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 PLAMER, GEORGE PRONOLD, STEVE RICE, JULIE SOWERS, DOUG STANGEL, NANCY VERRIER AND MARK ZIMONICK, Complainants,	
vs.	Case 207 No. 31845 MP-1495
BROWN COUNTY, Respondent,	Decision No. 20857-D
and	
LLOYD BRAZEAU, Co-Respondent.	

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of the Complainants.

Mr. Kenneth Bukowski, Corporation Counsel, Brown County, County Courthouse, Green Bay, WI 54305 and Michael, Best & Friedrich, Attorneys at Law, by Mr. Thomas P. Godar, One South Pinckney Street, P.O. Box 1806, Madison, WI 53701-1806, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DETERMINING BACK PAY ENTITLEMENT

On July 3, 1985, the Wisconsin Employment Relations Commission issued a decision which inter alia granted make whole relief to those above-named individual Complainants who would have been employed by Brown County at the Mason Street facility commencing July 15, 1983.

Following the completion of judicial review proceedings, the County offered unconditional reinstatement to the above-named individual Complainants effective January 1, 1988.

The parties thereafter unsuccessfully attempted to reach agreement on the scope of the County's back pay liability. Examiner Marshall L. Gratz then conducted hearing on the back pay issues in Green Bay, Wisconsin on February 2, 22, 23, March 30, and April 27, 1989. The parties then submitted post-hearing argument, the last of which was received December 4, 1992.

The parties agreed to waive whatever applicability Secs. 227.46(2) and (4), Stats. have to this decision.

Having considered the matter, the Commission makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. If Brown County had operated a Mason Street Youth Home facility from July 15, 1983 through December 31, 1987, the facility would have been staffed by five 40 hour per week and six 16 hour per week positions.

2. At the time of the July 14, 1983 layoff of all Youth Home employes, AFSCME represented the following eight full-time and five part-time employes who had the indicated seniority dates:

Full-time

George Pronold	10- 6-75
Katherine Palmer	3- 1-77
Toni Cagle	4- 8-77
Nancy Verrier	10-17-79
Bruce Chapman	10-29-79
Mima Lorberblatt-Teske	10-20-80
Mark Zimonick	3-25-81
John Nanney	7- 5-82

Part-time

Darlene Funk	1- 1-73
Steven Rice	8-16-79
Julie Sowers	4-15-80
Jean Elliot	4-16-80
Douglas Stangel	8- 5-80

The 1983 collective bargaining agreement between the County and AFSCME contained the following layoff provision:

> Article 24. SENIORITY
>
> (a) LAYOFFS: If a reduction of employee personnel is necessary, the last person hired shall be the first person laid off, and the last person laid off shall be the first person recalled. No regular employees shall be laid off if there are part-time, temporary or seasonal employees working.

By operation of this layoff provision, the two least senior part-time employes (Elliot and Stangel) would have been laid off, the five most senior full-time employes (Pronold, Palmer, Cagle, Verrier and Chapman) would have received the five available full-time positions and the three remaining least senior full-time employes (Lorberblatt-Teske, Zimonick and Nanney) and the three most senior part-time employes (Funk, Rice and Sowers) would have received the six available 16 hour per week positions.

3. None of the individually-named Complainants who would have been employed at a County-operated Mason Street Youth Home facility failed to seek, accept or retain work comparable in type and compensation to Youth Home employment between July 15, 1983 and December 31, 1987.

4. Complainant Pronold did not remove himself from the labor market through his enrollment as a student at University of Wisconsin - Green Bay.

5. Complainant Palmer removed herself from the labor market during her enrollment as a student at Iowa State University.

6. Complainant Nanney was removed from the labor market when he was incarcerated.

7. Pursuant to the terms of the 1983 and the 1984-1988 collective bargaining agreements between the County and AFSCME, full-time employes would have received the following compensation for the years in question at a Mason Street facility:

July 15, 1983 - December 31, 1983

Wages	$7,821.00	($8.00 X 977.6 hrs.)
Holiday Pay	432.00	(Assumes employes would have worked two of the 3-1/2 holidays)
Retirement	385.00	(5-1/2 months X $70)
Longevity	10.00	per month beginning 8th year of service
	20.00	per month beginning 12th year of service

1984

Wages	$17,388.80	($8.36 X 2080 hrs.)
Holiday Pay	902.88	(Assumes employes would have worked four of the 7-1/2 holidays)
Retirement	1242.00	($103.50 X 12 months)
Longevity	10.00	per month beginning 8th year of service
	20.00	per month beginning 12th year of service
	30.00	per month beginning 16th year of service

1985

Wages	$18,262.40	($8.78 X 2080 hrs.)
Holiday Pay	948.24	(Assumes employes would have worked four of the 7-1/2 holidays)

Retirement	1242.00	($103.50 X 12 months)
Longevity	10.00	per month beginning 8th year of service
	20.00	per month beginning 12th year of service
	30.00	per month beginning 16th year of service

1986

Wages	$18,990.40	($9.13 X 2080 hrs.)
Holiday Pay	986.04	(Assumes employes would have worked four of the 7-1/2 holidays)
Retirement	1242.00	($103.50 X 12 months)
Longevity	10.00	per month beginning 8th year of service
	20.00	per month beginning 12th year of service
	30.00	per month beginning 16th year of service

1987

Wages	$19,552.00	($9.40 X 2080 hrs.)
Holiday Pay	1,015.20	(Assumes employes would have worked four of the 7-1/2 holidays)
Retirement	1242.00	($103.50 X 12 months)
Longevity	10.00	per month beginning 8th year of service
	20.00	per month beginning 12th year of service
	30.00	per month beginning 16th year of service

8. Pursuant to the terms of the 1983 and 1984-1988 collective bargaining agreements, part-time employes would have received the following compensation for the years in question at the Mason Street facility:

July 15, 1983 - December 31, 1983

Wages	$3,128.40	(40% of full-time wages)
Holiday Pay	192.00	(Assumes 40% of full-time benefit and that employes would have worked one of the 3-1/2 holidays)
Retirement benefit)	154.00	(40% of full-time
Longevity		(40% of full-time benefit)

1984

Wages	$6,955.52	($8.36 X 832 (16 X 52))
Holiday Pay	401.28	(Assumes 40% of full-time benefit and that employes would have worked two holidays)
Retirement benefit)	496.80	(40% of full-time
Longevity		(40% of full-time benefit)

1985

Wages	$7,304.96	($8.78 X 832)
Holiday Pay	421.44	(Assumes 40% of full-time benefit and that employes would have worked two holidays)
Retirement benefit)	496.80	(40% of full-time
Longevity		(40% of full-time benefit)

1986

Wages	$7,596.16	($9.13 X 832)
Holiday Pay	438.24	(Assumes 40% of full-time benefit and that employes would have worked two holidays)
Retirement benefit)	496.80	(40% of full-time
Longevity		(40% of full-time benefit)

1987

Wages	$7,820.80	($9.40 X 832)
Holiday Pay	451.20	(Assumes 40% of full-time benefit and that employes would have worked two holidays)
Retirement benefit)	496.80	(40% of full-time
Longevity		(40% of full-time benefit)

9. As of the July 14, 1983 layoff, only full-time employes were eligible for health and dental insurance benefits. At the time of the layoff, Complainant Pronold had basic family health and family dental coverage, Complainants Verrier, Zimonick and Nanney had HMP family health and family dental coverage, Complainants Palmer and Lorberblatt-Teske had basic single health and single dental coverage, and Complainants Cagle and Chapman had HMP single health and single dental coverage.

10. In October 1984, the parties reached agreement on a 1983 contract. During bargaining, there was no discussion between the parties as to whether

or how the 1983 agreement impacted upon any back pay entitlement of individual Complainants.

Based upon the above and foregoing Findings of Fact the Commission makes and issues the following

CONCLUSIONS OF LAW

1. None of the individual Complainants failed to mitigate their losses.

2. The 1983 collective bargaining agreement does not waive or diminish the individual Complainants' entitlement to back pay.

3. Because Complainants Elliot and Stangel would not have been employed at a County operated Youth Home facility, they are not entitled to back pay.

4. The back pay entitlement of the 11 individual Complainants who would have been employed at a County-operated Mason Street Youth Home facility consists of wages, holiday pay, retirement, longevity, and any health and dental coverage if possessed on July 13, 1983. Clothing, training, travel and moving expenses directly related to securing or retaining alternative employment are valid offsets against interim earnings.

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

ORDER 1/

As of May 31, 1993, Brown County's obligation pursuant to Dec. No. 20857-B to make affected individual Complainants whole for back pay losses incurred between July 15, 1983 and January 1, 1988 is met by payments as follows:

George Pronold	$150,654.80
Katherine Palmer	59,598.17
Toni Cagle	81,349.07
Nancy Verrier	85,284.61
Bruce Chapman	65,961.67
Mima Lorberblatt-Teske	0.00
Mark Zimonick	3,621.67
John Nanney	15,185.38
Darlene Funk	11,166.81
Steven Rice	No claim
Julie Sowers	23,585.97

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Found on pages 8 and 9.

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

Continued

1/ Continued

> (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. 227.57 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.

BROWN COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DETERMINING BACK PAY ENTITLEMENT

BACKGROUND

On April 21, 1983, Complainant AFSCME was certified by the Wisconsin Employment Relations Commission as the collective bargaining representative of all regular full-time and regular part-time nonprofessional employes of the Brown County Youth Home. At the time of AFSCME's certification, the County was considering the option of subcontracting the Youth Home operation.

On May 3, 1983, Lloyd Brazeau, the Director of Brown County Youth Home, submitted a subcontract proposal to the County which stated:

> As the present Director of the Brown County Youth Home, I feel I am aware of the needs necesary (sic) 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.

On May 9, 1983, 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, AFSCME 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 of his opinion that the decision to subcontract would be a permissive subject of bargaining, 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, 1983. AFSCME 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. Additional bargaining sessions were held June 2 and June 9, 1983.

On or about June 15, 1983, the County determined that it would subcontract with Brazeau to provide shelter care facilities and entered into

such a contract on June 17, 1983.

On June 16, 1983, Brazeau mailed the following letter to all Youth Home employes:

> We have stated publicly that we will request all staff members, of the Youth Home, to apply for employment with us in the event that the County awarded the contract to us. We further indicated that all applications submitted would be considered.
>
> If you are interested in applying for employment with us to operate our youth home, please contact me by June 22, 1983.
>
> If you have any questions regarding the applications, please do not hesitate to contact me.

Based upon this letter, some employes contacted Brazeau while others did not. No bargaining unit employes were hired by Brazeau. All bargaining unit employes were laid off effective July 15, 1984.

On June 28, 1983, AFSCME and former Youth Home employes filed a prohibited practice complaint with the Commission alleging the County had violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally subcontracting the Youth Home.

Bargaining sessions between the parties were held June 30, July 13 and August 13, 1983. The subcontracting issue remained unresolved.

In December 1983, the parties met with a Commission mediator in an unsuccessful attempt to reach an agreement.

In March 1984, Commission Examiner Christopher Honeyman issued a decision on the prohibited practice complaint which concluded that the County violated its duty to bargain when it subcontracted the Youth Home. The Examiner ordered the County to reinstate the Youth Home employes and make them whole. The County filed a petition with the Commission seeking review of the Examiner's decision.

In May and June 1984, the parties exchanged the following correspondence:

> May 15, 1984
>
> Mr. Gerald Lang, Personnel Director
> Brown County, Room 410 Northern Bldg.
> 305 E. Walnut St.
> Green Bay, WI 54301
>
> Re: Brown County Youth Home
>
> Dear Mr. Lang:
>
> I have been informed by the members of the Brown County Youth Home that you are seeking updated applications for positions with Brown County.

Please be advised that any such action in dealing with individual employees will be considered by the Union as an unfair labor practice. I caution you that there is already one decision on the Youth Home, ordering the County to reinstate the employees to similar positions. Any other action must be dealt with through the Union.

Sincerely,

James W. Miller

May 31, 1984

Mr. James W. Miller
Representative, Bay District
Wisconsin Council 40
2785 Whippoorwill Drive
Green Bay, WI 54304

Re: Your Correspondence of May 15, 1984, concerning Brown County Youth Home

Dear Mr. Miller:

I am in receipt of your letter of May 15, 1984, regarding the Brown County Youth Home. As you know, the County has appealed the decision of the hearing examiner in the Youth Home matter. In order to mitigate potential County damages, the County is making a good faith effort to provide employment for former Youth Home employees. This is being done through the auspices of the Personnel Department solely for the purpose of mitigating potential County damages, should the County receive an adverse ruling with regard to its appeal of the Youth Home decision.

These types of employment opportunities cannot be made available unless updated job applications are provided by the former Youth Home employees. If the Union wishes to discuss this matter, the County will be more than willing to do so at a mutually convenient time and place. However, if the Union refuses to negotiate in good faith on this matter, or if offers of employment are rejected, the County considers that it has mitigated its damages and will not be liable to these employees for future wages.

The County is taking this action solely for potential damage mitigation purposes and does not in any way waive its appeal of the merits of Mr. Honeyman's decision nor any other rights which the County possesses.

Very truly yours,

GERALD E. LANG
Personnel Director

June 18, 1984

Mr. Gerald E. Lang
Personnel Director
Brown County Courthouse
P.O. Box 1600
Green Bay, WI 54305

Re: Brown County Youth Home

Dear Mr. Lang:

Your letter to Mr. Miller dated May 31, 1984, has been forwarded to me for review and reply.

Please indicate what additional information you need from the former employees of the Youth Home.

Be advised that if you have an unconditional offer of employment to convey, you may convey same directly to me.

Very truly yours,

RICHARD V. GRAYLOW
Personnel Director

cc: Jim Miller
Ken Bukowski

June 29, 1984

Mr. Richard Graylow
Lawton & Cates Law Offices
110 East Main Street
Madison, WI 53703-3354

Re: Brown County Youth Home

Dear Attorney Graylow:

Your letter to me of June 18, 1984, advised that any unconditional offer of employment to former employees of the Youth Home may be conveyed to you.

Currently in the Brown County Social Services Department there are two (2) social worker vacancies, one (1) a fulltime position in the Adult Services unit dealing with the Community Options Program (COP), and the other is a one-half (1/2) time position in the Adult Services unit and deals with some of the COP as well as other duties. The starting wage for these positions is $9.13 per hour with normal County fringe benefits.

Four (4) of the former Youth Home workers have the education and/or experience to qualify them for these positions; and therefore, Brown County would like to interview these four (4) employees for consideration of employment in these social work positions.

> Since these positions are higher level positions than the child care worker positions, there should be no quarrel regarding our actions in consideration (sic) these former Youth Home employees for social work positions.
>
> Should you have other thoughts on this matter, please contact myself or Ken Bukowski, Corporation Counsel, at the earliest opportunity.
>
> Very truly yours,
>
> GERALD E. LANG
> Personnel Director
>
> cc: Ken Bukowski, Corporation Counsel
> James Miller, AFSCME, AFL-CIO

Some former Youth Home employes did update their County job applications and/or express interest in the specific Social Services vacancies.

In October 1984, pursuant to Sec. 111.70(4)(cm)6, Stats., the parties met with a mediator/arbitrator in an effort to reach agreement on an initial contract. AFSCME's final offer contained the following subcontracting language:

> The Union recognizes that, except as hereinafter provided, the County has the right to subcontract work provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no employee shall be laid off or suffer a reduction of any provisions in the Agreement as a result of subcontracting.

The County had no specific subcontracting proposal. The County's offer as to a Management Rights clause stated in part:

> Article 1. MANAGEMENT RIGHTS RESERVED
>
> Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

Before the Mediator/Arbitrator, the parties reached agreement on a 1983 contract. As part of the settlement, AFSCME dropped its subcontracting proposal. The County's Management Rights clause was part of the agreement. There was no discussion between the parties as to: (1) the impact of the 1983 agreement on the Examiner's decision and the review proceedings before the Commission; or (2) whether the 1983 contract would or would not allow the County to unilaterally subcontract.

In July 1985, the Commission issued a decision which affirmed the Examiner's determination that the subcontracting of the Youth Home had violated Sec. 111.70(3)(a)4, Stats. The Commission's Order included a make whole

remedy. The County and Brazeau sought judicial review of the Commission's decision.

In February 1986 and March 1987, the Commission decision was affirmed by the Brown County Circuit Court and Court of Appeals, District III, respectively. On April 18, 1987, the Wisconsin Supreme Court denied a petition for review filed by the County and Brazeau.

By the following letter, the County offered unconditional reinstatement to all former Youth Home employes, effective January 1, 1988:

> Effective on or around January 1, 1988, Brown County will be operating a Shelter Care facility. The plans are to operate the 15 bed Shelter Care facility located on West Mason Street. The facility will be under the direction of a Shelter Care Administrator and will be staffed by Shelter Care Workers who will provide 24-hour per day/7 day per week coverage.
>
> As a former Brown County Youth Home employee, Brown County is offering you the position of Shelter Care Worker. This is a fulltime position on a rotating shift averaging 40 hours per week. Hourly pay is being negotiated between AFSCME Local 1901F and Brown County and is expected to be more than $9.00 per hour. Job duties are generally defined in the enclosed position description; however, the position description is subject to modification.
>
> Brown County requires a response from you regarding this offer no later than December 1, 1987. An earlier response would be beneficial to Brown County in preparation for operation of the Shelter Care facility.
>
> Please contact me if you have any questions regarding this offer. We look forward to hearing from you.
>
> Sincerely,
>
> GERALD E. LANG
> Personnel Director
>
> GEL:sr
> cc: James Miller, AFSCME
>
> I ACCEPT BROWN COUNTY'S OFFER OF EMPLOYMENT AS A SHELTER CARE WORKER.
>
> _____
>
> I DECLINE BROWN COUNTY'S OFFER OF EMPLOYMENT AS A SHELTER CARE WORKER.
>
> _____

Some employes accepted the offer while others did not.

1983 CONTRACT AS A WAIVER OF BACK PAY

The County asserts that under the terms of the 1983 collective bargaining agreement, AFSCME waived any back pay claims of the former Youth Home employes. In this regard, the County contends that the 1983 contract has a term of January 1, 1983 through December 31, 1983 and thus covers the time when the subcontract occurred; and that the Management Rights clause in the contract, particularly when viewed in the context of AFSCME's decision to drop its subcontracting proposal, gives the County the right to subcontract the Youth Home. Should the Commission reject this argument as a basis for extinguishing all liability, the County contends, in the alternative, that its back pay liability should end effective with the October, 1984 agreement on the terms of the 1983 contract. The County cites Olivetti Office U.S.A. v. NLRB, 926 F.2d 181 (1991) as support for these arguments.

We reject the County's arguments. Initially, it is noteworthy that the Court of Appeals has already rejected the County's proposed interpretation of the Management Rights clause. Before the Court of Appeals, the County asserted that the Circuit Court had erred by failing to consider the impact of the 1983 agreement on the propriety of the Commission's decision. The Court of Appeals rejected the County's argument holding:

> This management rights clause simply restates the same management prerogatives guaranteed by MERA. Neither we nor the commission have questioned the county's long term policy decision to condense the youth home. The commission ordered reinstatement only for those bargaining unit employees who would not have been laid off had the county, rather than Brazeau, staffed the Mason Street youth home. The county's contention that such a clause empowers it to replace public employees without bargaining, however, is meritless. The County's unquestioned right to lay off employees for "legitimate reasons" does not give it the right to avoid mandatory bargaining over a decision to replace public employees, especially where that decision relates primarily to wages, hours, or conditions of employment. Accordingly, the existence of a management rights clause is immaterial, and the circuit court committed no error by refusing to allow it into the record. (emphasis added)

Assuming arguendo that the Court's interpretation of the contract language is not definitive and further assuming that the County's interpretation of the contract is correct, we would still reject the County argument that the 1983 agreement constitutes a waiver of any right to back pay.

A waiver of relief acquired through a complaint proceeding must be established by clear and unmistakable contract language or bargaining history. 2/ Here, the parties reached agreement on the 1983 contract in October 1984. At that time, AFSCME and at least some of the individual employe Complainants possessed a remedial order from Examiner Honeyman which included make whole relief. The County and Respondent Brazeau's petitions for review as to the Examiner's order were pending before the Commission. There is no evidence that the parties discussed whether the management rights language of

2/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

the 1983 contract was retroactive in its effect or whether the 1983 agreement waived the back pay relief individual Complainants had already received from the Examiner. There is nothing in the 1983 contract which discusses the continued entitlement or lack thereof to back pay.

Given all of the foregoing, even assuming arguendo that AFSCME, as the exclusive bargaining representative, has the authority to waive the entitlement of the individual named Complainants to back pay, we think it apparent that a clear and unmistakable waiver of back pay has not been established.

We also reject the related County argument that any back pay liability should be cut off as of the October 1984 agreement on a 1983 contract.

The County's position in this regard is premised on the assertion that: (1) by bargaining a 1983 contract, it complied with the portion of the Commission's Order requiring that it bargain over the subcontracting issue; (2) the 1983 contract allows the County to subcontract; and (3) from the date it acquired the right to subcontract, its obligation to make employes whole ended.

