STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF GREEN BAY, CITY HALL EMPLOYEES UNION LOCAL 1672-A, AFSCME, AFL-CIO and RAMONA DAVIDS,	
Complainants,	
vs.	Case XCVII No. 28059 MP-1218 Decision No. 18731-A
CITY OF GREEN BAY,	
Respondent.	

Appearances:

Lawton & Cates, by Attorney Richard B. Graylow, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainants.

Attorney Mark Warpinski, Assistant City Attorney, City Hall, 100 North Jefferson, Green Bay, Wisconsin 54301, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

City of Green Bay City Hall Employees Union Local 1672-A, AFSCME, AFL-CIO 1/ having filed a complaint with the Wisconsin Employment Relations Commission on May 20, 1981 alleging that the City of Green Bay had committed prohibited practices within the meaning of Sec. 111.70(3)(a) 1, 2, 3 and 4, Stats., by refusing to bargain over the decision of the City to subcontract certain services currently performed by employes represented by the Union and by refusing to bargain over the impact of said decision; and the Commission having appointed Peter G. Davis, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order in said matter pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and hearing having been held in Green Bay, Wisconsin on July 21, 1981; and the parties having submitted written argument the last of which was received on January 6, 1981, the Examiner having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. City of Green Bay City Hall Employees Union Local 1672-A, AFSCME, AFL-CIO, herein the Union, is a labor organization which functions as the collective bargaining representative of certain employes of the City of Green Bay. James W. Miller functioned as the representative of the Union at all times material herein.

2. The City of Green Bay, herein the City, is a municipal employer.

3. In the Fall of 1980 the City and Brown County entered into an agreement pursuant to Sec. 66.30(3), Stats., establishing a Joint Data Processing Commission which was to provide data processing service to both the City and Brown County. The City and Brown County also agreed that Brown County would be the employer of all employes functioning under the Data Processing Commission's direction and that five City employes represented by the Union who performed data processing functions would therefore become employes of the County upon implementation of the agreement. Pursuant to the foregoing, on March 3, 1981 Ernest M. Johnson, Personnel Director of the City, sent the following letter to Miller:

1/ During the hearing the Union amended the complaint to include Ramona Davids as a Complainant.

This is to inform you of the intentions of the City of Green Bay and Brown County Joint Data Processing Commission to complete consolidation of the data processing functions of the City & County under the Joint Data Processing Commission. This will necessitate the elimination of all data processing positions underthhe (sic) existing Table of Organization of the City of Green Bay. All existing personnel who wish to be will be placed in positions within the newly formed data processing organization. It is the intention of the Data Processing Commission to complete the consolidation on or about May 1, 1981. If you wish to discuss the impact of this change, contact me at your earliest convenience so that arrangements can be made for a meeting.

4. Miller responded to Johnson's March 3, 1981 letter with the following letter dated April 7, 1981:

This letter will acknowledge receipt of your letter dated March 3, 1981, concerning the elimination of the Data Processing positions.

The Union is currently developing proposals to present to the City of Green Bay on this matter. It is anticipated that the Union will be ready to submit the proposals and begin negotiations shortly after May 1st.

5. Miller's April 7, 1981 letter prompted Assistant City Attorney Mark Warpinski to write Attorney Richard Graylow, counsel for the Union, the following letter dated April 8, 1981:

On March 3, 1981, the City notified Mr. Jim Miller, the Union Representative for Local 1672-A of the decision of the City of Green Bay and Brown County to amalgamate the data processing departments of those municipalities. We further advised you that on May 1, 1981, that such consolidation would go into effect. On April 7, 1981, Mr. Miller, on behalf of his Union employees, notified the City that he would have a proposal to submit to the City with respect to the necessary negotiations to accommodate such a consolidation but that such information would not be available until after May 1.

Please be advised that the City of Green Bay considers this to be a delaying, deliberate, and provocative movement on behalf of Local 1672-A. We believe that the Union is not entitled to drag its feet to avoid the consequence of a purely management decision. We are not prepared now, nor will we ever be prepared, to negotiate the actual decision to consolidate these two departments. We will as the law provides and directs, be prepared to negotiate the changes and the impacts that grow out of those changes with Local 1672-A.

While we cannot order that negotiation take place immediately, we believe that in the spirit of cooperation that such negotiations should commence in the very near future. Be advised that the City intends to protect all of its management rights in these proceedings. Your earliest and most convenient response will be greatly appreciated.

Coincidentally Graylow wrote Johnson the following letter also dated April 8, 1981:

I represent Local 1672-A, AFSCME, AFL-CIO and write to you in its behalf. As you know, the Local is the exclusive bargaining agent for, among other things, all employees working in the date processing area.

It has come to my attention that the City intends to eliminate ". . . all data processing positions under the existing Table of Organization of the City of Green Bay." Please see your letter to Mr. Jim Miller in this regard.

I am informed and believe that the Local wishes to bargain, not only the impact of the decision, but the decision itself. Accordingly, Mr. Miller, AFSCME representative, will be contacting you in the very near future, if he hasn't already, with the Local's bargaining proposals.

6. Graylow responded to Warpinski's April 8, 1981 letter with the following letter dated April 13, 1981:

I have received your letter of April 8, 1981.

I have asked Mr. Jim Miller to contact your office, or your representatives at once in order to accomodate your needs.

I wish to advise further that "effective date" of amalgamation is, in my opinion, the mandatory subject of bargaining. I so advise in light of your assertion of the first unnumbered paragraph that apparently, a May 1, 1981 "effective date" has already been determined unilaterally.

Coincidentally, Warpinski, apparently prompted by Graylow's letter to Johnson dated April 8, 1981, sent the following letter to Graylow dated April 13, 1981:

I would like to modify my letter of April 8, 1981. Please be advised that the City is prepared and will bargain whatever the law requires. Please be further advised that we are proceeding on this matter.

7. On April 29, 1981 Warpinski sent Miller the following letter and Memorandum of Understanding:

Please find enclosed a memorandum of understanding as yet unadopted which forms the basis for the amalgamation of the two data processing departments. At this point, the City of Green Bay is prepared to proceed to negotiate all that is required by law of this amalgamation with AFSCME, Local 1672-A.

Please contact me or have your attorney contact me as soon as possible. You are aware that we intend to proceed with this matter and time is now of the essence to complete the project the project (sic).

MEMORANDUM OF UNDERSTANDING

The following agreement has been reached between Brown County and the Drivers, Warehouse and Dairy Employees Union, Local No. 75, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, representing the Courthouse Complex employees, regarding represented employees of the Joint City/County Data Processing Department.

1. The Department seniority list is established as follows:

Name	Classification	Seniority Date in Department	Seniority Date in Classification (if Different)
Anne Andrews	Computer Operator	6/27/77	10/3/79
Ramona Davids	Programmer/Analyst II	10/10/77	9/81
Jacqueline Cook	Data Entry Coordinator	11/1/77	
Sandra Van Lanen	Data Entry Operator	1/16/78	
Kathleen Davis	Programmer/Analyst II	8/9/78	
Jean Stencil	Computer Operator	2/19/79	
Beth Longly	Data Entry Operator	5/7/79	
Patti Bellisle	Data Entry Operator	8/20/79	
Linda Kirby	Data Entry Operator	11/19/79	
Jeffrey Austin	Programmer/Analyst II	2/4/80	
Ron Torznik	Programmer/Analyst II	4/20/81	

2. Seniority

a. In the event of a layoff within the department, employees would exercise their seniority within their classification and the department providing the employee is qualified to do the work.

b. If present Brown County employees were to be laid off, they can exercise their seniority rights within the Courthouse Complex Bargaining Unit.

c. If present City of Green Bay employees were to be laid off, they can exercise their seniority rights within the

Courthouse Bargaining Unit from the date of transfer to the Brown County Joint City/County Data Processing Department.

d. City of Green Bay employees retain fringe benefits with length of service based on the date they were hired by the City of Green Bay.

e. In the event an additional computer operator is needed and one less data entry operator is needed, the County will make a good faith effort to train a data entry operator to be a computer operator.

3. Rates of Pay

Classification	Hourly Rate of Pay Present	7/12/81
Data Entry Operator	$5.98	$6.11
Data Entry Coordinator	$6.39	$6.53
Computer Operator	$6.43	$6.58
Programmer/Analyst I	$8.58	$8.78
Programmer/Analyst II	$9.22	$9.43

Programmer Analysts who have less than two years of experience will be classified as Programmer/Analyst I. Programmer Analysts who have two or more years of experience will be classified as Programmer/Analyst II.

No such Memorandum had been adopted by either the City or Brown County as of July 21, 1981.

8. Miller then sent Johnson the following letter dated April 30, 1981:

The following proposal is made on behalf of Local 1672-A, Green Bay City Hall Employees, AFSCME, AFL-CIO, concerning the City Data Processing positions:

"There shall be no amalgumation (sic) of the City of Green Bay Data Processing positions or functions with any other unit for any reason".

Please advise me as to a convenient date for negotiations.

9. Warpinski then sent Miller the following letter date May 1, 1981:

Your correspondence of April 30, 1981, to Ernest Johnson regarding the Joint Data Processing Department has been referred to me for response. Having reviewed your response and our prior correspondence to you, please be advised that we are prepared to make arrangements for a meeting with you any time after May 4, 1981, to negotiate the resolution of this matter.

Be mindful of the fact that we are responsible to the public and need to take action on this Joint Data Processing Department. I make no comment on your proposal and reserve same until our meeting.

10. On or about May 6, 1981 Johnson sent the following memo to members of the City's Personnel Committee with a copy to Miller.

RE: Update and Recommendation on Consolidation of Data Processing Units of the City and County.

At the regular meeting of the Joint Data Processing Commission on April 23, 1981, the final steps necessary to complete consolidation were discussed. It was decided that Mr. Brew, the Director of Information Services, should proceed with making the necessary arrangements to move the equipment to the new location in the Northern Building on the weekend of May 16-17, 1981. The arrangements have been made and the move has been scheduled. The next step that needs to be accomplished is the combining of the existing

staff members of each jurisdiction under the Data Processing Commission. Discussions have continued among Mark Warpinski, Don VanderKelen, and myself, concerning the position of the City in this matter. Additionally, written requests have been sent to the business agent of the bargaining unit for the City in an effort to make arrangements to meet with him to discuss consolidation. We have received a written response from the business agent as follows:

> "There shall be no amalgamation of the City of Green Bay Data Processing positions or functions with any other unit for any reason."

As a result of the aforementioned discussions, I am recommending that the following action be taken at the Personnel Committee meeting on May 13, 1981:

> The Data Processing positions in the City of Green Bay Table of Organization be deleted. The effective date of this action will be the date that the Board of Supervisors in Brown County approve the acceptance of the positions in the Table of Organization for the City/County Joint Data Processing Commission.

11. Miller then sent the following letter dated May 14, 1981 to the City's Mayor:

> On behalf of Local 1672A Green Bay City Hall Employees Union, AFSCME, AFL-CIO I wish to once again protest the unilateral decision made by the City of Green Bay with respect to the amalgamation of the Data Processing functions and possessions.
>
> The Union has attempted to collectively bargain, not only the decision, but impact of same as well, however, the City has absolutely refused to do any collective bargaining to date.
>
> As the Chief Executive officer of the City of Green Bay, I ask you to direct your officers, agents and employees to cease and desist forthwith from any amalgamation of these functions until such time as all these matters are collectively bargained.
>
> In addition, I wish to advise that I have instructed the Unions Attorneys to proceed with whatever appropriate remedial litigation is advisable.
>
> Please let me have your response as soon as possible.

12. On or about May 16, 1981 as a partial implementation of the decision to subcontract with Brown County for data processing services, the City moved a computer operated by Anne Andrews, an employe represented by the Union, to a location within a Brown County office. Effective May 18, 1981 Andrews' work site was changed to reflect the computers location. The work site of the remaining four City data processing employes remained unchanged.

13. On May 19, 1981 the City Personnel Committee met and took the following action:

> #1. Proposal to delete the positions in the Data Processing Department from the Table of Organization.
>
> The Personnel Director stated that Bill Brew, the Director of Information Services, was present to answer any questions that the Committee might have.
>
> Mr. Brew stated that progress is being made in the Data Processing merger. The computer has been moved to the Northern Building, but the City Data Processing employees are still in City Hall.
>
> Ald. Zolper asked who was operating the computer if it is in the Northern Building.

The Personnel Director stated that all of the operations are still the same. The County Data Processing employees used to come to City Hall to use the computer; now the City employees go to the Northern Building to use the computer. Just the location of the computer is changed; everything else is the same.

Ald. Zolper stated that he wants all of the City Data Processing employees to have the same rights as far as status and seniority for promotions and vacations, as if they were still City employees.

There was a motion and a second that the agreement between the City of Green Bay and Brown County for the Joint Data Processing Commission has been ratified by both municipalities. The City therefore states that all rights of its City employees who shall be affected by this amalgamation be protected in such combination and further that such City employees shall suffer no diminution of any benefits or any other matters concerning wages, hours, and working conditions, and should be treated as though they were still City employees. On the effective date of such amalgamation, the City Data Processing Department shall cease to exist or be part of the City's Table of Organization. Motion carried.

There was a motion and a second to adjourn. Motion carried.

14. Warpinski sent the following letter to Graylow on or about May 29, 1981:

As I previously indicated to you in our most recent phone conference, the Common Council has adopted a resolution providing that the Joint Data Processing Department will not be staffed by City employees until such time as the City is satisfied that its employees will suffer no diminution in their present benefits. We have taken that to mean that the present City employees may not suffer any net diminution in benefits.

To that end, our Personnel Director has completed a comparison of the City and County benefits as they would apply to all of the City employees intended to be amalgamated into the Joint Data Processing operation. The comparison shows that all of the employees will receive an increase in net benefits and salary as a result of the combination of the two departments. That being the case, we are prepared to subject to any suggestions you may have to advise the Personnel Committee of the Common Council that the proposed scheme of amalgamation will not result in a diminution of benefits.

I will provide you with the final analysis of the comparison as soon as it is completed.

We believe that we are prepared to meet and discuss this amalgamation with you and your clients in the very near future. We would appreciate it if you could provide us with any information that you may have regarding those people that you represent who may choose not to participate in the amalgamation but would perfer (sic) to "bump" back into a regular non-data processing, City job. Your earliest and most convenient response will be greatly appreciated.

15. On or about June 10, 1981 Warpinski sent the following letter to Graylow:

On June 9, 1981, at other proceedings, I mentioned to Mr. Miller that the City is very anxious to meet with you to negotiate those matters dealing with the amalgamation of the Data Processing Department with the Brown County unit. Mr. Miller indicated that no such negotiation will take place until such time as the equipment is returned to City Hall. I will make no editorial comment in regards to that statement. Rather, I ask you to confirm with Mr. Miller that that is your position. I will check back with you in five days if that is, in fact, the case.

Please advise.

16. On or about June 12, 1981 Warpinski sent the following letter to Graylow:

I thought it would be appropriate to follow up my correspondence of June 10, 1981, with another request to meet with you and your clients to meaningfully discuss a resolution of the amalgamation of the Data Processing Department of the City with that of the County. While we understand Mr. Miller's proposal, we do not believe that that is a reasonable alternative. If, however, you believe that to be the case and also believe that that will serve as a basis for discussion in this matter, be again advised that we are more than willing to meet with you to discuss this matter.

In the alternative, if you have any other suggestions that you believe would be cost effective regarding the amalgamation of these two departments, please let us know.

Because the administration of the City including both appointed and elected officials, are charged with the responsibility of appropriately expending the public funds, we make this request to meet with you to discuss these matters.

17. In response to Warpinski's letter of June 10 and 12, 1981 Graylow sent the following letter dated June 17, 1981 to Warpinski:

Mr. James Miller has indicated his desire to receive any written proposals of the City relating to (1) amalgamation or (2) impact of amalgamation.

In as much as I do not wish to become a witness in this matter, I ask that any and all further correspondence with respect to bargaining be transmitted directly to Mr. Miller.

18. On July 6, 1981 the City and the Union executed a collective bargaining agreement with a term of January 1, 1981 through December 31, 1981 which set forth the terms and conditions of employment of the data processing employes in question and included the following provision:

ARTICLE XXV

MANAGEMENT RIGHTS

The Union recognizes the prerogative of City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which City has not officially abridged, delegated or modified by this Agreement are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote and discipline for just cause, and to determine reasonable schedules of work and to establish the methods and processes by which such work is performed.

This clause is not intended to deny the employees appeal through the grievance procedure.

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

CONCLUSIONS OF LAW

1. The City of Green Bay has a duty to bargain under the Municipal Employment Relations Act with the City of Green Bay City Hall Employees Union Local 1672-A, AFSCME, AFL-CIO over both the decision to enter into an agreement with Brown County to subcontract certain data processing services and the impact of any such decision to subcontract upon the wages, hours and conditions of employment of employes represented by Local 1672-A.

2. The City of Green Bay may not implement any decision to subcontract data processing services prior to exhausting its duty to bargain with Local 1672-A over that subject.

3. The City of Green Bay, when it partially and unilaterally implemented the decision to subcontract by moving certain equipment and one employe to a work site controlled by Brown County, violated its duty to bargain with Local 1672-A

and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 Stats. The City of Green Bay's action in that regard did not constitute a prohibited practice within the meaning of Secs. 111.70(3)(a)1, 2 or 3, Stats.

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

ORDER 2/

The City of Green Bay, its officers and agents, shall immediately

1. Cease and desist from implementing a subcontract prior to the exhaustion of its duty to bargain with Local 1672-A over the decision to subcontract.

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

   (a) Restore the status quo by returning the equipment and the employe from the Brown County facility to their original work location.

   (b) Bargain collectively with Local 1672-A regarding the decision to subcontract data processing services and the impact of any such decision upon the wages, hours and conditions of employment of employes represented by Local 1672-A.

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

The portions of the complaint alleging violation of Secs. 111.70(3)(a)1, 2 and 3, Stats., are hereby dismissed.

Dated at Madison, Wisconsin this 11th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its May 20, 1981 complaint, the Union alleged that the City had refused to bargain over the decision to amalgamate data processing services and the impact thereof and had thereby committed prohibited practices within the meaning of Secs.111.70(3)(a)1, 2, 3 and 4, Stats. As a remedy, the Union asked that the City be ordered to (1) restore the status quo; (2) bargain over the decision to amalgamate and the impact thereof; and (3) pay the Union's attorneys fees and costs.

On June 11, 1981 the City filed an answer which denied the alleged refusal to bargain and affirmatively asserted that it had unsuccessfully requested that the Union bargain over the issues in question. On June 23, 1981 the City filed an amended answer which included (1) a request for a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to whether the decision to consolidate is a mandatory subject of bargaining; and (2) a counterclaim alleging that the Union had refused to bargain over the impact of the consolidation and had thereby committed prohibited practices within the meaning of Secs. 111.70(3)(b)1 and 3, Stats.

During the July 21, 1981 hearing, the Examiner instructed the City to formally file a separate petition for declaratory ruling if it wished to pursue same. As to the City's counterclaim, the Union's unwillingness to pursue said matter on July 21 led the Examiner to inform the parties that separate hearing at a later date would be scheduled. To date, no request for the scheduling of such a hearing has been received and no such hearing has been held. On July 30, 1981 the Union filed a petition for declaratory ruling pursuant to Sec. 227.06(1), Stats., seeking a ruling from the Commission that the decision to amalgamate is a mandatory subject of bargaining. On August 6, 1981, the Commission informed the parties that no action would be taken on said petition until a decision was issued in the instant matter.

The Positions of the Parties

The Union argues that for the purposes of analysis, the "amalgamation" or "consolidation" is identical to a subcontract inasmuch as the City is divesting itself of equipment, personnel and responsiblity in the area of data processing and then buying the same services from Brown County. The Union thus contends that under Unified School District No. 1 of Racine County v. WERC 81 Wis 2d 89 (1977) the decision to amalgamate is clearly a mandatory subject of bargaining. As it believes the City has refused to bargain over the decision to amalgamate, the Union requests that the City be ordered to restore the status quo and bargain.

The City initially asserts that it has always been willing to bargain the impact of the amalgamation and thus that any Union allegations to the contrary should be dismissed. As to the decision to amalgamate, the City alleges that it is willing to bargain over that subject without waiving its ability to subsequently assert that the decision is a permissive subject of bargaining. It contends that this willingness meets its duty to bargain over the decision and thus requests that the Union's allegations in that regard be dismissed. Finally, the City argues that it has no obligation to return the computer and its operator to the original work site prior to any bargaining. It contends that it has contractually retained the right to establish the work site and that as long as the employes remain the City's and retain their contractual benefits, no alternation of the status quo is present.

Discussion

The ebb and flow of the parties' positions as they jockeyed for the upper hand in their dispute renders analysis of the issues somewhat more difficult than it otherwise would have been. However, the following can be discerned with little difficulty:

1. The City decided to eliminate its data processing personnel and on March 3 notified the Union that it was willing to bargain the impact of its decision.

2. The Union, wishing to block the consolidation, notified the City that it was willing to begin negotiations shortly after the date the City wished to implement the decision.

3. The City, upset by the Union's stalling, asked that bargaining begin more quickly but refused to bargain over the decision to amalgamate stating "We are not prepared now, nor will we ever be prepared, to negotiate the actual decision to consolidate these two departments."

4. The Union explicitly informed the City that it wished to bargain over the decision and the impact thereof.

5. The City then took a more conciliatory tack and told the Union that it was willing to bargain "all that is required by law". The City, apparently hoping to forestall Union concerns about impact, sent the Union a copy of a tentative agreement reached by the Teamsters and Brown County which purported to insure that no City employe represented by the Union would be adversely affected.

6. Unmoved, the Union submitted a bargaining proposal which would prohibit amalgamation. The City responded by suggesting that bargaining commence anytime after May 4.

7. On or about May 17, the City began to implement the consolidation by moving certain equipment and one employe.

8. Thereafter the Union refused to bargain over either the decision or the impact until the equipment and employe were returned to the original work site.

Any meaningful determination regarding the duty to bargain under the foregoing circumstances must commence with resolution of the question of whether the decision to amalgamate is a mandatory subject of bargaining. A comparison of the situation at hand to that confronting the Court in Racine clearly yields an affirmative answer to that question.

In Racine the Court reaffirmed that the applicable standard for determining bargainability "is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees or whether it is primarily related to the formulation or management of public policy". The Court then proceeded to apply this standard to a school district's decision to subcontract its food service program via the following analysis:

. . .

> The decision to subcontract the district's food service program did not represent a choice among alternative social or political goals or values.
>
> The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. The decision would presumably be felt in only two ways; it is argued that it would result in a financial saving to the district, and the district's food service personnel will have to bargain with ARA for benefits which they enjoyed before the decision, including the loss of some 2,304 accumulated sick-leave days and participation in the Wisconsin Retirement Fund.
>
> The primary impact of this decision is on the "conditions of employment"; the decision is essentially concerned with wages and benefits, and this aspect dominates any element of policy formulation. The Commission and the circuit court were therefore correct in holding that bargaining was mandatory with respect to the decision.

. . .

> Furthermore, no remand is necessary to determine whether the food program is "primarily related" to wages, hours and conditions of employment. The district does not argue that the contract will affect the nature of its services, nor has it made an offer of proof or pointed to any prejudice. The nature of the decision to subcontract the operation was fully litigated before the Commission, and there is no reason to believe an additional hearing would produce significant new evidence.

. . .

While the parties and thus the Examiner have utilized the terms "consolidation" and "amalgamation" when referring to the instant dispute, the City is, in essence, subcontracting with Brown County for data processing services. As in Racine, the decision to subcontract does not represent a choice among alternative social or political goals or values. The decision merely substitutes one public employer for another. Apparently the same work will continue to be performed in the same manner as no evidence was presented indicating any change in service level. As in Racine, the fact that the City has attempted to minimize any impact upon the employes is of no consequence in the determination of the mandatory status of the decision itself. In the absence of any showing that the decision is related in any significant degree to the "formulation or management of public policy" and given the apparent and substantial impact which a transfer of employes from one employer to another could have on "wages, hours and conditions of employment", it is found that the latter dimensions of the decision predominate. Where, as here, and as in Racine, the decision primarily relates to wages, hours and conditions of employment, it must be found to be a mandatory subject of bargaining.

The second critical determination to be made herein involves the Union's insistence that the status quo be restored before any bargaining on either the decision or the impact takes place. It is axiomatic that where an employer has made a unilateral change in an area which is subsequently determined to be a mandatory subject of bargaining, the employer is typically ordered to return to the status quo as it existed prior to the change so that meaningful bargaining over the subject can occur. Absent such an order, bargaining would likely be a fraud as the Employer would not be disposed to meaningfully discussing the reversal of a decision which had already been implemented. Thus, in Racine, Dec. No. 12055-B, (10/74) the Commission ordered the District to reinstitute the food service program which had been subcontracted and to then bargain upon demand regarding the decision to subcontract. Here the record establishes that the City moved equipment and one employe to a Brown County site in order to begin to implement the subcontract. Even assuming that the City did have the right to take such an action under the parties contract, 3/ where the action was admittedly motivated by a desire to partially implement the decision to subcontract, it is appropriate to order that the status quo be restored. Having concluded that the appropriate remedial order in the instant case should include such a requirement, it follows that the Union's refusal to bargain over either the decision or the impact until the status quo was restored is proper.

Applying the foregoing to the facts at hand, one finds that between the March 3, 1981 letter to Miller and April 13, 1981 letter to Graylow, the parties were sparring over the scope of their bargaining. However as no demand for bargaining over the decision had been formally made by the Union or refused by the City, no finding of a refusal to bargain by the City during this period is appropriate. From the April 13, 1981 letter to Graylow until the May 17, 1981 move of equipment and personnel, the City was taking the somewhat indefinite but legally unassailable position that it was willing to bargain "whatever is required by law". It received Miller's proposal of April 30 and responded properly suggesting dates for bargaining. Thus no finding of a refusal to bargain is appropriate during this period either. However, once the City unilaterally took the first steps toward implementation of the subcontract, it breached its duty to bargain with the Union. Thus, despite the City's purported willingness to bargain over

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3/ No evidence was presented as to what contract, if any, the parties were operating under in May 1981. Thus no definitive finding can be made in this regard and no waiver by contract theory can be considered.

both the decision and impact, its partial and unilateral implementation of the decision to subcontract requires a finding that the City thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. As the Union failed to make any argument as to why the instant refusal to bargain should also be found to be violative of Secs. 111.70(3)(a)1, 2, or 3, Stats., and as the Examiner is unaware of any valid theory under which such a finding would be warranted, these allegations have been dismissed.

As to the Union's request for attorneys fees and costs, the Commission in Madison Metropolitan School District (16471-D) 5/81 aff'd Dane County Circuit Court 2/15/82, appealed to Court of Appeals 3/82, stated:

> . . . no attorney's fees nor costs will be granted, unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language. The only exception shall be in cases where the Commission finds that an employe has, or employes have, been denied fair representation under the circumstances previously discussed herein.

As none of the cited exceptions apply here, the Union's request is denied.

Dated at Madison, Wisconsin this 11th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner