all of the employees on ten designated days across the year. In the Highway Department, the employees had a contract provision guaranteeing a forty hour week, and the County concluded that intermittent layoff days would violated that provision. They therefore laid off one unit member. In the continuous operations, it was judged impractical to use intermittent layoffs. Thus, in the Sheriff's Department, a position was left vacant, and at the Health Care Center, the number of employees was reduced by attrition.

The Union views the intermittent layoff days as a unilateral change in a mandatory topic of bargaining during the contract hiatus. The effect of any layoff, the timing and criteria for layoffs, and the procedures for layoffs, are all mandatory topics. The Union argues that here the County proceeded to unilaterally select ten days in the year on which all employees would be laid off. Moreover, the decision to use blanket layoffs on individual days is completely at odds with the layoff provisions the parties have negotiated. The contract presumes seniority based layoffs of individuals or small groups of unit employees, not the temporary layoff of every employee. The Union points to the familiar rule of interpretation, holding that to express one thing is to exclude another. Applying that rule here, the agreement of the parties to seniority based individual layoff procedures must indicate that temporary mass layoffs are not permitted. It should be evident that the parties never contemplated this subject in their negotiations over layoffs, and that the County was thus obligated to bargain with the Union before embarking on this radical departure.

The Union argues that accepting the County's bald assertion of a right to purchase less labor, and to do so however it sees fit, would substantially erode the duty to bargain and the integrity of the collective bargaining agreements. If the County can do this, it can layoff for hours at a time, or minutes at a time. It can unilaterally decide to pay less in wages, or reduce vacation allotments, or any number of other things that would advance its public policy determination that labor costs should be reduced. Such outcomes cannot be countenanced under the same law that protects the role of the unions as equal partners at the bargaining table.

The Union observes that the loss of ten days of pay reduces the employees annual salaries by 3.85%, with identical reductions in their Social Security, Medicare and WRS contributions. This represents a substantial departure from the status quo under the prior contract. The County's unilateral change not only violated the duty to bargain, but seriously undermined the union. It put the union in a false light, as an ineffectual force as compared to the might of the County. Moreover the County's doling out concessions to union and non-union workers in the same resolution and in the same manner sent out the unmistakable message that there was no protection to be had by being or remaining represented. The County is thus guilty of egregious interference with the protected rights of employees. Given the scope and severity of the violation, the Union argues, the Commission must go beyond merely making employees whole, and should order the County pay the Union $9,000 for its costs of providing representation in this matter.

The County views the layoffs at issue here as the exercise of a right which has, at all times, been recognized and reserved in the contract. The County has the right to manage its finances. It has the right to decide to layoff employees. It does not need the Union's permission to do these things. The decision to engage in economically motivated layoffs is fundamentally a decision concerning public policy, and is not a mandatory topic of bargaining. The impact of that decision is a mandatory topic of bargaining, but the parties have already bargained over it. In the summer of 2009, the County advised the Unions that it needed to respond to budget shortfalls, and that while it was reserving its right to layoff and reduce hours, it was also offering proposals to avoid layoffs. The Union did not accept the County's offer to bargain, and the County was left to exercise its authority to purchase less labor than it had in the past. That is not a decision that primarily relates to wages, hours and working conditions. Rather it is a decision about the levels of public services, and the expenditure of public money. As to the effects of that decision, the Union cannot be heard to complain that County did not bargain when the Union never made a demand for bargaining.

The County points out that both expired contracts contain management rights provisions and layoff clauses. Nowhere in these documents, or in the history of the County's dealings with these unions, is there any limitation on the decision to layoff. Nowhere is there any limitation on the County's right to elect unit-wide layoffs, rather than individual layoffs. The fact that these rights had not been exercised during the term of the prior agreements does not mean that they are not available during the contract hiatus. It is the rights of the parties under the prior contracts, not the precise conditions existing under those contracts, that carries over to the hiatus. That is the status quo to be maintained, and that is the status quo that allowed the County to act as it did.

DISCUSSION

At issue in this proceeding is whether the County violated the duty to bargain in good faith, including the duty to refrain from making unilateral changes to the status quo, when it embarked on a program of intermittent unit-wide layoffs in 2010. Separately, the Union asserts both derivative and independent acts of interference were committed in conjunction with the intermittent layoffs.