As we just discussed, the Court of Appeals concluded that the 1983 contract did not reflect bargaining over the subcontracting question. Thus, the second and third premises upon which the County bases its argument are not valid.

It is also important to note that during the Commission review of the Examiner's decision, the County argued that it should be allowed to meet its bargaining obligation without having to first reinstate unit employes. We rejected that argument and held that bargaining must occur in a context which approximates the status quo which existed at the time the illegal conduct occurred (i.e. following an offer to reinstate the affected employes). We stated:

> 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 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 avail-able 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. (emphasis added)

The Court of Appeals affirmed the requirement of our Order that bargaining occur on the level playing field which reinstated employes provides. The Court held:

> The county next challenges the commission's remedial orders requiring reinstatement and back pay for the bargaining unit employees that would have retained their jobs and the county staffed the new youth home. The county contends that a simple bargaining order would be sufficient to advance the purposes of MERA. We conclude, however, that the commission acted within its authority and that its orders must be upheld.
>
> It is our obligation to defer to the commission in its selection of a remedial order. WERC v. City of Evansville, 69 Wis.2d 140, 166, 230 N.W.2d 688, 703 (1975). Where it cannot be said that the commission's order is a patent attempt to achieve ends other than those contemplated by MERA, and the order is otherwise within the commission's legal authority and the findings supporting it rely on sufficient evidence, the order will not be set aside by the reviewing court. Id. at 166-67, 230 N.W.2d at 703. Here, the commission's order satisfies the three requirements enumerated by our supreme court in Evansville.
>
> First, the order is an attempt to achieve ends contemplated by MERA. The commission explained its remedial orders as necessary to restore the parties to the conditions preceding the county's violation and to make whole the employees affected by the prohibited conduct. MERA contemplates fairness in bargaining 4/ and empowers the commission to remedy wrongs resulting from prohibited practices. By returning the parties as nearly as possible to their pre-violation positions, the commission's orders support MERA. A less comprehensive remedy, such as a simple bargaining order, would require the union to bargain from a disadvantageous position: to bargain on behalf of wrongfully laid off employees who remain uncompensated throughout an indefinite period of negotiation. The county has not shown that the commission's orders are outside the ends contemplated by MERA. Our supreme court has upheld similar remedies. See, e.g., Racine, 81 Wis.2d at 104-05, 259 N.W.2d at 732-33. (Footnote omitted)

. . .

When the 1983 contract was bargained, the affected unit employes had not been offered reinstatement and made whole. Thus, it is clear that the 1983 contract neither establishes compliance with our bargaining order nor provides a persuasive basis for tolling the County's back pay obligations.

MITIGATION

Under Wisconsin law, an employer can seek to reduce the back pay an employe would otherwise receive by asserting that the employe failed to mitigate his/her damages by not seeking or accepting alternative employment. Glamann v. St. Paul Fire Ins., 140 Wis.2d 640 (1987); State ex rel Schilling & Klinger v. Baird, 65 Wis.2d 394 (1974). To meet its burden as to this affirmative defense, the employer must establish that: (1) the employe failed to exercise reasonable diligence seeking alternative employment and (2) it was reasonably likely the employe might have found comparable work by exercising reasonable diligence. Glamann, supra; Schiller v. Keuffel & Esser Co., 21 Wis.2d 545 (1963); Gant v. Milwaukee Athletic club, 151 Wis. 333 (1912); Barker v. Knicker-bocker Life Ins. Co., 24 Wis. 630 (1869). An employe is not obligated to seek or accept employment of a "different or inferior kind" Schiller, supra; Mitchell v. Lewensohn 251 Wis. 424 (1947); State ex rel Schmidt v. Dist. No. 2, 237 Wis. 186 (1941), but rather must only make reasonable efforts to seek and/or accept work of "like character" with similar and not inferior "terms and conditions at a place reasonably convenient to the employe." Parish v. Anschn Properties, 247 Wis. 166 (1943); Schmidt, supra; Loss v. Geo. Walter Brewing Co., 145 Wis. 1 (1911).

An employe's mitigation obligations extend to an offer of work by the employer who wrongfully discharged or laid off the employe. Larson v. Fisher, 259 Wis. 355 (1951); see also Murbro Packing, Inc., 276 NLRB No. 9 (1985). Further, if an employe effectively removes himself/herself from the employment market, for instance through pursuit of additional education, back pay obligations are tolled for the period of removal. Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (1985), Taylor v. Safeway Stores, Inc. 524 F.2d 263 (1971).

Mitigation Obligations in the Context of Brazeau's June 16, 1983 Letter

In our earlier decision, we found that:

> Prior to taking over the operation, Brazeau invited all County Youth Home employes to submit employment applications.

That invitation was extended by the following letter which was mailed to all the individual Complainants herein.

> We have stated publicly that we will request all staff members, of the Youth Home, to apply for employment with us in the event that the County awarded the contract to us. We further indicated that all applications submitted would be considered.
>
> If you are interested in applying for employment with us to operate our youth home, please contact me by

June 22, 1983.

> If you have any questions regarding the applications, please do not hesitate to contact me.

The County argues that all the individual Complainants failed to apply for employment with Brazeau and thereby failed to exercise reasonable diligence when mitigating their damages. Thus, the County contends that it has no back pay liability.

The County asserts that the jobs under Brazeau's operation were comparable in wages, benefits and duties to those performed by the individual Complainants under the County operation of the Youth Home. The County further alleges had Complainants applied, there was a reasonable likelihood of employment with Brazeau. The County contends that Complainants failed to apply for employment due to employe anger towards Brazeau. Citing Glamann, supra, the County therefore argues that it has met its burden to establish Complainants' failure to mitigate their damages from the improper layoff.

The Complainants argue that all affected employes mitigated their damages. Complainants contend that the County has not established the availability of alternative work of the same type or nature as that performed by Youth Home employes prior to layoff.

Having considered the parties' arguments in the context of Wisconsin mitigation law, we conclude that Brazeau was soliciting applications for work at compensation levels clearly inferior to those provided by the County prior to the layoff. Brazeau himself generally conceded that he could not offer "a comparable fringe and benefit package." For example, Brazeau did not offer any retirement benefit whereas the individual employe Complainants had participated in a retirement plan (i.e. the Wisconsin Retirement Fund). Further, as County employes, the individual employe Complainants earned approximately $16,000 in wages per year in contrast to the $12,000 or $14,000 level at which Brazeau compensated his employes. Given the inferior wages and benefits, Wisconsin mitigation law did not obligate the individual employe Complainants to apply for work with Brazeau. Thus, to the extent that any employe failed to respond to Brazeau's letter, 3/ that failure did not breach the duty to mitigate.

Mitigation Obligations in the Context of Alternative County Employment

The County makes a general argument that any back pay liability should be tolled effective May 15, 1984 when AFSCME failed to appropriately cooperate with County efforts to provide alternative employment to Complainant employes. We reject this argument for several reasons.

First, a review of the full exchange of correspondence satisfies us that AFSCME did not block County efforts to provide alternative employment opportunities. Graylow's June 18, 1984 letter asks the County to indicate what information employes need to provide to update their applications. The County responded by advising Graylow of two social work vacancies. Thus, AFSCME and the County were at least to that extent cooperating in an effort to provide

3/ As noted in the BACKGROUND section of this decision, the record establishes that some individual employe Complainants did respond to Brazeau's letter.

employment opportunities to laid off employes.

Second, the evidence establishes that some individual Complainants did in fact update their applications and apply for specific vacancies as they arose. Thus, even if we were to conclude that the Complainant Union had sought to block County efforts to provide employment opportunities, those efforts did not succeed.

Given the foregoing, we reject this general County argument. To the extent the County also argues that specific employes breached their duty to mitigate by failing to pursue alternative employment with the County, we will respond to this argument in our discussion of the claims of the individual Complainants.

EMPLOYE CLAIMS AGAINST BROWN COUNTY

The make whole portion of our remedial Order stated:

> 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, 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 than 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 Compens-ation 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 Compens-ation 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 (sic) 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.

Complainants and Respondent County agree that the Commission's make whole Order properly includes compensation for lost wages, retirement and longevity. They further agree that the parties' 1983 and 1984-1988 collective bargaining agreements establish the wage rates and benefit levels which should be utilized when calculating any valid employe claim. The parties' positions in this regard are consistent with our July 1985 decision wherein we held that back pay calculations were subject to the parties' collective bargaining. However, the parties do not agree on the composition of employe claims as to a variety of other components. Thus, we proceed to discuss and resolve these disputes.

Interest

Respondent County argues no interest is presently due because there is a good faith dispute as to the amount of damages owed.

In Wilmot Union High School, Dec. No. 18820-B (WERC, 12/83) we addressed this argument in the following manner:

> In both Anderson v. LIRC and Madison Teachers v. WERC, the Courts held inter alia, that the administrative agency involved had erred by not ordering interest as regards a period including the time from the beginning of the back pay period to the date of the initial decision holding that the back pay involved was due and owing. Each Court held that the agency involved had improperly failed to apply the general rule in Wisconsin that pre-judgment interest is available as a matter of law on fixed and determinable claims or where there is a reasonably certain standard of measuring damages. 13/ In each case the Court treated employment-related back pay as sufficiently determinable under the Wisconsin rule standards, above, to entitle the affected complainant to interest from the respective date of each instance of loss of a monetary benefit due to the respondent's statutory violation. 14/ Each court thereby applied interest not only to the period after a decision was issued to the effect that back pay was due and owing in the circumstances, but also to the period of time before any such decision had been issued.
>
> ---
>
> 13/ Anderson v. LIRC, supra, slip. op., 111 Wis.2d at 258-59, citing, Nelson v. Travelers Insurance Co., 102 Wis.2d 159, 167-68 (1981). Madison Teachers v. WERC, supra, slip. op. at 7-8, citing, Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 438 and First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis.2d 358, 276.
>
> 14/ Notably, in Anderson the Supreme Court was dealing with back pay liability that had potentially been increasing over a period of several years. The Court applied interest over a period of several years. The Court applied interest to the entire back pay period including a period after an offer of reinstatement that the Supreme Court held was not sufficient to terminate the accrual of back pay. 111 Wis.2d at 260.

We remain persuaded by the above quoted rationale and thus reject the Respondent's argument.

Interest is calculated separately on each year's back pay entitlement. The 12% simple interest rate causes the County's back pay liability to increase

by 1% each month. Calculations in this decision reflect amounts owed as of May 31, 1993.

Shift Differential

Certain Complainant employes received shift differential payments when employed at the Youth Home prior to their layoff and thus have included shift differential payments within their claim. However, neither the 1983 or the 1984-88 contracts provide for shift differential payments during the relevant period herein. Thus, shift differential is not a valid component of employe back pay.

