STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WALWORTH COUNTY EMPLOYEES LOCALS 1925, 1925-A, 1925-B, and 1925-C AFSCME - COUNCIL 40, AFL-CIO, Complainants, vs. WALWORTH COUNTY, Respondent.	Case XXVI No. 21547 MP-740 Decision No. 15429-A
LAKELAND NURSING HOME OF WALWORTH COUNTY EMPLOYEES LOCAL 1925-A, AFSCME, COUNCIL 40, AFL-CIO, Complainant, vs. WALWORTH COUNTY, Respondent.	Case XXVII No. 21548 MP-741 Decision No. 15430-A

Appearances:

Mr. Richard W. Abelson, District Representative, AFSCME, Council 40, appearing on behalf of the Complainants.

Lindner, Honzik, Marsack, Hayman & Walsh, Attorneys at Law, by Mr. Eugene J. Hayman, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 7, 1977, separate complaints were filed by the above named Complainant(s), each alleging that the above named Respondent had committe prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats. The Commission appointed Marshall L. Gratz, then a member of its staff, to act as examiner and to make and issue Findings of Fact, Conclusions of Law, and Order in each matter as provided in Sec. 111.07(5), Stat Sequential hearings on said complaints were held before the examiner on June 7, 1977 at Elkhorn, Wisconsin. The parties submitted post-hearing briefs, the last of which was received on November 3, 1977. The examiner has considered the evidence and arguments of counsel, and, being fully advised in the premises, issues the following consolidated findings, conclusions and order. 1/

District Representative Richard Abelson, 716 Monticello Drive, Racine, Wisconsin 53402.

2. Walworth County, referred to herein as the County, is a municipal employer with a mailing address of c/o County Clerk, Courthouse, Elkhorn, Wisconsin 53121. The County operates, inter alia, a facility known as the Lakeland Nursing Home.

3. At all material times, each of the Locals has been the exclusive representative of a bargaining unit of County employes. The unit so represented by Local 1925-A includes, inter alia, certain regular full-time and regular part-time nonsupervisory employes employed by the County at its Lakeland Nursing Home.

4. Separate collective bargaining agreements existed between the County and the respective Locals which agreements were in effect from the beginning until the end of calendar year 1976. The 1976 Local 1925-A agreement contained the following provisions, among others:

"ARTICLE II

MANAGEMENT RIGHTS

. . .

2.05 Subcontracting. The Union recognizes that the Company has statutory and charter rights and obligations in contracting for matters relating to some municipal operations. The right of contracting of subcontracting is vested exclusively in the County, but the County agrees not to contract work if it would result in lay-off or reduction in hours of regular employees.

. . .

ARTICLE XXVII

DURATION

27.01 This agreement shall become effective January 1, 1976 and shall remain in effect through December 31, 1976, and shall be automatically renewed for periods of one (1) year thereafter; unless either party shall serve upon the other written notice of a desire to negotiate modifications or to terminate this agreement. Such notice to be served not later than August 15 of the year negotiations are desired.

Negotiations of a new agreement, subsequent to receipt of the above required notice, shall be processed so that a new agreement can be concluded by December 31 if possible.

. . ."

The County's 1976 agreements with each of the other Locals contained a duration clause materially the same as that in Sec. 27.01 above.

5. At all material times until at least June 15, 1976, all laundry services for the Lakeland Home were performed by County employes on County equipment on the County's Lakeland Home premises. As of June, 1976, the Home's laundry employed ten nonsupervisory municipal employes, all of whom were in the unit represented by Local 1925-A.

6. In early June, 1976, Lakeland Home Superintendent Richard Coogan informed Local 1925-A president Helen Isferding that the County was contemplating subcontracting a portion of the laundry work such that all but

perhaps a couple of the bargaining unit employes then employed in the laundry would be laid off. Isferding replied by questioning the County's right to lay off any of the laundry employes in such a situation.

7. On June 15, 19[illegible] the County's Board of Supervisors passed a resolution ". . . to discontinue the operation of the laundry facilities at the Home, effective January 1, 1977" and authorizing inclusion of "facilities for processing patient personal clothing in the addition to Lakeland Nursing Home, North Building now being designed."

8. On or about June 17, 1976, Coogan met with the Home's laundry employes, including the Local 1925-A steward for the laundry area, and informed them as follows: that a major portion of the laundry work would be subcontracted effective January 1, 1977; that, as a result, only the three most senior laundry employes remaining employed in the laundry on December 31, 1976 would be retained to work in the laundry after that date; that any other bargaining unit employes employed in the laundry on December 31, 1976 would be laid off immediately thereafter; and that employes so laid off could bid for vacancies in non-laundry positions posted in the interim.

9. On July 7, 1976, following the conclusion of a meeting held for other purposes, representatives of Local 1925-A and the County conversed concerning the future of the laundry. Eugene Hayman, the County's labor relations legal counsel and chief negotiator, informed the Local's representatives that the County Board had passed a resolution concerning the laundry as a result of which the County planned to subcontract a major portion of the Lakeland Home laundry work to an outside firm. The Local's representatives (who included Isferding and District Representative Abelson) responded that the County had the right to subcontract so long as no regular employe was laid off or reduced in hours. Supervisor Janowetz, a member of the County Board, responded by asking aloud what was to prevent the County from allowing the 1976 agreement to expire and then laying laundry employes off as a result of the subcontracting. Abelson responded that such an action would constitute a prohibited practice under state law, was objected to by the Local, and would be met with grievances and/or formal complaints. Hayman then stated that he would look into the matter, and the discussion ended.

10. In late July or early August, 1976, the Locals notified the County of their desire for negotiations concerning successors to their respective 1976 agreements. During the remainder of 1976, beginning on October 2, representatives of the County and of one or more of the Locals met on nine dates, some involving separate meetings with more than one Local. Although the County was generally willing to meet with the Locals at reasonable times and was not generally bent upon avoiding tentative agreements on many of the items in dispute, the Locals have proven by a clear and satisfactory preponderance of the evidence that the County deliberately avoided reaching agreements with each of the Locals prior to the end of 1976 in order to create a contract hiatus with Local 1925-A and to thereby free itself from contractal prohibitions of January 1, 1977 layoffs resulting from subcontracting.

11. On or about December 14, 1976, Coogan met with laundry employes Ms. Pfeiffer, Wendy Koehnke, Wesley Butke and Richard Katzman and orally informed them that they would be placed on layoff status, effective January 1, 1977. Coogan caused written notices to the same effect to be served on those four employes on or about December 20, 1978.

12. During the course of a contract negotiation session on December 23, 1976, Abelson inquired of the County bargaining committee as to its intentions with respect to the Lakeland Home laundry. Hayman replied that the laundering of flatwork would be subcontractd and that four of the seven unit employes then working in the laundry would be placed on layoff status, effective January 1, 1977. Hayman's December 23 statements in

those regards were the first County communication to Local 1925-A as to the specific number of laundry employes the County intended to lay off.

13. Effective January 1, 1977, the County placed Pfeiffer, Koehnke, Butke and Katzman on layoff status. Each of those individuals had, at all material times, been a regular employe and a municipal employe. The layoff of each of those four employes was the result of the County's subcontracting of a substantial portion of the Lakeland Home laundry work to an outside firm.

14. The first negotiation session in 1977 between the County and any of the Locals was held on January 13, 1977. On that occasion, the County met jointly with representatives of all of the Locals. The parties agreed during that meeting that it would be desirable to request Wisconsin Employment Relations Commission mediation. Hayman and Abelson left the meeting to prepare a letter to the WERC. The resultant letter, which was dated, signed, and mailed to WERC Chairman Morris Slavney on January 13, 1977, read as follows:

"Dear Sir:

The Walworth County employees represented by AFSCME, Council 40, AFL-CIO have reached an impasse in their efforts to negotiate a labor agreement with Walworth County. The parties jointly request that the Commission appoint a staff member in order to mediate the dispute.

<u>The five hundred employees' labor agreements expired on December 31, 1976. The parties have agreed to continue the expired labor agreements until final impasse or a new agreement is reached.</u>

We are looking forward to your prompt cooperation in hopes that we can commence mediation as quickly as possible.

Very truly yours,

Eugene Hayman /s/ — Richard Abelson /s/
District Representative
AFSCME - AFL-CIO"

[emphasis added]

Abelson composed and dictated the underlined portion of that letter. Hayman composed and dictated other portions of the letter. On January 13, 1977, there were no discussions between the bargaining committees or between Hayman and Abelson as to whether the agreement "to continue the expired labor agreements" referred to in that letter would take effect retroactive to January 1, 1977.

15. Local 1925-A's 1976 attempts to dissuade the County from implementing layoffs as a result of contemplated laundry work subcontracting were expressions of objection based on claimed contractual and statutory protections rather than expressions of collective bargaining proposals. Neither Local 1925-A nor the County at any material time requested collective bargaining with the other about the specific subject matters of whether the County should subcontract Lakeland Home laundry work or whether the County should lay off regular laundry employes as a result of subcontracting any such work.

16. During the hearing in these matters, the County expressly stated that it had no objection to the Local's request, implicit in the complaints herein, that the examiner and Commission exercise the Commission's prohibited practice jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine the merits of the alleged violations of the terms of a collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact, the examiner makes the following

CONCLUSIONS OF LAW

1. Freedom from layoffs resulting from County decisions to subcontract that primarily relate to wages, hours and other conditions of employment was a condition of employment existing on January 1, 1977 for the regular employes in the bargaining unit represented by Local 1925-A. The termination of the 1976 agreement between the County and Local 1925-A did no not control whether that condition of employment continued to exist on and after January 1, 1977. The County's 1976 decision to subcontract laundry work was primarily related to wages, hours and other conditions of employment rather than to the formulation or management of public policy. Therefore, the County changed an existing condition of employment on January 1, 1977 when it laid off regular bargaining unit employes Pfeiffer, Koehnke, Butke and Katzman as a result of a subcontracting decision that was primarily related to wages, hours and conditions of employment. The County made that change unilaterally, i.e., without he acquiescence of Local 1925-A, and without first either bargaining to impasse on the matter with Local 1925-A. However, Local 1925-A waived its right and the County's obligation to bargain to impasse before making such a change by Local 1925-A's failure to request bargaining on that subject after the County informed Local 1925-A about its plans for changes in that condition of employment. Therefore, the County's layoff of the four laundry employes on January 1, 1977 did not constitute a refusal to bargain or a prohibited practice within the meaning of Secs. 111.70(3)(a) 4 and/or 1, Stats.

