STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MORAINE PARK FEDERATION OF TEACHERS
LOCAL 3338, AFT-WISCONSIN, Complainant,

vs.

MORAINE PARK TECHNICAL COLLEGE DISTRICT BOARD, Respondent.

Case ID: 259.0000
Case Type: COMP_MP

DECISION NO. 35461-B

Appearances:

Timothy E. Hawks, Hawks Quindel, S.C., 222 East Erie Street, Suite 210, P.O. Box 442, Milwaukee, Wisconsin, appearing on behalf of Complainant Moraine Park Federation of Teachers Local 3338, AFT-Wisconsin.

John A. St. Peter, Edgarton, St. Peter, Petak & Rosenfeldt, 10 Forest Avenue, Suite 200, P.O. Box 1276, Fond du Lac, Wisconsin, appearing on behalf of the Respondent Moraine Park Technical College District Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 20, 2014, a complaint of prohibited practices was filed with the Wisconsin Employment Relations Commission by the Moraine Park Federation of Teachers Local 3338, AFT - Wisconsin, alleging that the Moraine Park Technical College District Board had violated §§ 111.70(3)(a)1 and 3, Stats., by conditioning wage increases on the Union recertification outcome for certain faculty members employed by the District and represented by the Union. Commissioner Rodney G. Pasch recused himself from participating in the matter due to his prior employment by the District. On March 26, 2015, William C. Houlihan was appointed as hearing examiner and was authorized to exercise the authority granted in §§ 111.70(4), 227.46 and 227.46(3)(a), Stats., to issue the final decision of the Commission.

A hearing was conducted on June 30, 2015, in Fond du Lac, Wisconsin. A record of the proceedings was taken and distributed on July 8, 2015. Post hearing briefs were filed and exchanged by October 2, 2015.

Based on the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Complainant Moraine Park Federation of Teachers Local 3338, AFT - Wisconsin ("Union") is an employee organization in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

2. Respondent Moraine Park Technical College District Board ("District" or "Board") is a political subdivision of the State of Wisconsin, which engages the services of employees for various purposes.

3. The Union and District have been signatories to a series of collective bargaining agreements going back many years.

4. At its closed session on February 19, 2014, the Board was advised that the Union had filed for recertification as the exclusive bargaining representative of faculty employees of the District.

5. A recertification election was conducted from April 1 through April 21, 2014, where employees voted on whether or not to be represented by the Union. The Union prevailed in the recertification election and maintained its status as the exclusive representative of the faculty.

6. The District develops a budget on a cycle which is established by law. On April 16, 2014, the administration of the District presented a proposed budget to the finance committee of the Board, which provided for a 2 percent wage increase for all employees. The proposed increase was discussed. At that meeting, the Board was advised that faculty may be limited to a CPI increase of 1.46 percent depending on the results of the vote on faculty Union recertification.

7. Board members requested, and subsequently received, clarification as to how the law regulated wage adjustments that were subject to collective bargaining negotiations and the availability of supplemental increases.

8. A budget was subsequently prepared which provided for a 2 percent raise for non-represented employees and a 1.46 percent raise for represented employees.

9. That budget was passed at the June 18, 2014 meeting of the Board. During the course of the June 18 meeting, Board member Richard Zimman made a number of remarks supporting the proposed budget and opposing any supplemental raise for represented faculty.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. Complainant Moraine Park Federation of Teachers Local 3338, AFT - Wisconsin, is a labor organization within the meaning of § 111.70(1)(h), Stats.

2. Respondent Moraine Park Technical College District Board is a municipal employer within the meaning of § 111.70(1)(j), Stats.

3. By providing a raise of 2 percent to its non-represented employees and 1.46 percent to its represented employees, Moraine Park Technical College District Board did not violate §§ 111.70(3)(a)1 or 3, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following:

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 7th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

There is no meaningful dispute of fact in this matter. The Union and the District have been signatories to a series of collective bargaining agreements going back many years. In 2010 they negotiated a contract covering the period 2010 through 2013, expiring on June 30, 2013. Following the enactment of Act 10, the District approached the Union on two separate occasions, seeking to have the Union reopen the contract to have employees pay the employee share of the Wisconsin Retirement System premium. The District offered no quid pro quo for the requested premium payment. The Union was unwilling to reopen the contract and declined the requests.

The Union filed a petition for recertification. The administration apprised the Board of that fact at its February 19, 2014 meeting. The certification election was conducted between April 1 and April 21, 2014. The Union won the election and was recertified.

During the late winter through early spring, the administration developed a budget that it recommended to the Board. That budget was prepared and initially presented to the finance committee (consisting of all members of the Board) at its April 16, 2014 meeting. The proposed budget contained a recommended wage increase of 2 percent for all employees of the District. The matter was discussed by the Board members. Minutes of the meeting indicated: "Committee members specifically discussed the proposed 2% wage increase for all staff. Ms. Baerwald and Ms. Broske confirmed that faculty may be limited to a CPI increase of 1.46% depending on the results of the vote on faculty union recertification."

Concerned that the Board was considering reducing the proposed 2 percent wage increase, Union President Mike Gradinjan wrote the Board a letter, dated April 25, 2014, which included the following:

> April 25, 2014
>
> Dear Moraine Park District Board:
>
> We understand you received a report at the April 16 Board meeting on a plan to budget a 2% wage increase for all Moraine Park employees. We applaud those who developed this plan and value our employees. We are dismayed, however, to hear the raise would be limited to CPI for faculty if they voted to recertify. State law does not limit raises to CPI. It limits the amount that represented employees can bargain for related to base wages. State law lists prohibited subjects of bargaining as overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions. While we may not

> bargain over any of these items, there is no prohibition of the Board doing the right thing and granting similar increases to all employee classes. While money isn't everything, paring out a segment of our workforce for a smaller share of the budget is not what this college needs right now.

The Board did not respond to the April 25, 2014 letter.

In response to a request by a Board member for clarification relative to the application of the law on bargaining, staff provided the following:

> **DATE:** May 21, 2014
>
> **TO:** MPTC District Board
>
> **FROM:** Dr. Sheila Ruhland, President
> Kathy Broske, Vice President – Human Resources
>
> **SUBJECT: Collective Bargaining on Base Wages for General Municipal Employees**
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> In response to a board member request for language specific to collective bargaining on base wages, Kathy Broske has provided a summary based on information from a Wisconsin Legislative Council Information Memorandum.
>
> Municipal Employment Relations Act (MERA) and Base Wages[1]
>
> Under MERA, as amended by 2011 Wisconsin Acts 10 and 32, general municipal employees can collectively bargain with their employers on base wages but are prohibited from bargaining collectively on other subjects. "Base wages" includes only total base wages and excludes any other compensation, such as overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules and automatic pay progressions. Any compensation that is not "base wages" is not a subject of collective bargaining and is granted at the discretion of the municipal employer.
>
> Although a municipal employer may bargain collectively on base wages, a municipal employer may only bargain a one-year collective bargaining agreement and may not bargain a base wage increase which exceeds the CPI-U increase applicable to the term

> of the agreement. The CPI-U increase applicable to bargaining agreements with a term beginning July 1, 2014 is 1.46%.
>
> If a municipal employer wishes to increase the total base wages of its general municipal employees in an amount that exceeds the CPI limit, the governing body of the municipality must adopt a resolution that specifies the amount by which the proposed total base wage increase will exceed the limit. The resolution may not take effect unless it is approved in a referendum, which must occur in November for collective bargaining agreements that begin the following January 1, except that, for school districts, the referendum must occur in April for collective bargaining agreements that begin in July.
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> [1]Information excerpted from Wisconsin Legislative Council Information Memorandum IM-2012-08.

On May 22, 2014, the Union and the District met for their first bargaining session and the District proposed a 1.46 percent wage increase.

At the June 18, 2014 meeting of the Board, a number of Union members and supporters attended the meeting to encourage the Board to authorize supplemental pay to bring the 1.46 percent up to the 2 percent level. The Board's attorney was in attendance at the meeting and explained that, while the Board was limited in how much it could negotiate with the Union, it retained the authority to exceed the CPI for what is generally referred to as supplemental payments.

The agenda item prompting this discussion was a motion to approve a budget without any supplemental increases for the faculty. During the deliberations, Board Chairperson Richard Zimman made certain remarks germane to this proceeding. Zimman's remarks included the following:

> **RZ [Richard Zimman]:** Any other discussion? Any other comments?
>
> I'd like to make a couple of comments, and these are my comments, these are not the Board's comments. I want to make that clear. [Moraine Park Federation of Teachers President] Mike [Gradinjan] and I over the years have exchanged comments in this room or others.
>
> When we talked in April about what would be the initial discussion about pay increases for employees of Moraine Park,

and how to work on the budget, and the 2% level was talked about, and then the question was, because recertification of the Federation, I think was in process at that time, it was, we didn't know. At that time it was explained to us that the most we could give in total base wages would be CPI, 1.46, and that that was the restriction, and what was going on there.

And I heard some comments tonight about union busting. Boy, there's nobody on this Board that even thought of that; that's just not our makeup. We are glad that the Federation President for the state is here, we're glad that our staff is here. Everybody on this Board has their own thoughts about Act 10, and their own experiences with it, but nobody has ever indicated anything about trying to get rid of unions, busting unions, or convincing unions.

Basically at that time you were in recertification and we just, we didn't know. All we knew was the rules were going to change, depending upon what the outcome was and that was the discussion that we had in here, so that as Board members we were aware of what the rules would be, that we would have to go by.

So I just want everyone here, and it makes me feel better saying it, making sure that everyone knows that there's nothing here about not supporting your right to unionize, your right to negotiate to the very limit of whatever the law allows us to do.

Entering into Act 10, and some of the Board members may not have been here, Mike and I, as I've said, Mike and I had different viewpoints over the past few years.

My viewpoint, very clearly was that we had just entered into, in 2010, we had ratified a 3-year contract that we had negotiated in good faith, very happy with the outcome of working with the Federation. That would have covered 10-11, 11-12, and 12-13. There were built-in raises in that, there were benefits in that – the whole collective bargaining scene at that time. And we negotiated and came to an agreement.

That was in 2010. As you all know in the beginning of 2011, Act 10 happened. And then, no one saw it coming, all the rules changed. Funding was taken away from the College. Our ability to serve our students was severely limited.

The State told us that what we were supposed to do is basically neutralize that through pay adjustments and through the pension payments, which you're all well aware of what happened. Like Jodine [Deppisch], I'm also a public employee, my wife is a public employee. So we know exactly what happened.

At that time the Board discussed it and asked the Federation, and directed the administration to go back and ask the Federation, to see about reopening things to help us get through this financial crisis that we were in, that was going to cause the elimination of teaching positions, as well as the termination of programs - which would be bad for our employees, bad for our students.

The response we got is that the Federation was not interested in that kind of a partnering with us.

So we got through the 11-12 school year, and went into the last year of the contract. And we asked again: "This is the last year. You've had a buffer now before, you know, the provisions of Act 10 are visited upon you, as they've been, one of the last …"

[Track 2 ends.]

Track 4 [Zimman continued]

We're trying to form a partnership, and when you really, the way you enter into things is you find out what other people are like when you need help.

I personally feel that we were acting in good faith, trying to continue the relationship that we had. And we were rebuffed. Not once but twice. And as a result we had to do what was bad for the students, and bad for the institution, and bad for our employees, and cut, and cut, and cut. Because we had no other way to [unintelligible: "get there"?], and we were deficit spending at the same time [looks at Board member Mike Miller], which Mike reminded us of almost every meeting, that we can't be deficit spending our way out of this budget.

So that being said, that's a little bit of history. That's not resentment, that's not union busting, that's just kind of history.

> I believe, had we entered into it, had you as a Federation accepted the partnership that we had asked you for at that time to help each other, we would be having a whole different conversation, under the law at least, as it exists now. And I regret that we weren't – that that didn't happen.
>
> Because here we are now – you're there, we're here, and we have a different history than could have been written, had you extended your hand half way as we were extending ours to try and get ourselves out of the mess that the State had put us in.
>
> That's just my view of how I see it, and I hope and pray that we can work on the morale, work on the compensation …
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> * * *
>
> … compensation, work on the partnership, get things to where we all believe and know they really truly need to be for the benefit of the institution. But that's gonna take some work on both sides, that's not a one-sided deal. And that's the way I believe. For that reason, you know, I'm going to support the budget as it's written, and I'm going to hope that next year we have a whole different situation because we've done the hard work in the next twelve months to correct, kind of, the rail - things going off the rails as I see them. And we will be able to celebrate a year from now, rather than have the situation we have. That's my feeling, and it's nothing different than I've been saying for a couple years. It's just the way I see it.
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> * * *
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> **Roll Call:** [All respond by simply saying "yes," except Zimman, who responds "Regrettably, yes."]

Following the remarks, the Board adopted the budget, which included a 2 percent raise for the non-represented employees of the District and a 1.46 percent raise for bargaining unit employees.

The Union believes the District has violated §§ 111.70(3)(a)1 and 3, Stats., by preparing a budget with a 2 percent salary increase for all non-represented employees and reducing the increase amount provided to bargaining unit employees following recertification of the Union. Both parties cite case law in support of their respective positions, all of which was decided prior to the enactment of Act 10.

Traditionally, a municipal employer was tasked with developing a budget and negotiating a collective bargaining agreement with its unions. The budgetary cycle was driven by statute, but the negotiations period was not. The budget commonly reflected an allocation for wages and benefits, though the contract negotiations may not have concluded. It was common for an employer to indicate that there was no money in the budget for certain proposals. It was just as common for a union to respond that the budget did not drive bargaining but, rather, the bargaining drove the budget.

Act 10 has changed much of that. Bargaining has been reduced in both scope and impact. There is no impasse mechanism. The employer has been given virtually unchecked control over its budget, at least as regards the Union. The Union notes that Act 10 did not change Sections 2 or 3 of MERA. While true, the background surrounding those provisions, notably the duty to bargain, has changed significantly.

The Union relies upon *Jefferson County*, Dec. No. 26845-B (WERC, 7/92), and *Edgerton Fire Protection District*, Dec. No. 30686-B (WERC, 2/05), in support of its claim. In *Jefferson County*, the County had a pay plan, applicable to non-union employees, which provided for contingency wage supplements for employees who reached ten and fifteen years' service. To qualify, in addition to the service requirement, the employee had to have a satisfactory job performance and approval of his supervisor.

AFSCME was certified to represent a group of employees of the County who had previously been unrepresented. Following certification, but before the parties had negotiated their initial agreement, two bargaining unit employees qualified for the contingency adjustments. The County believed its obligation under the law was to maintain the status quo as bargaining proceeded and regarded the status quo as static; that it was to maintain the wages and benefits of employees as they existed when the union was certified. Accordingly, the County did not pay the contingency adjustments which came due post certification. The County reasoned that it was maintaining the status quo, that the contingency pay was a part of the non-represented pay plan and the employees in question were now represented.

AFSCME brought a prohibited practice charge before the Commission contending that the County had violated §§ 111.70(3)(a)1, 3 and 4, Stats. The examiner entered the following conclusions of law:

CONCLUSIONS OF LAW

> 1. The Respondent's decision not to initiate contingency pay and/or increases in contingency pay to employes who had become represented by the Union but who were not covered by a collective bargaining agreement does not constitute

a unilateral change of conditions of employment or a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats.

2. The Respondent's compensation plan inherently discriminates against employes by conditioning employes' eligibility for contingency rates based on the absence of union representation, and therefore violates Sec. 111.70(3)(a)3, Stats.

3. The Respondent's compensation plan which bases the eligibility for contingency rates upon the absence of union representation has a reasonable tendency to interfere with employes' exercise of their rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

In coming to these conclusions, the examiner regarded the status quo as static as did the County. She believed that the County was obligated to maintain the wages and benefits as they existed when AFSCME was certified. She regarded the status quo as unlawful and inherently discriminatory. She regarded the plan as defective because it:

> … conditioned the eligibility for contingency rates on the absence of union representation. The existing pay plan itself held the threat of reprisal for union representation and discriminated against those who chose representation, and as such, violated both Secs. 111.70(3)(a)1 and 3.

She concluded that the employees in question would have been paid the contingency pay but for their union representation.

On appeal, the examiner was affirmed in part and reversed in part. Her first two conclusions of law were reversed and the third was modified. The Commission found as follows:

C. The Examiner's Conclusions of Law 1 and 2 are reversed to read as follows:

1. Jefferson County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

2. Jefferson County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

D. The Examiner's Conclusion of Law 3 is modified to read as follows:

Jefferson County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., when it refused to consider granting contingency pay or increases in contingency pay to those employes who became eligible for same following the Union's certification as the bargaining representative for said employes.

The Commission reasoned that the status quo had to be maintained while the parties bargained their initial contract. The Commission regarded the status quo as dynamic, including the contingency pay with the service and performance components that existed in the plan. The examiner's second conclusion of law was summarily overturned. The Commission found no union animus present and so no violation occurred. The examiner's conclusion that the pay plan was inherently discriminatory because it conditioned employees' eligibility for contingency rates based on the absence of union representation was rejected.

The Commission did conclude that the County had violated § 111.70 (3)(a)1, Stats. The Commission reasoned:

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.

* * *

> In our view, there can be no doubt that the County's action had a reasonable tendency to make employes less supportive of the Union, less interested in exercising these statutory rights. The denial of the wage increases was based solely on the employes' decision to be represented by a union. The message to employes, whether intended or not, was that you have paid a price for your choice. Such messages and actions clearly violate Sec. 111.70(3)(a)1, Stats.

(Footnotes omitted).

The matter was subsequently appealed to the courts, where the focus was on the status quo doctrine.

In coming to its conclusion that a § 111.70(3)(a)1, Stats., violation had occurred, the Commission indicated a need to evaluate the conduct under all the circumstances. There are a number of circumstances that surround the events leading to this proceeding.

The timetable for recertification was April 1 through April 21, 2014. The timeline is set by statute. The District's budget cycle includes the recertification window and it too is established by statute. This overlap of timetables will continue to exist. These timetables create an issue. If the District is prepared to pay some or all of its non-represented employees more than it intends to pay its represented employees, it must budget that money as the represented employees vote to recertify. If it budgets more money for the non-represented employees, that message is sent during the recertification vote. Whatever the District budgets for represented employees is then subject to its duty to bargain.

There are employers who have provided a higher rate of pay and / or benefits for some or all of their non-represented employees than were negotiated for the represented employees. That, without more, has never been deemed unlawful, though it certainly sends an economic message to the represented employees. The Commission in *Jefferson County* rejected the notion that such a compensation system was a *per se* violation.

The District did not campaign during the recertification period. This is in contrast to the employer in the *Edgerton Fire Protection District*, *supra.*, which has been cited as support for the Union's claim in this proceeding. The employer in *Edgerton* engaged in overtly threatening efforts to avoid the union, including eliminating the jobs of those who sought the union and running a campaign to avoid the union. Misleading and threatening remarks were made to undermine the vote.

In this case, once the Union was recertified, the District proceeded to enter into bargaining, on schedule, and extended the full offer allowed by law.

Throughout the budget and recertification period Board members appeared to be uncertain as to how the new law worked. The Board sought clarification in a number of ways and through the period in question. The information provided was factual and accurate.

The Union points to the remarks of Board member Zimman as demonstrating animus toward the Union and as making clear that the sole basis for not extending the 2 percent raise to all employees was the employees' decision to recertify the Union. The essence of Zimman's remarks was that he felt that the Union should have opened the contract to provide the District with relief when it experienced budget problems. He regarded the Union's request that the District extend beyond its duty to bargain as an ironic parallel. The context of the remarks was that bargaining unit employees had retained certain benefit contributions that had been taken from non-represented employees.

Zimman's remarks attempted to place the request for supplemental pay in the context of the prior collective bargaining agreement. Had the District approached the Union in bargaining, seeking a wage adjustment that recouped the money expended to pay the retirement and health insurance premiums during the term of the contract the District sought to reopen, it is not at all clear that would have violated MERA. Similarly, had Zimman made his remarks in opposition to a contract tentative agreement that he had not participated in, it is not clear that any provision of MERA is offended.

The central dispute in *Jefferson County* was the duty to bargain and the status quo doctrine applicable to the negotiation of an initial contract by a newly certified union. The context of the dispute is important in understanding the ruling. In *Jefferson County*, AFSCME was certified to represent the employees and the employer was obligated to maintain the status quo while bargaining proceeded. The Commission and courts ultimately held that the employer violated that obligation by modifying the administration of a portion of its non-represented pay plan as applied to bargaining unit employees.

The Commission found that a message had been sent that the employee was to pay a price for selecting the union. The tangible price was the loss of monies he or she would have otherwise earned. At least as important was the message that the employer could bring about such a result without dealing with the union. The Commission discussed the applicability of its prior decision in *Wisconsin Rapids School District*, Dec. 19084-C (WERC, 3/85), where it observed:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment – either during negotiations of a first agreement or during a hiatus after a previous agreement has expired – is a per se violation of the MERA duty to bargain. 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.

The message and actions were found to have violated § 111.70(3)(a)1, Stats. The message that the employer could act unilaterally was at least as significant as the substantive provisions involved. In *Jefferson County*, had the parties entered into bargaining and eliminated contingency pay from the compensation package of the represented bargaining unit employees, there would have been no basis under MERA for a prohibited practice claim notwithstanding the result that non-represented employees still enjoyed the benefit. It was the fact that the employer operated unilaterally in derogation of the bargaining process that led to the findings of prohibited practice.

At the time *Jefferson County* was decided, the employer was operating in an area that was a mandatory subject of bargaining. Contingency pay is a form of wages. Contingency pay, which is a form of longevity pay with a performance aspect, is today a prohibited subject of bargaining. The parties could not enter into negotiations to address contingency pay, just as they could not enter into negotiations to address the wage adjustment beyond the 1.46 percent cap. Both are areas in which the employer is free to act.

Act 10 changed the rights and responsibilities of the parties to one another. Previously, all economics were subject to the duty to bargain. That is no longer the case. Previously, the employer was essentially free to deal with non-represented employees as it sought fit and was obligated to bargain with respect to its organized employees. Act 10 has changed that. The law regulates, and caps, what the employer can bargain with its represented employees. Most items are not subject to bargaining. The employer is still free to deal with non-represented employees as it sees fit. It is free to pay what it can afford. The employer is now additionally free to compensate represented employees beyond and outside the scope of what is negotiable. Employers lacked that freedom before.

The violation of § 111.70(3)(a)1, Stats., found in *Jefferson County* went hand in hand with the violation of § 111.70(3)(a)4, Stats., the duty to bargain. The interference resulted because the County had failed to satisfy its obligation to bargain with the newly formed union. That relationship does not exist outside the scope of bargaining. The new statutory scheme contemplates a scenario where non-represented employees are provided larger base wage adjustments than permitted under the collective bargaining caps. The law regulates bargaining, not spending.

Dated at Madison, Wisconsin, this 7th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Examiner