STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, TONI CAGLE, BRUCE CHAPMAN, JEAN ELLIOT, DARLENE FUNK, MIMA LORBERBLATT-TESKE, JOHN NANNEY, KATHY PALMER, GEORGE PRONOLD, STEVE RICE, JULIE SOWERS, DOUG STANGEL, NANCY VERRIER, and MARK ZIMONICK,	:	
Complainants,	:	Case CCVII No. 31845 MP-1495
vs.	:	Decision No. 20857-A
BROWN COUNTY,	:	
Respondent,	:	
and	:	
LLOYD BRAZEAU,	:	
Co-Respondent.	:	

Appearances:

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

Mr. Kenneth J. Bukowski, Corporation Counsel, Northern Building, Green Bay, Wisconsin 54305, appearing on behalf of Brown County.

Warpinski & Vande-Castle, S.C., Attorneys at Law, by Mr. Mark A. Warpinski, 303 South Jefferson Street, P. O. Box 993, Green Bay, Wisconsin 54305, appearing on behalf of Lloyd Brazeau.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO filed a complaint on June 28, 1983 with the Wisconsin Employment Relations Commission alleging that Brown County and Lloyd Brazeau had committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 3 and 4 Wis. Stats.; the Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70 (5), Wis. Stats. A hearing was held in Green Bay, Wisconsin, on August 26, 1983, at which time the complaint was amended to add the individual complainants named above. All parties filed briefs, and the last of them was received and the record closed by January 11, 1984. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at 5 Odana Court, Madison, Wisconsin. Toni Cagle, Bruce Chapman, Jean Elliot, Darlene Funk, Mima Lorberblatt-Teske, John Nanney, Kathy Palmer, George Pronold, Steve Rice, Julie Sowers, Doug Stangel, Nancy Verrier, and Mark Zimonick are individuals who were employed at the Brown County Youth Home until about July 15, 1983.

2. Brown County is a municipal employer having its principal offices at Brown County Courthouse, Green Bay, Wisconsin 54305. Until about July 15, 1983 the County operated as a County administrative department a Youth Home located

in leased space at the St. Norbert Abbey, Green Bay, Wisconsin. At all material times until July 15, 1983 Lloyd Brazeau was director of the Youth Home and the County's agent.

3. In or about December, 1982 employes of the Brown County Youth Home organized with Complainant Union for purposes of collective bargaining with the County. A petition for election was filed with the Wisconsin Employment Relations Commission, and following an election the Commission, on April 21, 1983, certified the Complainant Union as exclusive representative of all regular full-time and regular part-time non-professional employes of the Brown County Youth Home, excluding supervisory, confidential, managerial, executive and professional employes.

4. From approximately 1980 onwards, various sub-committees of the County Board which were concerned with the operations of the Youth Home considered subcontracting this operation, largely because of its cost. In late 1982, the County was advised by the owners of the St. Norbert Abbey that the County's lease for the Youth Home's space, which was to expire on July 1, 1983, would not be renewed because the owners needed the space themselves. The County was subsequently able to negotiate an extension of the lease to July 15, 1983, but not past that date. In about November, 1982 County officials began a search for alternative space for the Youth Home, and subsequently received several expressions of interest from private organizations wishing to act as subcontractors of the Youth Home. Employes of the County's Youth Home organized with the Complainant Union after hearing of these proposals. The County did not respond favorably to any of the initial subcontracting proposals and continued to search for space to operate the Youth Home as a County direct operation.

5. Harold Compton, a member of the County Board of Supervisors and of its Board of Public Welfare, was principally involved in the search for new facilities for the Youth Home. On or about April 28, 1983 co-Respondent Brazeau told Compton that he would be interested in acting as a subcontractor to operate the Youth Home as a private enterprise. On May 3, 1983, Brazeau presented the County with a formal proposal for operation of the Youth Home as a subcontractor, which specified in its entirety as follows:

> As the present Director of the Brown County Youth Home, I feel I am aware of the needs necessary to provide short term, non-secure shelter care. If the resolution before the Board of Social Services is passed I will provide the following:
>
> 1. In a structure located at 2221 West Mason Street a twelve-bed facility licensed for seven males and five females.
>
> 2. Twenty-four hour awake coverage for both male and female.
>
> 3. A program emphasizing the same consistency and structure that presently exists.
>
> 4. In 1982, our average daily population was nine. There were days when we were over twelve. It is my strong feeling that a home detention program coupled with a shorter length of stay would reduce the average daily population.
>
> 5. This can be done at a cost of approximately $217,000.00.
>
> Respectfully submitted,
>
> Lloyd J. Brazeau
> May 3, 1983

6. During June, 1983 Brazeau formed a corporation named Shelter Care of Brown County, Inc., whose purpose was to serve as the subcontractor of the Youth Home pursuant to Brazeau's proposal. During the same month the County determined to award a subcontract for the Youth Home to Shelter Care of Brown County, Inc.

essentially on the terms Brazeau had proposed, and on or about June 17, 1983 a contract to that effect was executed.