2. The 1976 Local 1925-A agreement had expired on December 31, 1976, and it was not, at least on the strength of its own terms, in effect on January 1, 1977. The parties' agreement, evidenced by the January 13 letter, ". . . to continue the expired labor agreements . . .", did not make the expired 1976 Local 1925-A agreement or Sec. 2.05 thereof applicable to the County's act of layoff on January 1, 1977. Therefore, by laying off the four laundry employes on January 1, 1977 as a result of subcontracting, the County did not violate the terms of a collective bargaining agreement and did not commit a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

3. The County's noncommunication of the specific names and number of employes to be laid off as a result of its subcontracting of laundry work until its December 14 oral notification to the affected employes and its December 23 statement to the Locals did not interfere with, restrain, or coerce municipal employes in the exercise of rights protected by Sec. 111.70(2), Stats. Therefore, the County did not, by said noncommunication, commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

4. By its deliberate avoidance of reaching agreement during 1976 with the Locals or any of them on the terms of a successor to its respective 1976 collective bargaining agreements with each Local, the County bargained in bad faith and committed refusals to bargain collectively with each Local and prohibited practices with respect to each Local, within the meaning of Sec. 111.70(3)(a)4 and 1, Stats. By the same conduct, the County violated the duration clauses of its respective collective bargaining agreements with each Local and thereby committed prohibited practices, with respect to each Local, within the meaning of Secs. 111.70(3)(a)5 and 1, Stats.

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

ORDER

A. IT IS HEREBY ORDERED that Walworth County, its officers and agents shall immediately:

1. Cease and desist from bargaining in bad faith with Walworth County Employee Locals 1925, 1925-A, 1925-B and/or 1925-C, AFSCME, Council 40, AFL-CIO.

2. Cease and desist from violating terms of collective bargaining agreements it has or may hereafter have with any of the above named labor organizations which terms relate to the conduct of negotiations of a successor agreement.

3. Take the following affirmative actions which the examiner finds necessary to achieve the underlying purposes of MERA:

   a. Notify its employes in bargaining units represented by any of the labor organizations noted above, by posting in conspicuous places where notices to such employes are usually posted, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Chairman of its Board of Supervisors and shall remain posted for thirty (30) days after initial posting. Reasonable steps shall be taken by the County to insure that said notices are not altered, defaced or covered by other material.

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

B. IT IS FURTHER ORDERED that, except as otherwise noted above, the complaints in the above matters shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 14th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

APPENDIX

NOTICE TO ALL EMPLOYES IN BARGAINING UNITS REPRESENTED BY WALWORTH COUNTY EMPLOYEES LOCALS 1925, 1925-A, 1925-B and 1925-C, AFSCME, COUNCIL 40, AFL-CIO.

Pursuant to an Order of a Wisconsin Employment Relations Commission examiner, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify you that:

1. Walworth County will not bargain in bad faith with Walworth County Employee Locals 1925, 1925-A, 1925-B and/or 1925-C, AFSCME, Council 40, AFL-CIO.

2. Walworth County will not violate terms of collective bargaining agreements it has or may hereafter have with any of the above named labor organizations which terms relate to the conduct of negotiations of a successor agreement.

WALWORTH COUNTY

By_____
County Board Chairman

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Both complaints relate to the parties' negotiations concerning successors to the Locals' respective 1976 agreements with the County and to the County's decisions in 1976 to subcontract Lakeland Home laundry work to an extent that undisputedly resulted in the layoff of four regular bargaining unit laundry employes effective January 1, 1977.

In Case XXVII, Local 1925-A alleges, and the County denies, that:

(1) the parties' January 13, 1977 agreement "to continue the expired [1976] agreement . . . until final impasse or a new agreement is reached . . ." was intended to be effective retroactive to January 1, 1977 and to make County actions from and after January 1, 1977 subject to the terms of that agreement and to retroactive remedies of any breach thereof;

(2) since the County's January 1, 1977 layoff of four regular laundry employes resulted from subcontracting, the County thereby violated both the terms of the "continued" 1976 agreement (and Sec. 111.70[3][a]5 and 1) and the Sec. 111.70(3)(a)4 and 1 prohibition against unilateral changes in existing conditions of employment;

(3) the County committed an independent violation of Sec. 111.70(3)(a)1 by delaying its revelation to Local 1925-A as to how many and which, if any, employes would be laid off by reason of its decision to subcontract laundry work; and

(4) the County also violated Sec. 111.70(3)(a)4 and 1 by deliberately avoiding reaching a settlement during 1976 on the terms of a successor to its 1976 agreement with Local 1925-A, in order to defeat the contractual prohibition of regular employe layoffs resulting from subcontracting.

Local 1925-A requests declaratory, cease and desist, notice posting and make-whole relief, and the County requests dismissal of the complaint on its merits.

