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,	
vs.	Case 207 No. 31845 MP-1495
BROWN COUNTY,	Decision No. 20857-B
Respondent,	
and	
LLOYD BRAZEAU,	
Co-Respondent.	

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. Kenneth Bukowski, Corporation Counsel, Brown County Courthouse, P. O. Box 1600, Green Bay, Wisconsin 54305, appearing on behalf of Respondent Brown County.

Warpinski and 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 the Respondent Lloyd Brazeau.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Christopher Honeyman having on March 22, 1984, issued his Findings of Fact, Conclusions of Law and Order in the above-entitled matter, wherein he concluded that the above-named Respondent Brown County committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 4, Stats., by subcontracting the operation of the Brown County Youth Home without first bargaining with the Complainant AFSCME over the decision to subcontract, and ordered the Respondent County to cease and desist from refusing to bargaining and to take certain affirmative steps to remedy the violation; and the Examiner having further dismissed the Complaint of prohibited practices against the Respondent Brazeau; and the Respondent County having, on April 19, 1984, filed with the Commission a Petition for Review of the Examiner's decision; and the Respondent Brazeau having, on April 25, 1984, filed with the Commission a Petition for Review of the Examiner's decision; and the Complainant having, on May 17, 1984, filed with the Commission a "Motion To Dismiss Appeals and Summarily Affirm The Examiner" wherein they argued that the Petition filed by the Respondent Brazeau was untimely filed and that the Petition filed by the Respondent Brown County was not properly authorized by the Brown County Board of Supervisors; and the Respondent Brazeau having, on June 11, 1984, submitted argument in support of his Petition for Review, together with the "Affidavit of Attorney Mark A. Warpinski" in opposition to the Complainants' Motion to Dismiss; and the Commission having directed that argument be submitted on the merits of both the Motion and the Petitions; and the parties having submitted briefs and the Commission having on February 21, 1985 issued a "Notice of Intent to take Official Notice of Certain

Documents"; and no objection to the Commission's Notice having been received within ten days as specified in said Notice; and the Commission, having reviewed the record, including the Petitions for Review, Motion to Dismiss, written arguments of Counsel and documents officially noticed, and being satisfied that the Complainants' Motion to Dismiss Appeals should be denied, and that the Examiner's Findings of Fact and Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Complainants' Motion to Dismiss Appeals and Summarily Affirm Examiner is hereby denied.

B. That the Examiner's Findings of Fact 1-8, are hereby affirmed and adopted as the Commission's Findings of Fact 1-8; that the Examiner's Findings of Fact 9 and 10 are modified and supplemented to read as follows and adopted as the Commission's as modified:

> 9. At the time of Brazeau's May 3, 1983 proposal on behalf of Shelter Care of Brown County, Inc.: neither Brazeau nor his corporation possessed a staff, a facility, or any specialized organization, plan, process or technique not available to the County in its direct employ of Brazeau; and the West Mason Street facility was available to all comers. Brazeau's proposal 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 County's agreement with Brazeau's corporation. While Brazeau requested job applications from the County Youth Home employes, he did not commit himself to hiring any such employes prior to entering into the agreement with the County 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 then current annual cost of operations of the County Youth Home.
>
> 10. In the circumstances the County found itself in as of mid-May, 1983, the County's only available alternatives for providing a Youth Home service after expiration of its Abbey lease were to remodel and move to the Mason Street facility and either staff that facility with County employes in the bargaining unit or staff it with employes of Shelter Care of Brown County, Inc. through the contracting out arrangement proposed by Brazeau on behalf of that corporation.
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> 11. By its decision to accept and implement Brazeau's May 3, 1983 offer, Respondent County decided to utilize non-unit personnel to perform the Youth Home functions previously performed by County employes in the bargaining unit. That decision, coming as it did in the decisional context noted in Modified Findings 9 and 10, above, did not involve a substantial choice among alternative social or political goals but did involve substanital dimensions concerning the wages, hours and conditions of employment of bargaining unit employes, and hence was a matter primarily related to wages, hours and conditions of employment.
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> 12. The record demonstrates that the County's decision to accept and implement Brazeau's May 3, 1983 offer was economically motivated and that it was not motivated in whole or in part by an intent to retaliate against employes for their union activity.

1/ See Footnote 1 on page 3.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

C. That the Examiner's Findings of Fact 11 is renumbered 13 and adopted as the Commission's.

D. That the Commission adopts the following additional Findings of Fact:

14. That on March 22, 1984, Examiner Honeyman issued his Findings of Fact, Conclusions of Law and Order; that, on March 29, 1984, County Corporation Counsel Kenneth Bukowski wrote a letter to the Commission's General Counsel Peter Davis, with copies to Complainants' Counsel Richard Graylow and Respondent Brazeau's Counsel Mark Warpinski, stating in pertinent part, as follows:

. . .

> Please be advised that Mr. Warpinski and Mr. Graylow, representing the other two parties in this matter, have graciously agreed that the County could have until Wednesday, April 25, 1984, in which to appeal this case, if Brown County decides to do so. Therefore, I presume since all parties agree, that all parties will have until Wednesday, April 25, 1984, in which to appeal the above-referenced matter. If I am incorrect in this regard, please let me know immediately.;

That on April 2, 1984, General Counsel Davis responded by letter addressed to Graylow, Warpinski and Bukowski referencing the instant case and stating:

> I am writing to confirm your agreement that any Petition for Review in the above-entitled matter be received in the Commission's Madison Offices on or before April 25, 1984.;

That the Respondent County submitted a Petition for Review of Examiner Honeyman's decision on April 19, 1984; that Respondent Brazeau submitted his Petition for Review of Examiner Honeyman's decision on April 25, 1985; and that Complainant Union, on May 17, 1984, filed with the Commisison a "Notice of Motion and Motion to Dismiss Appeals and Summarily Affirm Examiner".

15. That Kenneth Bukowski is the Corporation Counsel of Brown County; that Bukowski has represented the Respondent Brown County throughout the course of the instant litigation; that Bukowski is the apparent agent of Brown County; and that the Commission has received no objection from any officer or agent of Brown County to the submission of a Petition for Review in the instant matter.

16. That, at no time prior to the submission of the Motion to Dismiss on May 17, 1984, did the Complainant raise any objection to the arrangements outlined in the Davis letter of April 2, 1984 or to the filing of the Respondent Brazeau's Petition for Review after the expiration of the twenty day period set forth in Sec. 111.07(5), Stats.

E. That the Examiner's Conclusions of Law are hereby modified to read as follows:

1. That Respondent County did not have a duty to bargain with Complainant Union concerning whether 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 and did not violate Sec. 111.70(3)(a) 4 or 1 by its refusal to bargain concerning those matters.

2. That Respondent County had a duty to bargain with Complainant Union concerning whether the non-supervisory work to be performed at the Mason Street facility of a type historically performed by Youth Home bargaining unit employes would be contracted out for performance by other than County bargaining unit employes; that, in the instant circumstances, by contracting with Shelter Care of Brown County, Inc., for non-supervisory Youth Home services to be performed at the Mason Street facility, and by refusing to bargain with Complainant Union about its decision to contract out work of a type historically performed by the Youth Home bargaining unit for performance by other than bargaining unit personnel, Respondent County committed and is committing prohibited practices in violation of Sec. 111.70(3)(a)4 and 1, Stats.

3. That Respondent 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 therefore did not violate Sec. 111.70(3)(a)1, 3 and 4, Stats.

4. That the petition for Review of Respondent Brown County was appropriately and timely filed by a party in interest within the meaning of Sec. 111.07(5), Stats.

5. That the Petition for Review of Respondent Brazeau was appropriately and timely filed by a party in interest within the meaning of Sec. 111.07(5), Stats.

F. That the Examiner's Order is hereby modified to read as follows and, as so modified is adopted as the Commission's Order:

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

1. Cease and desist from causing or permitting (by contract or otherwise) other than County employes in the AFSCME bargaining unit to perform non-supervisory Youth Home services for the County without first fulfilling its statutory duty to bargain with Complainant Wisconsin Council 40, AFSCME, AFL-CIO concerning the decision to do so.

2. Cease and desist from refusing to bargain collectively with said Complainant regarding its decision to contract with Shelter Care of Brown County Inc., or any other enterprise, for the provision of such Youth Home services as have been historically performed by County employes in the bargaining unit represented by said Complainant.

3. Take the following affirmative action which the Commisison finds will effectuate the purposes and policies of the Municipal Employment Relations Act.

a. Institute a County-operated Youth Home program providing equivalent or substantially equivalent bargaining unit employment opportunities to those which would have existed had the County operated the Mason Street facility with bargaining unit personnel from and after July 15, 1983.

b. Bargain collectively with Wisconsin Council 40, AFSCME, AFL-CIO regarding the decision to cause or permit (by contract or otherwise) other than County employes in the AFSCME bargaining unit to perform non-supervisory Youth Home services for the County.

c. Offer immediate and unconditional reinstatement to those of the bargaining unit employes laid off effective on or about July 14, 1983, who would have been immediately employed had the County operated the Mason Street facility with bargaining unit personnel, in a position equivalent or substantially equivalent to that in which such employe would have been employed in that facility, without prejudice to the employe's seniority or other rights or privileges.

d. Afford the other former employes of the County Youth Home who were laid off effective on or about July 14, 1983, and would have been laid off had the County operated the Mason Street facility with bargaining unit personnel the rights (if any) including recall rights (if any) that they would enjoy under the existing and applicable County layoff and recall procedures.

e. Make whole the former employes of the County Youth Home who were laid off effective July 14, 1983, for all losses of pay experienced by them as a result of the County's failure to employ bargaining unit personnel to operate the Mason Street facility during the period June 14, 1983 through the date the County has complied with d. (reinstatement), above, by payment to each of them, with interest 2/, of the respective sum of money equivalent to that (if any) which each would have earned as an employe had the County operated the Mason Street facility with bargaining unit personnel during that period, less any earnings from employment or self employment each received (which he/she would not otherwise have received) during that period. In the event that each or any received Unemployment Compensation benefits during all or any portion of the period for which the employe is entitled to make whole relief under the foregoing, reimburse the Unemployment Compensation division of the Wisconsin Department of Industry, Labor and Human Relations in the amount received as regards that period or portion thereof. The foregoing make whole relief is intended to compensate only for losses experienced because of the County's prohibited practice cited herein, i.e., as a result of the County's failure to employe bargaining unit personnel to operate the Mason Street facility as a County facility during the period of time noted, and is not intended to compensate for losses experienced as a result of unjustified employe failures to mitigate losses.

f. Notify employes by posting in conspicuous employe notice locations in the Mason Street facility and by mailing to each of the bargaining unit employes laid off effective on or about July 14, 1983 at their last known address, a copy of the notice attatched hereto marked "Appendix A". Such copy shall be signed by a responsible official of the County and shall be mailed and 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 insure that said posted notice is not altered, defaced or covered by other material.

g. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps the County has taken to comply herewith.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The instant complaint was filed on June 28, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983).

3. That the portions of the Complaint alleging that Respondent Brazeau committed violations of Sec. 111.70, Stats., are hereby dismissed, and the allegation in the complaint that Respondent County committed a violation of Sec. 111.70(3)(a)3, Stats., is also hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

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 institute a Youth Home operation to be operated by Brown County and will bargain collectively with Wisconsin Council 40, AFSCME concerning any decision to contract out or otherwise offer employment at that facility to other than bargaining unit employes employed by the County.

We will not cause or permit other than County employes in the AFSCME bargaining unit to perform non-supervisory Youth Home services for the County until we have fulfilled our duty to bargain with AFSCME Council 40, AFL-CIO about that subject.

We will offer immediately and unconditional reinstatement to those of the bargaining unit employes laid off effective on or about July 14, 1983, who would have been immediately employed there had the County operated the Mason Street facility with bargaining unit personnel, to a position equivalent or substantially equivalent to that in which such employes would have been employed in that facility, without prejudice to their seniority or other rights or privileges.

We will afford the other former employes of the County Youth Home who were laid off effective on or about July 14, 1983, and would have been laid off had the County operated the Mason Street facility with bargaining unit personnel, the rights (if any) including recall rights (if any) that they would enjoy under the existing and applicable County layoff and recall procedures.

We will make whole those former employes of the County Youth Home who were laid off effective on or about July 14, 1983, for all losses of pay experienced by them as a result of the County's failure to employ bargaining unit personnel to operate the Mason Street facility during the period July 15, 1983 through the date the County has complied with d. (reinstatement), above, by payment to each of them, with interest, of the respective sum of money equivalent to that (if any) which each would have earned as an employe had the County operated the Mason Street facility with bargaining unit personnel during that period, less any earnings from employment or self employment each received (which he/she would not otherwise have received) during that period. In the event that each or any received Unemployment compensation benefits during all or any portion of the period for which the employe is entitled to make whole relief under the foregoing, we will reimburse the Unemployment Compensation division of the Wisconsin Department of Industry, Labor and Human Relations in the amount received as regards that period or portion thereof.

Dated at Green Bay, Wisconsin this _____ day of _____, 1985.

Brown County

By_____
Name

_____
Title

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

BROWN COUNTY

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

INTRODUCTION

The Complainants initiated this proceeding by filing a complaint that the Respondents had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats., by subcontracting the operation of the Brown County Youth Home without first bargaining with Complainant AFSCME Council 40, the exclusive representative of a bargaining unit including the individuals employed by the County at the Home prior to implementation of the subcontract.

The Examiner dismissed the complaint as to Respondent Brazeau as well as the allegation that Respondent County had engaged in anti-union discrimination but found that Respondent County had committed the alleged violation of its duty to bargain and fashioned a remedial order including a requirement that the County discontinue its subcontract until it has fulfilled its statutory duty to bargain concerning the decision to subcontract, and reinstate and make whole those of the former employes of the Home who were laid off because of the decision to subcontract.

Each of the Respondents has filed what the Respondents assert are timely petitions for Commission review. Complainants have responded with a motion for summary Commission affirmance of the Examiner on the ground that neither of the documents filed by Respondents constitutes a timely and otherwise viable petition for review.

FACTUAL BACKGROUND

Much of the factual background of the case is undisputed and detailed sufficiently in the Examiner's Findings of Fact and Memorandum.

To briefly summarize, prior to July 15, 1983, Respondent Brown County maintained and operated Youth Home staffed on a 24 hour per day basis by eight non-professional employes of the County. Respondent Brazeau was the Director of the County's Youth Home on that date and during the material developments occurring the months preceding it.

The County's Youth Home was located in leased space at St. Norbert's Abbey in Green Bay, and that space was licensed to accommodate up to 26 children. At that location, the County provided unlocked shelter to youngsters in runaway, child abuse, child neglect, and other situations in which such shelter was needed on a temporary basis, often pending Children's Court action or Department of Social Services evaluation and recommendations.

Complainant AFSCME organized the employes of the Youth Home in December of 1982 and was certified as the bargaining representative for those employes on April 21, 1983.

In late 1982, the County had learned that it would be unable to renew the lease after its expiration of July 1, 1983. The owners did agree to extend the lease until July 15, 1983, but no longer. The County searched for another location for the Youth Home, and considered offers from private enterprises which proposed to operate the Youth Home on a subcontract basis. The County did not accept the initial proposals for subcontracting and it continued to search for a new site. By April 1, 1983, a new site had not been secured for the Youth Home.

On April 28, Brazeau approached the County and expressed an interest in acting as a subcontractor for the Youth Home. On May 3, he submitted a written proposal 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 approximatley $217,000.00.

On May 9, James Miller, Business Representative for Complainant AFSCME sent a demand for negotiations to the County's Personnel Director, Gerald Lang. By a subsequent letter from its Attorney, the Union took the position that the decision to subcontract Youth Home operations was a mandatory subject of bargaining. The County's Corporation Counsel, Kenneth Bukowski, advised the County Executive and County Board Chairman that the decision itself would be a permissive subject, but that the impact of the decision on represented employes would have to be bargained. The parties then met for their first bargaining session on May 18. The Union proposed that subcontracting be allowed only if it would not affect any current employes. The County did not agree to this proposal, but held itself out as willing to negotiate the impact of any subcontracting. As of the hearing before the Examiner, the record does not reflect any agreement between the County and the Union on any aspects of the initial collective bargaining agreement for these employes, including the subcontracting proposals.

On June 17, 1983, the County entered into a contract with Brazeau along the lines of his May 3 proposal. Brazeau, through his corporation, Shelter Care of Brown County, Inc., became the subcontractor for Youth Home Services on July 15. Prior to taking over the operation, Brazeau invited all County Youth Home employes to submit employment applications. Only one part-time relief worker applied. The County Youth Home employes were all laid off from County employment on July 14, 1983.

Brazeau's operation differed from the former Youth Home in that it used twelve beds, rather than twenty-six, it operated at a converted private residence on West Mason Street, rather than at St. Norbert's Abbey, and was operated at a cost to the County of $217,000 rather than the $297,000 spent in the year prior to subcontracting.

The Complainants filed the instant Complaint of Prohibited Practices against the County and Brazeau on June 28, 1983, alleging that both Respondents had violated the Municipal Employment Relations Act by unilaterally subcontracting the Youth Home services. The complaint also asserted that the decision was made in retaliation for the employes' decision to become represented, and that it constituted a refusal to bargain. Further, the Complainants alleged that the Respondents' actions interfered with the protected rights of bargaining unit members.

THE EXAMINER'S DECISION

As noted above, the Examiner dismissed the complaint insofar as it alleged violations of MERA by Brazeau. With respect to the County, the Examiner found that the decision to subcontract, made unilaterally, was a refusal to bargain and a derivative act of interference. The Examiner based his decision on the Wisconsin Supreme Court's decision in Racine Schools v. WERC, 81 Wis.2d 89 (1977), which was the primary authority cited by all parties to this litigation.

The Examiner rejected the County's argument that, since the decision to accept Brazeau's offer involved a variety of public policy choices including changing the size and location of the facility (i.e., matters reserved to the employer as a public body), it was therefore primarily related to public policy and permissive under Racine Schools, supra. Instead, the Examiner concluded that those ends could have been achieved without subcontracting and that the primary motivating factor for the County was the $80,000 per year savings achieved through the contract with Brazeau.

The Examiner acknowledged the difficulty of fashioning a remedy, since there was no collective bargaining agreement in place, but directed the County to reinstate those of the former employes of the Youth Home who were laid off as a result of the decision to subcontract (as distinguished from those of the former employes who were laid off as a result of the decision to reduce the scale of the operation), to make such employes whole for their losses, and to bargain the decision to subcontract with Complainant Union.

THE PETITIONS FOR REVIEW AND THE PARTIES' POSITIONS CONCERNING SAME

The County's Petition

The County maintains that the Examiner erred in his application of the Racine Schools test since the food service subcontracting there involved only a change in the identity of the employe, not in the location or level of services. In this case, the County asserts, the subcontracting of Youth Home services was undertaken to alter the direction of the operation, and was arrived at only after extensive review and debate of policy alternatives by the County.

The County alleges that the Examiner's decision contains internal factual inconsistencies which cast doubt on the Examiner's ultimate conclusions. The Examiner's Finding of Fact 9, according to the County, concludes that the decision to subcontract was made in order to relocate the facility and reduce its size, while his Finding of Fact 10 established that the decision was not primarily related to matters of public policy. Additionally, the County argues that the Examiner's Finding of Fact 9 conflicts with portions of his Memorandum, with the former stating that the decision to move the facility did not stem from a desire to economize, while the latter claims that economy was the primary reason for the change in operations.

Although the County disputes the Examiner's conclusion that the decision to subcontract the Youth Home was economically motivated, it argues that even if the decision had been based solely on economics, that does not require the conclusion that it constituted a mandatory subject of bargaining, citing, First National Maintenance Corp. v. NLRB, 452 U.S. 666, 107 LRRM 2705 (1981), wherein the Court stated that economically motivated decisions to shut down a portion of an operation are not mandatory subjects of bargaining under the National Labor Relations Act where collective bargaining could not provide a solution to the concerns leading management to contemplate taking the disputed action.

Finally, the County generally cites the testimony of Social Services Board Chairman Harold Compton and argues that this plainly established that the County's disposition of the Youth Home resulted from a thorough and spirited debate over competing social and political considerations, and thus was a permissive subject of bargaining.

Brazeau's Petition

Brazeau objects to the Examiner's decision on many of the same grounds raised by the County. Further, Brazeau characterized the Examiner's division of the decision to subcontract into three components as tortured and artifical. The subcontracting decision made by the County was not, as the Examiner suggests, merely a group of separate decisions, one to move the facility to West Mason Street, another to reduce its size, and a third to reduce the cost of operations. Rather, Brazeau asserts, the decision was a single act achieving policy goals of Brown County while also impacting wages, hours and working conditions. The components which go to public policy concerns must be weighed in the same equation with those affecting bargainable topics if the balancing test of Racine Schools is to be followed. Brazeau asserts that the balance in this case comes down on the side of public policy and the overall decision must therefore be found permissive. The artificial compartmentalization undertaken by the Examiner

necessarily results in a presumption that all subcontracting decisions are mandatorily bargainable. This, Brazeau argues, ignores not only Racine Schools and Brookfield, 3/ but also the recent line of federal cases including First National Maintenance, supra, and Otis Elevator Company United Technologies, 269 NLRB 162, 115 LRRM 1281 (1984). Moreover, such a presumption improperly relieves the Complainants of their burden of proof, improperly placing the onus on the employer to prove that the decision was not a mandatory subject.

Even assuming that the Examiner was correct in finding that the County violated its duty to bargain with the Union, Brazeau maintains that the remedy ordered by the Examiner goes well beyond any appropriate level of relief. First, Brazeau asserts that the Examiner ignores the evident failure of the affected employes to mitigate their damages by applying for positions with Shelter Care of Brown County, Inc. More importantly, the Examiner ignores the fact that restoration of the status quo ante is not necessary to facilitate bargaining in this instance. Since the contract between Brown County and Shelter Care allows for cancellation upon 45 days notice, the existence of the contract does not alienate the Union's right to bargain and to implement the bargain, if any, ultimately reached. Citing, City of Appleton, Dec. No. 18171 (Pieroni, 10/80), aff'd Dec. No. 18171-A (WERC, 1/82). To require the County to reestablish a Youth Home employing County personnel without assurances that the bargain will ultimately require the facility is far broader than required to facilitate bargaining. The reestablishment of the Youth Home as a County operation with the former employes, Brazeau notes, necessarily has an adverse effect on the innocent employes and management of Shelter Care. Thus the Examiner's remedy unfairly penalizes the Employer and innocent parties. This is not a result favored by the law, and the order to bargain should not therefore be tied to a restoration of the status quo ante.

Finally, Brazeau argues that the Examiner's order reinstating former employes with full back pay ignores the fact that the Employer offered to bargain all issues except the decision to subcontract and the Union refused this offer. Thus the Union failed to seek mitigation at the bargaining table. In combination with the individual employes' failure to mitigate by applying for positions with Shelter Care, this mandates at the very least a remand of the matter to the Examiner for the determination of actual damages, rather than the broad relief ordered.

Position of Complainants on the Merits of the Petitions for Review

The Union argues that the Examiner's decision should be affirmed in all respects. The Union asserts that there is nothing in the record to suggest that the County's decision to subcontract was intended to achieve policy goals. The County still operates a Youth Home--it simply does so through a different employing entity and with different employes. The obvious primary impact of the subcontract was on the wages, hours and working conditions of the former employes who lost their jobs. The County's refusal to come to grips with Racine Schools and its implications, the Union asserts, is premised on the County's mistakenly narrow reading of the case and strained attempts to distinguish the instant case. Taken as a whole, the record evidence--balanced in accordance with the Racine Schools test--proves that the subcontracting decision itself was primarily related to wages, hours and working conditions, and had to be bargained.

With respect to the assertions of Brazeau that the individual employes failed to mitigate their damages, the Union maintains that a failure to mitigate is an affirmative defense which must be raised and proven by the County. Since the County failed to do so, the Examiner's decision cannot be attacked for not addressing this issue.

Finally, the Union disputes Brazeau's claim that the Union itself failed to bargain. Citing City of Green Bay, Dec. No. 18731-A (Davis, 6/82) aff'd with modifications, Dec. No. 18731-B (WERC, 6/83). The Union asserts that there is no obligation to bargain effects where the decision is mandatory and the employer refuses to bargain over that decision. Accordingly, the Union requests that the Examiner's decision be affirmed in its entirety.

3/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979) (held permissive a municipal employer's economically motivated decision to lay off employes).

Complainants' Motion to Dismiss Brazeau's Petition for Review and the Positions of the Parties Concerning Same

The Complainants moved to dismiss Brazeau's Petition for Review as untimely. They assert that a dissatisfied party has 20 days to submit a Petition for Review under Sec. 111.07(5), Stats.; that while Complainants' Counsel agreed to an extension of time for the County's petition, no such extension was contemplated or agreed to for Brazeau's petition; and that Brazeau submitted his petition of April 25, 1984, 34 days after the Examiner issued his decision. Thus, the Union argues, the petition must be dismissed.

The County and Brazeau note that the letter from Bukowski to General Counsel Davis and carboned to Complainants' Counsel stated that Bukowski's understanding was "All parties will have until Wednesday, April 25, 1984, in which to appeal the above-referenced matter. If I am incorrect in this regard, please let me know immediately." Davis' response, dated April 2, 1984, confirmed that "Any Petition for Review" had to be received by April 25. This letter was addressed to Counsel for all parties. Brazeau and the County attack the Complainants' motion as manifestly unfair, noting that Brazeau relied on the correspondence of Bukowski and Davis, which passed without objection by Complainants' Counsel. The Complainants, it is argued, waived their right by their silence and should be estopped from raising an objection six weeks after they had notice of the arrangements for petition filing. Moreover, Respondents argue, the Davis letter of April 2 may be construed as an interim order, issued within the twenty days of the Examiner's decision, establishing a different time for appeal. Finally, they argued that Sec. 111.07(12), Stats., sets a standard of substantial compliance with procedures in cases before the Commisison and directs that cases not be dismissed on purely technical grounds. For all the foregoing reasons, the Respondents urge that the Complainants' Motion to Dismiss be denied.

Complainants' Motion to Dismiss the County's Petition for Review and the Positions of the Parties Concerning Same

The Complainants' moved to dismiss the County's Petition for Review, alleging that its filing was not authorized by the County Board, but only by a committee of the Board; that a municipality can only act through its full Board; and that since it is the County which will bear responsibility for the remedy in this case, it follows that only the County Board could have legitimately authorized the instant appeal. For those reasons, the Complainants argue that there has been no valid appeal by the Respondent County for the Commission to address, but merely a petition filed by a body which is not legally competent to submit such a petition.

The County responds to the Complainants' motion by noting that the Brown County Board has delegated to the Social Services Board the responsibility to oversee the day-to-day operations of the Youth Home; that as part of this responsibility, the Social Services Board authorized the instant appeal; that the Authority to manage the Youth Home necessarily includes the right to direct litigation connected with its operations; and that the County Board itself voted to subcontract the Youth Home to Shelter Care, thereby impliedly authorizing any acts necesary to implement that decision, including a defense of that decision in any legal forum. Finally, the County asserts that the Corporation Counsel personally possesses the power to take an appeal of decisions adverse to the County's interests. For those reasons, the County urges the Commission to deny the Motion to Dismiss and to proceed to the merits.

DISCUSSION

The Motion to Dismiss Brazeau's Petition for Review

The Complainants' conduct undercuts their claim that they never intended to allow an extention of time for the filing of Brazeau's appeal. The Bukowski letter of March 29 plainly communicated an understanding that all parties, i.e., the County, Brazeau and the Complainants--would receive an extention of time. General Counsel Davis' response on April 2 confirmed this understanding. The Bukowski letter was carboned to Complainants' Counsel Graylow, and the Davis letter was directly addressed to him. Thus the Complainants had notice of the arrangements and failed to object for a period of six weeks. Assuming that a misunderstanding occurred, the Complainants were the only party who could recognize it as such and correct the mistake. The burden was on Complainants either to acquiesce or to object in a timely fashion. No objection followed until

six weeks after the Complainants knew of the misunderstanding and five weeks after Brazeau was prejudiced by it. Under these circumstances, the reliance of Brazeau on the Bukowski and Davis letters was reasonable and foreseeable, while the prolonged silence of Complainants was not reasonable. The Commission therefore deems the Complainants to have agreed to the extension of time for Brazeau by its conduct and to have thereby waived any objections to a petition filed within the time period established by the Bukowski and Davis correspondence. 4/

Complainants' Motion to Dismiss the County's Petition for Review

The Petition for Review filed on behalf of the County herein was filed by and individual who is obviously an agent of the County--the Corporation Counsel. That petition therefore must be presumed to represent the objection of a party in interest pursuant to the statute. If, in fact, the filing of the petition is contrary to the actual intention of the party in interest, Brown County, the appropriate means for bringing that fact to the Commission's attention and remedying the error would be action by the authorized body to withdraw the Petition for Review. Only upon being apprised of such action on the part of Brown County Board would the Commisison have occasion to inquire as to the authority of the County's Corporation Counsel to file it. It can also be noted that had we found the Brazeau petition untimely, we could and would have treated it as a request to submit amicus arguments in support of Respondent County's petition.

The Merits of the Examiner's Decision

We share the Examiner's overall conclusions--affirmance of which has been urged by Complainants--that Respondent Brazeau has not been shown to have committed any prohibited practices; that Respondent County has not been shown to have engaged in Sec. 111.70(3)(a)3 discrimination; but that Respondent County has been shown to have committed refusal to bargain prohibited practices violative of Secs. 111.70(3)(a)4 and 1. Specifically, we conclude that the County committed refusals to bargain by unilaterally substituting non-unit contracted-for personnel for the bargaining unit personnel it had been employing at the Youth Home and by refusing to bargain about that decision after being requested to do so by Complainaint Union. We also share the Examiner's view that the remedy appropriate in such circumstances includes both cease and desist and make whole relief.

While we agree with the Examiner's decision in many respects, we have modified certain of his findings and conclusions and his order to fully conform same to our views of the case as set forth below.

In our view, the Examiner applied the appropriate controlling legal precedents, to wit, those developed by our Wisconsin Supreme Court in Racine Schools and Brookfield, supra. The private sector cases cited by the Respondents are not directly applicable to cases arising under MERA, and the Wisconsin Supreme Court expressly rejected a proposed reliance on private sector analysis in Racine Schools, supra, 81 Wis.2d at 97-100. It would be inappropriate to base our decision herein on the First National Maintenance and Otis Elevator cases, supra, cited by the Respondents.

Even if we had given those cases any consideration herein, they would not have warranted the outcome urged by the Respondents. For, those cases appear to boil down to the proposition that an employer decision affecting job security that would otherwise be a mandatory subject of bargaining will not be a mandatory subject if collective bargaining about the decision could not have solved the problems leading the employer to consider making the decision in question. 5/ Here, for reasons noted below, the considerations prompting the County to decide to provide Youth Home services by means of contracted for rather than bargaining unit employes would have been amenable to possible solution through collective bargaining about wages, hours and conditions of employment.

4/ Even if we had found Respondent Brazeau's petition untimely, we would have treated it and his supporting arguments as amicus submissions in support of the County's Petition for Review and on that basis would have considered them in our disposition of this case.

5/ See, e.g., First National Maintenance, supra, 107 LRRM at 2709-10.

We agree with the Respondents that there is a more apt characterization of the County's acceptance and implementation of Brazeau's May 3, 1983 offer than the Examiner's characterization thereof as three separate decisions: to offer Youth Home services at 2221 W. Mason Street, to offer Youth Home services at a facility with fewer beds than the Home's facilities at St. Norbert Abbey had, and to utilize contracted-for personnel rather than bargaining unit employes to provide Youth Home services.

As Respondents argue, in determining the overall status of the Youth Home, the County had undertaken a decision-making process that concerned the location and size of the Home as well as whether the serivce would be offered at all and by whose employes. We are not persuaded, however, by the Respondents arguments that the County's need to find a new location and its needs/desire to reduce the number of its Youth Home beds, or either of those matters constituted an integral part of the decision to use the employes of a subcontractor. As Respondents have shown, the County engaged in lengthy deliberations concerning the Youth Home generally. 6/ Much of the ongoing discussion related to an assessment of the goals and objectives of the Youth Home service and the implications of present and future state and federal government requirements or conditions on funding.

6/ In his brief to the Commission, Respondent Brazeau cites the following as having been involved in the County's lengthy deliberations concerning the Youth Home generally and its decision to accept Brazeau's offer in particular:

> . . . providing youth care in a remodeled home in a residential setting . . . providing educational, recreational and special counseling and job opportunity services which had previoulsy been lacking at the Abbey location (id. at 3).

> . . . The County was concerned whether the Youth Home could be used for juveniles needing a secure or nonsecure setting . . . , whether such care could be provided in one facility, . . . how to secure funding for a Youth Home in light of the State's reduction of support . . . , whether closing the Youth Home was a viable alternative . . . , what sort of interim soulution could be used to allow planning for new federal or state laws mandating that secure juvenile facilities not be located at an adult detention center . . . , how to best integrat juveniles into the community, whether the lack of activities at the Abbey resulted in greater destructiveness and vandalism, . . . how to increase the use of counseling services for the youth . . . , what the appropriate size of the Youth Home and length of stay there should be . . . , and providing a residential atmosphere with adequate security. . . . (id. at 8).

> . . . the belief that Mr. Brazeau could perform the full scope of services the County wanted . . . (id. at 9).

> . . . quality and scope of services to be provided at the Youth Home, including condition of the facility, the turnover in management, the ability to plan for anticipated changes in the program, the ability to provide counseling services and

The question of whether to subcontract the operation of the home to Shelter Care of Brown County, Inc. arose in the midst of those broader ongoing discussions about youth home services. Indeed, the record clearly indicates that the decision to contract out to that firm was viewed by the decision makers an a interim solution to a set of broader and longer range problems and uncertainties.

In that context, our review of the record persuades us that even though many options were considered by the County, by May of 1983, the deliberations had reached a point where the only realistic means available to the County for continuing Youth Home operations after its Abbey lease extension ran out was to move the Youth Home operations to the Mason Street facility and to thereby reduce the number of available beds to the lesser number to which that facility could be upgraded for licensing by means of certain remodeling. Thus, the record does not support the notion of wholly independent decisions to move and to size down the facility.

However, even at that point in its decision-making, the County had available to it the choice of using County employes or those of a subcontractor to operate the Mason Street facility. The record satisfies us that it was not a selection among alternative social or political goals and objectives that prompted the County's ultimate approval of the latter of those two alternatives. On the contrary, the minutes of the May 17, 1983 SPECIAL YOUTH HOME ADVISORY COMMITTEE indicate to us that those two alternative modes of operating the Mason Street facility had been considered by the County's decision makers and that the subcontracting alternative had been chosen as the one being recommended to the County Board because "the county can't operate as cheaply as a private contractor" and "union negotiating was given as a cause of why" that was the case. (5/17/83 Committee Minutes at p.4, Respondent County's Exhibit 5). No other reason was given at that meeting in response to pointed questions from some in attendance as to why the resolution being advanced for County Board consideration provided for the subcontracting alternative rather than operating the Mason Street facility with the County's own employes. Indeed, the resolution itself expressly states in its concluding WHEREAS clause, ". . . that a substantial savings can be achieved by the method of the County utilizing the alternative of contracting with a private contractor. . . ." (Complainants' Exhibit 3).

Thus, notwithstanding our differences with the Examiner concerning how we get to this point, we also find it appropriate to apply the Racine Schools "primarily related" test within the context of the above-noted two-way choice between operating the Mason Street facility with bargaining unit personnel or with employes of a subcontractor. As the Examiner correctly stated, the Racine Schools test calls upon us to determine ". . . whether a particular decision is primarily related to wages, hours and conditions of employment of the employes or, whether it is primarily related to the formulation or management of public policy." 7/ For the reasons noted above, we are persuaded that the decision the County was ultimately faced with was not where the Youth Home would be located or its size, but rather a question of whether to use Shelter Care of Brown County, Inc.'s or bargaining unit County employes to staff the smaller bed-capacity Mason Street facility.

The Respondents assert that the County had a right, without bargaining with the Union, to decide to have contracted-for personnel perform its Youth Home services instead of bargaining unit personnel and to layoff all of its bargaining unit Youth Home employes in the process. We conclude, however, for the reasons noted by the Examiner, that the County's refusal to bargain about the above decision and its unilateral decision to accept and implement Brazeau's offer are violative of the requirements of the duty to bargain as specified by the Wisconsin Supreme Court in Racine Schools.

Thus, we agree with the Examiner that the County's policy decisions as regards obtaining new quarters for a Youth Home, changing to a residential rather than institutional setting, and changing (reducing) the number of beds in its Youth Home facility were not ultimately involved in its decision whether to continue to have its Youth Home services performed by bargaining unit employes or instead to use the employes of Shelter Care of Brown County, Inc. We also share

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7/ Racine Schools, supra, 81 Wis.2d at 102.

the Examiner's view that the decision to accept and implement Brazeau's offer cannot be attributed to an objective of retaining Brazeau's services or of implementing any of the other programmatic or logistical objectives referred to by Respondents. In other words, the evidence shows that the County's ability to decide among alternative social or political goals or values as regards the provision of youth services would not have been affected, let alone significantly compromised, had the County fulfilled an obligation to bargain with the Union before substituting non-unit for unit personnel.

In our view, the principles established in Racine Schools render the decision to use non-unit instead of unit personnel involved herein a matter as to which the County had an obligation to bargain with the Union. While the particular facts involved in the Racine Schools case did not involve a change in location, they did involve operational considerations such as the need for additional equipment and personnel. 8/ Because the central consideration ultimately involved in the decision making here (as in Racine Schools) was whether to use non-unit personnel rather than the employer's bargaining unit personnel to perform a function historically performed by bargaining unit personnel, we agree with the Examiner that the principles of that case warrant the overall conclusion reached by the Examiner herein.

Given its substantial wage, hours and conditions of employment dimensions and the absence of a significant public policy dimensions, the decision to use non-unit personnel was primarily related to wages, hours and conditions of employment. 9/

Accordingly, we have affirmed the Examiner's general conclusion that the County violated Sec. 111.70(3)(a)4 and 1, Stats., and have specified in our modified conclusion of law that the County violated that section both by refusing, upon request, to discuss subcontracting with the Union, and by deciding to use non-unit rather than unit employes for providing Youth Home services historically performed by bargaining unit personnel, without having fulfilled its duty to bargain about that matter with the Union.

Review of Examiner's Remedy

In Racine Schools, supra, the Commission issued an Order which was affirmed by the Supreme Court, providing relief involving each of the elements conventionally ordered in cases of subcontracting in violation of the duty to bargain, to wit, cease and desist from the unlawful conduct, reinstitute the former operation as an employer-operated program, offer reinstatement in appropriate positions to employes adversely affected by the unlawful conduct; make whole employes adversely affected by the unlawful conduct; bargain collectively with the complainant union as regards the decision to subcontract the work historically performed by the bargaining unit and as regards the impact of any such decision on the wages, hours and conditions of employment of the bargaining unit involved; and post appropriate notices to employes concerning remedy compliance. 10/

The general purposes of remedial orders in cases of unlawful unilateral changes in mandatory subjects of bargaining are (1) to require the offending party to bargain about the decision to subcontract the operation in which bargaining

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8/ Racine Schools, supra, Dec. No. 12055-B at Findings 9, p. 3 and Finding 17, p. 6

9/ Accord, City of Green Bay, Dec. No. 18731-B (WERC, 6/83), appeal to Circuit Court withdrawn (held mandatory a decision to consolidate City and County data processing operations at County-owned location since decision was essentially to substitute non-unit for unit employes performing the same function).

10/ Racine Schools, supra, Dec. No. 12055-B (WERC, 10/74), aff'd, 81 Wis.2d 89 (1977). See also, Gorman, Basic Test on Labor Law Unionization and Collective Bargaining, 532-35 (West, 1976); Morris, The Developing Labor Law, 1663, 1665, 1676-78 (2 ed, BNA, 1983); McDowell and Huhn, NLRB Remedies for Unfair Labor Practices, 209-211, (U of Penn, 1976).

unit employes were previously employed, and to do so with economic conditions restored to parallel as closely as possible those in existence at the time the decision to subcontract was unlaterally made and implemented in violation of the duty to bargain; and (2) to make whole employes affected by the refusal to bargain conduct. 11/

Of course, the specific remedy in any given case must necessarily be tailored to the circumstances of the case involved. The very nature of certain aspects of the order are inherently limited as to time and conditions under which they remain in effect, and in appropriate circumstances various aspects of the conventional remedy may be limited or modified or not ordered to afford the remedy that best effectuates that underlying purpose of the statute. 12/

The remedy ordered by the Examiner herein was designed to achieve the two purposes noted above. In addition to ordering the County to bargain with Complainant Union about "the decision to subcontract the operation of the Mason Street facility of Brown County Youth Home and the impact of any such decision upon the wages, hours and conditions of employment of employes", the Examiner also ordered the County to cease and desist from implementing a subcontract prior to the exhaustion of its duty to bargain over the decision to subcontract, and to offer reinstatment to and make whole for losses suffered by reason of their layoff, those former employes of the County Youth Home as were "laid off as a result of the decision to subcontract the Youth Home." In his Memorandum, the Examiner commented concerning remedy as follows:

> 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 subcontracting. But although this created a practical problem in the result of this case, the law makes no distinction as to mandatory and nonmandatory 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.

While we agree with the remedial objectives reflected in the Examiner's Order, we have reformulated the Order for clarity and greater specificity in a number of areas. We have also modified the Order in certain respects to conform more closely with our analysis of the case, above, and we have made it clear that the Commission's compliance proceedings will remain available to resolve disputes concerning what constitutes compliance with the Order.

Our Order (as was true of the Examiner's) does not require the County to change the location, size or nature of the Mason Street facility being operated by Shelter Care of Brown County, Inc. Our cease and desist order focuses solely on Youth Home subcontracting and only on substitution of non-unit for unit employes for the performance of work historically performed by bargaining unit employes, to wit, Youth Home services other than those that were supervisory in the labor relations sense of that term.

Notwithstanding Respondents' arguments to the contrary, we consider it appropriate that the remedy herein include a cease and desist order requiring that the County cease using non-unit employes to perform Youth Home work until it has fulfilled its statutory duty to bargain with the County about whether non-unit

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11/ Green County, Dec. No. 20308-B (WERC, 11/84) at 19, citing Mid-State VTAE, Dec. No. 14958-C (5/'7), aff'd Dec. No. 14958-D (WERC, 4/78) and Milwaukee Metropolitan Sewerage District, Dec. No. 17123-B (3/81), aff'd, 17123-C (WERC, 3/82).

12/ See generally, Gorman, supra, at 138-39, 532-35,; Morris, supra, at 1653-1678; McDowell and Huhn, supra, at 81-115.

personnel should be substituted for unit personnel for the performance of such work. To limit the remedy to a bargaining order as Respondent Brazeau has alternatively urged would not achieve either of the remedial purposes noted above. It would neither make whole the employes adversely affected by the County's unlawful use of non-unit personnel in the performance of what was previously an operation performed by bargaining unit personnel; nor would it meaningfully restore the conditions in which the parties would have bargained about the decision to subcontract the Youth Home in the absence of the prohibited practices found herein. Respondent Brazeau's proposed remedial approach would require Complainant Union to seek through the bargaining process not only the protection of bargaining unit employes from layoffs due to subcontracting, but also the termination of the subcontract, the reinstitution of the operation by the County, and the reinstatement of former bargaining unit employes to perform the available work in that operation. Since it was Respondent County's prohibited practices that unlawfully altered those conditions, it is not inequitable that the remedial order herein return the parties to the status quo circumstance, rights and obligations that would have obtained had the County operated Mason Street with bargaining unit employes beginning on July 15, 1983. We find no merit in the contention that the remedy is unnecessary or inappropriately harsh on either of the Respondents or the employes of Shelter Care of Brown County, Inc.

Conversely, while we have specifically required reinstitution of a Youth Home employing bargaining unit employes of the County, we do not intend that our Order give the Union any greater advantages or rights than it had when the County unlawfully used non-unit rather than bargaining unit personnel to staff the Mason Street facility. Accordingly, we have fashioned our provisions for affirmative County remedial action to restore to the bargaining unit only the employment opportunities they would have had if the County had operated the Mason Street facility with bargaining unit personnel. Thus, our Order focuses not on the numbers and nature of positions at the Abbey, but rather on the numbers and nature of the positions that would have been filled by bargaining unit personnel had the County operated the Mason Street facility rather than subcontracting that operation. (To the extent possible, however, it is our intent that the rates of pay and benefits for comparable positions at the Abbey be the basis for initial back pay calculations, subject to possible subsequent retroactive modification as a result of the parties' contract bargaining.)

We have deleted from the Examiner's bargaining order the requirement that the County bargain the impact of a decision to substitute non-unit for unit personnel because the County has been and expressly remains willing to fulfill that aspect of its bargaining obligation, rendering an order herein to that effect unwarranted.

In response to Respondent Brazeau's criticism that the Examiner's Order deprives the County of the well established defense of failure to mitigate as a set off against its back pay liability herein, we have expressly referred in our Order to the continuing availability of such a defense herein. In our view, however, the Examiner's Order would not have foreclosed the County from seeking to set off sums attributable to a failure to mitigate against its back pay liability to the individuals involved. We do not share Complainants' view that the County has effectively waived such defense by not pleading it heretofore in this proceeding. For, as is usually the case in proceedings of this kind, the details of back pay were not addressed in the hearing before the Examiner or in his Order. In our view, the County remains in a position to assert that some or all of the employes granted back pay under our Order are entitled to less or none on account of an unjustified failure to mitigate their damages. We reject, however, Respondent Brazeau's further contention that the employes should be stripped of any claim for back pay on the basis of the Union's unwillingness to reach

hence this additional requirement will provide a more effective means of notification to them of the contents of the posted notice.

In addition, we have ordered that those of the laid off Youth Home employes who are not entitled to an offer of immediate reinstatement nonetheless be accorded the rights (if any) which existing County layoff and recall procedures provide. It is our intent that under the provisions of our back pay order, that group of employes will also be (1) afforded the rights and opportunities they would have had if the County had operated the Mason Street facility with bargaining unit employes, and (2) made whole to the extent that they experienced net losses of pay by reason of the County's unlawful failure to do so.

The back pay portion of our Order is to be applied in a manner that deems the layoffs and recalls that would have occurred on and after July 14, 1983 to have been governed by the County ordinance layoff procedures in effect at such times. We have also expressly provided for the customary interest on the monetary aspects of our modified Order. 13/

We recognize that the parties' bargaining concerning the impact on wages, hours and conditions of employment of the layoffs and subsequent changes in Youth Home operations experienced since the Union obtained its certification may result in provisions in addition to those being ordered herein. Nevertheless, we find the Examiner's reliance on the collective bargaining process for the very identification of the basic contours of the remedial order in this case was overbroad. It is our hope that the parties can resolve any and all disputes concerning the steps required of the County under our modified Order through bilateral compliance negotiations. Indeed, we have attempted to make the Order as specific as the instant record permits to guide the parties in that regard. Nonetheless, it should be understood by all parties that the Commission will remain available to resolve any remaining disputes concerning what steps must be taken to comply with our remedial order herein, either through informal mediation or by means of a decision following a compliance hearing.

Dated at Madison, Wisconsin this 3rd day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

13/ See Note 2, supra.

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