7. On or about May 9, 1983 the Complainant Union, by its Business Representative James W. Miller, requested negotiations concerning wages, hours and conditions of employment of the Youth Home employes, in a letter to County Personnel Director Gerald Lang. On May 13, 1983 the Union's attorney advised the County by letter to the County Executive and County Board Chairman that the Union took the position that the decision to subcontract the Youth Home was a mandatory subject of bargaining. On May 17, 1983, the County's Corporation Counsel, by letter to the County Executive and County Board Chairman, gave an official opinion that the subcontracting decision, as opposed to the effects of the decision, was not a mandatory subject of bargaining. On May 18, 1983 the first negotiation meeting between the Union and County took place. At that meeting the Union proposed, among other matters, that the collective bargaining agreement include a subcontracting clause which specified that contracting out would be permitted if no current employes were affected. This proposal was not accepted by the County, which, however, offered to bargain the effects of the decision to subcontract the Youth Home. The Union did not agree to this proposal, and throughout several further bargaining meetings the parties' positions remained essentially unchanged. The County consistently took the position that the decision to subcontract the youth home would not be bargained as it was not a mandatory subject of bargaining, and the Union consistently took the position that the County must bargain the decision and that it was obligated to maintain the status quo, including the location of the youth home, pending exhaustion of that duty.

8. The subcontracting arrangement became effective on July 15, 1983, and produced a savings of $80,000.00 in the first year's contract as compared with the previous year's cost of operation of the County Youth Home. The subcontracted facility has twelve beds, while the former Youth Home had twenty-six. In addition to Brazeau five full-time employes are employed at the subcontracted Youth Home while eight had been employed at the County Youth Home. Prior to the closure of the County Youth Home, Brazeau requested employment applications from all of the County Youth Home employes. With the exception of one part-time relief employe, none of the County's employes applied for employment by Shelter Care of Brown County, Inc. The County's employes were laid off effective July 14, 1983.

9. The proposal made by Brazeau on May 3, 1983 included three concepts: to move the facility to the West Mason Street site, to operate the facility at a reduced size, and to subcontract it to Brazeau's corporation. Although these proposals were made as part of a comprehensive offer to subcontract at a fixed price, the record shows that Brazeau did not have control of the West Mason Street facility and that the proposed location and size of the facility were matters which the County could decide independently of a decision to subcontract the operation of the facility. The record shows that the decision to move the facility did not stem primarily from the desire to economize but was a necessity dictated by the expiration of the County's lease, and that the decision to reduce the size of the facility was primarily related to the level of service which the County wished to offer. Both of these decisions are primarily related to the formulation or management of public policy and only in the second instance to wages, hours or working conditions.

10. The record shows that the West Mason Street facility was available to all comers and that Brazeau did not have any specialized organization, plan, process or technique not available to the County in its direct employ of Brazeau. At the time of the proposal to subcontract, Brazeau also did not possess either a staff or a facility. Brazeau's proposal to subcontract offered to continue "a program emphasizing the same consistency and structure that presently exists", and no change in the consistency and structure of the program was agreed on in the subcontracting agreement. While Brazeau requested job applications from the County Youth Home employes, he did not commit himself to hiring any such employes prior to receiving the subcontract nor did he give any guarantees concerning the wages, benefits, security of employment, hours or other working conditions of such employes as might be hired, and he did commit himself to a fixed price $80,000.00 lower than the current annual cost of operation of the County Youth Home. The record therefore demonstrates a substantial relationship between the decision to subcontract the Youth Home as such and the wages, hours and conditions of employment of the employes, and fails to demonstrate a substantial choice among alternative social or political goals or values related to the decision to subcontract as such. The record therefore demonstrates that the decision to

subcontract the operation of the Youth Home to Brazeau was not primarily related to matters of public policy. The record does not demonstrate that an intent to retaliate against employes for their union activity was in whole or part a reason for the decision to subcontract the facility and lay off the employes.