Overtime

Certain Complainant employes worked overtime when employed at the Youth Home and thus have included overtime within their claim.

Our back pay Order links employe compensation to those hours which would have been worked at the downsized Mason Street facility. The record before us does not allow us to determine how much overtime was worked at the Mason Street facility during the period in question. Thus, we have no valid basis for awarding overtime to any claimant herein.

Clothing

The claim of Complainant Cagle includes an estimate for clothing expenses incurred in a new job which exceeded the expenses incurred as a Youth Home employe. We are satisfied that increased clothing costs incurred can be a valid offset against interim earnings when back pay is calculated. However, here, we have denied the claim because it is unsupported by specific evidence as to the precise level of the expenses in question.

Moving Expenses

Two of the individual Complainants, Cagle and Chapman, have included moving expenses in their claims. If directly related to acquiring alternative employment, we are persuaded such expenses could legitimately be offset against interim earnings. However, assuming arguendo that the two claims in question would meet this standard, both would be denied as unsupported by specific evidence of actual costs.

Training Expenses

The claim of Complainant Cagle includes the cost of training related to the alternative employment she obtained. We are satisfied such a claim is a valid offset against interim earnings because Cagle's training produced employment which in turn generated income which reduces the County's back pay liability. See, Famet, Inc., 202 NLRB 409 (1973).

Sick Leave

Complainants contend that employe back pay claims properly include sick leave benefits the employe would have received but for the improper layoff.

AFSCME cites Airco, Inc., 62 LA 1056 (Eyrland, 1974) and International Paper Co., 37 LA 1026 (Bothwell, 1962) as support for its position.

The County argues that claims for sick leave benefits are not valid because the employes are already claiming back pay for a full year's work schedule. Thus, the County contends the employes' direct wage claim already compensates them for any time the employes would have been absent from work due to illness. The County asserts that neither of the arbitration awards cited by Complainants addresses the availability of sick leave pay in addition to wage payments in a back pay context.

We find the County's position persuasive. When viewed in the context of the existing claims for wages based upon a full years work schedule, a grant sick leave benefits would constitute double compensation for the hours covered by the benefit. While the arbitration awards cited by Complainants demonstrate that collective bargaining agreements can be interpreted as providing for simultaneous receipt of sick pay and vacation pay during an employe illness or disability, neither those awards nor the agreements bargained by the parties herein provide a persuasive basis for granting employes compensation for sick leave benefits in addition to full back pay.

Vacation Benefits

Complainants argue that vacation benefits are properly compensable as back pay, citing Link Brothers Packing, Dec. No. 12900-E (WERC, 3/76), Gulf Envelope Co., 107 LRRM 1435 (NLRB, 1981), Allied Corp., 80 LA 680 (Cohen, 1983) and International Paper Co., 81-2 ARB 8368 (Barnhart, 1981).

The County contends that vacation pay is inappropriate because the employes have already claimed back pay based on a regular work schedule. Thus, as with sick leave pay, the County argues that a grant of vacation benefits would place the employes in a better position than they would have been in had they not been laid off. The County asserts that none of the cases cited by Complainants support inclusion of vacation benefits in a back pay calculation.

We find the County's position persuasive. A grant of vacation pay in addition to wages would constitute double compensation for work hours lost and thus is inconsistent with a make whole remedy. Nor does the nature of the vacation benefits in the parties' contracts support inclusion of this benefit as part of a back pay claim.

With the possible exception of International Paper, none of the cases cited by Complainants support a contrary conclusion. In Link Brothers, the "vacation pay" issue before the Commission was whether an employe was entitled to a bonus paid to employes who worked during hunting season rather than taking vacation. The employe was denied the bonus because the Commission was satisfied that the employe would not have worked during the hunting season. Gulf Envelope dealt with the entitlement of striking employes to vacation, Allied Corp., with the vacation entitlement of laid off employes.

Holiday Pay

Complainants assert that employes are entitled to all holiday pay lost due to the wrongful layoffs. Complainants cite State of Wisconsin, Dec. No. 20144-A (Burns, 5/84), aff'd by operation of law, Dec. No. 20144-B (WERC, 6/84), Zewall Sportsbear Co., 53 LA 1165 (Dworkin, 1969), Anaconly Aluminum, 48

LA 219 (Allen, 1967) and Acme Precision Products, Inc., 81-1 ARB 8042 (Daniel, 1980), in support of their position.

The County disputes the holiday pay claim as constituting double compensation thus in excess of the Commission's make whole Order. It argues that the cases cited by Complainants offer little, if any, support for inclusion of holiday pay.

Our make whole Order is designed to place employes in the same position as to earnings as they would have been in had they not been laid off. To the extent Complainants are seeking contractually established premium pay for holidays worked by the employe, and holiday pay to which employes are entitled whether or not they work a holiday, the claim is well founded. This is additional compensation which employes would have received in addition to their hourly base wage had they not been laid off. This conclusion is consistent with State of Wisconsin, supra, where the litigants and the Commission agreed that the make whole provisions of grievance arbitration awards appropriately included premium pay employes would have received because they would have worked on a holiday.

Looking at the holiday benefits bargained by the parties in their 1983 and 1984-1988 contracts, it is apparent that for each holiday designated in the contract all regular full-time employes receive eight hours of straight time pay as a holiday allowance in addition to regular earnings. Regular part-time employes receive this holiday allowance on a pro-rata basis. In addition, regular full-time and regular part-time employes receive time and one-half for all work performed on a holiday.

Because all of these benefits would have produced additional compensation for employes had they not been laid off, employes are entitled to inclusion of these holiday benefits as part of the back pay calculation.

For 1984-1987, based on the limited record before us, we are assuming that there are 7-1/2 contractual holidays each year on which the Home would be staffed and that full-time employes would have worked four holidays each year while part-time employes would have worked two holidays each year. For the period of July 15, 1983 through December 31, 1983, there were 3-1/2 holidays on which employes would work and we are assuming full-time employes would have worked two holidays while part-time employes would have worked one holiday.

Insurance

Complainants contend that it is proper to include within the employes' back pay claim both the costs of obtaining alternative health and dental insurance and any out of pocket medical costs which would not have been incurred but for the County's wrongful action. Complainants cite Mercer School District, Dec. No. 21486-A (Buffett, 11/84) aff'd by operation of law, Dec. No. 21486-B (WERC, 11/84) and Sheet Metal Workers International Association 89-1 ARB 8272 (Koven, 1989) as support for its position.

The County argues that employes are entitled to either the cost of obtaining replacement insurance or reimbursement for actual incurred medical costs but not both. Citing State of Wisconsin, Dec. No. 20144-A, B, supra, the County asserts the Commission has held that employer liability should be limited to the cost of alternative insurance because failure to obtain alternative coverage was based on employe inaction more than the employer's termination decision. The County also cites Sheet Metal Workers for the proposition that employe contributions toward premiums are not reimbursable

because such monies would not have been paid to the employe and that reimbursement should be limited to actual medical expenses incurred.

The potential harm to employes caused by improper loss of insurance benefits is that medical and/or dental expenses previously covered by insurance policies will now become the direct obligation of the employe. While it can be argued that employes who lose coverage have an obligation to mitigate their loss by obtaining alternative coverage, such an argument does not acknowledge the reality of the cost of insurance and the lack of income available to an unemployed individual to obtain alternative coverage. Thus, we reject such an argument. Therefore, we think it clear that if an employe did not obtain alternative coverage, back pay includes incurred medical and dental expenses which would otherwise not have been incurred by the employe under County coverage minus an offset for any deductibles the employe and/or premium contribution level applicable to County coverage. However, if an employe obtains alternative coverage, part of the make whole obligation is to reimburse the employe for the cost of such coverage to the extent such costs would not otherwise be incurred as offset by the contribution level the employe would have made toward insurance under the County plan had they continued to be employed.

The County has no obligation for any portion of the cost of alternative insurance which is attributable to the provision of benefits superior to those previously enjoyed by the employe prior to layoff. On the other hand, if an employe's alternative coverage does not provide a benefit previously received and the employe incurs an out of pocket cost as a result of this disparity, then the County is obligated under our make whole remedy for both the cost of the alternative coverage (minus an offset for employe contribution under the County plan) and incurred out of pocket costs.

This approach is compatible with the result reached in Mercer. To the extent it differs from the result in State of Wisconsin, that case involved the question of an employer's compliance with a grievance arbitrator's award, not the remedy the Commission would have found most appropriate.

When calculating the impact of insurance on back pay entitlement, we will assume that all Complainants who had insurance coverage as of the July 1983 layoff would have retained it during the back pay period while those who did not have coverage at that time would not have acquired same. It can be argued that this approach is not appropriate for all the part-time Complainants whose part-time status made them ineligible for health and dental insurance as unrepresented County employes and who became eligible under the 1984-88 collective bargaining agreement. However, to assume that the part-time employes would have taken the insurance benefits when they became available is to speculate without any record support. Thus, we have rejected this alternative approach.

Loans, Second Mortgages

Complainants assert that as a matter of equity, the County should be ordered to reimburse employes for loans, second mortgages necessitated by the improper layoffs. Complainants argue that but for the County's wrongful action, such actions to make ends meet would not have been necessary.

The County contends that it has no loan repayment obligation. It alleges that the employes would not have received loans from the County had they not been laid off and thus that loans are not part of a make whole remedy. The County further argues that any back pay awarded to Complainants will allow

Complainants to pay off any outstanding loans. It asserts that it would be "double dipping" to allow both back pay and an award for loan repayment.

Our Order includes the County obligation to make employes whole for "all losses of pay" through payment of money "which each would have earned as an employe . . ." Thus, it is apparent that our Order does not entitle employes to compensation for loans incurred due to the County's action.

Travel Costs Incurred Attending WERC Compliance Hearing

The claim of Complainant Chapman includes travel costs related to his attendance at one of the compliance hearings. As was true for employe loans, this claim is beyond the scope of our make whole Order and thus is denied.

Mileage/Travel Expenses

Complainants assert the County is obligated to reimburse employes for mileage/travel expenses incurred while mitigating wage loss through alternative employment. Complainants cite Ingalls Shipbuilding Corp., 37 LA 953 (Murphy, 1961) as support for its position. Complainants also argue that it is inappropriate to offset any travel expenses Complainants would have incurred had they not been laid off, citing Link Brothers Packing, supra.

The County argues that it has no obligation for mileage/travel expenses. The County contends that the Commission would be establishing a "dangerous precedent" to conclude otherwise asserting that commuting costs are not tax deductible and that Wisconsin administrative code provisions recognize that some travel to secure employment is a fact of modern life. The County argues that the cases cited by Complainants "are limited to the specific facts in those cases." In any event, the County contends that costs which would have been incurred commuting to the Youth Home must be offset against any travel costs awarded by the Commission.

Having considered the parties' positions, we conclude that employes are entitled to use transportation/moving expenses incurred seeking/maintaining alternative employment as an offset from interim earnings to the extent the expenses exceed those incurred had the employes been employed at the Youth Home. See, American Mfg. of Texas, 167 NLRB 520 (1967).

HOW MUCH WORK WAS AVAILABLE WITH BRAZEAU

In our 1985 decision, we made clear that the County's back pay obligation was limited only to the employment opportunities available had the County (rather than Brazeau) operated the Mason Street facility. Because the Mason Street facility was to have been staffed at levels below those effective prior to the July 1983 layoffs, we explicitly held that not all unit employes were entitled to an offer of reinstatement under our Order.

Despite the foregoing, the Complainants argue that all employes are entitled to back pay based on their pre-layoff work hours. The County asserts that the Mason Street facility was indeed staffed at lower levels and that post-layoff employment opportunities existed for only five full-time and six part-time employes.

Having considered the parties' arguments, we conclude that Brazeau staffed the Home with five full-time (40 hours per week) and six part-time (16

hours per week) positions from July 1983 to January 1, 1988 when the County resumed control. We reach this conclusion because: (1) Brazeau testified that he staffed the Home at this level; (2) Brazeau provided a plausible explanation for how he was able to handle an increased client load with fewer staff; and (3) the documentation of individual employe earnings at the Mason Street facility from July 1983 to January 1, 1988 does not provide a definitive basis for determining any alternative staffing levels. Complainants correctly note that in any given year, Brazeau employed more than 11 individuals. However, the record of employe earnings supports Brazeau's rejoinder that employe turnover explains the disparity in numbers.

Having determined the number of positions available for bargaining unit employes, we turn to the question of identifying which individual Complainants would have been retained to perform this work.

WHO WOULD HAVE PERFORMED THE AVAILABLE WORK

Because the parties were still bargaining their initial contract at the time the Home's staffing levels were decreased, the determination of which employes would have been retained and which employes would have been laid off would have been governed by the County's ordinances. Thus, we specified in our July 1985 decision that 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 or after July 14, 1983 to have been governed by the County ordinance regarding layoff procedures in effect at such times." The portion of the County ordinance in effect in July 1983 stated:

> 4.98 LAYOFFS. The appointing authority may lay off an employee whenever it is necessary to reduce the work force for any reason. No permanent employee, however, shall be laid off while there are temporary or probationary employees serving in the same classification in the same department. Layoffs shall be based on job performance. Where job performance is relatively equal, then seniority shall prevail. The appointing authority shall notify each person laid off of all his/her rights including reinstatement eligibility. Regular employees shall receive at least 10 days notice prior to layoff. Layoff plans shall be approved by the Personnel Director before they are implemented. Laid-off employees shall be held in a layoff pool for a period of time equal to their length of service, but no longer than two years. Recall will be based on job performance history provided such employee can qualify to do the work available. Where job performance is relatively equal, then seniority shall prevail.

While the terms of the Ordinance are clear enough, it is by no means clear which Youth Home employes would have been laid off under its terms. Most importantly, the record does not allow us to determine whether job performance would or would not have been a basis for retaining less senior employes.

The County's arguments herein assume that the layoff clause in the 1983 contract would be utilized to identify those employes who would have been retained and those who would have been laid off. Complainants have not objected to use of the contractual provision. The contractual layoff clause provides:

> Article 24. SENIORITY
>
> (a) LAYOFFS: If a reduction of employee personnel is necessary, the last person hired shall be the first person laid off, and the last person laid off shall be the first person recalled. No regular employees shall be laid off if there are part-time, temporary or seasonal employees working.
>
> . . .

Job performance is not an operative factor in the layoff decision under the contract. Thus, application of the contractual clause is clear. We conclude that the clarity of the contractual layoff procedure and our inability to meaningfully apply the County Ordinance warrant the use of the contractual layoff clause in this proceeding.

At the time of the subcontracting with Brazeau, the following individuals were employed at the Youth Home:

Name	Classification	Hire Date
Darlene Funk	Child Care Worker (PT)	1- 1-73
George Pronold	Child Care Worker	10- 6-75
Katherine Palmer	Child Care Worker	3- 1-77
Toni Cagle	Child Care Worker	4- 8-77
Steven Rice	Child Care Worker (PT)	8-16-79
Nancy Verrier	Child Care Worker	10-17-79
Bruce Chapman	Child Care Worker	10-29-79
Julie Sowers	Child Care Worker (PT)	4-15-80
Jean Elliot	Child Care Worker (PT)	4-16-80
Douglas Stangel	Child Care Worker (PT)	8- 5-80
Mima Lorberblatt-Teske	Child Care Worker	10-20-80
Mark Zimonick	Child Care Worker	3-25-81
John Nanney	Child Care Worker	7- 5-82

The bargaining unit status of employe Sowers is unclear. The bargaining unit as certified by the Commission and as set forth in the parties' 1983 contract, includes regular part-time employes. Sowers' testimony regarding her regular work hours and her work schedule as reflected in a March 1983 letter from Brazeau would support a conclusion that she was a regular part-time employe at the time of the July 1983 layoff, even though her hours had been reduced. Yet Sowers' name was not included by the parties on the list of employes eligible to vote in the March 1983 election which led to AFSCME's certification as the bargaining representative.

Complainants treat Sowers as a unit employe in this proceeding. She is a named employe Complainant. The County contends Sowers' status is uncertain.

Having considered this question, we conclude that the record evidence best supports a determination that Sowers was a regular part-time employe at the time of the layoff. Thus, we have treated her as a unit employe for the purposes of this proceeding.

As discussed earlier herein, there are five full-time and six part-time Youth Home positions. Application of the 1983 contract's layoff clause in light of the seniority of bargaining unit employes produces the following:

Five Full-time	Six Part-time
Pronold	Lorberblatt-Teske
Palmer	Zimonick
Cagle	Nanney
Verrier	Funk
Chapman	Rice
	Sowers

Laid off

Elliot
Stangel

For the purposes of our calculations, we are assuming that the work force composition would have remained the same during the back pay period (July 15, 1983 through December 31, 1987). Thus, it is assumed the five full-time and six part-time employes would have chosen to remain employed by the County during this period at the Home. Therefore, the part-time employes' entitlement is based on a 16 hour week for the entire period and the employes whom we conclude would have been lawfully laid off have no entitlement to back pay for the period.

It could be argued that we should instead base our calculations upon an attempt to recreate what the ebb and flow of the work force would have been during this period. Under such a scenario, as Complainants secured other employment or removed themselves from availability for employment, part-time employes might acquire full-time employment or Complainants on layoff would acquire part-time or full-time employment. Neither party has proposed such an approach and, in our view, for good reason. Such an effort would essentially require substantial speculation as to the life choices Complainants would have made in various circumstances. We do not find such speculation to be a satisfactory basis for proceeding.

We proceed to discuss the specific entitlement of the 11 individual Complainants to back pay.

BACK PAY CALCULATIONS

Pronold

At the time of his layoff, George Pronold worked 40 hours per week on the night shift. He received family health and dental benefits under the County's "basic" plan.

In 1982, while employed full-time at the Youth Home, Pronold enrolled at the University of Wisconsin - Green Bay. At the time of his layoff, Pronold was a full-time student. Pronold pursued his studies on an essentially full-time basis until May 1987 when he received a degree.

From his layoff through his ultimate re-employment at the Youth Home effective January 1, 1988, Pronold sought work by applying for various positions with various employers in the Green Bay area. He also had an application for work with the County on file, which he updated in 1984 and again in 1987. In the Spring of 1985, Pronold accepted a temporary summer job cutting grass for the City of DePere. Prior to his starting date in this position, he received a letter from Brown County advising him of a vacant Park Ranger position and asking if he was interested in being considered for the job. Pronold responded to the letter by calling the Brown County Personnel Department and advising them that he would need to consult with AFSCME before responding. Pronold then called the offices of the AFSCME attorney representing the Complainants and was advised that he should apply. Pronold then called the County Personnel Department and advised them that although he would be working for the City of DePere, the County could consider him to be an applicant. Pronold was not offered the position.

During the summer of 1986, Pronold chose not to work for the City of DePere again because of child care problems.

In December 1986, through May 1987, Pronold was employed sporadically by the Oneida Indians as a tutor. During the summer of 1987, Pronold again held a temporary job cutting grass for the City of DePere. In 1987, Pronold also applied for Brown County vacancies in Park Ranger and Social Worker positions. He was not offered either position.

Effective January 1, 1988, in response to an unconditional offer of reinstatement, Pronold returned to employment with Brown County, as a Child Care Worker in the Youth Home.

The County contends that Pronold is not entitled to any back pay because he was a full-time student from the time of his layoff through May 1987. The County argues in this regard that Pronold should receive no back pay during the time when he was voluntarily enhancing his employment skills.

Should the Commission reject this contention the County asserts that Pronold's back pay claim was extinguished on or about June 1, 1985 when he "refused to make any efforts to secure a job as a County Ranger."

The County disputes any claim based on vacation, sick leave, holiday or shift differential benefits and further contends that interest is unavailable. As to Pronold's claim of $2,295 for medical and dental expenses, the County takes no specific position beyond its general view that a claimant is entitled to payment for either actual medical and dental expenses incurred or incurred premium payments but not both.

Lastly, the County asserts that it has no liability for Pronold's second mortgage.

Complainants dispute the County's claim that Pronold's student status impacts on his claim. In this regard, they note that Pronold was a student prior to his layoff and sought further employment following his layoff despite his student status.

Complainants also deny the County's assertion that Pronold failed to take appropriate action regarding a County Park Ranger position in 1985. Complainants assert that Pronold did advise the County that they could consider him an applicant for this position and note that Pronold was not offered the position.

Complainants conclude Pronold's back pay claim of $163,137.64 which includes back pay from July 1983 through February 1, 1989, 12% interest, sick leave, vacation, shift differential, and holiday benefits, medical and dental expenses, and a second mortgage.

First for our consideration is Pronold's student status. The County correctly argues that if Pronold's student status effectively precluded him from holding a full-time job, his student status would impact significantly upon his back pay. However, here we are satisfied that Pronold's student status did not remove him from the employment market or preclude him from accepting full-time employment. We reach this conclusion because (1) Pronold was a full-time student while also employed full-time at the Youth Home; (2) Pronold continued to actively seek employment from his layoff through his ultimate return to County employment on January 1, 1988; (3) there is no evidence that Pronold refused any offer of full-time employment; and (4) there is evidence that Pronold was willing to adjust his student schedule as needed to accommodate work.

Turning next to the question of Pronold's response to a Park Ranger position in May, 1985, Pronold testified he advised the County that although he had a position with the City of DePere, the County could consider him an applicant. The County witness testified Pronold told him that he was not interested in the position because of his employment with the City of DePere. We find Pronold's understanding of the conversation to be persuasive when we view his testimony and the record as a whole. In this regard, we note County records reflect Pronold advised the County by telephone on May 25, 1985, that he would be consulting his Union representative before he responded as to the Park Ranger position. Pronold testified that he called the office of the AFSCME attorney and was advised to apply. In this context we find his view of his conversation with the County Personnel Department to be credible. Thus, while it is conceivable that discussion about the City of DePere job led the County to conclude that Pronold was not interested in applying, we find that Pronold did advise the County that he could be considered as an applicant for the Park Ranger position in the spring of 1985. Our conclusion is further supported by Pronold's continuing interest in County employment as evidenced by his 1987 applications for Ranger and Social Worker vacancies.

Given the foregoing, we are satisfied that Pronold's back pay entitlement is $150,654.80 as reflected in Appendix A.

Palmer

At the time of her layoff Palmer worked 40 hours per week on the night shift. She was receiving single health and dental benefits under the County's "basic" plan.

Following her layoff, Palmer unsuccessfully applied for a social work position with the County and the City of Green Bay and for retail positions with area businesses.

On August 20, 1984, Palmer moved to Ames, Iowa and enrolled as a full-time student at Iowa State University. Palmer received a Masters Degree from Iowa State in May 1986. Palmer then moved to Madison, Wisconsin and worked as a clerk for Wisconsin Physicians Service (WPS) until she quit in July 1986. She then moved to Marshfield, Wisconsin and taught briefly on a part-time basis at Mid-State Technical College until accepting a computer operator position with a private company. Palmer did not accept the County's reinstatement offer which was effective January 1, 1988.

The County contends that Palmers' back pay claim extends from July 15, 1983 through her enrollment as a full-time student at Iowa State which removed her from the work force. Following her graduation, the County argues that Palmer's back pay entitlement would resume and continue until she voluntarily terminated her employment with WPS.

The County calculates the value of Palmer's claim as $25,340.

Complainants submit a claim for Palmer of $137,238.91 which includes wages, holiday pay, vacation pay, overtime/compensatory time, personal loans, moving expenses, health and dental expenses, retirement and interest. Complainants contend that Palmer's student status should not toll her back pay because she remained capable of working and because her student status resulted from her loss of County employment. Complainants further argue that Palmer's claim should not be adversely affected by her quitting her WPS job. Complainants assert that Palmer had no obligation to continue in an unsuitable position.

As to the issue of whether Palmer's August 1984 enrollment as a full-time student tolls her back pay, we conclude that it does. The record satisfies us that Palmer thereby effectively removed herself from the labor market. Unlike Pronold, she did not remain in the work force during her tenure as a student. Thus, we conclude that her entitlement to back pay was tolled from August 20, 1984 through May 15, 1986.

Next for resolution is the question of whether Palmer extinguished her back pay entitlement when she voluntarily quit her position with WPS. The County correctly argues that if Palmer's WPS position provided wages and fringe benefits equivalent to those at the Youth Home and she voluntarily quit that position her back pay entitlement would be affected. However, the record before us does not establish an equivalency of wages and fringe benefits. All we know is that Palmer earned $5532.12 in 1986 working at WPS for an unknown period with unknown fringe benefits. Thus, the County has failed to meet its mitigation burden of proof as to the equivalency of the WPS position.

The County has also asserted that in the alternative where, as here, a substantial time has passed since the layoff, employes have an obligation to mitigate by retaining employment inferior to that which they lost. We conclude that the County would be correct if Palmer had been in the labor market since her layoff and had been unsuccessful in obtaining equivalent employment. However, that is not the case here. Palmer removed herself from the labor market while at Iowa State. Thus, although a substantial period of time had passed since the July 1983 layoff, Palmer had not been unsuccessfully seeking equivalent employment during most of this period. Therefore, we conclude that the County has not established through its alternative argument that Palmer failed to mitigate when she quit her WPS employment.

Palmer's claim includes moving expenses of $448.11 for her move between Madison and Marshfield, Wisconsin in 1986. We have not included these expenses as an offset to interim earnings because it has not been sufficiently

established that the move was prompted by alternative employment. We note in this regard, that Palmer's 1986 earnings in the Marshfield area were $176.00.

As reflected in Appendix B, her back pay is $59,598.17.

Cagle

Cagle was employed as a 40 hours per week employe when laid off effective July 15, 1983. She was receiving single health benefits under the County's HMP plan.

Following her layoff, Cagle unsuccessfully sought employment until July 1984 when she began working part-time (maximum 20 hours per week) at a group home. In March 1985, Cagle began full-time employment with Community Alcoholism Services, Inc. (CASI) in Appleton, Wisconsin. Cagle received an unconditional offer of reinstatement from the County to a Youth Home position effective January 1, 1988. Cagle did not accept the offer and her employment with CASI continued through December 31, 1987.

Cagle lived in DePere, Wisconsin during the entire period in question. The mileage from her home to CASI was 53-1/2 miles round trip while the round trip from her home to the Youth Home is 12-1/2 miles.

Following her layoff through November 1985, Cagle sought training and certification in the field of alcohol and drug counseling. Although she had not acquired the certification she sought prior to her CASI employment, her training assisted her in acquiring the job with CASI.

Complainants assert a claim of $144,625.71 on behalf of Cagle. The claim consists of wages, retirement contributions, educational costs, mileage, clothing expenses, medical expenses, loans and interest.

If Cagle is entitled to any back pay, the County calculates the value of her claim as $29,542 which includes wages, retirement and insurance components. The County disputes Cagle's entitlement to educational costs, mileage, clothing expenses, loans and interest.

As to Cagle's contested mileage expenses related to alternative employment, we have previously concluded that such expenses can be deducted from interim earnings to the extent they exceed those that would have been incurred during County employment but for the layoff. Regarding Cagle's training expenses we are satisfied that they were sufficiently related to her obtaining alternative employment so as to be offset against interim earnings.

Cagle's claim for clothing expenses is denied because it is unsupported by specific evidence as to the precise nature of the expense.

Her claim for loans is denied as beyond the scope of our Order.

Given the foregoing, Cagle's back pay entitlement, as reflected in Appendix C, is $81,349.07.

Verrier

Verrier was a full-time employe of the Youth Home receiving family HMP insurance benefits at the time of the layoff. She unsuccessfully sought employment until June 1985 when she obtained a job with the State of Wisconsin.

Verrier continued to be employed by the State of Wisconsin at the time she rejected Brown County's January 1, 1988 unconditional reinstatement offer.

Complainants submit a claim for $165,938.43 consisting of wages, shift differential, holiday pay, vacation pay, retirement longevity, sick pay, medical expenses, loans, travel expenses, insurance costs and interest.

If Verrier is entitled to any back pay, the County calculates her claim as no more than $30,528 consisting of wages and insurance minus interim earnings and unemployment compensation benefits.

As indicated earlier herein, Verrier is entitled to payment for the value of County wages, holiday pay, net of medical expenses and insurance costs, WRF, travel expenses for interim employment plus interest minus interim earnings and unemployment compensation.

As reflected in Appendix D, the value of her claim is $85,284.61.

Chapman

Chapman was a full-time Youth Home employe receiving single HMP health and dental insurance benefits. Following the layoff, he unsuccessfully sought employment until November 1984 when he began working for the University of South Carolina in Charleston, South Carolina. Chapman continued this employment until April 1987 when he moved to California to accept a new job.

Chapman declined the County's offer of unconditional reinstatement which would have been effective January 1, 1988.

Complainants total claim for Chapman is $137,682.54 which consists of wages, WRF, moving expenses, health insurance, travel costs, shift differential, holiday pay, vacation pay and interest.

The County asserts Chapman's claim is $23,418 derived from back pay and insurance costs minus interim earnings and unemployment benefits.

As indicated earlier herein, Chapman's claims for moving expenses, shift differential, travel costs, and vacation pay are not compensable. He is entitled to receive back wages he would have earned including holiday pay, WRF compensation, the cost of obtaining alternative insurance minus interim earnings and unemployment compensation. Appendix E sets forth the manner in which his compensable claim of $65,691.67 has been calculated.

Teske

Teske was a full-time employe at the time of the layoff who was receiving single "basic" health and dental benefits.

While on layoff Teske sought alternative employment and worked part-time at the Rolene Ceramic Studio. On August 6, 1984 she began full-time employment with the County as a Social Worker.

Teske's claims are limited to the period from her July 1983 layoff through her August 1984 employment with the County. Complainants assert a claim of $25,154.62 for this period.

The County asserts that it has no potential liability for Teske because her earnings and unemployment benefits during the period in question exceed what she would have earned as a 16 hour per week part-time employe at the Youth Home.

We have previously concluded herein that Teske's employment would have been 16 hours per week. We have also previously determined that compensation is not available for shift differential, vacation, sick leave and loans. Thus, Teske's compensable claim is limited to wages, holiday pay and WRF. In both 1983 and 1984, Teske's earnings and unemployment benefits exceeded the value of her compensable claim. Thus, as reflected in Appendix F, Teske is not entitled to receive any money from the County.

Zimonick

Zimonick was a full-time employe receiving family HMP health and dental insurance benefits at the time of the layoff.

Following the layoff Zimonick unsuccessfully sought employment until ultimately being hired by Green Bay Canning in June 1984. In September 1984, he quit his Green Bay Canning job and accepted part-time employment with the County. Effective January 1, 1988, Zimonick accepted full-time employment with the County as a Social Worker.

Complainants submit a claim for Zimonick of $136,126.69 consisting of wages, insurance, holidays, medical and dental costs, and retirement.

The County contends that Zimonick's claim is limited to $378.

As concluded earlier herein, Zimonick's back pay claim is calculated based on 16 hours per week of employment. As reflected in Appendix G, his claim is $3,621.67.

Nanney

Nanney was a full-time Youth Home employe receiving family HMP health and dental insurance benefits at the time of the layoff. After a brief period of unemployment Nanney obtained a job as a truck driver in September 1983. After several weeks Nanney became ill and his employer would not allow him time off to see his doctor. Because of his illness, Nanney left this employment. Thereafter, he was employed in various capacities until April 1987, when he became unemployed. In November 1987, Nanney was arrested and incarcerated and thereby became unavailable for employment.

Complainants present a claim for Nanney of $125,813.64 which consists of wages, holidays, retirement and interest. Complainants argue that but for the County's wrongful layoff of Nanney, the various misfortunes which befell him, including incarceration, would not have occurred. Thus, Complainants contend the County should not benefit in any way from Nanney's misfortunes when back pay is calculated.

The County alleges Nanney has no back pay claim because he voluntarily quit a job with Leight Transfer which was providing him with more income than would have been available with the County.

The record establishes that Nanney's employment with Leight produced wage compensation which substantially exceeds that which Nanney would have earned as

a 16 hour per week Youth Home employe. However, we have no evidence as to Leight's fringe benefits and thus it is difficult to make a definitive judgment as to the equivalency of the compensation for the two positions, particularly when consideration is given to the additional hours per week Nanney worked for Leight to receive the higher level of compensation. However, even assuming that the position with Leight was equivalent to that of the Youth Home, we do not conclude that Nanney extinguished his back pay entitlement when he left Leight's employ.

Nanney's uncontroverted testimony establishes that he quit Leight because he became ill and was not allowed time off to see his doctor. Under such circumstances, Nanney's action is not a "voluntary" quit which would break his mitigation obligations. Thus, we reject the County's argument to the contrary.

Nanney's valid claim is $15,185.38 as reflected in Appendix H.

Funk

Funk was a part-time Youth Home employe who was not receiving health or dental insurance coverage at the time of the layoff.

After unsuccessfully seeking other employment for several months, Funk accepted part-time employment with the Pulaski, Wisconsin schools in November, 1983. Funk continued this employment through December, 1987.

In February, 1986, Funk also began part-time employment with Family Service Associates. Funk rejected the County's offer of January 1, 1988 reinstatement.

Complainants calculate Funk's back pay claim as $59,339.57 including wages, shift differential, holiday pay, vacation, longevity, sick leave, educational expenses, medical and dental expenses, and employment search costs.

The County asserts Funk's back pay entitlement is $3,686.

A portion of Funk's written claim statement (Exhibit 36, page 2) states:

> My 2 part-time jobs during the past 4 years required me to work from 8 a.m. - 4 p.m. (daily scheduled (sic) was self-determined), so I would have been available to work the established Youth Home schedule the past 4 years.

Although not explicitly argued by Complainants in their written briefs, this above-noted statement can reasonably be construed as an assertion that Funk's interim earnings ought not be offset against her back pay entitlement. We reject this argument for several reasons. First, because of the reduced and restructured staffing at the Youth Home, we cannot assume that Funk's work hours would have been outside the 8 a.m. - 4 p.m. hours of her other employment. More significantly, Funk's testimony regarding her family responsibilities does not provide a persuasive basis for concluding that she would have worked all three part-time jobs during the years in question.

As reflected in Appendix I, Funk's back pay entitlement is $11,166.81.

Rice

No claim has been made for or submitted by Rice.

Sowers

Sowers was employed part-time at the Youth Home and did not have County health or dental insurance.

After unsuccessfully seeking alternative employment following the layoff, Sowers accepted a part-time position as a church choir director. She retained this position through 1986.

From July 15, 1985 through October 30, 1985 Sowers managed a wallpaper and paint store which she then purchased. Sowers has thereafter been self-employed in the wallpaper/paint business.

The County made an offer of reinstatement to Sowers effective January 1, 1988 for 16 hours of work per week as a regular part-time employe. Sowers rejected this offer but accepted employment as relief child care worker at the same facility.

Complainants submit a claim for Sowers of $95,830.29 consisting of wages, holiday pay, vacation, sick leave, WRF, and loans.

The County argues Sowers' claim is appropriately calculated as $10,443.

As reflected in Appendix J, Sowers' back pay entitlement under our Order is $23,585.97.

Dated at Madison, Wisconsin this 28th day of May, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

METHOD OF CALCULATION

Complainats' make whole entitlement is calculated separately for each calendar year or portion thereof.

The three major calculation components are Youth Home earnings (wages, holiday pay, longevity, and retirement), interim income (unemployment compensation plus interim wages minus any wage offsets) and insurance (cost of alternative coverage plus eligible health and dental expenses minus employe cost for insurance).

Interim income is subtracted from Youth Home earnings. The insurance component can either increase or decrease any make whole entitlement produced by the Youth Home earning/interim income calculation.

Interest is separately calculated on the amount owed at the end of a calendar year. West Side Community Center, Inc., Dec. No. 19212-C (WERC, 5/87).

Given the interest rate of 12% per year, interest owed on the principal owed from any given year increases at a rate of one percent per month until payment is made.

For example, the individual complainants' 1983 entitlement has been accruing interest at a rate of 1% per month since December 31, 1983 (113 months as of May 31, 1993). Pursuant to our Order, as of May 31, 1993, each Complainant is entitled to receive 113% interest on his or her 1983 entitlement.

APPENDIX A

NAME: George Pronold

SENIORITY DATE: 10/6/75

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Full-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	7,821.00	17,388.80	18,262.40	18,990.40	19,552.00
HOLIDAY PAY	432.00	902.88	948.24	986.04	1,015.20
LONGEVITY	20.00	120.00	120.00	120.00	140.00
RETIREMENT	385.00	1,242.00	1,242.00	1,242.00	1,242.00
TOTAL	+8,658.00	+19,653.68	+20,572.64	+21,338.44	+21,949.20

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,473.00	3,775.00	0.00	0.00	0.00
WAGES	0.00	0.00	2,843.38	250.00	2,151.00
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-3,473.00	-3,775.00	-2,843.38	-250.00	-2,151.00

APPENDIX A con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	308.96	311.04	825.00	620.00	480.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00	53.00	0.00	52.00	0.00
EMPLOYE COST FOR COUNTY INSURANCE	37.15 (5 X 7.43)	89.16	89.16	89.16	89.16
TOTAL	+271.81	+274.88	+735.84	+582.84	+390.84
NET ENTITLEMENT	5,456.81	16,153.56	18,465.10	21,671.28	20,189.04
INTEREST	6,160.20	16,315.10	16,433.94	16,686.89	13,122.88
TOTAL	+11,617.01	+32,468.66	+34,899.04	+38,358.17	+33,311.92

GRAND TOTAL

$150,654.80

APPENDIX B

NAME: Katherine Palmer

SENIORITY DATE: 3/1/77

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Full-time

YOUTH HOME EARNINGS

	1983	1984	1985 4/	1986	1987
WAGES	7,821.00	10,099.80 5/	0.00	10,405.73 6/	19,552.00
HOLIDAY PAY	432.00	351.12 7/	0.00	730.40 8/	1,015.20
LONGEVITY	0.00	0.00	0.00	45.00 9/	120.00
RETIREMENT	385.00	724.50 10/	0.00	672.75	1,242.00
TOTAL	+8,638.00	+11,175.42	0.00	+11,853.88	+21,929.20

4/ Student.

5/ Assumes a 7/31/84 quit which produces 1,208.11 hours of earnings.

6/ Assumes a 6/15/86 return to labor market which produces 1,139.73 hours of earnings.

7/ Based upon three holidays which predated a 7/31/84 departure and assumes Palmer would have worked 1-1/2 holidays.

8/ Based upon the 5-1/2 holidays which occur after 6/15/86 and assuming she would have worked 3 of said holidays.

9/ Assumes longevity entitlement begins 8/15/86.

10/ Assumes a 7/31/84 quit.

APPENDIX B con't

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,366.00	3,978.00	0.00	0.00	0.00
WAGES	0.00 11/	0.00 12/	0.00	5,708.12	8,371.17
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-3,366.00	-3,978.00	0.00	-5,708.12	-8,371.17

INSURANCE

COST OF ALTERNATIVE COVERAGE	0.00	0.00 13/	0.00	0.00	0.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00 14/	325.00	0.00	0.00	0.00
EMPLOYE COST FOR COUNTY INSURANCE	0.00	0.00	0.00	0.00	0.00
TOTAL	0.00	+325.00	0.00	0.00	0.00

11/ Palmer was employed by Lifestyles Plus, Inc. prior to layoff and there is no evidence the level of her services for this employer increased after her layoff. Thus her earnings from Lifestyles Plus, Inc. are not offset against Brown County earnings.

12/ See footnote 8/.

13/ Cost of alternative coverage is not chargeable to County once Palmer removed herself from the work force.

14/ Palmer's dental claim is for unspecified services and unsubstantiated by evidence of a bill or payment.

APPENDIX B con't

NET ENTITLEMENT	5,272.00	7,522.42	0.00	6,145.76	13,558.03
INTEREST	5,957.36	7,597.64	0.00	4,732.24	8,812.72
TOTAL	+11,229.36	+15,120.06	0.00	+10,878.00	+22,370.75

GRAND TOTAL

$59,598.17

APPENDIX C

NAME: Toni Cagle

SENIORITY DATE: 4/8/77

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Full-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	7,821.00	17,388.80	18,262.40	18,990.40	19,552.00
HOLIDAY PAY	432.00	902.88	948.24	986.04	1,015.20
LONGEVITY	0.00	0.00	80.00	120.00	120.00
RETIREMENT	385.00	1,242.00	1,242.00	1,242.00	1,242.00
TOTAL	+8,638.00	+19,533.68	+20,532.64	+21,338.44	+21,929.20

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,498.00	4,134.00	0.00	0.00	0.00
WAGES	0.00	1,320.00	13,356.00	17,229.00	18,531.83
OFFSETS 18/	0.00	1,320.00	15/ 1,848.10	16/ 2,238.60	17/2,398.50
TOTAL	-3,498.00	-4,134.00	-11,507.90	-14,990.40	-16,133.33

15/ Includes Molitor seminars ($700), and St. Elizabeth's tuition.

16/ Includes Molitor seminar 2/5/85; mileage at 210 X 41 miles X 42 weeks X 5 days = $1,808.10.

17/ Mileage at $0.21 X 41 miles X 52 weeks X 5 days = $2,238.60.

18/ Mileage at $0.225 X 41 miles X 52 weeks X 5 days = $2,398.50.

APPENDIX C con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	457.13 (6 X 63.95 + 73.43)	807.73	0.00	0.00	0.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00 19/	0.00 20/	9.00 21/	0.00	38.00
EMPLOYE COST FOR COUNTY INSURANCE	57.18	131.64	131.64	131.64	131.64
TOTAL	+399.95	+676.09	-122.64	-131.64	-93.64
NET ENTITLEMENT	5,539.95	16,075.77	8,902.10	6,216.40	5,702.23
INTEREST	6,260.14	16,236.53	7,922.87	4,786.63	3,706.45
TOTAL	+11,800.09	+32,312.30	+16,824.97	+11,003.03	+9,408.68

GRAND TOTAL

$81,349.07

19/ Records submitted by Cagle did not establish that incurred expenses would have been reimbursed under County coverage in effect at time of layoff.

20/ See footnote 5/.

21/ Difference between County and CASI insurance drug deductible.

APPENDIX D

NAME: Nancy Verrier

SENIORITY DATE: 10/17/79

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Full-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	7,821.00	17,388.80	18,262.40	18,990.40	19,552.00
HOLIDAY PAY	432.00	902.88	948.24	986.04	1,015.20
LONGEVITY	0.00	0.00	0.00	0.00	20.00
RETIREMENT	385.00	1,242.00	1,242.00	1,242.00	1,242.00
TOTAL	+8,638.00	+19,533.68	+20,452.64	+21,218.44	+21,829.20

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,427.00	3,725.00	0.00	0.00	0.00
WAGES	0.00	424.48	9,178.48	21,597.68	24,184.84
OFFSETS 24/	0.00	0.00	2,940.00	22/ 5,145.00	23/5,512.50
TOTAL	-3,427.00	-4,149.48	-6,238.48	-16,452.68	-18,672.34

22/ $0.21 X 100 miles (100 mile round trip subject to reduction if it doesn't account for mileage between Verrier home and Mason Street) X 140 days (see Ex. 19 p. 3).

23/ $0.21 X 100 miles (100 mile round trip subject to reduction if it doesn't account for mileage between Verrier home and Mason Street) X 245 days.

24/ $0.225 X 100 miles (100 mile round trip subject to reduction if it doesn't account for mileage between Verrier home and Mason Street) X 245 days.

APPENDIX D con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	0.00	0.00	0.00	207.90	273.72
ELIGIBLE HEALTH & DENTAL EXPENSE	420.43	933.85	688.07	314.99	416.01
EMPLOYE COST FOR COUNTY INSURANCE	149.30	418.08	418.08	418.08	418.08
TOTAL	+271.13	+515.77	+269.99	+104.81	+271.65
NET ENTITLEMENT	5,482.13	15,899.97	14,484.15	4,870.57	3,428.51
INTEREST	6,194.81	16,058.97	12,890.89	3,750.34	2,228.53
TOTAL	+11,676.94	+31,958.94	+27,375.04	+8,620.91	+5,657.04

GRAND TOTAL

$85,284.61

APPENDIX E

NAME: Bruce Chapman

SENIORITY DATE: 10/29/79

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Full-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	7,821.00	17,388.80	18,262.40	18,990.40	19,552.00
HOLIDAY PAY	432.00	902.88	948.24	986.04	1,015.20
LONGEVITY	0.00	0.00	0.00	0.00	20.00
RETIREMENT	385.00	1,242.00	1,242.00	1,242.00	1,242.00
TOTAL	+8,638.00	+19,533.68	+20,452.64	+21,218.44	+21,829.20

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,352.50	1,564.00	0.00	0.00	0.00
WAGES	0.00	4,304.87	15,358.55	15,500.00	17,073.91
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-3,352.50	-5,868.87	-15,358.55	-15,500.00	-17,073.91

APPENDIX E con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	0.00	268.80	0.00	0.00	0.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00	0.00	0.00	0.00	0.00
EMPLOYE COST FOR COUNTY INSURANCE	38.40	111.60 (12 X 9.30)	111.60	111.60	111.60
TOTAL	-38.40	+157.20	-111.60	-111.60	-111.60
NET ENTITLEMENT	5,247.10	13,822.01	4,982.49	5,606.84	4,643.69
INTEREST	5,929.22	13,960.23	4,434.42	4,317.27	3,018.40
TOTAL	+11,176.32	+27,782.24	+9,416.91	+9,924.11	+7,662.09

GRAND TOTAL

$65,961.67

APPENDIX F

NAME: Mima Loderblatt-Teske

SENIORITY DATE: 10/20/80

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Part-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	3,128.40	6,955.52	7,304.96	7,596.16	7,820.80
HOLIDAY PAY	192.00	401.28	421.44	438.24	451.20
LONGEVITY	0.00	0.00	0.00	0.00	0.00
RETIREMENT	154.00	496.80	496.80	496.80	496.80
TOTAL	+3,474.40	+7,853.60	+8,223.20	+8,531.20	+8,768.80

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,234.00	3,822.00	0.00	0.00	0.00
WAGES	604.05	25/ 6,883.57	18,822.54	19,364.15	20,364.99
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-3,838.05	-10,705.57	-18,822.54	-19,364.15	-20,364.99

25/ 5/12ths of earnings from Rolene Ceramic Studio.

APPENDIX F con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	0.00	0.00	0.00	0.00	0.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00	0.00	0.00	0.00	0.00
EMPLOYE COST FOR COUNTY INSURANCE	0.00	0.00	0.00	0.00	0.00
TOTAL	0.00	0.00	0.00	0.00	0.00

NET ENTITLEMENT	0.00	0.00	0.00	0.00	0.00
INTEREST	0.00	0.00	0.00	0.00	0.00
TOTAL	0.00	0.00	0.00	0.00	0.00

GRAND TOTAL

$0.00

APPENDIX G

NAME: Mark Zimonick

SENIORITY DATE: 3/25/81

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Part-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	3,128.40	6,955.52	7,304.96		
HOLIDAY PAY	192.00	401.28	421.44	No Claim for 1986 & 1987	
LONGEVITY	0.00	0.00	0.00		
RETIREMENT	154.00	496.80	496.80		
TOTAL	+3,474.40	+7,853.60	+8,223.20		

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	3,381.00	3,675.00	0.00		
WAGES	109.21	4,257.11	9,889.82		
OFFSETS	0.00	0.00	0.00		
TOTAL	-3,490.21	-7,932.11	-9,889.82		

INSURANCE

COST OF ALTERNATIVE COVERAGE	1,014.78	2,086.46	1,362.84		
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00	0.00	0.00		
EMPLOYE COST FOR COUNTY INSURANCE	405.91	834.59	545.14		
TOTAL	+608.87	+1,251.87	+817.70		
NET ENTITLEMENT	593.06	1,173.36	0.00		
INTEREST	670.16	1,185.09	0.00		
TOTAL	+1,263.22	+2,358.45	0.00		

GRAND TOTAL

$3,621.67

APPENDIX H

NAME: John Nanney

SENIORITY DATE: 7/5/82

EMPLOYMENT STATUS AT TIME OF LAYOFF: Full-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Part-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	3,128.40	6,955.52	7,304.96	7,596.16	7,315.67
HOLIDAY PAY	192.00	401.28	421.44	438.24	0.00
LONGEVITY	0.00	0.00	0.00	0.00	0.00
RETIREMENT	154.00	496.80	496.80	496.80	0.00
TOTAL	+3,474.40	+7,853.60	+8,223.20	+8,531.20	+7,315.67 26/

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	600.00	0.00	0.00	0.00	640.00
WAGES	5,800.00	2,833.32	6,547.68	8,840.00	2,700.00
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-6,400.00	-2,833.32	-6,547.68	-8,840.00	-3,340.00

26/ Pro-rata based on incarceration.

APPENDIX H con't

INSURANCE

COST OF ALTERNATIVE COVERAGE	0.00	0.00	0.00	0.00	0.00
ELIGIBLE HEALTH & DENTAL EXPENSE	0.00	0.00	0.00	0.00	0.00
EMPLOYE COST FOR COUNTY INSURANCE	405.91	834.59	834.59	834.59	834.59
TOTAL	-405.91	-834.59	-834.59	-834.59	-834.59
NET ENTITLEMENT 27/	0.00	4,185.69	840.93	0.00	3,141.08
INTEREST	0.00	4,227.55	748.43	0.00	2,041.70
TOTAL	0.00	+8,413.24	+1,589.36	0.00	+5,182.78

GRAND TOTAL

$15,185.38

27/ Nanney's entitlement to receive monies is subject to his existing obligations under Wisconsin law.

APPENDIX I

NAME: Darlene Funk

SENIORITY DATE: 1/1/73

EMPLOYMENT STATUS AT TIME OF LAYOFF: Part-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Part-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	3,128.40	6,955.52	7,304.96	7,596.16	7,820.80
HOLIDAY PAY	192.00	401.28	421.44	438.24	451.20
LONGEVITY	0.00	0.00	0.00	0.00	0.00
RETIREMENT	154.00	496.80	496.80	496.80	496.80
TOTAL	+3,474.40	+7,853.60	+8,223.20	+8,531.20	+8,768.80

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	1,007.00	265.00	0.00	0.00	0.00
WAGES	495.23	6,104.99	6,115.25	13,017.22	15,467.00
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-1,502.23	-6,369.99	-6,115.25	-13,017.22	-15,467.00

INSURANCE

COST OF ALTERNATIVE COVERAGE			NOT APPLICABLE		
ELIGIBLE HEALTH & DENTAL EXPENSE					
EMPLOYE COST FOR COUNTY INSURANCE					
TOTAL					
NET ENTITLEMENT	1,972.17	1,483.61	2,107.95	0.00	0.00
INTEREST	2,228.55	1,498.45	1,876.08	0.00	0.00
TOTAL	+4,200.72	+2,982.06	+3,984.03	0.00	0.00

GRAND TOTAL

$11,166.81

APPENDIX J

NAME: Julie Sowers

SENIORITY DATE: 1/1/73

EMPLOYMENT STATUS AT TIME OF LAYOFF: Part-time

EMPLOYMENT STATUS FOR REMEDIAL PURPOSES: Part-time

YOUTH HOME EARNINGS

	1983	1984	1985	1986	1987
WAGES	3,128.40	6,955.52	7,304.96	7,596.16	7,820.80
HOLIDAY PAY	192.00	401.28	421.44	438.24	451.20
LONGEVITY	0.00	0.00	0.00	0.00	0.00
RETIREMENT	154.00	496.80	496.80	496.80	496.80
TOTAL	+3,474.40	+7,853.60	+8,223.20	+8,531.20	+8,768.80

INTERIM INCOME

UNEMPLOYMENT COMPENSATION	0.00	0.00	0.00	0.00	0.00
WAGES	513.00	513.00	9,716.10	7,404.25	8,448.27
OFFSETS	0.00	0.00	0.00	0.00	0.00
TOTAL	-513.00	-513.00	-9,716.10	-7,404.25	-8,448.27

INSURANCE

COST OF ALTERNATIVE COVERAGE			NOT APPLICABLE		
ELIGIBLE HEALTH & DENTAL EXPENSE					
EMPLOYE COST FOR COUNTY INSURANCE					
TOTAL					
NET ENTITLEMENT	2,961.40	7,340.60	0.00	1,126.95	320.53
INTEREST	3,346.38	7,414.01	0.00	867.75	208.35
TOTAL	+6,307.78	+14,754.61	0.00	+1,994.70	+528.88

GRAND TOTAL

$23,585.97