In Case XXVI, Locals 1925, 1925-B and 1925-C join Local 1925-A in alleging, contrary to County denials, that:

(1) the County violated Secs. 111.70(3)(a)4 and 1 by failing to bargain in good faith with the Locals, based on the totality of the County's 1976 conduct in the negotiations for successor agreements to those for 1976; and

(2) the County violated the provisions in each of the respective 1976 agreements to the effect that "Negotiations of a new agreement . . . shall be processed so that a new agreement can be concluded by December 31 if possible."

The Locals request declaratory, cease and desist, and notice posting relief, and the County requests dismissal of complaint on its merits.

Alleged Unilateral Change in Existing Condition of Employment

Local 1925-A contends that the County violated Secs. 111.70(3)(a)4 and 1 and committed a per se refusal to bargain by implementing a change in an existing condition of employment by its January 1, 1977 layoff of four regular laundry employes as a result of contracting out of laundry work. The examiner has concluded otherwise.

The County did, in the examiner's view, effect a unilateral change in a mandatory subject of bargaining. Municipal employes' freedom from layoff due to subcontracting is a mandatory subject of bargaining, at least where the subcontracting decision involved primarily relates to wages, hours and conditions of employment rather than to the formulation or management of public policy. 2/ And, in the examiner's view, the County's decision to subcontract laundry work herein primarily related to employe wages, hours and conditions of employment; 3/ the County has not argued otherwise. The pre-1977 status quo was that the regular employes in the bargaining unit enjoyed freedom from layoffs due to subcontracting decisions primarily related to wages, hours and conditions of employment. The existence of that condition of employment immediately prior to January 1, 1977 is proven by the fact that Sec. 2.05 of the 1976 agreement was in effect throughout 1976, but the termination of that agreement, alone, does not alter that status quo. For, the MERA duty to bargain collectively ordinarily entails a requirement that the municipal employer refrain from unilaterally changing existing conditions of employment until it has bargained to impasse about a contemplated change with the majority representative unless the majority representative has waived the municipal employer's obligation to do so 4/ by clear and unequivocal contract language or conduct. 5/ Neither party contends that the instant parties bargained to impasse over a proposal to change the pre-1977 status quo regarding the condition of employment in question. Rather, the record indicates that the parties did not bargain about the subjects of the contemplated subcontracting and layoffs at all during 1976. 6/ On those occasions when the laundry situation was discussed

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2/ See, Unified School District No. 1 of Racine v. WERC, 81 Wis. 2d 89 (1977).

3/ As in Racine Schools, (see footnote 2, above) nothing in this record suggests that the municipal employer's decision to subcontract involved an altering of the nature or level of services provided to the public. Rather, it was the identity of the provider of the service and of the employes performing the service (and ultimately the cost of providing the service) that the County decided to change. (Coogan told Isferding that the County had concluded that the subcontracting would result in cost-saving for the County. Tr. 54.) The social and political goal-setting dimensions of that decision to subcontract do not predominate over its relationship to the wages, hours and conditions of employment of the laundry employes affected by it.

4/ Greenfield School District, (14026-B) 11/77; City of Wisconsin Dells, (11646) 3/73; and City of Brookfield, (11406-A, B) 9/73. See also, NLRB v. Katz, 369 U.S. 736 (1962).

5/ E.g., City of Brookfield, (11406-A, B) 9/73.

6/ Tr. 15, 32, 47 and 76. The record does not reveal whether Local 1925-A proposed that the successor to its 1976 agreement include a provision to the same effects as Sec. 2.05 of the 1976 agreement. The burden of proving that the Local had made such a proposal (or that it had otherwise requested bargaining related to the County's announced plans) rested upon the Local once the County proved that it had put the Local on notice that it was contemplating subcontracting and resultant January 1, 1977 layoffs.

between County and Local representatives, 7/ the Local responded to the County's stated plans to subcontract resulting in layoffs by objecting, questioning the County's right to layoff in such a situation, claiming that its contractual and statutory rights would be violated by any such layoff and/or stating that it would seek legal recourse if the County went through with its layoff plans. It is therefore clear that the Local did not assent to the January 1, 1977 layoffs or to the change in a condition of employment that those layoffs constituted. Hence, the change was unilateral.

However, the examiner has concluded that, as the County contends, the Local waived any obligation the County had to bargain to impasse before implementing such a change by the Local's failure to request bargaining with the County after the County notified the Local that it was contemplating laundry subcontracting and resultant layoffs effective January 1, 1977.

Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, 8/ including alleged unilateral changes in a mandatory subject, 9/ except where either the unilateral change amounts to a fait accompli 10/ or the circumstances otherwise indicate that the request to

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7/ See Findings 6, 9 and 13. See also Finding 8 involving Coogan's meeting with the laundry employes including their Local 1925-A steward.

8/ E.g., City of Superior (11560-B) 4/74 (by implication); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 4 LRRM 524 (1939); Southern California Stationers, 162 NLRB No. 146, 64 LRRM 1227 (1967); Hartmann Luggage, 173 NLRB No. 193, 69 LRRM 1573 (1968); McCann Steel Co., 196 NLRB No. 6, 32 LRRM 1398 (1953). See also, Robertshaw-Fulton Controls Co., 36 LA 4, 12-13 (Hilpert, 1961) (applying federal duty to bargain principles, arbitrator finds that union waived its right to bargain about changes in work rules when, in response to the posting of notice of such changes, it merely expressed its nonassent thereto but failed to request bargaining about same).

9/ E.g., New Richmond Joint School District No. 1 (15172-B) 5/78; City of Jefferson (15482-A) 8/77; Coppus Engineering Corp., 195 NLRB No. 113, 79 LRRM 1449 (1972).

10/ Compare Carmichael Floor Covering Co., 155 NLRB No. 65, 60 LRRM 1364 (1965) enf'd sub. nom. NLRB v. Johnson, ____ F. 2d ____, 63 LRRM 2331 (CA 9, 1966) (employer's implementation of change and communication of fact that employer intended to implement same were simultaneous, leaving the union no opportunity to bargain before implementation) with Fruehauf Trailer Co., 162 NLRB No. 3, 64 LRRM 1037 (1966) (employer's last-minute notification of near-finalization of plans to close plant did not constitute a fait accompli; union could still have proposed that employer repudiate plans or reach some other compromise with union regarding same; union's failure to request bargaining in those regards held to be a valid waiver defense to refusal to bargain charge).

bargain would have been a futile gesture. 11/

In its brief, the Local seems to contend that the latter exceptions should apply herein, arguing

> "The action concerning the subcontracting of the County Nursing Home laundry facility was taken unilaterally by the County, and the Union was informed of the fact with no opportunity to negotiate concerning the impact of the subcontracting upon said employes. (Transcript pp. 9-12) (Exhibit #4)." 12/

Also, Abelson, in his testimonial narrative at transcript 9-12, charges that the County informed the Local of the County Board's resolution to close the existing laundry and of the subcontracting and layoff consequences of that decision "as an act of finality and not subject to negotiations" after which "there was absolutely no time where the Union was given the opportunity to negotiate the subcontracting or the implication of the subcontracting." He noted that the County informed the Local on July 7 that the County Board had already decided -- as provided in the resolution of June 15 (Exhibit 4) -- to close the existing laundry and operate only on a smaller scale in a different building, all effective January 1, 1977. The "tone of the conversation" suggested to Abelson that the County was determined to carry out that decision notwithstanding anything the Local might say or do. In this regard he noted that Janowetz was willing to consider aloud the possibility of deliberately causing a contract hiatus to assure effectuation of the layoffs and that Hayman expressly took that course of action under advisement. Abelson also noted that the County did not attempt to bargain about the subcontracting or the potential layoffs. Finally, Abelson seems to suggest that, since the Local first knew for certain that layoffs would be implemented only when the four employes received written notices to that effect on or about December 20, 1976, the Local had no notice of a definite change in existing conditions of employment until that time, and ought not be faulted for not having requested what would theretofore have been premature bargaining.

The record as a whole does not, however, present circumstances excusing the Local's apparent failure to request bargaining about whether the County would lay off employes on January 1, 1977 as a result of subcontracting. 13/ The County's notification to the Local concerning its plans was early and clear. It began with Coogan's conversation with Local president Isferding in early June (presumably before passage of the resolution) and continued with Coogan's meeting with the affected employes including their steward on June 17. The discussion on July 7 followed. In December there was the oral notification to employes on the 14th, the written notification to employes on or about the 20th, and the discussion with the Local's representatives on the 23rd. The County's communications of intentions in June and July unequivocally indicated that the County intended to lay off

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11/ Norfolk Southern Bus, 66 NLRB 1165, 17 LRRM 400 (1946) (employer refuses to bargain and does not inform union later when it has changed its mind so as to be willing to bargain; held, union could reasonably conclude that employer would have refused any subsequent request for bargaining); Burke Machine Tool Co., 36 NLRB 1329, 9 LRRM 203 (1941) (employer insults and throws union representative out of office before he has a reasonable opportunity to unequivocally request bargaining; held, absence of such request not fatal to charge of refusal to bargain); Old Town Shoe Co., 91 NLRB No. 35, 26 LRRM 1479 (1950) (employer wrote letters to employes and otherwise made public its unequivocal policy not to bargain with union while employes were on strike).

12/ Locals' brief at 2.

13/ See, Note 6, above, and accompanying text.

all but the three senior laundry employes effective January 1, 1977 as a result of subcontracting unless attrition, etc., made such layoffs unnecessary. The County had thereby communicated an anticipatory repudiation (effective January 1, 1977) of the otherwise existing condition of employment prohibiting such layoffs. Hence, a request for bargaining at that point would not have been premature.

Moreover, the County did not present its plans as a fait accompli. Instead, a substantial period of time between the announcements of the County's plans in June and July and the contemplated date for implentation thereof (January 1, 1977) afforded the Local ample time to review its situation, to formulate proposals designed to persuade the County not to implement its plans, and to request bargaining with respect to same. County Board resolutions are not irrevocable decisions. Had the Local, for example, presented an alternate means for producing the cost savings the County apparently sought to achieve by the subcontracting, it might have persuaded the County to change its plans. Or, the parties might have deadlocked, in which case the unilateral change (i.e., the layoffs), would have been unlawful since the defense of waiver by inaction would not have been available and no bonafide impasse would have arisen in view of the subjective bad faith attributed hereinafter to the County's 1976 bargaining conduct.