11. At the time Brazeau's proposal to subcontract the facility was before the County Board and at all times thereafter until the contract became effective, Brazeau served as a member of the County's bargaining committee with Complainant Union. The record shows that in that capacity he did not act as spokesman and was used only as an advisor. The record does not demonstrate that Brazeau used either his membership on the bargaining committee or his official position as Director of the Youth Home to undermine the Union in its attempts to retain employment for its bargaining unit members and to obtain a contract containing a restriction on subcontracting.

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

CONCLUSIONS OF LAW

1. The decisions to move the Youth Home to the Mason Street facility and to operate it at a size of twelve beds rather than the former twenty-six were primarily related to questions of public policy, and the Respondent County did not have a duty to bargain with Complainant Union concerning these decisions. Respondent County therefore did not violate Sec. 111.70(3)(a)1 or 4 by its refusal to bargain concerning these decisions.

2. The decision to subcontract the operation of the Youth Home as such was primarily related to wages, hours and conditions of employment, and the Respondent County had a duty to bargain with Complainant Union concerning this decision. The County therefore violated Sec. 111.70(3)(a)1 and 4 by its refusal to bargain concerning this decision.

3. The decision to subcontract the Youth Home was not made for the purpose, in whole or part, of retaliation for union activity by the Youth Home employes or to restrain or coerce employes in the exercise of their rights under the Municipal Employment Relations act, and was therefore not in violation of Sec. 111.70(3)(a)3, Wis. Stats.

4. Respondent Lloyd Brazeau's conduct in representing the County and in proposing to act as subcontractor was neither in retaliation for employes' union activity nor constitutes bad-faith bargaining, and is therefore not in violation of Sec. 111.70(3)(a)1, 3 or 4, Wis. Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

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

1. Cease and desist from implementing a subcontract prior to the exhaustion of its duty to bargain with Wisconsin Council 40, AFSCME, AFL-CIO 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) Bargain collectively with Wisconsin Council 40, AFSCME, AFL-CIO regarding the decision to subcontract the operation of the Mason Street facility of the Brown County Youth Home and the impact of any such decision upon the wages, hours and conditions of employment of employes represented by Wisconsin Council 40, AFSCME, AFL-CIO.

b) Offer to reinstate to their former positions or substantially equivalent positions such former employes of the County Youth Home as were laid off as a result of the decision to subcontract the Youth Home, and make whole said employes for any losses suffered as a result of their layoff.

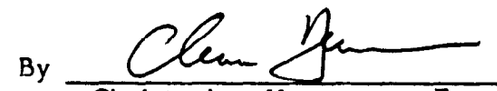
c) Notify the employes by posting in conspicuous places on its premises, where notices to its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by a responsible official of the County and shall be posted immediately upon receipt of a copy of this order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to ensure that said notice is not altered, defaced or covered by other material.

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

3. The portions of the complaint alleging that Co-Respondent Lloyd Brazeau committed violations of Sec. 111.70, Wis. Stats., are hereby dismissed, and the allegation in the complaint that the Respondent County committed a violation of Sec. 111.70(3)(a)3 is also hereby dismissed. 1/

Dated at Madison, Wisconsin this 22nd day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ 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.

APPENDIX A

Notice to All Employes

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

> We will immediately cease and desist from subcontracting the operation of the Brown County Youth Home without bargaining the decision to do so with Wisconsin Council 40, AFSCME, AFL-CIO, and we will make whole all employes who lost wages and benefits because of the subcontracting.

Dated at Green Bay, Wisconsin this _____

By _____
on behalf of Brown County

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the County violated Sec. 111.70(3)(a)1, 3 and 4, Wis. Stats., by unilaterally subcontracting away the facility employing its Youth Home bargaining unit and laying off the entire bargaining unit without bargaining over the decision to subcontract. The complaint further alleges that Respondent Lloyd Brazeau violated the same statutory sections by his personal involvement as a bargaining agent of the County and by his simultaneous proposal to obtain the subcontract involved.

The central facts are articulated in the Findings and need not be repeated here. The essential question, of whether or not the County was obligated to negotiate with the Union over the proposed decision to subcontract the Youth Home, was identified as the key question early in the proceedings and the parties had adopted their current positions, relying essentially upon the same precedents, prior to the time the decision to subcontract was made.

The controlling principle was set out by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County vs. WERC. 2/ That case involved the subcontracting of a food service operation in the Racine schools. The Court adopted the test of whether the particular decision to contract out work is primarily related to wages, hours and conditions of employment or is primarily related to the formation and choice of public policy. 3/ The Court described the test in the following terms:

> . . . the question is whether a particular decision is primarily related to wages, hours and conditions of employment of the employees, 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 representatives of the people. . . .

The court went on to analyze the facts of the Racine case in light of this test and concluded as follows:

> . . . 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.
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> 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.

2/ 81 Wis. 2d 89 (1977).

3/ The court had first applied this test to other types of mandatory/permissive issues in Beloit Education Association v. WERC, 73 Wis. 2d. 43.

In the present case the Complainants argue that "the same services, at the same level" are being provided by Brown County, noting testimony by County Board Member Compton, that the County's Youth Home was ". . . a holding area for troubled children" and comparing it to testimony by Brazeau that the subcontractor's business is "Providing shelter care for Brown County residents . . . ." Complainants contend that the fact that all of the former employes of the Youth Home, save Brazeau and one relief part-time employe, have been laid off shows that the major impact of the decision has been on the wages, hours and conditions of employment of those employes. Complainants also contend that in several cases decided by the Commission since the Racine standard was articulated the Commission has consistently found the subcontracting decision, not just its impact, to be a mandatory subject of bargaining. 4/ One such case, the Complainants note, involved a defense of a substantial alleged change in the nature or level of services to be provided, which was rejected. 5/ The Complainants argue that nothing in the present case warrants a departure from the ruling and remedy in City of Green Bay, 6/ in which the employer was ordered to rescind its subcontract and return to the status quo as a precondition to good-faith bargaining on any decision to move and subcontract the work involved. 7/

Respondent County argues that by the time Brazeau's proposal was made, the County had but weeks in which to find a new facility and that the time pressure gave to the decision to subcontract the quality of necessity. The County notes that no other suitable site had been found, even though it had made efforts to obtain a site at which the Youth Home could be maintained as a County direct operation. The County contends also that in the course of deciding to accept Brazeau's proposal it determined to reduce the size of the operation from twenty-six to twelve beds. Noting that in City of Brookfield v. WERC 8/ the Wisconsin Supreme Court determined that the decision to lay off employes, when motivated by considerations of level of service, is not a mandatory subject of bargaining, the County contends that in this case the factors of level of service and necessity to move the operation outweigh the wages, hours and conditions of employment of the employes as elements in a single decision to subcontract the Youth Home. The County argues that the decision to subcontract in this instance is therefore primarily related to the formulation and management of public policy and that the decision as a whole must therefore be found to be not a mandatory subject of bargaining.

The County further notes that Complainants presented no evidence that the County's actions were motivated by anti-union animus or that any overt restraint, coercion or inference with employes' rights under MERA were involved.

In deciding that the "primarily related" test governs whether a particular subcontracting decision is or is not a mandatory subject of bargaining, the Court acknowledged that this is a difficult test to apply, citing Beloit to the effect that "drawing the line or making the distinction is not easy." 9/ Neither Racine nor any of the prior WERC decisions have involved some of the complicating factors present here. I am convinced, however, that both Complainants' and Respondent County's arguments are founded on a misreading of the Racine test.

4/ See City of Green Bay, 18731-B (6/83) and cases cited therein.

5/ Walworth County, 15429-A, 15430-A (12/78)

6/ supra.

7/ In that case a computer operation was subcontracted and physically moved to another municipal employer.

8/ 87 Wis. 2d 819 (1979).

9/ Beloit, supra, 73 Wis. 2d at 53, cited in Racine, supra, 81 Wis. 2d at 95.

The passage of Racine quoted above and the text of the decision as a whole give the strong impression that the Court's intention is to require a rigorous analysis of a decision to subcontract. Here both parties have assumed in their arguments that the subcontracting decision should be viewed in essence as a "package" with the decisions to move the operation and reduce its size, apparently because that is the way the proposal was made to the County Board. But the approach of considering a subcontracting decision as irretrievably "bundled" in whatever manner it is first raised has two possible consequences. One is that in situations where a substantial public-policy choice is joined in a single proposal with yet more significant effects on wages, hours and working conditions of employes, the public employer could find the public policy issue outweighed by the other "aspects" of the proposal and thus forfeit its right to sole determination of such questions. The other is that allowing matters of public policy not integral to the question of subcontracting to be considered with working conditions, etc. as aspects of a single choice could open the door to abuses in which an employer might confuse the subcontracting question with public-policy issues not necessarily related to it, in the hope of tipping the balance.

Neither of these possibilities is consistent with the Court's attempt to give effect simultaneously to bargaining rights under MERA and to the unfettered right of public employers to act on questions of public policy, by distinguishing between these rights to the extent possible. I therefore conclude that "drawing the line" requires a rigorous analysis of subject matter involved in the subcontracting decision so as to distinguish not only between "aspects" of a single question but also between those matters necessarily and properly part of a decision to subcontract and any others which may have been included for other reasons.

In the case at hand Compton testified to several concerns which motivated the County in deciding to subcontract to Brazeau. Some of these appear unconvincing as serious matters of public policy. Compton testified that one reason why the County wanted to move to the Mason Street facility proposed by Brazeau was that the "residential setting" would improve the rehabilitation of the children sent there. 10/ This seems strained in view of Compton's other testimony that this site had already been rejected once in the County's search for a facility and that acceptance of it was largely dictated by the need to move quickly. Compton also testified that with a vendor the County thought it could better insure accountability. This seems improbable because the County already controlled Brazeau, the engine of the proposed subcontractor, and also because this proposition contradicts the essence of the "right of control" test, the classic standard used in determining the difference between an employe and a subcontractor. Compton's testimony that subcontracting was expected to improve generally the atmosphere and rehabilitation at the Home was vague and is undercut by Brazeau's specific proposal, which offered "A program emphasizing the same consistency and structure that presently exists." Compton also testified, however, that subcontracting to Brazeau was expected to help in reducing the turnover that had brought the County three Youth Home directors in four years. His testimony that this turnover was thought to be a factor in the vandalism and other on-going problems which the Youth Home had experienced is clearly a reason related to public policy, as it affects the quality of service provided. But it is apparent from Compton's testimony and the record as a whole that more important than any of these factors were the reduction in size of the Home, the cut in its costs and the need to find a new facility promptly.

It is clear from the record that the County made repeated efforts to retain the space at St. Norbert Abbey and was repeatedly rebuffed by its owners, who required the space themselves. In light of that fact the Union's reliance on the Green Bay case cited above puts it in the position of one attempting to reassemble Humpty Dumpty. In the Green Bay case the facts showed that the move of the computer operation was the result of a decision to economize, while here the move was mandated by a force the County could not control. To argue that, under these circumstances, the decision to move the operation was not primarily related to public policy approaches absurdity, since the County's only other option was to close the facility. And while the decision to reduce the size of the operation from twenty-six to twelve beds may have had much to do with the cut in employ-

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10/ This building was a three-bedroom house which required additional construction in order to house even as many as twelve children.

ment as well as the cut in cost, this decision is clearly related to the level of service to the public the County wishes to provide. Under the rule of City of Brookfield, cited above, such a decision is only secondarily related to wages, hours and working conditions. Taken by itself, therefore, the decision to reduce the size of the operation would not be a mandatory subject of bargaining even though it involved several layoffs.

But although the parties have treated these questions as being aspects of a single decision to subcontract the facility to Brazeau, the record shows that there is no integral relationship between the decision to move, the decision to reduce the size of the Youth Home, and the decision to subcontract in this case. Among the reasons often given as justifying subcontracting are the availability of particularily qualified employes, availability of better equipment and facilities, and specialized expertise of the management of the subcontractor. Here, Brazeau had no exclusive facility available. The Mason Street building was available to all comers, as Brazeau's brief notes. Brazeau had no pre-existing staff and no personal expertise that was not already available to the County in its direct employ. The essential functions of the Youth Home would continue unchanged, as a short term (30 days or less) holding facility for runaways as well as delinquents, pending more permanent disposition of each child.

It might be argued that the proposal by Brazeau to reduce the size of the facility to twelve beds, upon which decision the Mason Street site would, with some construction, become usable, represented a form of intellectual property requiring good-faith dealing between the County and Brazeau. Under certain circumstances, as in the publishing industry, this view has historically been given credence. But Wisconsin law leaves no doubt that the County was under a duty to bargain in good faith with Complainant Union, and it establishes no commensurate duty towards an employe wishing to go into business for himself. Brazeau was, at the time he proposed the smaller Youth Home and its new location, an employe of the County, and there is no doubt that even though he originated the idea which opened the possibility of using the Mason Street site, the County had free use of it the moment it was suggested. Both the decision to reduce the facility's size to twelve and the decision to move it to the Mason Street facility were public-policy choices which the County was free to make without bargaining with Complainant Union; but the record therefore shows that neither decision was an integral or necessary part of the decision to subcontract.

The cost savings attending the subcontracting are substantial, representing in excess of 25% savings over the previous year's costs. That this results at least partly from cuts in employment related to the cut in size of the facility is probable. At the time the subcontract was signed on June 17, 1983, the rates of pay to be paid were indeterminate, and there is no evidence that Brazeau had discussed fringe benefits with any prospective employes. But simply changing from a substantial public employer to a small private company may reasonably be expected to change the entire nature of the employment relationship. The fact that Brazeau's June 16, 1983 request to employes for applications included no guarantees concerning wages, benefits or continued employment is simply the most immediate effect of the subcontract: all of the jobs were put at risk, not simply those which were lost as a result of the reduction in size. It is therefore clear that while the means by which Brazeau's fixed price was to be met are undefined, a large measure of uncertainty as to wages, benefits and tenure attended that offer. These factors are clearly related to mandatory subjects of bargaining.

As to the concern that stability in management might be enhanced by subcontracting to Brazeau, this is indeed a matter primarily related to public policy. But its relative importance among the various questions then being decided may be fairly assessed by attempting to imagine the reception such a proposal from an employe would receive at the County Board if unaccompanied by any other changes in the operation or cost of the department involved.

For these reasons, I conclude that the proposal of subcontracting by Brazeau actually led to three distinct decisions, which are the reduction in size of the Youth Home, the choice of the West Mason Street former three-bedroom house to locate it in, and the subcontracting itself. The first two decisions, for the reasons already noted, I find to be primarily related to public policy. But the decision to subcontract per se I find to be primarily related to the cost savings of $80,000.00 which Brazeau promised the County. Although, as already noted, the allocation of this savings between wages, etc. and cuts in employment is

undefined, it is apparent from a review of the cases cited above that such cost-based decisions to subcontract have been found to be primarily related to wages, hours and working conditions. I therefore find that the decision to subcontract the Youth Home to Brazeau's corporation was a mandatory subject of bargaining and that the County's refusal to bargain that decision violated Sec. 111.70(3)(a)1 and 4, Wis. Stats. The record does not show any intent by the County to retailiate against employes for voting in the Union, and the County's act therefore does not violate Sec. 111.70(3)(a)3.

Brazeau's conduct is also charged as being violative of MERA, although the complainants are less than precise as to the specific violation he has alleged to have committed. Because his dual role in this matter presents an obvious potential for conflict of interest, two possibilities must be examined. One is that he could have used his subcontracting proposal to avoid, on his own or the County's behalf, bargaining a contract with the Union. The other is that Brazeau could have used his County position to undermine the bargaining in order to secure the subcontract.

The record shows that Brazeau, as a member of the County's bargaining committee, was inactive except in the sense of being available as a resource for advice to Gerald Lang, Personnel Director, who acted as spokesman. The record is devoid of evidence that evading the Union was a County concern in its decision to subcontract, and there is likewise no evidence that Brazeau made his subcontracting proposal in order to avoid dealing with the Union himself. I conclude that there is no evidence that Brazeau either attempted to discriminate against employes, or personally engaged in bad faith bargaining as a member of the County's bargaining committee, or improperly influenced the County to subcontract with him in order to avoid dealing with the Union. Instead, the record shows merely that Brazeau saw his opportunity and took it. I therefore find that Brazeau's conduct does not violate the Municipal Employment Relations Act.

The fact that the Union in this case had only recently won the election creates a difficulty of remedy, as there is no contract to lay out the standard by which employes may be laid off and therefore it may be difficult to determine which employes were laid off as a result of the reduction in size and which as a result of the subcontracting. But although this creates a practical problem in the result of this case, the law makes no distinction as to mandatory and non-mandatory subjects of bargaining depending on whether the union asserting the right to bargain is new or of long standing. The problem is thus unavoidable, and in keeping with ample precedent I find that a general order to bargain the nature of the layoffs resulting from the subcontracting is the best way to handle the allocation of reinstatement rights, as well as the wage rates used in computing back pay.

Dated at Madison, Wisconsin this 22nd day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner