STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LA CROSSE COUNTY INSTITUTIONS EMPLOYEES, LOCAL 227-A, WCCME, AFSCME, AFL-CIO, Complainant, vs. LA CROSSE COUNTY, Respondent.	Case XXX No. 18737 MP-431 Decision No. 13284-A

Appearances:
Lawton and Cates, Attorneys at Law, by Messrs. Bruce Ehlke and Robert Arnot, appearing on behalf of the Complainant.
Mr. Ray A. Sundet, Corporation Counsel, LaCrosse County, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed Thomas L. Yaeger, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes and hearing on said complaint having been held at LaCrosse, Wisconsin on February 21 and March 5, 1975, before the Examiner; and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Complainant, LaCrosse County Institutions Employees, Local 227-A, WCCME, AFSCME, AFL-CIO, herein Complainant, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes and the certified bargaining representative of all employes of the LaCrosse County Oak Forest and Lakeview Institutions, excluding supervisory, confidential and professional employes, for the purposes of collective bargaining on wages, hours and conditions of employment.

2. That Respondent, LaCrosse County, herein Respondent, is a Municipal Employer; that among other municipal services, Respondent maintains and operates Lakeview Hospital, hereinafter referred to as Lakeview; that Leonard Yeskie was employed by the Respondent as Superintendent of Lakeview from 1948, through September 30, 1973; that Oscar Lindgren, Jr. is and has been Superintendent of Lakeview since October 1, 1973; and that Kenneth Guthrie has been employed by Respondent as its Personnel Director and negotiator since at least 1971.

3. That from at least 1963, when Lakeview changed from a two shift to three shift per day operation until November 1, 1974, employes there received free meals during working hours; that first shift employes received breakfast and lunch; that second shift employes received dinner; that third shift employes received midnight lunch and the option to stay

for breakfast; that employes ate their meals in the patient dining room with the patients or if they desired could eat in a separate dining room away from the patients where the meals were slightly different and the employe would be required to pay something for the meal; that in return for their meals employes originally started work twenty minutes prior to the scheduled start of their eight hour shifts and worked twenty minutes beyond the end of their shift; that in later years, it not being clear from the record exactly when, employees reported for work only ten minutes early and did not work beyond the end of their shift; and that employes were paid for the time spent eating, however, they were not paid for the additional time put in prior to and beyond the end of their eight hour shift.

4. That originally the practice of granting employes free meals was followed at Lakeview in order to have employes available in the dining room to aid in restraining patients or for other emergencies as well as compensate said employes for the extra time put in prior to and after their shifts, however, even after the need for employes to be present in the dining room diminished the practice continued; that, furthermore, said policy or practice applied to all employes whether they were actually on duty in the dining room or not; and that employes continued to put in extra time beyond their eight hour shifts up until the meal practice was discontinued.

5. That on June 20, 1968, Respondent County Board considered and adopted the following Resolution that had been propounded by the Respondent's Institutions Committee;

"R E S O L U T I O N

TO: The Honorable County Board Chairman & Supervisors
La Crosse County, Wisconsin

Gentlemen:

WHEREAS, your Institutions Committee has met to consider the matter of providing free meals for employees of the County Institution; and,

WHEREAS, it has come to the attention of said Committee that some of the institutions are providing these meals; and,

WHEREAS, this appears to be a matter of wages and compensation within the province of the County Board rather than the institutions themselves,

NOW, THEREFORE, BE IT RESOLVED that for the remainder of 1968 and until altered by this Board no free meals shall be provided for the employees of said institutions.

INSTITUTIONS COMMITTEE"

that shortly after adoption of the aforesaid Resolution the Institution's Committee met with the Lakeview Trustees and Superintendent to review what affect, if any, said resolution had on the free meal policy in existence at Lakeview; that said Institutions Committee is comprised of County Board members; that said Institution's Committee advised the Trustees that the policy existed in order to encourage employes to be on call during meal times and as such was not a free meal in violation of the Resolution and, thereby, authorized the continuance of the policy; that on August 21, 1968, Respondent Board member Klos, in a negotiating session with Complainant's negotiating team and, in response

to an inquiry by Complainant's representatives, acknowledged that the Institutions Committee had authorized free meals for employes at Lakeview in place of wages for extra duty as an exception to the aforesaid Resolution; and that Lakeview employes continued to receive free meals thereafter.

6. That in 1972, Guthrie, in a conversation with the then Union President, Otto Briggs, said "we're going to have to go after your meals up there (Lakeview) one of these days too."; and that the Lakeview Superintendent, Respondent Personnel Director and at least some County Board members, were aware that free meals were being provided to Lakeview employees in 1972 and thereafter.

7. That negotiations began in the summer of 1973 for the 1974 contract; that Complainant submitted a list of written proposals for change to Respondent and Respondent subsequently submitted its written proposals to Complainant; that the parties held several bargaining sessions thereafter up until January 1974, when Complainant petitioned the Wisconsin Employment Relations Commission, herein Commission, to initiate fact finding; and that the issue of free meals at Lakeview was not raised by either party in its proposals, nor was it ever discussed in the aforesaid bargaining sessions that preceded Complainant's petition for fact finding.

8. That a member of the Commission's staff conducted an investigation into the petition; and that the issue of free meals was not raised during said investigation.

9. That a fact finder was appointed by the Commission in the Spring of 1974 to conduct hearings in the dispute and make and issue findings of fact and recommendations for resolution of the dispute; that the parties presented their proposals to the fact finder; and that none of the issues presented to the fact finder were concerned with the free meals being provided employes at Lakeview.

10. That in the Spring of 1974, at the regular Trustee's meeting, the meal practice at Lakeview was discussed; that as a result of these discussions and subsequent investigation into the extent of the free meal practice at Lakeview it was determined that all employes were receiving free meals regardless of whether they were on duty during their lunch period, and that said investigation was the first such investigation conducted into the free meal practice at Lakeview subsequent to the Institution Committee's authorization of the free meal policy at Lakeview in 1968.

11. That in July 1974, the fact finder issued his findings of fact and recommendations for resolution of the dispute; and that subsequent to receipt of the fact finder's recommendations, the parties held a bargaining session on August 15, 1974 inasmuch as the Respondent was not willing to accept all of the fact finder's recommendations.

12. That prior to the August 15, 1974 bargaining session, Complainant advised Respondent that it would accept the fact finder's recommendations; that at the August 15th meeting Respondent proposed (1) to accept the fact finder's recommendations on wage retroactivity and vacation issues but, (2) offered to pay only 2 1/2% to the Wisconsin Retirement Fund, whereas the fact finder recommended that Respondent pay the full amount, and (3) not grant dues check-off; that Respondent advised Complainant that the aforesaid proposal was its "final offer"; and that Complainant thereafter proposed that the parties seek mediation of their dispute.

13. That on September 5, 1974 a mediation session was held wherein a mediator from the Commission's staff met with the parties; that said

meeting began at approximately 7:30 p.m.; that the mediator met with the parties in separate caucuses in an effort to resolve their differences; that Complainant made three or four different proposals during the mediation session to resolve the dispute, but Respondent did not move from its proposal of August 15, 1975; that near the end of the meeting, the issue of employes' free meals at Lakeview was first raised when Guthrie, in discussion with the mediator said:

> "and I related it to Mr. Knudson---the position that there would be no changes in our proposal of August 15th, and conditioned upon and wanted to accept the 8.8 percent for the institutions and five and a half percent, I believe, for the highway and parks, at that time would be acceptable contingent upon the withdrawal of the meals; and the mediator---
>
> Q Excuse me. To your recollection, is that exactly the way you stated it to him?
>
> A My statement to him directly was: Then you can go back and advise the union we're giving them due and timely notice this is contingent upon the discontinuance of meals at Lakeview";

that this proposal was the same as Respondent's "final offer" previously made on August 15, 1974, except that it was made contingent upon Complainant agreeing to the elimination of the free meals; and that this was the first time the issue of free meals was raised during negotiations for the 1974 collective bargaining agreement.

14. That the mediator carried Respondent's proposal to Complainant's caucus; that Klopp, Complainant's negotiator, replied:

> "What do you mean? I said: This hasn't even been a matter of discussion. I said: It hasn't been a matter of collective bargaining, it wasn't one of the---it hasn't taken place in any of the bargaining at all, it wasn't an issue in fact finding, and it hasn't even been discussed in the mediation here, I said. . . .And I said: You go back and tell the county if they attempt to take the meal away, we'll file a grievance on it; but, I said, this is not going to be a part of this bargaining session, because it hasn't been an issue, it hasn't been a matter before the mediator it has got nothing to do with the '74 agreement.";

that Complainant then presented the mediator with a counter-proposal for Respondent; and, that the mediator returned to Respondent's caucus with said message and counter-proposal.

15. Upon returning to Respondent's caucus the mediator advised Respondent that Complainant objected to the offer being contingent upon termination of the meal practice on the grounds that it was untimely and inappropriately raised at that stage of the negotiations; and that the mediator also presented Respondent with Complainant's counter-proposal which did not provide for elimination of the free meals.

16. That Respondent advised the mediator that it would not change its position in response to the Complainant's counter-proposal; that the mediator then returned to Complainant's caucus; that Complainant advised the mediator that it would take the Respondent's package to the membership with a recommendation for a ratification vote; that the Complainant requested Respondent, through the mediator, for a summary of the changes agreed upon in negotiations; and that no meeting of the minds was reached on September 5, 1974 concerning the discontinuance of free meals at Lakeview.

17. That on September 6, 1975 Respondent provided the Complainant with the requested summary of negotiated changes; and that there was no reference in said summary to the discontinuance of the Lakeview employe meal practice.

18. That on September 13, 1975, the 1974 contract was ratified by the Union; that said contract was thereafter signed by the parties dated September 13, 1974; and that said contract contains the following pertinent provisions:

"ARTICLE I

RECOGNITION

. . .

Local 227A - All County institutional employees at Oak Forest and Lakeview, excluding supervisory, confidential and professional employees as certified by the Wisconsin Employment Relations Commission on April 30, 1968 (Case VII, No. 11954, ME-360, Decision No. 8454).

. . .

ARTICLE II

ADMINISTRATION

Section 1. Except as otherwise provided for in this Agreement, the County retains the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to determine the construction, maintenance of services to be rendered, the materials and equipment to be used, the size of the work force, and the allocation and assignment of work or workers; to schedule when work shall be performed; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations.

. . .

APPENDIX A - INSTITUTION EMPLOYEES

Section 1. HOURS

A. The basic work day shall be eight (8) consecutive hours within the twenty-four (24) hour period except for interruptions for unpaid lunch periods which shall consist of one half (1/2) hour scheduled as near to the mid-point of the employee's shift as possible.

. . .

Section 2. OVERTIME

A. Overtime will not be expected except in emergencies, and will not be approved for pay except when requested by the Department

Head and approved by the Superintendent. Overtime shall be paid at the rate of time and one-half for all hours worked over eighty hours (80) in any two (2) week period except in the following situations: On any day when an employee works more than eight (8) hours, even though the employee has not exceeded eighty (80) hours in the two (2) week pay period, no overtime will be paid for fifteen (15) minutes or less following a regular schedule. Overtime paid after fifteen (15) minutes will be based on the following: Between fifteen (15) minutes and forty (40) minutes one-half (1/2) hour overtime pay. From forty (40) minutes to sixty (60) minutes, one (1) hour overtime pay. Employees tardiness shall be handled in the same manner for loss of pay."

19. That on September 6, 1974, a notice was posted on the Union Bulletin board at Lakeview that the free meal policy would be terminated as soon as said change could be implemented by the Trustees; that on September 23, 1975, Guthrie notified Complainant's President of its intent to terminate the Lakeview employe meal practice; that on September 30, 1974, Klopp, acting on behalf of Complainant lettered Guthrie as follows:

"Your letter dated September 23, 1974, to Mr. Albert Hammes, President of Local 227-A, has been turned over to me for a response.

First of all, we are surprised and a little amazed at the unorthodox and improper method you used to communicate what is intended as a unilateral action to discontinue the lunch provided the employees at Lakeview.

A verbal communication through a mediator on a matter which was never raised during the course of negotiations, this year or any other year, and was not a subject at issue in the mediation, is unethical, inappropriate, and does not constitute good faith bargaining. This is especially true when it is relayed at the tail end of a mediation meeting in which the County lacked the grace to fully honor a modest Fact Finder's award, as the intent of the law provides.

The lunch received by the employees at Lakeview is and has been a condition of employment at Lakeview for many years. As such, it is subject to negotiation. To date, aside from the informal message carried to us by the mediator, it has not been a subject raised by the County for consideration in bargaining. There is nothing in the Agreement between the parties which allows the County to discontinue an established practice.

We should like to bring to your attention that the employees at Lakeview are required to report for work ten (10) minutes before the scheduled starting time. This time is not paid for. During their lunch period, they are actually on duty, and are required to take care of any patient needs which may arise at that time. Under these circumstances, we believe the County has no complaint in providing a meal.

Your assertation that this is not negotiable, allegedly because the Union did not respond to a mediator's statement is inconsistent with the facts. The mediator, Douglas Knutson [sic] was told to inform you that the meal question

was a negotiable item, but was not a subject of the mediation issues, and if the County were to unilaterally attempt to take the meal away, a grievance would be filed.

Your further claim of inconsistencies between institutions as to meals, is not a valid argument. There are inconsistencies in pay, in time put in, in contract language, in benefits received by other County Employees, so, one minor inconsistency of a meal arrangement can hardly be construed as being a conflict with the intent of the Agreement.

It is our hope that before the County takes further action, such as is suggested in your letter stating that the 'free meals at Lakeview will be discontinued as soon as the Board of Trustees adopts a uniform policy--', the County will reassess its position and evaluate all the ramifications involved. We believe maintenance of the status quo is in the best interests [sic] of all concerned.";

and that said letter was in effect a request to bargain over the purposed change in the meal policy at Lakeview.

20. That on October 30, 1974, Respondent, without previously offering or bargaining with Complainant over the discontinuance of the Lakeview meal practice, posted the following notice to employes advising them of the discontinuance of said free meals effective November 1, 1974:

"TO ALL LA CROSSE COUNTY INSTITUTIONS EMPLOYEES:

NOTICE:

EFFECTIVE NOVEMBER 1, 1974 EMPLOYEES WILL NO LONGER BE SERVED MEALS AT THE LA CROSSE COUNTY INSTITUTIONS.

THE ABOVE ACTION WAS TAKEN BY THE LA CROSSE COUNTY INSTITUTIONS TRUSTEES IN COMPLIANCE WITH RESOLUTION NO. 8 BY THE LA CROSSE COUNTY BOARD OF SUPERVISORS. THE TRUSTEES FURTHER DESIRE THAT ALL LA CORSSE COUNTY INSTITUTIONS EMPLOYEES BE REGULATED SIMILARLY.

FOR THE
LA CROSSE COUNTY INSTITUTIONS TRUSTEES

E. R. LUND, PRESIDENT
JOEL STOKKE, VICE PRESIDENT
HENRY W. REBHAN, SECRETARY
LEVI CAVADINI
EARL LINSE
CARLET MILLER

ATTESTED:

O. LINDGREN, JR., N.H.A.
ADMINISTRATOR
LA CROSSE COUNTY INSTITUTIONS"

that on November 1, 1974, Respondent did terminate its policy of providing Lakeview employes with free meals; that on said date Respondent also changed Lakeview employes hours from an 8 hour and 10 minute shift with a 1/2 hour paid lunch period to an 8 1/2 hour shift with a 1/2 hour unpaid lunch period; and that as a consequence of said change in hours, 1st shift employes now work from 6:45 a.m. to 3:15 p.m., 2nd shift employes work from 2:24 p.m. to 11:15 p.m., and 3rd shift employes work from 10:45 p.m. to 7:15 a.m.

12. That on November 4, 1974, Complainant grieved the Respondent's change in the meal policy and hours worked by Lakeview employes; that on

December 6, 1974, Complainant appealed the aforesaid grievance to arbitration; and that thereafter the Respondent has refused to arbitrate said grievance.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That, Respondent, LaCrosse County, by unilaterally terminating its prior policy of providing employes at its Lakeview Institution with free meals during their working hours on and after November 1, 1974, failed and refused to bargain collectively within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and thereby committed prohibited practices within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. That, Respondent LaCrosse County, on November 1, 1974, by unilaterally changing Lakeview employe hours of work and eliminating a 1/2 half hour paid lunch period did not fail and refuse to bargain collectively within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act and has not committed prohibited practices within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

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

ORDERS

IT IS ORDERED that LaCrosse County, its officers and agents, shall immediately:

1. Cease and desist from refusing to engage in collective bargaining with Complainant LaCrosse County Institutions Employees, Local 227-A, WCCME, AFSCME, AFL-CIO concerning the discontinuance of providing free meals to Lakeview employes represented by Complainant during their working hours.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   (a) Immediately reinstate the free meal policy being observed at Lakeview on October 20, 1974, and make each employe whole for losses occasioned by its unilateral action in terminating the free meals by reimbursing said employes at the rate of 1/6th of an hour's pay for each day worked wherein no free meals were received at the wage rate in effect at that time and in accordance with the overtime provisions of the applicable collective bargaining agreement.

   (b) Before instituting future changes in the free meal policy observed at Lakeview on October 30, 1974, offer to bargain with the Complainant regarding the proposed change and, if requested, bargain with Complainant regarding said change.

   (c) Notify all of its Lakeview employees represented by Complainant of its intent to comply with the Order herein by posting in a conspicuous place on the

premises, where notices to Lakeview employes are usually posted, copies of the Notice attached hereto and marked Appendix "A". Such copies shall be signed by the Chairman of the County Board of Supervisors and the Administor-LaCrosse County Institutions, and shall be posted immediately upon receipt of a copy of this Order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) calendar days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 11th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES REPRESENTED BY LACROSSE COUNTY INSTITUTIONS EMPLOYEES, LOCAL 227-A

Pursuant to Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL immediately reinstate the free meal policy at Lakeview and make employes whole for losses occasioned by our prior termination of said meal policy.

2. WE WILL NOT institute changes in the free meal policy at Lakeview without first notifying LaCrosse County Institution Employees, Local 227-A, of the proposed change and offering to bargain and, if requested, bargain with the LaCrosse County Institutions Employees, Local 227-A.

LACROSSE COUNTY

By_____
Chairman, County Board of Supervisors

_____
Administrator, LaCrosse County Institutions

Dated this_____day of_____1975.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

PLEADINGS, PROCEDURE AND POSITION OF THE PARTIES

On January 16, 1975, LaCrosse County Institutions Employees, Local 227-A, WCCME, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that LaCrosse County on November 1, 1974, unilaterally discontinued providing Lakeview employes with a free meal and also on that date unilaterally revised said employes' work schedules and, thereby, violated Section 111.70(3)(a)3 and 4 of the Municipal Employment Relations Act. Complainant also avers that said actions by Respondent were in violation of the parties' collective bargaining agreement and that Respondent has refused to process and arbitrate a grievance filed by Complainant contesting said actions thereby violating Section 111.70(3)(a)5 of the MERA. In its prayer for relief Complainants seeks restoration of the status quo ante as well as that employes be made whole for all losses occasioned by Respondent's unlawful actions.

By way of its answer filed on February 10, 1975, Respondent entered a special appearance contesting the Commission's jurisdiction to proceed on the complaint, however, Respondent subsequently made a general appearance before the Commission at hearing on the instant complaint. Also, in its answer Respondent denied Complainant's allegations that it refused to bargain with Complainant and unilaterally changed any condition of employment or hours of work in violation of MERA and, that it did not refuse to process Complainant's grievance through arbitration.

Complainant contends that Respondent had a long standing practice of providing Lakeview employes with free meals during working hours in return for said employes working additional time before and after their normal shifts as well as during their lunch period and that said meals were considered part of the employes' compensation. Thus, when Respondent discontinued the free meals on November 1, 1974, it thereby unilaterally changed a condition of employment without first bargaining said change with the employes exclusive bargaining agent. Complainant takes the same position with respect to Respondent's actions of November 1, 1974, wherein it changed Lakeview employes regular hours from an 8 hour and 10 minutes shift inclusive of a 1/2 hour paid lunch period to an 8 hour shift exclusive of a 1/2 hour unpaid lunch period.

Respondent claims that Complainant bargained away the free meals in negotiations preceding agreement on the 1974 collective bargaining agreement as is evidenced by the inclusion in said contract of Appendix A, Section 1(a). Respondent also argues that the changes complained of by Complainant were nothing more than an exercise of its management rights as set forth in the aforesaid collective bargaining agreement. Respondent contends further that there was no binding practice of providing employes with free meals inasmuch as mutuality was lacking because the County Board, which is changed by statute with the responsibility for the financial operation of all county facilities, in 1968 adopted a resolution prohibiting the granting of free meals to any institution employe. While Wisconsin Stats. 46.18(1) vests in the Trustees the authority to manage the institutions they are subject to the regulations and conditions imposed by the County Board and said Board did not authorize the free meals at Lakeview. Furthermore, Respondent claims its County Board had no knowledge that meals were being provided to Lakeview employes while at the same time being denied to employes of other institutions operated by the County, and that even though a few employes were probably required to watch patients during meal

periods, Respondent cannot be considered to have condoned the practice that developed to the extent that it developed through "laxity in management". Finally, Respondent contends that it must have uniformity in the operation of its three institutions and it is unconscionable to burden the taxpayers with this discriminatory practice at one institution.

Hearing was held on February 21, 1975 and March 5, 1975 at LaCrosse, Wisconsin. Complainant filed its brief on June 16, 1975. The Respondent filed its brief on July 25, 1975 and Complainant's reply brief was filed on August 11, 1975.

In resolving the issues raised herein the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

Estoppel

At hearing, prior to taking any testimony, Complainant made a motion that the Respondent be estopped from asserting lack of knowledge of the free meal policy at Lakeview as a defense in these proceedings on the basis that in a prior Commission case involving Respondent 1/ the Examiner therein found

> "6. That on June 20, 1968, shortly after the County Board became aware of the fact that the employes at Oak Forrest Sanatorium were receiving a free meal, it passed a resolution prohibiting County institutions from providing free meals until such practice is authorized by the County Board.
>
> 7. That shortly before the adoption of the above resolution, the County Board also learned that certain employes at the County Hospital 2/ were receiving as compensation, a free meal; however, the County Board permitted this practice to continue."

Complainant contends that said findings should preclude Respondent from herein raising a defense based on assertions of fact contrary to prior findings of this Commission.

In support of this contention Respondent relies upon this Commission's decision in Kenosha Unified School District No. 1, 12029-C, 12/73. In said case the Examiner concluded that in order for a prior judicial determination to constitute a bar to a determination of the same issue in a subsequent proceeding said finding or determination must have been necessary to the determination of an issue properly before said tribunal. The Examiner concluded that it was inappropriate to apply the doctrine of collateral estoppel in said case because the prior finding being relied upon was not necessary to a determination of issues properly before the tribunal wherein said finding was made.

1/ LaCrosse County, 8683-A, C, 2/69, affirmed Wis. Sup. Ct. 53 Wis. 2d 295 (1971).

2/ The 'County Hospital' is synonymous with Lakeview.

The Commission's prior Findings of Fact relied upon herein by Complainant arose in a complaint proceeding involving the identical parties to the instant proceeding. Furthermore, the undersigned is persuaded that the aforesaid findings were necessary to a determination of issues properly before the Commission in that proceeding. The complaint therein alleged Respondent county unilaterally terminated a free meal policy at its Oak Forest Sanatorium after Union certification and thereby committed a prohibited practice. Respondent claimed that said free meal benefit was granted by the Sanatorium Trustees and was unauthorized inasmuch as only the County Board could authorize the continuance of the policy as a result of a previously adopted County Board Resolution. The Commission found, however, that the County Board had permitted the County Hospital (Lakeview) to grant free meals without its authorization. This finding, among others, led the Commission to conclude that the reasons given for the termination of free meals at the Oak Forest Sanatorium were "at least in part, pretexts."

In view of the foregoing the undersigned is satisifed that the aforesaid finding #7 pertaining to the continuance of free meals at Lakeview after the adoption of the 1968 County Board Resolution referred to in aforesaid Finding #6 was necessary and material to the determination of an issue properly before the Commission in that proceeding. 3/ Therefore, the Examiner is persuaded that Respondent is herein bound by said prior Commission determination and thereby estopped from denying that it had any knowledge of the existence of a free meal policy at Lakeview subsequent to the passage of the County Board Resolution in 1968 ordering the discontinuance of free meals for all institution employes.

However, said estoppel only pertains to the Respondent's defense that it had no knowledge of the granting of free meals to Lakeview employes subsequent to the passage of the aforesaid Resolution and cannot be relied upon to establish the continuance of said free meals from February, 1969, the date of the Commission's findings to the present or that said continuance was proper and binding upon Respondent. The burden must necessarily rest with Complainant to establish free meals continued to and were in existence from February, 1969 until their termination and that said policy was binding upon Respondent.

Meals

As early as the late 1940's, when Lakeview was called the LaCrosse County Mental Institution, employes received free meals during working hours. The practice of furnishing meals to employes has continued to the present without interruption notwithstanding that the free meals have been the subject of a prior County Board Resolution as well as litigation before this Commission.

Initially, employes receiving free meals started work before their scheduled shifts and also worked beyond said shifts on a daily basis. The extra time was 40 minutes per day. The free meals were treated by Respondent as compensation for the additional duty for which they received no pay. Over the years however, the extra time put in by employes has diminished. Sometime after 1963, when Lakeview converted from a two to a three shift operation the additional time worked by employes prior to and after their shifts was reduced from 40 minutes per day to 10 minutes. Notwithstanding this, Lakeview employes continued to receive two free meals per shift.

3/ Schofield V. Rideout, 233 Wis. 550, 290 N.W. 155 (1940); Moehlenpah v. Mayhew, 138 Wis. 561, 119 N.W. 826 (1909).

Another reason for free meals at Lakeview had to do with supervision of patients in the dining room at meal time. In order to handle any patient disturbance that might occur during the meal period employes needed to be present in the dining room at meal time. Thus, some employes ate with the patients and inasmuch as they were "on-duty" while eating they were not charged for their meals. Over the years however, the need for patient supervision in the dining room has diminished. Notwithstanding, however, Respondent made no change in its free meal policy until November 1, 1974. In fact, while all unit employes were receiving free meals immediately prior to November 1, 1974, most were not on duty in the dining room during the lunch period.

In 1968, the County Board of Supervisors adopted a resolution terminating free meals at all of its institutions including Lakeview and prohibiting granting same without its approval. Shortly after adoption of the aforesaid Resolution, the Institutions Committee met with the Lakeview Trustees and Superintendent Yeske to review the Lakeview meal policy in light of said Resolution. The Committee advised the Trustees that inasmuch as the meals were compensation for extra duty they were an exception to the Reslution and could continue. Thereafter, and until early 1974, the Committee nor the full Board took any further action on the Lakeview meal policy.

There is no doubt in the undersigned's mind that free meals for unit employes at Lakeview constituted wages as well as a condition of employment and as such are a mandatory subject of bargaining. 4/ The meals constituted wages for employes inasmuch as they received no other compensation for the extra time put in before and after their shifts as well as for being on duty during their lunch periods. Furthermore, even though many employes if not most were not on duty during their lunch periods in later years they continued to work extra time for which they received no compensation aside from the free meals.

Section 111.70(3)(a)4 makes it a prohibited practice for a municipal employer to refuse to collectively bargain, as defined in Section 111.70 (1)(d), with a representative of a majority of its employes concerning wages, hours and conditions of employment. As interpreted by this Commission, a municipal employer must bargain to impasse on mandatory subjects of bargaining prior to making any changes therein or be found to have refused to bargain in good faith. 5/ A unilateral change in a mandatory subject of bargaining is a per se refusal to bargain in good faith. 6/ This duty pertains not only to contract negotiations but also survives thereafter and continues during the term of said agreement 7/ with respect to those subjects that were not discussed or provided for in the collective bargaining agreement, i.e., where the duty has not been

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4/ Weyerhaeuser Timber Co., 87 NLRB No. 123 (1949); W. W. Cross and Co., 77 NLRB 1162; enf'd. 174 F2d 875 (CA-1, 1948).

5/ Madison Jt. School District, (12610) 4/74, Racine Unified School District, (11315-B) 1/74, modified Comm. (11315-D) 4/74; City of Wisconsin Dells, (11646) 2/73.

6/ Fennimore Jt. School District. (11865-A) 6/74, aff'd Comm. (11865-B) 7/74.

7/ Village of Shorewood, (13024) 9/74; Madison Jt. School Dist. (12610) 4/74; Fennimore Jt. School Dist., (11865-A) 6/74, aff'd Comm. (11815-B) 7/74; City of Brookfield, (11489-A) 10/73, modified Comm. (11489-B) 4/75; City of Brookfield, (11406-A) 7/73, aff'd Comm. (11406-B) 9/73, aff'd Waukesha County Cir. Ct. 6/74.

extinguished as a result of the bargaining agent waiving its statutory right to insist on bargaining. 8/

The Respondent claims to have bargained and agreed with Complainant during said bargaining to the discontinuance of the Lakeview meal policy. It asserts that its final offer made during the September 5, 1974 negotiations was contingent upon Complainant agreeing to the discontinuance of free meals at Lakeview. On the other hand Complainant contends it advised Respondent that because the issue was raised at the very last minute of negotiations that it was not agreeing that said issue was to become a part of the negotiations. A review of both versions of what took place in negotiations on September 5, 1974 has led the undersigned to conclude that neither version is entirely credible.

Complainant's assertion that the issue was not raised until after a tentative agreement has been reached and its version of what transpired thereafter is totally lacking in credibility. The undersigned does not believe that a responsible Union negotiator would conclude a negotiation session with a mediator present by leaving without awaiting a response to a message carried to the adversary through the mediator on such a critical issue, yet, this is exactly what Respondent claims to have done. Furthermore, Complainant's position does not square with Guthrie's credible statement to the mediator that "we're giving them due and timely notice".

Nor, does the undersigned find the Respondent's recollection of the events of September 5, 1974 entirely credible. Respondent acknowledges that Complainant was extremely upset over Respondent's raising of the meal issue during the wanning moments of negotiations yet, contends that a short time later Complainant agreed to the discontinuance of meals without any further discussion. Furthermore, if Complainant had agreed to stopping the free meal policy why didn't Respondent include the item along with the other listed changes supplied to Complainant the following day, particularly inasmuch as it was such a critical item? Finally if Respondent would have bargained away the furnishing of meals there would have been no need for a special notice or reason to defer implementation until November 1, 1974. Also, why was no reference made in the November 1, 1974 notice to the fact that the parties agreed to the discontinuance of meals during their negotiations if that in fact happened but, rather based said termination on the previous 1968 Resolution? The undersigned is persuaded that Respondent did not negotiate Complainant's concurrence in the discontinuance of employe meals on September 5, 1974.

However, Respondent's recollection of how and when the issue of meals was first raised is credible. Respondent asserts it told the mediator prior to the end of the September 5th session that its offer of August 15, 1975 was still on the table but was contingent upon Complainant agreeing to the discontinuance of meals at Lakeview. Thereupon the mediator returned to Respondent's caucus with Complainant's message that it did not consider meals to be an issue in the negotiations by virtue of Respondent never raising said issue until the twilight of negotiations. Along with the aforesaid message the mediator also carried a counter proposal to Respondent that made no mention of discontinuance of the meals. Respondent then countered by stating its position remained unchanged. Later the Union said it would take the Respondent's proposal back for a vote with a recommendation.

8/ City of Brookfield (11406-A) 7/73, supra.

There is no doubt in the mind of the undersigned that there never was a meeting of the minds between the parties on the discontinuance of meals at Lakeview. Respondent could only have assumed Complainant was recommending its last proposal which it had made contingent upon discontinuance of the meals because it never received work Complainant had agreed, On the other hand, Complainant could only have assumed Respondent understood it was recommending the Respondent offer without meals as a part thereof because it never made that clear to Respondent. Obviously, neither party sought to clarify the position of the other, both going their own way mistaken in their belief that their understanding was correct, otherwise this situation would never have arisen. Under such circumstances there is not a basis upon which to find the parties had reached an understanding that employe meals were to be discontinued. Absent an agreement to discontinue meals the prior policy survives.

Thus, when the contract was signed by the parties, there having been no agreement reached in negotiations to terminate the free meals at Lakeview, the Respondent was bound to continue same or bargain to impasse over any change therein upon notice to Complainant and request to do so. It can be inferred from Complainant's letter of September 30, 1974, that Guthrie's letter of September 23, 1974, advised Complainant of the impending discontinuance of the free meals. Complainant in its September 30, 1974, letter advised Respondent inter alia,

> "The lunch received by the employees at Lakeview is and has been a condition of employment at Lakeview for many years. As such, it is subject to negotiation. To date, aside from the informal message carried to us by the mediator, it has not been a subject raised by the County for consideration in bargaining. There is nothing in the Agreement between the parties which allows the County to discontinue an established practice."

One can reasonably equate the aforequoted passage as a demand for bargaining. While not specifically demanding bargaining over any change in the meal policy Complainant states same is required prior to any change by the County and, this is sufficient to put Respondent on notice of Complainant's desire to bargain over any change in the meal policy.

Subsequent to Complainant's letter of September 30, 1974, the Respondent never offered to bargain about the change in meal policy at Lakeview, persumably believing it had bargained said change on September 5, 1974. Then, Respondent's Lakeview Board of Trustees met and decided to discontinue the meals. Thereafter and on October 30, 1974 said Trustees met with the Complainant Executive Board and presumably advised it of the decision to discontinue meals at Lakeview on November 1, 1974. It also posted the September 30, 1974 Notice to LaCrosse County Institution's Employes advising them of the discontinuance of free meals. At no time between September 6, 1974, and November 1, 1974, did Respondent bargain with Complainant concerning the discontinuance of meals at Lakeview. Thus, by unilaterally terminating the free meal policy at Lakeview on November 1, 1974, the Respondent violated its duty to bargain in good faith over a change in a mandatory subject of bargaining during the term of the contract.

Respondent's contention that Complainant waived its statutory right to insist on bargaining on changes in the free meal policy at Lakeview by agreeing to the inclusion of Article II Section 1 Administratio and Appendix A, Section 1A Hours, in the 1974 contract is unpersuasive.

In order for there to be a waiver of statutory bargaining rights it must be clear and unmistakable. 9/ However, there is no language in Article II Section 1, specifically dealing with employe meals and this Commission will not find a waiver merely on the basis of general languag contained in a management rights clause which in essence is what Article II, Section 1 is. Also, the language of Appendix A, Section 1A where reference is made to "unpaid lunch periods" is not tantamount to a waiver by Complainant of its right to bargain over the discontinuan of free meals. Said language pertains only to the time alloted for eating meals and whether employes will be paid during said meal period, not whether the employes' meal will be furnished. Were this true Respondent need not have put the issue of free meals on the bargaining table inasmuch as this language was carried over into the 1974 contract from the previous agreement. Thus, Complainant not having waived its statutory right to insist on bargaining, Respondent breached its duty to bargain by not bargaining with Complainant concerning the termination of meals for Lakeview employes.

Respondent also argues that the free meal policy was not binding upon it because 1) it was not authorized by the County Board of Supervis which is charged with the responsibility for the financial operation of all county facilities 2) that it was not condoned by the county to the extent that it had developed, and 3) that it would be discriminatory to furnish free meals to employes at one institution and not to employes of the other institutions. The undersigned finds the last argument to b totally unpersuasive.

The evidence establishes that shortly after the County Board's adoption of the 1968 resolution supposedly terminating free meals at all institutions and, incidently, propounded by the Institutions Committ said Committee met with the Trustees and Superintendent of Lakeview and authorized the continuance of free meals in the face of said Resolution. Respondent herein in effect contends that the Committee lacked the requisite authority to extend the meal policy, however, Respondent adduced no evidence in support of that proposition.

The Wisconsin Statutes at Section 59.06 authorizes the County Board to appoint Committees like the Institutions Committee herein.

> "(1) The board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution."

The Respondent, however did not establish that the Committee exceeded its authority as prescribed by the Board in its resolution creating said committee. Therefore, inasmuch as the Board may delegate ministerial and executive functions to such a committee 10/ there is no basis upon which to could conclude that the Institutions Committee lacked authority to authorize the continuance of the free meals at Lakeview notwithstanding the 1968 Resolution. Thus, Respondent has not established that the Institutions Committee acted without authority in extending free meals to Lakeview employes.

School Dist., (11865-A) 6/74, aff'd Comm. (11865-B) 7/74; City of

With respect to Respondent's contention that the meal policy or practice was expanded through "laxity in management" and never condoned, the undersigned queries where the ultimate responsibility rests for poor or lax management of a county operation. The answer to that question seems clear--the County Board who is charged with the responsibility of managing its affairs. While it may delegate some or part of its duties it may not thereby escape from its responsibility and accountability for the acts of its agents acting within the scope of their authority. 11/

In the case of Lakeview the management thereof was delegated to the Trustees elected by the Board pursuant to Section 46.18(1) of the Wisconsin Statutes who in turn appointed a superintendent as provided for in Section 46.19(1) of the Wisconsin Statutes. Furthermore, the Superintendent has the authority, subject to approval of the Trustees, to "appoint and prescribe the duties of necessary additional officers and employes of the institution." 12/ While the Trustees are subject to regulation by the County Board and the Superintendent is accountable to the Trustees the record is devoid of any evidence that the Trustees or Superintendent acted without authority in establishing and continuing the policy of granting free meals to employes in return for their working hours in excess of their basic work day as set forth in the collective bargaining agreement. Absent such evidence the undersigned must dismiss Respondent's aforesaid defenses as unsubstantiated allegations.

In view of the foregoing findings the undersigned finds it unnecessary to make a finding with respect to whether Respondent's conduct violated its collective bargaining agreement as alleged in the complaint.

Change In Hours

On November 1, 1974, at the same time the meals were discontinued at Lakeview a change in hours was also made. Immediately prior to November 1, 1974, employes worked eight hours and ten minutes including a 1/2 hour paid lunch period, whereas on November 1st and thereafter employes were scheduled to work 8 hours with a 1/2 hour unpaid lunch period. There was no evidence of any prior notice being given to employes of this change in hours.

Notwithstanding that there is no evidence of any notice to or bargaining with Complainant over the change in hours immediately preceding said change, the 1974 collective bargaining agreement in Appendix A, Section 1 deals specifically with the matter of hours of work. Section 1A thereof provides for an eight hour work day as well as a 1/2 hour unpaid lunch period. This language preceded the 1974 agreement and goes back to 1971 when it was negotiated between the parties.

The subject of hours of work is a mandatory subject of bargaining under MERA 13/ thereby precluding a municipal employer from making unilateral changes therein without first bargaining said change to

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11/ Section 111.70(1)(a) Wisconsin Statutes.

12/ Section 46.19(1) Wisconsin Statutes.

13/ Section 111.70(1)(d).

impasses with the employes' exclusive bargaining agent. 14/ However, by virtue of the parties having previously negotiated the provisions of Appendix A, Section 1A the Respondent had no further duty to bargain with Complainant about the subject change in hours, inasmuch as said clause constitutes a clear and unmistakable waiver of Complainant's statutory right to insist on bargaining. 15/ The Complainant had previously agreed to the "basic work day" as being eight hours exclusive of a 1/2 hour unpaid lunch period. Thus, the Respondent had no duty to bargain with Complainant about the changes in hours that were effective November 1, 1974, inasmuch as said changes were consistent with what the parties had previously negotiated for.

Remedy:

Because the free meals were tied in with the number of hours worked by Lakeview employes it presents difficulties in fashioning a remedy. Obviously, the most appropriate remedy herein would be to order reinstatement of the status quo ante prior to bargaining any change in the free meal policy. However, the free meals were granted in consideration for some employes being on duty during their lunch period as well as reporting for work ten minutes early. However, the 1974 collective bargaining agreement provides for a standard work day of eight hours exclusive of a 1/2 hour unpaid lunch period. Thus, to order Respondent to reinstitute the work schedule in existence prior to November 1, 1974, would be to order a violation of contract.

Therefore, for the reasons noted above, the Respondent has been ordered to reinstate only the free meals that were being provided at Lakeview prior to November 1, 1974 and in addition reimburse each employe for 1/6th of an hour for each day worked since October 31, 1974 wherein no free meals were received at the wage rate in effect at the time and in accordance with the overtime provisions of Appendix A, Section 2. The undersigned has equated the free meal with the ten minutes employes reported to work early, inasmuch as the evidence established that nearly all of the employes in recent years were not required to be on duty during their lunch period. Furthermore, the reason the 1/6th hour is to be treated as overtime and paid in accordance with the provisions of Appendix A, Section 2 of the agreement is that it is impossible to give back the meal employes lost whereas said meals were given in consideration for overtime worked for which employes received no pay. Thus, the equivalency of the meals is 1/6 hour's pay and provides meaningful redress of Respondent's prohibited practice.

Dated at Madison, Wisconsin this 11th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

14/ See footnote 5/ supra.

15/ See footnotes 5/ and 9/ supra.