Furthermore, the County's words and actions did not warrant the conclusion that such a request for bargaining would have been futile, i.e., inevitably met by a refusal to bargain on the County's part. Janowetz' and Hayman's remarks were not addressed to whether the County would have met its duty to bargain in good faith, upon request, about whether to carry through with its plans. Moreover, the record reveals that the County responded promptly to the Local's requests for information concerning the County's plans, and that the County did not refuse to discuss any particular subject of bargaining advanced by the Local. Hence, the record does not support the notion that the Local had reason to believe that requesting the County to bargain would have been met by a County refusal to do so.

Therefore, despite its expression of objections to the County's plans to lay off laundry employes on January 1, 1977 as a result of subcontracting, the Local's failure to request bargaining after learning in June and July of those plans constitutes a waiver of the County's Sec. 111.70(3)(a)4 and 1 obligation to refrain on January 1, 1977 from making that announced January 1, 1977 change in the mandatory subject involved. 14/

Alleged Violation of Agreement Section 2.05

Because the County stated that it had no objection, the examiner is asserting the WERC's prohibited practice jurisdiction to determine this matter of contract interpretation and application.

Section 2.05 of the 1976 Local 1925-A agreement provides, in part, as follows:

> "Subcontracting. The Union recognizes that the County has statutory and charter rights and obligations in contracting for matters relating to some municipal operations. The right of contracting or subcontracting is vested exclusively in the County, but the County agrees not to contract work if if would result in lay off or reduction in hours of regular employees."

14/ See Robertshaw-Fulton Controls Co. , above, Note 8.

The date on which the subcontracting actually began is unclear, but it is clear that on January 1, 1977 the County placed four regular laundry employes on layoff as a result of its contracting out of a portion of the Lake Land Home laundry work to an outside firm. The County contends, however, that because the 1976 agreement was not in effect as of January 1, 1977 when those layoffs were imposed, the 1976 agreement and Sec. 2.05 thereof are not applicable to said layoffs.

Local 1925-A, on the other hand, contends that the 1976 agreement (including Sec. 2.05) was in effect as of January 1, 1977 by reason of an agreement reached between the parties on January 13, 1977 "to continue the expired labor agreements until final impasse or a new agreement is reached." As evidence of that agreement, the Local has presented the joint letter quoted in Finding 16 which was undisputedly executed and mailed on January 13, 1977. Besides the parties' request that a WERC staff member be assigned to mediate the contract disputes, that letter contains the following recitation:

> "The five hundred employes' labor agreements expired on December 31, 1976. The parties have agreed to continue the expired labor agreements until final impasse or a new agreement is reached."

Abelson, the Locals' chief spokesperson in the negotiations, admitted in his testimony that he "probably" drafted and requested the insertion into the letter of that portion quoted above; the Locals' brief contains an unqualified admission of union authorship of that portion. 15/

The County admits that it agreed on January 13, 1977 to be bound to the terms of the 1976 agreement as provided in the joint letter of that date. It argues, however, that said letter can only be deemed to bind the County to the 1976 agreement in 1977 for a period on and after January 13 because neither the letter nor any of the discussions concerning continuation of the 1976 agreement ever focused on a retroactive application thereof.

In view of the circumstances of the drafting of the January 13 letter and the absence of any discussion of retroactivity, the examiner must concur with the County's view that the County is not bound to the 1976 agreement as regards the period January 1-12, 1977. For, the portion of the parties' letter quoted above could support both parties' interpretations of its intended effective date. The critical term "continue" has more than one meaning. It can mean, consistent with the Locals' proposed interpretation, "To carry further in time . . . extend"; 16/ or, consistent with the County's proposed interpretation, it can mean "To go on after an interruption; resume." 17/ Given the absence of clarifying bargaining history or any other applicable standard of construction, the Local, as the party drafting that portion of the letter agreement, must bear the consequences of its ambiguity by suffereing a narrow interpretation thereof against its position. 18/

15/ Tr. 23 and Locals' Brief at 6.

16/ The American Heritage Dictionary of the English Language (1970), "continue" at 288.

17/ Id.

18/ Elkouri and Elkouri, How Arbitration Works, at 318-19 (BNA, 3rd ed., 1973) and cases cited therein including International Register Co., 49 LA 988, 990 (Arnod, 1967) and Browne & Sharpe Mfg. Co., 11 LA 228, 233 (Healy, 1948).

For the foregoing reasons, Local 1925-A's allegation, that the Count violated the terms of a collective bargaining agreement on January 1, 197 by laying off four laundry employes as a result of subcontracting, has be dismissed.

Alleged Bad Faith Pattern of County 1976 Bargaining

The Locals contend that the County designed its 1976 bargaining cond to cause a hiatus between the termination of the 1976 Local 1925-A agreem and any successor based on the County's allegedly mistaken belief that it would thereby free itself from all prohibitions of layoffs resulting from subcontracting. The Locals further contend that the County's resultant pattern of 1976 bargaining conduct with respect to each of them evidenced bad faith.

The record reveals that County representatives met with representati of one or more of the Locals on nine dates during 1976. On six of those dates, negotiations were "full-day" in length and on the other three, "ha day. Most, if not all, of the meetings held on the nine 1976 dates invol representatives of just one of the Locals meeting with the County at any one time. More than one such meeting was held on several of those dates. This represented a mutual departure from the structure of bargaining meet ings in the previous round of bargaining wherein representatives of each Local had attended all of the sessions concerning any of the Locals.

The County departed from its approaches in the several succeeding rounds of bargaining by indicating throughout the negotiations in 1976 th it would not offer to modify the status quo wages and fringe benefits unt tentative agreement was reached on all noneconomic items. Only after intensive urging by the Locals did the County come forward with a comprehensive wage and fringe offer. That offer, made sometime before December was the only comprehensive economic offer proposed by the County during 1976. It would have resulted in a wage cut for the employes.

The last bargaining meetings in 1976 were held on December 23. As of the end of the morning session on that day, the parties had resolved between 25 and 30 issues, mostly noneconomic, but some having economic implications. Some of the proposals agreed upon had been initiated by the Locals, others by the County. The parties had also, by that time, resolved virtually all of the noneconomic issues. There remained, however, some eight to ten disputed proposals per Local, some of which were wage and fringe issues common to all of the Locals.

When the afternoon session on December 23 began, the local represent tives present were those of Local 1925-A. Following discussions, proposa and counterproposals, the parties caucused. Upon the parties' reconvenin Abelson inquired as to the County's intentions concerning the laundry. Hayman replied that the Lakeland Home flatwork laundering work was to be subcontracted, and that, as a result, the four employes in the laundry wh had been so notified would be laid off, effective January 1, 1977. Follo ing that indication, no further substantive bargaining discussions occurr during that meeting. The parties did, however, discuss and agree upon wh no open dates during the balance of 1976, and Hayman indicated that he

Thus, while overall agreement was not reached on a successor to any of the Locals' 1976 agreements with the County by the end of 1976, the foregoing reveals that during 1976 the County was generally willing to meet at reasonable times and not intent upon avoiding tentative agreements on many of the items in dispute.

Abelson's testimony cited three specific County actions amounting in the Locals' view to "foot dragging", to wit, (1) the County's refusal to schedule a bargaining meeting between December 24 and 31, 1976; (2) its conditioning of its presentation of an overall economic offer upon resolution of all noneconomic issues, contrary to its approaches in prior rounds of bargaining with the Locals; and (3) its proposal of a cut in wages as part of its first and only overall economic offer made during 1976.

Those County actions, without more, could, but do not necessarily support the Locals' attribution to the County of a deliberate intention to avoid reaching overall agreements with the Locals during 1976. For example, the December 24-31 period involves holidays and is a characteristically difficult time to schedule a bargaining meeting. Hence, the County's refusal to meet on either Christmas or the one other day proposed by Abelson during that period and its failure to suggest any other date for Abelson to try to arrange his schedule to accommodate could, but need not, reflect "foot dragging". This is especially so in view of the absence of evidence of refusals to meet on any occasions prior to December 23, and in view of the fact tha the Local seems to have drawn substantive bargaining in the December 23 meeting to an end. Moreover, the County's "let's resolve noneconomic items first" was, to be sure, a departure from its approaches in previous years. But the record reveals that the parties had not settled before the nominal termination dates of four of their last five prior sets of agreements. Hence, the County's change in approach could be viewed as an effort to promote an overall settlement by expediting noneconomic issue bargaining just as it could also be viewed as a means of delaying bargaining on the critical wage and fringe issues of a common concern to all of the Locals. Moreover, while the fact that the County made only one overall economic offer during 1976 could reveal an intention to avoid agreement, it may also be explained, at least in part, by the fact that the parties had mutually agreed to restructure bargaining so as to address issues of concern to a single local by bargaining about same without the other Locals' teams being present. 19/ Since much of the bargaining in 1976 was in such a single-local format, the newly agreed-upon approach may well have contributed to the circumstances that led the Locals to feel that the County was paying less and later attention to the major overall economic issues than it had in the past. Finally, while the County's proposal of a wage cut was an unlikely means of bringing about overall settlements, especially where, as here, there is no evidence that the County cited unusual economic or political circumstances warranting an overall wage reduction; nevertheless, the MERA duty to bargain ". . . does not compel either party to agree to a proposal or require the making of a concession. 20/

However, certain other record facts satisfy the examiner that the County did, by the above enumerated actions (1-3) cited by Abelson, deliberately avoid agreement during 1976 on successor agreements with the Locals. As of early June, 1976, the County had learned that it could enjoy a cost saving by subcontracting a major portion of the Lakeland Home laundry work. In addition, it had, by that time, formulated plans

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19/ Hayman's testimony in that regard was undisputed. He stated ". . . we mutually agreed that we would have separate sessions with each Local to discuss their own peculiar problems and try to resolve them and leave the items that applied to all units for joint bargaining sessions." Case XXVI, Tr. 7.

20/ Section 111.70(1)(d), Stats.

to take advantage of that saving by subcontracting, even if that were to result in layoffs to be effective January 1, 1977. Rather than affirmatively requesting bargaining in hopes of reaching agreement with Local 1925-A to achieve its ends, the County chose, instead, to put Local 1925-A on clear notice of its plans and to let the Local make the next move. The Local objected to the anticipated layoffs, claiming statutory and contract protections. In response, on July 7, Janowetz openly posited the idea of allowing a contract hiatus to occur, and the County's labor relations lega counsel and chief negotiator, Hayman, expressly took the matter under advisement. The County did not, thereafter, openly posit any other approach to achieving its announced ends than that proposed by Janowetz. More importantly, the County appears to have pursued no other means of achieving its ends than through a contract hiatus. There is no evidence, for example that the County proposed terms for a successor agreement that would author it to implement the anticipated January 1, 1977 layoffs. Even when it was reasonably certain that layoffs would result from the contemplated subcontracting, the County initiated no efforts to obtain an agreed-upon effectu ation of its objectives. Yet, shortly after achieving those objectives b effecting the January 1 layoffs free of contractual restraints, the County unhesitatingly bound itself anew to the 1976 agreement from and after January 13. The examiner is therefore compelled to conclude that the County deliberately sought freedom from legal impediments to its planned subcontracting (and to the resultant cost savings) by establishing a waiver-by-inaction defense to a charge of unlawful unilateral change and by establishing a contract hiatus in order to avoid any contractual prohibitions in effect on January 1, 1977.

In the context of those additional facts, the County's actions (1-3 above) cited by Abelson are sufficient to constitute a pattern of conduct intended to avoid agreement during 1976 with respect to Local 1925-A. Since it took the same enumerated actions in connection with its 1976 bargaining with the other Locals, the examiner has also concluded that the County deliberately avoided an overall agreement with each of the other complaining Locals.

Accordingly, a cease and desist and notice-posting order has been issued in favor of each of the Locals. Local 1925-A's failure to request bargaining about the County's announced plans to change a condition of employment on January 1, 1977 waived the County's duty to refrain from unilaterally implementing those changes and makes the Union's request for re-establishment of the status quo ante January 1, 1977 (by reinstatement and back pay orders) inappropriate. However, that Union failure did not waive the County's MERA obligation to bargain in good faith and with an intention to reach an overall agreement with each of the Locals during 1976.

Alleged Violation of Agreements to Reach Successor Agreement By December 3 If Possible

The Locals contend that the County's 1976 bargaining table conduct also violated the 1976 Local 1925-A agreement Sec. 27.01 (and parallel provisions in the other Locals' 1976 agreements) which reads, in pertinent

Nevertheless, the conclusion discussed in the preceding section of this Memorandum, that the County deliberately avoided reaching overall agreements with the Locals during 1976, discussed in the preceding section, is clearly inconsistent with the spirit and letter of the contractual provisions noted above. Hence, the County's 1976 bargaining conduct noted in the preceding section as evidence of bad faith has also been found by the examiner to be the basis for finding Sec. 111.70(3)(a)5 and 1 violations by the County with respect to each of the Locals.

Alleged Interference by Delayed Communication of Specific Information Concerning Layoffs

In its brief, Local 1925-A argues that the County committed an independent violation of Sec. 111.70(3)(a)1 by ". . . withholding information of the impact of [the subcontracting] upon represented employes. . . ."

The record indicates, however, as noted in Finding 6, that Coogan informed the Local 1925-A president in early June of 1976, that the County was contemplating subcontracting a portion of the laundry work and a layoff of all but perhaps a couple of the bargaining unit employes employed in the laundry at the time of the subcontracting. Then, as noted in Finding 9, the County informed Local 1925-A's representatives of the County Board's June 15, 1976 passage of a resolution concerning January 1, 1977 changes in laundry operations and of the fact that it would mean subcontracting of a major portion of the Lakeland Home laundry work to an outside firm.

Taken together then, the information so conveyed in early June and on July 7 put the Local on notice that the County intended to subcontract laundry work on or about January 1, 1977 and to lay off (by inverse order of seniority as then contractually provided) all but a couple of the regular employes remaining in the laundry as of that date. 21/ The County could not know which, if any, regular laundry employes it would actually lay off on January 1, 1977 because it did not know which of the regular laundry employes would be gone from the laundry by that time due to, e.g., resignation, discharge, promotion, transfer, etc. Hence, the County's forbearance of notification of layoff to the affected employes until mid-December does not appear unreasonable. Clearly, though, a simultaneous notification to the Local at the time the employes were notified of their impending layoffs would have been most desirable and helpful. Moreover, while the County did inform the Locals' representatives, during the December 23 meeting, about the specific number and identity of those to be laid off, it did so only in response to the Locals' inquiry in that regard.

Nevertheless, in view of its earlier communications to the Locals' president and other representatives, the County's failure to notify the Local on its own initiative as to the exact number and identity of those to be laid off does not appear reasonably likely to have interfered with, restrained or coerced municipal employes in the exercise of protected MERA rights. Therefore, the alleged independent violation of Sec. 111.70(3)(a)1 has not been found herein.

Dated at Madison, Wisconsin this 14th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

21/ Note also the County's June 17 communication to the laundry employes including their union steward described in Filnding 8. Coogan there set the number of employes to be retained at three, the number it ultimately retained.