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. CITY OF GREEN BAY, Respondent.	Case XCVII No. 28059 MP-1218 Decision No. 18731-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainants.

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

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND MODIFYING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Peter G. Davis having, on June 11, 1982, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above entitled proceeding wherein he concluded that the Respondent had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.; and the Respondent having on June 28, 1982 timely filed a petition for Commission review of said decision; and the Complainants, on June 29, 1982 having timely filed a petition for Commission review of a part of the Examiner's order; and the parties having filed briefs in the matter, the last of which was received on August 19, 1982 and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and the Commission having reviewed the decision of the Examiner, affirms the Examiner's Findings of Fact and Modifies in part the Examiner's Conclusions of Law and Order.

NOW, THEREFORE, it is

ORDERED 1/

1. That the Examiner's Findings of Fact be, and the same hereby are, affirmed.

2. That paragraph 1 of the Examiner's Conclusion of Law be, and the same hereby is, affirmed.

2. The totality of conduct of the City of Green Bay, including its moving certain data processing equipment and an employe to a work site controlled by Brown County prior to exhausting its duty to bargain with Local 1672-A, constituted bad faith bargaining, and the City thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, and derivatively (3)(a)1, Stats. The City of Green Bay's actions in that regard did not constitute a prohibited practice within the meaning of Secs. 111.70(3)(a)2, or 3, Stats.

4. That paragraphs 1 and 2(a) of the Examiner's Order be, and the same hereby are, modified to read:

1. Cease and desist from bargaining in bad faith with Local 1672-A over the decision to subcontract.

1/ (Continued)

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

2. (a) Return to their original work location any data processing equipment and any data processing employes which have been transferred to the Brown County facility.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND MODIFYING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Background:

It its complaint initiating this proceeding, the Union, as the collective bargaining representative of (in part) "all employes of the City of Green Bay employed in the City Hall and associated departments . . .," alleged that the City committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 2, 3 and 4, Stats. by refusing to bargain collectively with regard to its decision, and the impact of its decision, to establish a Joint Data Processing Commission with Brown County, pursuant to Sec. 66.30, Stats. The Union alleged that this action would result in the dissolution of the City's own data processing department which is presently staffed by City employes represented by the Union. In response, the City denied that it had refused to bargain and asserted its past and present willingness to bargain both the decision to consolidate its data processing services and its impact, without, however, acknowledging that the decision itself was a mandatory subject of bargaining. The City further responded that the requirement to bargain in good faith did not require the City to return its recently moved data processing equipment and operator to their original location in City Hall.

The Examiner's Decision:

It is undisputed, and the Examiner so found in his Findings of Fact, that in the fall of 1980 the City and Brown County entered into an agreement pursuant to Sec. 66.30(3), Stats., to establish a Joint Data Processing Commission to provide data processing services to both the City and Brown County. Based upon the agreement and the City's written statements to the Union that the "consolidation" would "necessitate the elimination of all data processing positions under the existing Table of Organization of the City of Green Bay," the Examiner found that the five City employes represented by the Union who performed data processing functions would become employes of the County upon complete implementation of the agreement.

In order to trace the parties' shifting positions with regard to their obligation and willingness to bargain the proposed "consolidation", the Examiner's Findings of Fact incorporated a series of written communications between the Union and the City from March through June of 1981. In addition, the Findings incorporated notes from a meeting of May 19, 1981 of the City Personnel Committee which reported the discussion of the motion that the data processing positions be deleted.

The Examiner found that on or about May 16, 1981 the City moved computer equipment from City Hall to a location within a Brown County office and that this move was a partial implementation of the decision to subcontract. The Examiner also found that from May 18, 1981 the worksite of one employe was changed to reflect the computer's new location, while the worksite of the remaining data processing employes remained unchanged.