Central to the Union's theory is that the County did not enjoy a right to use intermittent unit-wide layoffs under the parties' prior collective bargaining agreements, and thus the use of them during the contract hiatus represents a change in the status quo. While the Union does not dispute the County's general right to use layoffs, it argues that the scope of that right is limited to the traditional last-in, first-out seniority based individual layoffs. There is little in the record to support that assertion. As both parties acknowledge, the law of the Brookfield case[1] is that economically based decisions to layoff are judgments as to levels of service, and primarily relate to the formulation and implementation of public policy. The decisions to close the courthouse, and to go without the services of professional employees, on ten specified days per year were made in response to budgetary pressures. It is self-evidently an economically based decision about levels of service. During the term of the collective bargaining agreements, that right is expressed in the management rights clauses of both contracts, which recognize the employer's right to relieve employees of duty due to lack of work or other legitimate reasons. That right is then constrained by a layoff procedure that must be followed. The procedure is expressed differently in each agreement, but in substance it comes down to laying off in inverse order of seniority, and recalling in seniority order.

Plainly the use of seniority as a basis for choosing among employees for layoff is a mandatory topic of bargaining and must be maintained during the contract hiatus. Nothing that the County has done violates these principles. No senior employee has been laid off while a junior employee was working. No junior employee has been recalled to work while a senior employee is on layoff. The Union assumes that the existence of a system for choosing among employees requires that the County make a choice. However, nothing in the language of the expired collective bargaining agreements prevents the employer from choosing *all* employees, if that is the decision it arrives at in considering County finances and desirable levels of service. Such a choice may render the negotiated procedures inapplicable, because there are no distinctions to be drawn within the workforce, but that is a function of the procedures that were negotiated, not some inconsistency between the County's actions and those procedures.

The Union also asserts that the County failed to account for the impacts of its layoff decisions in areas such as earnings for Wisconsin Retirement System pension calculations. It is fair to say that a layoff, of any scope or duration, will impact those earnings, and has the potential to reduce an employee's pension. That is part and parcel of what it means to be laid off. However, even if this was somehow not in the contemplation of the parties when they originally bargained for layoff provisions, the duty to bargain is not self-executing. It arises upon demand, and there was never any demand to bargain the impact of the County's intermittent unit-wide layoffs. The County is not obliged to guess at what the Union has in mind.

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[1] CITY OF BROOKFIELD v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 87 Wis. 2d 819, 275 N.W.2d 723 (1979): …"the decision to discuss the topic"… [of economically motivated layoffs] …"at the bargaining table is a choice to be made by the electorate as expressed through its designated representatives and department heads." ID, at 831-32.

Finally, the Union claims that the manner in which the County decided on and communicated the intermittent layoffs and other concessions constituted interference with protected rights. Specifically, the Union points to the fact that the County grouped all employees and Departments, represented and non-represented, in a single resolution, and argues that this undermined the dignity and stature of the Union as exclusive bargaining representative, sending a message to employees that being represented provides no advantage and no protection. That is not what a reasonable person in the shoes of a bargaining unit employee would have concluded. Given the Department-wide application of the intermittent layoffs, effectuating the layoffs would necessarily involve addressing both represented and unrepresented employees in identical terms. The substance of the decision would be the same, whether it was accomplished in a single resolution or two resolutions. Moreover, it is not true that the resolution did not recognize the importance and impact of collective bargaining. The reason that the Highway Department experienced the complete layoff of a worker rather than the intermittent layoff of all workers was the guaranteed 40 hour work week language of the AFSCME collective bargaining agreement. One reason for the unit-wide layoffs in the Courthouse and Professional units was the ability of employees to bump in the case of less than a total layoff. A reasonable person would conclude that the measures taken by the County were taken with the content and impact of the collective bargaining agreements in mind. The fact that the overall results were negative for the employees would not, in and of itself, impair the exercise of their protected rights, anymore than a decision to permanently layoff the least senior 5% of the bargaining units would have impaired their exercise of protected rights.

The County had, and retained, the right to make economically motivated layoff decisions. The status quo following contract expiration required them to make seniority based distinctions when selecting the employees to be laid off. However, there is no restriction in the expired contract or in the historic practices of the parties on the County's right to decide that all employees will be laid off. That is the decision the County made, and since there were no distinctions to be drawn between employees, the procedures for making such distinctions did not come into play. While the reduction in income for County employees impacted other wage driven benefits, those impacts were inherent is the loss of work time, and there was no demand made to bargain over such impacts. Finally, the manner in which the County arrived at the decision to exercise its right to layoff, and the distinctions made between cost-cutting measures in various departments, would not have had the effect of undermining the Union or interfering with the protected rights of workers. Accordingly, I have dismissed the complaint in its entirety.

Dated at Racine, Wisconsin, this 1st day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

DJN/dag
Dec. No. 33079-A