The Examiner made three Conclusions of Law. First, he concluded that the City had a duty to bargain 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 on the wages, hours and working conditions of the affected employes. Relying upon the Wisconsin Supreme Court's 1977 decision in Racine Schools, 2/ the Examiner stated 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 employes or whether it is primarily related to the

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2/ Unified School District No. 1 of Racine County v. WERC, 81 Wis 2d 89 (1977), hereinafter referred to as Racine Schools or Racine.

formulation or management of public policy. While noting that in the present fact situation a public, rather than private, employer was being substituted for another public employer, the Examiner still concluded that in light of the "apparent and substantial impact which a transfer of employes from one employer to another could have on wages, hours and conditions of employment," and in the absence of any showing that the decision was related in any significant degree to the formulation or management of public policy, the City had a duty to bargain over both the decision to consolidate and the impact of such decision. The Examiner also noted that there was no evidence presented indicating any change in service level. In other words, the Examiner found that in this instance, "amalgamation" or "consolidation" was the equivalent of subcontracting as discussed in Racine.

In response to the City's argument that the transfer of employes to the County would be implemented only under the condition that there would be no adverse impact on the employes, the Examiner stated that "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."

Having determined that the City had a duty to bargain both the decision and the impact, the Examiner then concluded that the City could not implement its decision to subcontract prior to exhausting its duty to bargain. In his discussion of the correspondence between the City and the Union with regard to the proposed consolidation, the Examiner noted that prior to the Union's formal demand on April 30, 1981 to bargain over the decision itself, there could be no finding of a refusal to bargain. After this letter, the City responded by suggesting dates for bargaining. However, based upon the finding that the City moved certain data processing equipment from the City Hall to a County building on or about May 16, 1981, and the additional finding that the relocation of the equipment was at least partially motivated by a desire to implement its decision, the Examiner implicitly concluded that the City had not exhausted its duty to bargain and expressly concluded that the moving of equipment and an employe by the City violated its duty to bargain.

The Examiner ordered the City to cease and desist from implementing the subcontract prior to exhausting its duty to bargain, and further, as affirmative action, ordered it to return the status quo by returning the equipment and the employe from the Brown County facility to their original location, and to bargain collectively regarding both the decision and its impact.

In discussing this remedy, the Examiner stated that the Union's subsequent refusal to bargain over either the decision or its impact until the status quo was restored by the return of the equipment and employe was a proper refusal. In that regard the Examiner reasoned:

> . . . 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

Having found that the City breached its duty to bargain with the Union once it unilaterally took the first steps toward implementation of the subcontract, the Examiner concluded that the City committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., but dismissed the allegations relating to Sec. 111.70(3)(a)1, 2 or 3, Stats.

The Petition for Review:

In its petition for review, the City does not expressly challenge any specific Finding of Fact, but argues generally against the Examiner's Conclusions of Law and Order, and, by implication, certain of his Findings. First, it argues that subcontracting, as that term is employed in the Racine decision, has not occurred. The City argues that there are several factual distinctions that distinguish its consolidation from the usual subcontracting situation, primarily the fact that the Joint Data Processing Commission is not a private entity but is created as a result of an inter-governmental agreement authorized pursuant to Sec. 66.30, Stats. As such, the action does not substitute private employes for public employes but merely transfers employes from one public employer to another, with the City's assurance that there will be no diminution of benefits.

In further support of its argument that the consolidation does not constitute subcontracting, the City alleges that the Examiner failed to consider testimony and argument relating to the City's inability to adequately perform its data processing functions without the transfer because of its inferior and insufficient equipment and manpower. In support of its argument that the proposed transfer of computer services will affect the nature and level of its services, the City has submitted a post-hearing affadavit by its Personnel Director for the purpose of presenting an offer of proof as to why this matter should be remanded for additional testimony, or, alternatively, supporting the City's contention that subcontracting has not occurred in this instance.

The City also takes the position that, contrary to the implied findings upon which the Examiner's second and third Conclusions of Law rest, it had exhausted its duty to bargain with the Union, and therefore had the right to proceed with the transfer of equipment and employes. The City argues that absent an unconditional willingness on the part of the Union to negotiate, the City was left with no alternative but to implement its decision to consolidate. Alternatively, the City contends that the management rights clause of the collective bargaining agreement confers upon the City the authority to designate the worksite for employes, and that the transfer of equipment and employes was a mere change of worksite. The City also notes that the collective bargaining agreement is silent with respect to subcontracting.

The City requests either that the Examiner's decision be overturned on the basis of his incorrect application of Racine, or that the proceedings be remanded for the taking of additional testimony on the need for subcontracting and joint municipal participation for the public good.

The Union's petition for review appeals only from that part of the Examiner's Order 2(a) which requires the City to return one named employe to her original work location. The Union asserts that the evidence demonstrated that all of the equipment and all of the employes were removed from the City premises, and therefore the City should be ordered to return all five identified employes to the City premises. The Union's appeal of the order implicitly requests a modification of that portion of Finding of Fact 12 which states:

> . . . the City moved a computer operated by Anne Andrews . . . to a location within a Brown County office. Effective May 18, 1981 Andrews' worksite was changed to reflect the computer's location. The worksite of the remaining four City data processing employes remained unchanged.

The Union asserts that all liability findings by the Examiner should be affirmed. The Union opposes the motion for remand for the taking of further testimony, arguing that the affiant has already testified, that the evidence is not newly discovered, and that events occurring subsequent to hearing are irrelevant and immaterial on the question of liability.

Discussion:

Preliminary Matters

In its petition for review, the City has requested a "remand of these proceedings . . . for the taking of additional testimony on the need for subcontracting the participation of various municipalities in providing data processing services for the good of the public." Alternatively, it requests that the Commission consider the post-hearing affadavit submitted by its Personnel Director.

The City's request is denied. The City has not alleged that there has been material error of fact. There is no claim that the City has discovered new evidence sufficiently strong to reverse or modify the order which could not have been previously discovered by due diligence. The City merely states that it wishes to elicit further testimony from Mr. Johnson with regard to the City's need for expanded computer services. The City had ample opportunity to examine Mr. Johnson at the hearing.

Furthermore, the question of whether the consolidation constituted subcontracting and was therefore a mandatory subject of bargaining was a central issue in this case from the beginning. The early correspondence between the parties clearly demonstrates this, as well as the actual request for a declaratory ruling on the issue filed by the Union on July 29, 1981. The City's reference to the Racine case in its initial brief before the Examiner demonstrates that it was aware of the well established standard to be applied, and so it cannot now claim to have been surprised by the Examiner's analysis and conclusion. In its brief the City states that it "does not concur that in this particular case there is a mandatory obligation to bargain subcontracting or contracting out of the data processing function." The brief then states:

> That issue is irrelevant since the City has acknowledged a willingness to meet with the bargaining representative for the Union to discuss and negotiate those matters.

It thus appears that the City, in both its presentation of testimony at the hearing and the organization of its brief, chose not to address the mandatory-permissive issue. It is not reasonable for the City to claim surprise in such circumstances or for the Commission to grant an opportunity to the City present further testimony on the point.

For the same reasons, the record will not be reopened to allow consideration of Mr. Johnson's affadavit.

The City's contention that the Examiner failed to consider testimony substantiating the City's need for consolidation based on its own inability to perform the services appears to be without merit. At the hearing, only three witnesses testified: James Miller, AFSCME representative; Gerald Lang, Director of Personnel for Brown County; and Ernest Johnson, Director of Personnel for Green Bay. The last two witnesses are also members of the Joint Data Processing Commission. Each witness was initially called by the Union, with the City having full opportunity to cross-examine. After the Union rested its case, the City expressly stated that it "would adopt the testimony of Mr. Johnson on cross-examination as its testimony in defense of the prohibited practice". 3/

A thorough review of Mr. Johnson's testimony demonstrates that he made no statements regarding either the City's inability to adequately provide data processing services without the consolidation or the City's intent to significantly modify the level of its services. On neither direct nor cross-examination was he asked any questions which went to these matters.

As a final point, Exhibit No. 4 is the "Co-operative Agreement (between the City of Green Bay and Brown County) for a Joint Data Processing Commission." Article I thereof states:

3/ T. 72.

> The purpose of a Joint Data Processing Commission is to provide for the implementation and operation of a cooperative data and management information system at a reasonable cost to foster efficiency in the provision of services under the direction of the governing Board of Commissioners.

That agreement itself does not seem to suggest that the consolidation was the result of a major policy change so much as a search for a more efficient method of data processing.

During the briefing period following the petition for review, the City filed a written objection that a letter dated July 30, 1982 from the Union Counsel to the WERC Chairman was an attempt to circumvent the record by adducing additional inaccurate testimony. Counsel for the Union responded that his letter was intended and offered as the Union's brief on appeal. The Commission accepts it as such, treating it as argument, the validity of which is to be judged according to the degree to which it was supported by evidence.

The Decision to Consolidate Services

In applying the standard established in Racine, the Examiner concluded that the "consolidation", or transfer, of the City's data processing functions to Brown County was essentially a subcontracting arrangement within the scope of the Racine decision, and therefore a mandatory subject of bargaining. We agree with the Examiner's analysis and conclusion.

In evaluating whether a school district's decision to subcontract its food services was a mandatory subject of bargaining, the court in Racine reaffirmed the following standard for determining whether any particular decision is mandatory or permissive:

> . . . The question is whether a particular decision is primarily related to the wages, hours and conditions of employment, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representative of the people. This test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping" rules that are to apply across the board to all situations. 4/

In that instance, the court found that the school district's decision was a mandatory subject of bargaining for the following reasons:

> . . . 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.

4/ Racine, supra, note 2 at 102.

> 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. 5/

In the past, the Commission has applied the Racine standard to cases involving the subcontracting of snow removal services 6/, laundry services 7/, janitorial serivces 8/, and bus services 9/. It has consistently found each of these subcontracting decisions to be a mandatory subject of bargaining according to the standard in Racine. However, because the present factual situation is distinguishable in some respects, and because both the Supreme Court and the Commission have warned that the test to determine bargainability can only be applied on a case-by-case basis, each of the City's arguments will be examined in detail.

The City has argued that the amalgamation of its data processing services is distinguishable from the situation in Racine and other subcontracting cases in several relevant ways. Because the Racine standard essentially involves a balancing to determine whether a decision's primary effect is on public policy or on employe's wages, hours and conditions of employment, the City has formulated a two-pronged attack on review that emphasizes the impact of the decision on the City and minimizes the impact on the employes. Moreover, the City has apparently structured its arguments on review to fit within some exceptions implied in either the court's decision in Racine or the Examiner's decision itself.

First, the City contends that it is highly relevant that its arrangement is not with a private employer, but with another municipality. It argues that its subcontracting arrangement was actually "participation with another municipality in an intergovernmental agreement (pursuant to Sec. 66.30, Stats.) for the purpose of providing service for the public good."

We conclude, however, that, in and of itself, the fact that the anticipated subcontractor is another public employer does not require the conclusion that the formulation or management of public policy predominates in the decision.

To the extent that the City is arguing that the determinative distinguishing factor in this instance is the fact that the agreement flows from the authority vested in the City pursuant to Sec. 66.30, Stats., it must also be rejected. As the Union has argued, the legislative grant of authority to a municipality or the exercise of the power contained within that legislative grant does not necessarily eliminate the duty to bargain. 10/ Section 66.30, Stats., is silent in regard to a municipality's duty to bargain. The Supreme Court has directed that MERA is to be harmonized with other statutes whenever possible, 11/ and in this instance, there does not appear to by any obstacle to harmonization which would require derogation of the duty to bargain.

The City also points out that because of assurances gained from Brown County, the impact on the employes involved would be minimal. The record shows that the City Personnel Committee passed a motion which states:

5/ Racine, supra, note 2 at 102-103.

6/ City of Menomonie, 15150-A (4/76).

> All rights of its City employes who shall be affected by this amalgamation be protected in such combination and further that such City employes 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 employes.

The City contends that not only will the employes not suffer any diminution in benefits, but that the benefits will actually improve under the agreement between the County and the labor organization representing its employes.

It is true that in comparison to situations in which employes lose their jobs due to subcontracting, the impact on the present employes will be less. However, no matter how the City has attempted unilaterally to minimize the impact in terms of benefits, the fact that there will be not only a change in work location, but also a change in the identity of the actual employer and the exclusive bargaining representative cannot be termed insignificant. Moreover, an examination of Exhibit No. 2, a detailed comparison of the salary and benefits of the affected employes before and after consolidation, shows that although overall compensation will increase for each employe, there are changes which may be of significance to the employes, such as a longer work week. Finally, because an exclusive bargaining representative might be legitimately interested in the integrity of the bargaining unit as a whole, the immediate minimization of any impact upon present employes is not determinative. 12/

The City also argues that unlike the situation in Racine, the present work will not be performed in the same place. In fact, the work location will change, from the City Hall to the County Building. While the decision in Racine does cite continuity of work location as a relevant factor, that factor was cited as one of several factors tending to prove that the public policy dimensions of the decision did not predominate. In and of itself, continuity of work location is not a controlling factor.

The City also would distinguish Racine on the ground that "the policies and functions of the City are affected by this decision," and that the transfer "will affect the nature of its services." In its petition for review, the City states that its decision to transfer the services was based upon the fact that "its equipment and manpower (were) inferior and insufficient to perform the data processing function for the City of Green Bay." By emphasizing that the decision was based upon a need to improve its services, the City is apparently attempting to show that its decision to subcontract was not motivated so much by a desire for financial savings as by the need to significantly change the level of services. 13/ The City is apparently also modifying its arguments on review in response to the Examiner's statement that "no evidence was presented indicating any change in service level" and that there was an "absence of any showing that the decision is related in any significant degree to the formulation or management of public policy."

Whatever the merits of the City's arguments in these regards, the City failed to prove its contentions in this instance. The City's own Personnel Director and representative to the Joint Commission testified and yet failed to raise or substantiate any of those assertions at the hearing.

In conclusion, based upon the present record, the consolidation decision in the present situation does not appear to be factually or legally distinguishable in a determinative way from the situation in Racine. The City had an obligation to bargain in good faith about what was, essentially, a decision to subcontract data processing work.

For the reasons noted below, we find that the City failed to bargain in good faith regarding that decision.

12/ See City of Oconomowoc, 18724 (6/81) in which the Commission rejected the argument that there was no mandatory duty to bargain over sub-contracting if no current employe was affected.

13/ In Racine the Court found that "the services provided by the district will not be affected (by the subcontracting)."

Bad Faith Bargaining:

In addition to its assertion that the consolidation decision was not a mandatory subject of bargaining in the first place, the City alternatively argues several other points. The City contends that it did in fact negotiate with the Union in good faith, and having exhausted all possibilities of resolution, was free to implement its decision. It further contends that the labor contract authorizes the City to subcontract during the term without bargaining and without Union consent. It also contends that, in any event, the move of equipment and an employe was just a change in worksite, a right implicitly reserved to it by the Management Rights provision of the collective bargaining agreement.

Each of the above arguments was considered and correctly rejected by the Examiner. However, the Examiner's decision is predicated on a per se violation of the duty to bargain arising from a unilateral implementation of a mandatory subject of bargaining, whereas we find, instead, that the City is guilty of subjective bad faith bargaining based on the totality of its conduct. Therefore, we have modified in part the Examiner's Conclusion of Law and Order in order to clarify that the City's violation of its statutory duty to bargain consisted of its bad faith posture as demonstrated by the totality of its conduct. 14/

The record does not support the City's contention that it bargained in good faith before transferring the equipment. The City has not contended that any of the Findings of Fact 3 through 11, which trace the events and the communcation between the parties prior to the removal of equipment, are unsupported by the record. Those facts demonstrate that the City's initial stated position was that the decision to consolidate was a decision not subject to bargaining; and that the City unilaterally made the decision to consolidate, took a series of steps toward implementation of that decision, expressly stated to the Union on April 8, 1981 that it would never negotiate such a decision, and, despite the Union's formal request to bargain both the decision and its impact, agreed only to discuss impact. While it is true that the City eventually modified its stated position somewhat and agreed to bargain "whatever the law requires", such last minute declarations of its willingness to negotiate were inconsistent with its continuing actions. Only 10 days after the City first indicated any willingness to bargain the decision itself, and prior to any face-to-face meetings with the Union, the Joint Commission, including City agents, met and proceeded to plan the final steps necessary to complete consolidation, including the transfer of the equipment on May 16-17, 1981. Despite the submission of a written proposal by the Union on April 30, 1981, and continued objections from the Union, the City proceeded with the move on May 16, 1981. It may be true that the Union was not responding as quickly as the City desired to the City's sudden offer to bargain the decision. However, given that the City has not shown that it had a legitimate independent reason for the removal of equipment at that time other than to implement its unilateral consolidation decision, and given the totality of the City's conduct, the Commission concludes that the City pursued a course of conduct inconsistent with a good faith intent to bargain or reach agreement about the sub-contracting decision.

The record does not establish that the City reserved the contractual right to subcontract during the term of the agreement based on, as argued, the management rights provision and the absence of a specific limitation regarding subcontracting. For, broad waivers of the duty to bargain about a subject generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the Union clearly and unmistakably waived its interest in the matter. 15/

14/ NLRB v. General Electric Co., (2nd Cir., 1969), 418 F2d 736, 72 LRRM 2530, cert. denied, 397 U.S. 965 (1970); Price County Telephone Co., 7755 (10/66); Walworth County, supra.

15/ The present record establishes no such waiver.

The City's contention that the relocation of the data processing equipment and an employe was a mere change in worksite and thereby permitted by the management rights provision of the collective bargaining agreement also cannot stand. The testimony of the City's Personnel Director, as well as exhibits documenting the City's consolidation plans, clearly establish that the primary reason for the transfer was furtherance of implementation of the decision to consolidate. 16/ Since there was no other legitimate explanation for the transfer at that time, it cannot be viewed out of context as a simple change in work site. It appears instead to have been part of a course of City conduct prohibited by MERA because it effectively poisoned the atmosphere for bargaining about the consolidation decision.

Remedy:

The City objects to part (2a) of the Examiner's Order which would require the City to restore the status quo by returning data processing equipment and an employe from the County facility back to their original location in the City Hall. We find, however, that the Examiner correctly ordered the City to restore the status quo.

The Commission also agrees with the Examiner that given the totality of the City's conduct, the propriety of that remedy is not affected by the Union's unwillingness (once the City acknowledged a willingness to do "whatever the law requires") to bargain over either the decision or its impact until the status quo ante was restored. 17/ For, in all of the circumstances, we consider a return of the equipment and of the employe to be necessary steps to remedying the harm to the bargaining environment caused by the City's course of bad faith conduct.

The Union's petition for review appeals only from that portion of the Order identified as 2(a) which requires the City to return ". . . the employe from the Brown County facility to (her) original work location." The Union alleges that the record shows that all five of the data processing employes were transferred. By implication, the Union is also challenging Finding of Fact 12.

It is true that the record clearly shows that if the City's planned consolidation had been fully implemented, the City's data processing positions would have been completely eliminated and all five data processing employes would have become employes of the County. However, the Examiner was correct in finding that the record actually before him demonstrated that only partial implementation had taken place. Both the testimony and an exhibit substantiates the finding that only one employe was actually transferred. Jim Miller, the Union representative, testified that only one employe, Anne Andrews, was directed to report to the County building (T. 13), and Exhibit No. 5 is the official notice ordering Ms. Andrews to report to the new worksite. In addition, the unrefuted testimony of Ernest Johnson, Personnel Director for the City, is that the other four employes were still working in their original location in City Hall (T. 63-64).

If, however, the City has transferred other employes as part of its decision to subcontract its data processing services, such transfers would also constitute a violation of the City's duty to bargain. Therefore, we have modified part 2(a) of the Examiner's order to read:

16/ See, for example, the May 6, 1981 memorandum quoted in the Examiner's Finding No. 10.

17/ In City of Brookfield, 87 Wis. 2d 819 (1979), the Supreme Court commented "with disfavor" on the Union's insistence that a decision to layoff be rescinded as a precondition to impact bargaining. 87 Wis 2d at 833-834. The instant situation differs materially in that both the decision and related impact matters are mandatory subjects.

Return to their original work location any data processing equipment and any data processing employes which have been transferred to the Brown County facility.

Dated at Madison, Wisconsin this 15th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner