

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KEWAUNEE COUNTY HIGHWAY	:	
DEPARTMENT EMPLOYEES, LOCAL	:	
1470, AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 9
	:	No. 33097 MP-1577
KEWAUNEE COUNTY, HAROLD J.	:	Decision No. 21624-A
RECKELBERG, EDMUND P. LEANNAH,	:	
EARL W. OPICHKA, ELROY C. HOPPE,	:	
WILMER L. DRAB, GARY J. THAYSE,	:	
MARVIN C. KRAUSE, GEORGE PAIDER,	:	
JOHN N. JOSKI, JAMES J. JADIN,	:	
	:	
Respondents.	:	
	:	
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Appearances:

Mr. Michael J. Wilson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, WI 54220, appearing on behalf of the Kewaunee County Highway Department Employees, Local 1470, AFSCME, AFL-CIO.

Mr. John M. Spindler, Nash, Spindler, Dean & Grimstad, Attorneys at Law, 210 East Waldo Boulevard, P.O. Box 1128, Manitowoc, WI 54220-0928, appearing on behalf of Kewaunee County, Harold J. Reckelberg, Edmund P. Leannah, Earl W. Opichka, Elroy C. Hoppe, Wilmer L. Drab, Gary J. Thayse, Marvin C. Krause, George Paider, John N. Joski, James J. Jadin.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Kewaunee County Highway Department Employees, Local 1470, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on March 23, 1984, in which the Union alleged that the Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA). The Commission, on April 24, 1984, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes. A hearing on the matter was conducted in Kewaunee, Wisconsin on May 9, 1984. The transcript of that hearing was provided to the Examiner on May 29, 1984. The parties filed briefs in the matter by July 24, 1984, and a waiver of reply briefs by August 15, 1984.

FINDINGS OF FACT

1. Kewaunee County Highway Department Employees, Local 1470, AFSCME, AFL-CIO (the Union), is a labor organization which has its offices located in care of P.O. Box 370, Manitowoc, Wisconsin 54220.
2. Kewaunee County (the County), is a municipal employer which has its offices located at 613 Dodge Street, Kewaunee, Wisconsin 54216, and which, among its various functions, operates a highway department, and a solid waste disposal site (the landfill).
3. Mr. Harold J. Reckelberg is Chairman of the County Board of Supervisors. The Personnel, Advisory and Legislative Committee of the County Board of Supervisors consists of: Mr. Edmund P. Leannah, Mr. Earl W. Opichka, Mr. Elroy C. Hoppe, Mr. Wilmer L. Drab, Mr. Gary J. Thayse, Mr. Marvin C. Krause, and Mr. Harold J. Reckelberg. The Solid Waste Management Committee (SWMC) of the County Board of Supervisors consists of: Mr. Marvin C. Krause, Mr. Edmund P. Leannah, Mr. Elroy C. Hoppe, Mr. Gary J. Thayse, and Mr. Harold J. Reckelberg. The Highway

Committee of the County Board of Supervisors consists of: Mr. Earl W. Opichka, Mr. George Paider and Mr. John N. Joski. Mr. James J. Jadin is the Commissioner of the County Highway Department, and Mr. Edward J. Dorner is the County Clerk.

4. The County and the Union are parties to a collective bargaining agreement which contains, among its provisions, the following:

. . .

#### ARTICLE 1: RECOGNITION

The Board recognizes the Union as the exclusive bargaining representative of the County Highway Department members receiving compensation based on hourly rates, exclusive of administrative, executive, salaried supervisory and salaried office personnel. The terms of this Agreement shall be limited in its coverage to such members. . . .

. . .

#### ARTICLE 18: VESTED RIGHT OF MANAGEMENT

. . .

. . . The county through its Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses, direct its employees to perform such work, wherever located in its jurisdiction, subject only to the restrictions imposed by this Agreement and the Statutes of the State of Wisconsin. . . .

. . .

#### ARTICLE 20: TERMS OF AGREEMENT

. . .

This Agreement shall become effective as of January 1, 1983, and remain in effect until December 31, 1983, . . .

5. The County Board, in a resolution adopted on August 22, 1978, established a committee to take preliminary steps to study the possibility of the County operating a county-wide solid waste disposal system. This committee contacted Robert E. Lee and Associates (Lee), a civil engineering firm in Green Bay, Wisconsin, to complete a comprehensive solid waste management plan which Lee did prepare and did submit to the County in January of 1980. The plan covered the type of landfill necessary to process the solid waste, financing mechanisms to create such a landfill and staffing arrangements to bring the landfill into operation. Included in this report was specific discussion of the advantages and disadvantages of four possible ownership/operational mechanisms available to the County. The four mechanisms, broadly stated, were: (1) public ownership/private operation; (2) public ownership/public operation; (3) private ownership/public operation; (4) private ownership/private operation. The plan specifically discussed the advantages of a solid waste management system which baled the solid waste. One of the advantages of such a baling system is that recyclable materials can be separated out of the process and can then be sold. In its plan, Lee stated its opinion that if County employees operated the landfill, the County might have difficulty in providing sufficient incentive for the employees to seek out and separate the recyclable materials from the other solid waste. In a resolution adopted on December 16, 1980, the County Board created a permanent standing committee, referred to as the Solid Waste Management Committee (the SWMC), to manage the proposed solid waste system. The County Board through its SWMC located a site for the landfill and by the fall of 1982 was nearing the point at which the site could be made operational. In October of 1982 Lee recommended to the Committee that they decide how to staff the landfill and the Committee asked Lee if Lee would make the necessary staffing arrangements. Lee considered the County's suggestion, but decided it could not legally do so and did not wish to undertake the arrangements necessary to act on the County's suggestion. Lee did, however, offer to undertake certain functions regarding the administration of the landfill, including the training and oversight of landfill staff, and the SWMC accepted this offer by Lee.

6. The County Personnel Committee, on January 14, 1983, offered the position of Solid Waste Manager to William Maigatter and the position of Assistant Manager to Daniel Fager. Maigatter and Fager accepted this offer. On February 14, 1983 the SWMC met to authorize various expenditures necessary to make the landfill operational. Included among these expenditures were, according to the minutes of that meeting: ". . . the rate of wages per hour along with pro rata health insurance plus mandatory state pension and social security benefits per part time employees" for Maigatter and Fager. On February 28, 1983, the County opened its landfill for operation and the landfill has been in continuous operation since that date. Maigatter and Fager were the County employees who opened the landfill on that date, and have been responsible for the physical operation of the landfill since that date. The County set forth the wages and fringe benefits to be received by Maigatter and Fager as part-time County employees in a Board resolution dated June 28, 1983.

7. Michael Wilson, the Union's Business Agent, sent a letter dated June 17, 1983, to Edmund Leannah, the Chairman of the County's Personnel Committee, which stated:

Kewaunee County Highway Department Employees, Local 1470, AFSCME, AFL-CIO herein request recognition as representative for the landfill site workers. Please advise the undersigned as to whether or not Kewaunee County concurs in the Union's request for recognition.

Reckelberg responded to Wilson's letter in a letter dated July 7, 1983, which stated:

In response to your letter dated June 17, 1983, in regard to the landfill site workers, Kewaunee County does not concur in the union's request for recognition in the Kewaunee County Highway Employees Local #1470.

. . .

8. Wilson filed a Petition To Clarify Bargaining Unit Of Municipal Employees with the Wisconsin Employment Relations Commission (the Commission) on September 30, 1983, which requested the Commission to include in the highway department bargaining unit represented by the Union the positions of Solid Waste Manager and Solid Waste Manager Assistant. On November 9, 1983, a Commission examiner conducted a hearing on the matter, and on January 31, 1984, the Commission issued Decision No. 21344 which addressed the issues raised by the Union's September 30, 1983, petition. The Commission concluded, in that decision, that Maigatter and Fager, as occupants of the positions of Solid Waste Manager and Solid Waste Manager Assistant, were municipal employees within the meaning of Sec. 111.70(1)(b) of the MERA. The Commission, also in that decision, issued the following "Order Clarifying Bargaining Unit":

That the positions of Solid Waste Manager and Solid Waste Manager Assistant are appropriately included in the highway department employees' collective bargaining unit represented by the Union.

This decision was first formally discussed by the County in a Personnel Committee meeting held on February 21, 1984. All of the members of the SWMC serve on the County's Personnel Committee. The County Personnel Committee did not react favorably to the Commission's decision. Reckelberg based his own unfavorable reaction on his conclusion that there is no place in the County highway department contract for landfill management, and Reckelberg concluded that the County's sole option to including Maigatter and Fager in the highway department bargaining unit was to sign a private contract with Maigatter and Fager.

9. Four members of the SWMC met with Maigatter and Fager at the landfill site on March 8, 1984. The SWMC, at that meeting, approved signing a management agreement between Maigatter and Fager to operate the landfill. On March 14, 1984, the SWMC and the County Board of Supervisors executed a management agreement with Maigatter and Fager. The body of that agreement reads as follows:

## MANAGEMENT AGREEMENT

AGREEMENT by and between the KEWAUNEE COUNTY BOARD OF SUPERVISORS (hereinafter called the "Board") and WILLIAM MAIGATTER AND DANIEL FAGER (hereinafter called "Managers").

1. Managers agree to manage and operate the Solid Waste Landfill operations owned by Kewaunee County.

2. The Board agrees to pay Managers a fee of \$2,790. per month.

3. Managers agree to have the landfill open to the public 28 hours per week in accordance with the following schedule:

Monday "8:00 A.M. - 3:00 P.M.  
Tuesday  
Wednesday 8:00 A.M. - 3:00 P.M.  
Thursday  
Friday 8:00 A.M. - 3:00 P.M.  
Saturday 8:00 A.M. - 12:00 Noon (First Saturday of each  
month April 1 to  
December 1)"

4. The Board will furnish and pay for:

- A. Utilities and telephone.
- B. Supplies and tools.
- C. Equipment and fuel.

5. Managers will keep the equipment in good repair and maintain the buildings "at the expense of the County."

6. Managers will purchase such supplies, tools and equipment as they deem necessary and charge the same to the Board "at the approval of the Solid Waste Management Committee."

7. Managers will be responsible for collecting user fees for persons using the Solid Waste facility and will remit the proceeds to the County Treasurer weekly.

8. Managers may employ such personnel as they deem necessary at their own expense.

9. It is understood the Managers are independent contractors and will be responsible for their own Social Security, Unemployment Compensation, Worker's Compensation, and payment of income taxes, as self-employed persons "also carry Personal Liability Insurance."

10. Board will make available to Managers group insurance coverage, provided Managers pay the premiums.

11. This Management Agreement is effective the first day of April, 1984 through December 31, 1984. It may be renewed by mutual agreement. 1/

10. Negotiation sessions between the Union and the County for the purpose of bargaining a successor agreement to the 1983 agreement mentioned in the Finding of Fact 4 above were conducted on October 19, November 9, November 29, and December 16 of 1983, as well as on January 6, January 27 and March 15 of 1984. At

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1/ The underscored portions of the Management Agreement reproduce underscored portions of that document. The words underscored appear in the Management Agreement in a different typeface than that of the other printed portions of the document. The quotation marks in items 3, 5, 6, and 9 do not appear in that document, but have been added above to show the remaining words which are not of the same typeface as the rest of the printed document.

the October 19, November 9 and November 29 bargaining sessions, the Union advanced the following proposal to the County:

ITEM #4, ARTICLE 2: PROBATIONARY AND  
EMPLOYMENT STATUS, D. PART-TIME EMPLOYEES

"There shall be no part-time employment or worksharing. The one exception shall be regular part-time employment at the sanitary landfill site for two (2) positions, (1) Solid Waste Manager and (2) Solid Waste Manager Assistant.

Said two (2) landfill positions shall receive all benefits of this agreement (vacation, sick leave and holidays shall be prorated)."

The Union and the County did not reach agreement on incorporating this, or any other, contractual provision covering the landfill positions at any time prior, or subsequent, to Commission Decision No. 21344. On March 15, 1984, the Union and County held the first negotiating session subsequent to the issuance of Commission Decision No. 21344. The Union representatives present at that session attempted to negotiate the wages, hours and working conditions of the Solid Waste Manager and Solid Waste Assistant Manager positions, but the County, at that meeting and at all times subsequent to that meeting, refused to so negotiate. Reckelberg informed the Union at this meeting that the County had exercised its only option and had entered into a private contract with Maigatter and Fager. The March 14, 1984, management agreement was approved by the County Board in resolution No. 67-3-84 which reads as follows:

APPROVE MANAGEMENT AGREEMENT BETWEEN KEWAUNKEE  
COUNTY BOARD OF SUPERVISORS AND WILLIAM MAIGATTER  
AND DANIEL FAGER

WHEREAS, the Kewaunee County Solid Waste Management Committee has had under consideration for sometime to put the management and operation of the Kewaunee County Landfill under private contract, and

WHEREAS, the Kewaunee County Solid Waste Management Committee feels it is in the best interests of Kewaunee County to let the management and operation of the landfill on a private contract.

NOW, THEREFORE, BE IT RESOLVED by Kewaunee County Board of Supervisors duly assembled this 20th day of March, 1984 approve the management agreement between William Maigatter and Daniel Fager to operate and manage the Kewaunee County Landfill as per attached management agreement.

BE IT FURTHER RESOLVED that the County Board Chairman and the County Clerk along with the Kewaunee County Solid Waste Management Committee sign the management agreement.

11. Although individual members of the SWMC discussed the possibility of subcontracting the operation of the landfill, such a subcontract is not specifically noted in the notices or the minutes to SWMC meetings between February of 1982 and March of 1984. Maigatter first learned of the possibility of signing an individual contract with representatives of the SWMC in September or October of 1983. Maigatter next learned of the possibility of signing an independent contract with the County in February of 1984 when Reckelberg came to the landfill, showed Maigatter a document, and asked Maigatter to examine that document and to make a proposal. That document was the management agreement set forth in Finding of Fact 9 above except to the extent that items 2, 3, 5, 6 and 9 had not been completely filled in. Maigatter believed, at the time of this meeting, that he could refuse to sign the document offered by Reckelberg, but that if he did so he "would have been out of a job." Maigatter did not seek or receive advice from an attorney or any other advisor prior to signing the management agreement although Maigatter did mention the agreement to a local tax advisor who prepared his tax return. Maigatter and Fager, at the time they signed the management agreement, were not involved in a partnership or corporation and signed the contract as individuals. The County did not put the operation of the landfill out on bids prior to the execution of the management agreement, and did not seek any other

applicants for the operation of the landfill prior to the execution of the management agreement. Maigatter's and Fager's duties at the landfill have, since the time the landfill opened to the present, remained substantially the same. Such duties have, since the time the landfill opened, included Maigatter's and Fager's collecting user fees from persons using the Solid Waste facility and then remitting the proceeds to the County Treasurer. The \$2,790 monthly salary reflected in Item 2 of the management agreement signed by Maigatter and Fager reflects the salary earned by each of these two men in 1983 with an increase in salary for 1984. Maigatter and Fager proposed this salary figure to the SWMC based on their wages in 1983, an increase in salary for 1984, and an allowance for the insurance payments they would have to make individually. The SWMC accepted this salary proposal without any modification or further discussion with Maigatter and Fager. The SWMC evaluated the propriety of the salary asked for by Maigatter and Fager on the basis of their 1983 salary, their 1984 expenses, their work performance in 1983, and on the increases afforded by the County to its employees in 1984. The landfill has maintained the same operating hours since the time of its opening except for one change regarding Saturday hours made by the SWMC in September of 1984. These hours are reflected in Item 3 of the management agreement signed by Maigatter and Fager. The County has, since the time the landfill opened, furnished and paid for the utilities, telephone, supplies, tools, equipment and fuel used at the landfill. The County has, since the time the landfill opened, maintained the landfill buildings and equipment at County expense. The landfill operation requires the operation and maintenance of large items of equipment such as a front end loader and a Komatsu cat and smaller items such as brooms and shovels. Maigatter and Fager do not have any tools or equipment at the landfill which are their own. Maigatter and Fager have, since the time the landfill opened, had the authority to purchase certain supplies, tools and equipment they deemed necessary subject to the approval of the SWMC. Sometime after Fager and Maigatter entered into the management agreement, Fager was required to serve two weeks with the Army Reserves. Maigatter hired an unemployed relative of Fager to fill in for Fager during his absence. Maigatter did not seek prior County Board approval for this hire, and paid the replacement's wages. Maigatter and Fager are presently paying their own social security, unemployment compensation, workers compensation, and income tax payments, and are also carrying their own personal liability insurance.

12. After the receipt of Commission Decision No. 21344, the members of the SWMC believed that an individual contract with Maigatter and Fager represented their sole option to acquiescing to Maigatter and Fager's inclusion in the highway department bargaining unit represented by the Union. Krause felt the County's reason for entering into the independent contract was that the positions occupied by Maigatter and Fager are not full-time positions and are positions which do not necessarily require the same hours and duties of each person. Hoppe believed entering into an individual contract with Maigatter and Fager was the best available means of assuring County taxpayers the most economical means of operating the landfill. Hoppe also felt entering into such an individual contract assured the Board a degree of control over the hours worked at the landfill, as well as the compensation to be afforded for those hours worked. Hoppe felt that the landfill could not be allowed to become a full-time operation or one for which overtime was afforded, and feared that if Maigatter and Fager became members of the highway department bargaining unit represented by the Union then the County Board would lose control over such items. Leannah felt that contracting with Maigatter and Fager individually assured County taxpayers of competent employees at the most economical cost possible. Reckelberg saw the independent contract with Maigatter and Fager as the County's sole option to including those employees in the highway department bargaining unit represented by the Union.

13. Maigatter and Fager are not at present, and have not been from the time the landfill started operation, independent contractors. The management agreement neither reflects an arms-length business transaction between Maigatter, Fager and the County, nor alters Maigatter's and Fager's status as County employees.

#### CONCLUSIONS OF LAW

1. Kewaunee County is a "Municipal employer" within the meaning of Sec. 111.70(1)(a), Stats.

2. Kewaunee County Highway Department Employees Union, Local 1470 of the Wisconsin Council of County and Municipal Employees, #40, AFSCME, AFL-CIO, is a "labor organization" within the meaning of Sec. 111.70(1)(j), Stats., and is the voluntarily recognized bargaining representative of a collective bargaining unit composed of certain employees of the Kewaunee County Highway Department.

3. William Maigatter and Daniel Fager, who are presently referred to as Managers of the Kewaunee County landfill, formerly occupied the positions known as Solid Waste Manager and Solid Waste Manager Assistant, respectively, prior to the execution of a management agreement with Kewaunee County on March 14, 1984. The Wisconsin Employment Relations Commission, in Decision No. 21344, determined that each individual, in the performance of their duties as Solid Waste Manager and Solid Waste Manager Assistant, was a "Municipal employee" within the meaning of Sec. 111.70(1)(b), Stats. Maigatter and Fager do not presently, and have not been at any time relevant to this proceeding, "independent contractors" within the meaning of Sec. 111.70(1)(b), Stats., in their performance of duties at the Kewaunee County landfill. Thus, Maigatter and Fager, in spite of the management agreement executed on March 14, 1984, each continue to be a "Municipal employee" within the meaning of Sec. 111.70(1)(b), Stats.

4. Kewaunee County, by refusing to bargain collectively with the Kewaunee County Highway Department Employees Union, Local 1470 of the Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, concerning the wages, hours and conditions of employment of the landfill positions presently occupied by Maigatter and Fager has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and, derivatively, of Sec. 111.70(3)(a)1, Stats.

5. Kewaunee County, by proposing, discussing, signing and enforcing a management agreement with Maigatter and Fager as individuals, has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and, derivatively, of Sec. 111.70(3)(a)1, Stats.

6. Kewaunee County, by proposing, discussing, signing and enforcing a management agreement with Maigatter and Fager as individuals, has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

7. Maigatter and Fager acted as individuals in discussing, signing and abiding by a management agreement with Kewaunee County, and do not constitute a "labor or employe organization" within the meaning of Sec. 111.70(3)(a)2, Stats. Thus, Kewaunee County, in proposing, discussing, signing and enforcing a management agreement with Maigatter and Fager did not commit a violation of Sec. 111.70(3)(a)2, Stats.

8. Kewaunee County, by proposing, discussing, signing and enforcing a management agreement with Maigatter and Fager as individuals, was not motivated by a purpose to chill the exercise of rights protected by Sec. 111.70(2), Stats., among the remaining members of the Kewaunee County Highway Department bargaining unit represented by Kewaunee County Highway Department Employees Union, Local 1470 of the Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO. Thus, Kewaunee County did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

#### ORDER 2/

Kewaunee County, its officers and agents, shall immediately

1. Cease and desist from:

- (a) Refusing to bargain collectively, upon request, with Kewaunee County Highway Department Employees Union, Local 1470, Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, as the majority representative for the highway department collective bargaining unit of which William Maigatter and Daniel Fager are individual members.

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no (Footnote 2 Continued on Page 8)

- (b) Implementing a subcontract prior to the exhaustion of its duty to bargain with Kewaunee County Highway Department Employees Union, Local 1470, Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, over a decision to subcontract.


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

- (a) Restore the status quo by treating William Maigatter and Daniel Fager as municipal employees of the Kewaunee County Highway Department and by affording Maigatter and Fager, as soon as possible after receipt of this Order, the exact wages and benefits they were receiving at the time (January 31, 1984) the Wisconsin Employment Relations Commission ordered the Solid Waste Manager and Solid Waste Manager Assistant positions to be included in the highway department bargaining unit.
- (b) Bargain collectively with Local 1470 regarding the wages, hours and conditions of employment of the positions occupied by William Maigatter and Daniel Fager.
- (c) Bargain collectively, if necessary, with Local 1470 regarding a decision to subcontract the landfill operation and the impact of any such decision upon the wages, hours and conditions of employment of employees represented by Local 1470.
- (d) Post in conspicuous places on its premises, where notices to its employees are usually posted, a copy of the notice attached to this Order and marked "Appendix A." This copy shall be signed by an authorized representative of the County, shall be posted as soon as possible after receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to insure that this notice is not altered, defaced or covered by other material.
- (e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of service of this Order as to what steps have been taken to comply with this Order.

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

Dated at Madison, Wisconsin the 5th day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Richard B. McLaughlin, Examiner

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2/ (Continued)

petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX A

NOTICE TO ALL EMPLOYEES

As ordered by the Wisconsin Employment Relations Commission, and in order to fulfill the policies of the Municipal Employment Relations Act, we notify our employees that:

We will immediately cease and desist from bargaining with individual members of the highway department bargaining unit represented by Kewaunee County Highway Department Employees Union, Local 1470, Wisconsin Council of County and Municipal Employee, #40, AFSCME, AFL-CIO.

We will immediately cease and desist from subcontracting the operation of the Kewaunee County Landfill without bargaining the decision to do so with Kewaunee County Highway Department Employees Union, Local 1470, Wisconsin Council of County and Municipal Employees, #40, AFSCME, AFL-CIO.

We will, upon request, bargain collectively with Kewaunee County Highway Department Employees Union, Local 1470, Wisconsin Council of County and Municipal Employees, #40, AFSCME, AFL-CIO, regarding the wages, hours and conditions of employment of Kewaunee County employees employed at the landfill, and will, if necessary, collectively bargain regarding the decision and the impact of a decision to subcontract the landfill operation.

Dated at Kewaunee, Wisconsin this \_\_\_\_ day of \_\_\_\_\_, 1984.

By \_\_\_\_\_  
On behalf of Kewaunee County

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

KEWAUNEE COUNTY (HIGHWAY DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union urges that the decision to subcontract for economic reasons and the impact of such a decision are mandatory subjects of bargaining and that the County is required by law to maintain the status quo on mandatory subjects of bargaining at least until an impasse is reached. In this case, according to the Union, the County subcontracted the landfill operation without prior notice to the Union and after that subcontract had in fact been accomplished. In the Union's estimation, the decision to subcontract was reached by the County Board surreptitiously without state mandated notice to the public in order to effect the subcontract before the March 15, 1984, negotiation session with the Union. The Union concludes that because the subcontract was effected without notice to the Union and because the Union has not, by contract or by conduct, waived its bargaining rights, the County Board's unilateral change regarding Maigatter's and Fager's employment status represents a refusal to bargain in violation of Sec. 111.70(3)(a)1 and 4, Stats. The Union also argues that the decision to subcontract was undertaken because of the County Board's hostility toward the Union and thus in violation of Sec. 111.70(3)(a)3, Stats. In addition, the Union asserts that an examination of the management agreement signed by Maigatter and Fager and an examination of the relevant case law reveals that the subcontract is, in reality, a sham transaction which does not involve independent contractors at all. The management agreement does, however, indicate, according to the Union, that Maigatter and Fager acted cooperatively and bargained the agreement. From this conclusion, the Union argues that the sham transaction constitutes a violation of Sec. 111.70(3)(a)1, 2, 3 and 4, Stats. The Union urges that testimony offered by a Lee representative does not constitute expert testimony and is, in any event, not impartial. The Union characterizes the the totality of the County's behavior regarding the subcontract as a conspiracy to commit unlawful acts which must be remedied by the Commission.

The County urges that the relevant factual background in the present matter is that the County had contemplated employing an independent contractor for some time before it executed the actual subcontract with Maigatter and Fager, that the operation of the landfill requires training and experience, that contracting out landfill operations is not unique to Kewaunee County, that the agreement covering highway department employees expressly provides for subcontracting, that the County did not want the landfill operation to be a Union operation for reasons of economy and of control, and that the management agreement signed by Maigatter and Fager is a true management agreement. The County asserts that the decision to subcontract did not deprive the Union of any bargaining unit members, and was effected to enable the County to control the landfill operation as a part-time facility operating at hours set by its owner. The County argues that its decision to subcontract was proper under the collective bargaining agreement and relevant arbitral precedent, was a reasonable business decision, constitutes an appropriate method of operating the landfill site and involves workers whose duties bear little resemblance to work customarily performed by highway department employees. The County concludes that its decision to subcontract was "just good business" and did not violate any provision of MERA.

DISCUSSION

The complaint alleges that the County has violated Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., and, as noted by the Conclusions of Law, violations of Sec. 111.70(3)(a)1 and 4, Stats., have been found.

The Violation of Sec. 111.70(3)(a)4 and Derivative  
Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer to "refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit . . ." A violation of this Section is also a violation of Sec. 111.70(3)(a)1, Stats., which makes it a prohibited practice for an employer to "interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)" since Sec. 111.70(2), Stats., recognizes the right of municipal employees "to bargain collectively through representatives of their own choosing . . ." Discussion of the

County's violation of Secs. 111.70(3)(a)1 and 4, Stats., begins with Commission Decision No. 21344, since the County did not have any duty to bargain with the Union over the Solid Waste Manager and Solid Waste Manager Assistant positions until the Commission established that the occupants of those positions were municipal employees who were appropriately included in the bargaining unit represented by the Union. Once the Commission issued its order including the disputed positions in the bargaining unit represented by the Union, the County had a statutory duty to bargain, 3/ upon request, with the Union as the majority representative of that bargaining unit. The County's duty to bargain with the Union regarding these positions extended to all mandatory subjects of bargaining. 4/

Contrary to the County's assertion, the presence or absence of a valid management agreement with Maigatter and Fager does not have any impact on the County's violation of Secs. 111.70(3)(a)1 and 4, Stats. Whether or not Maigatter and Fager became independent contractors with the execution of that agreement does affect the specific mandatory subjects of bargaining the County was obligated to negotiate with the Union, but does not affect the County's underlying duty to bargain collectively with the Union over mandatory subjects of bargaining.

If, as will be discussed below, Maigatter and Fager did not become independent contractors with the execution of the management agreement, and thus remained municipal employees included in the highway department bargaining unit represented by the Union, then the County had a duty defined in Sec. 111.70(1)(d), Stats., to bargain the wages, hours and conditions of employment of the positions occupied by Maigatter and Fager. The County's refusal to bargain with the Union over these subjects, its individual discussions with Maigatter and Fager regarding these subjects of bargaining and its unilateral implementation of the specific wages, hours and conditions of employment afforded to them in the management agreement violated this statutory duty.

If Maigatter and Fager became independent contractors with the execution of the management agreement, then the County was obligated to bargain with the Union regarding both the County's decision to subcontract for Maigatter's and Fager's services and the impact of that decision, since both constitute mandatory subjects of bargaining. The standard governing the mandatory/permissive character of a decision to subcontract was stated by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89, 102 (1977) to be "whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees or whether it is primarily related to the formulation or management of public policy." The Court then proceeded to apply this standard to a school district's decision to subcontract its food service program thus:

. . .

The decision to subcontract the district's food service program did not represent a choice among alternative social or political goals or values.

The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. The decision would presumably be felt in only two ways: it is argued that it would result in a financial saving to the district, and the district's food service personnel will have to bargain with ARA for benefits which they enjoyed before the decision . . .

. . .

The primary impact of this decision is on the "conditions of employment"; the decision is essentially concerned with

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3/ See New Richmond Jt. School District No. 1, Dec. No. 15172-B (WERC, 5/78).

4/ Milwaukee County, et al., Dec. No. 15420-A (WERC, 6/82).

wages and benefits, and this aspect dominates any element of policy formulation. The Commission and the circuit court were therefore correct in holding that bargaining was mandatory with respect to the decision. 5/

In the present case, the County's decision to subcontract "merely substituted private employees for public employees." In fact, the subcontract in the present case left the same persons performing substantially the same duties at the same hours and at the same site as they had before entering into the individual contract. Thus, the County had a statutory duty to bargain with the Union regarding its decision to independently contract for Maigatter's and Fager's services as well as the impact of that decision.

In sum, if Maigatter and Fager became independent contractors with the execution of the management agreement, then the County's refusal to bargain with the Union violated Secs. 111.70(3)(a) 1 and 4, Stats., since the decision to subcontract and its impact constitute mandatory subjects of bargaining. If Maigatter and Fager remained Municipal employees in spite of the execution of the management agreement, then the County's refusal to bargain violated Secs. 111.70(3)(a) 1 and 4, Stats., since the wages, hours and conditions of employment of those positions constitute mandatory subjects of bargaining.

As the County urges, the Union's right to demand bargaining from the County is a right which can be waived by conduct or by contract. 6/ However, neither possibility presents a valid defense in the present matter. The Union attempted to negotiate the wages, hours and conditions of employment of Maigatter and Fager at the first bargaining session scheduled after the Commission decision including Maigatter and Fager in the bargaining unit represented by the Union. Thus, the Union cannot be said to have waived its right to demand bargaining of the County by inaction. Nor can it be said that the 1983 collective bargaining agreement covering highway department employees represented by the Union offers any basis to conclude that the Union waived its right to demand bargaining of the County regarding the positions occupied by Maigatter and Fager. First, it should be noted that the 1983 collective bargaining agreement had expired at the time the management agreement was executed between Maigatter, Fager and the County. Second, even if that contract had been in effect, it did not automatically extend to Maigatter and Fager since accreted employees are not automatically covered by the collective bargaining agreement covering the bargaining unit the employees are accreted to unless collective bargaining produces such a result. 7/ Since there was no collective bargaining in the present case, the agreement covering highway department employees cannot be considered to have extended to Maigatter and Fager. Finally, even if Article 18 covered Maigatter and Fager, that provision does not clearly and unmistakably afford the County the right it seeks to assert in this case. 8/ The provision grants the County ". . . the sole right to contract for any work it chooses, direct its employees to perform such work wherever located in its jurisdiction, subject only to the restrictions imposed by this agreement and the Statutes of the State of Wisconsin." Without determining the appropriate interpretation of this language, 9/ it can be noted that the Union plausibly argues that this provision governs not the County's right to subcontract County operations but the right of the County to contract any work it chooses and to direct highway department employees to perform that work within the County's jurisdiction.

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5/ Ibid. at 102-103.

6/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A (Yaeger, 12/79); Dec. No. 16753-B (WERC, 6/81).

7/ School District of Coleman, Dec. No. 21569 (WERC, 4/84); Cochrane - Fountain City Community Jt. School District No. 1, Dec. No. 13700 (WERC, 6/75).

8/ Proof of a waiver, by contract, of the right to bargain must be clear and unmistakable. City of Wauwatosa, Dec. No. 19310-C, 19311-C, 19312-C (WERC, 4/84), citing City of Brookfield, Dec. No. 11406-A (Bellman, 7/73).

9/ Such an interpretation would be inappropriate since Sec. 111.70(3)(a)5, Stats., has not been pleaded in this case.

Because this argument is plausible, it cannot be said that Article 18 clearly and unmistakably affords the County the right to subcontract which it seeks to assert in the present case.

Thus, the Union has not waived by conduct or by contract its right to bargain the wages, hours and conditions of employment of Maigatter and Fager or the decision or the impact of any decision by the County to subcontract its landfill operation, and there is no valid defense to the County's refusal to bargain with the Union in the present case.

The Independent Violation of Sec. 111.70(3)(a)1, Stats.

Conduct by a Municipal Employer which has a reasonable tendency to interfere with, restrain or coerce municipal employees in their exercise of rights guaranteed in Sec. 111.70(2), Stats., constitutes an independent violation of Sec. 111.70(3)(a)1, Stats. 10/ Examination of this point turns on the validity of the County's assertion that Maigatter and Fager, when executing the management agreement, were not municipal employees but independent contractors. An examination of the circumstances regarding this subcontract, however, will not support the conclusion that Maigatter and Fager were independent contractors. The standard employed by the Commission to determine whether an individual is an employee or an independent contractor has been stated thus:

. . .

. . . When a question has arisen as to whether an individual is an employee or an independent contractor, the Commission has applied the "right of control" test. This test provides that where the employer for whom the services are performed retains the right to control the manner and means by which the result is accomplished, the relationship is one of employment. Where the employer retains control only as to the result, the relationship is that of independent contractor. The determination of the relationship depends on the particular facts of each case and all the incidents of the relationship must be weighed and assessed, and no one factor is dispositive. The earmarks of an independent contractor are that there is usually an engagement in a venture involving a financial investment and an assumption of the risks involved in the undertaking; that profit and loss are dependent on the efficiency and ability of the independent contractor; that pay for services or goods is based on the result rather than solely on the time to reach the result; and that the independent contractor exercises independent judgment and initiative in determining when, where, and how to accomplish the job. 11/

The earmarks of an independent contractor are absent in the present case. The County has ceded little, if any, control over the manner, the means, or the result of its landfill operation. Members of the SWMC testified that the County desired a landfill which operated on a part-time basis without risk of overtime, but which was open at specified hours. The County achieved this by hiring Maigatter and Fager as employees and did not change this by entering into the management agreement with Maigatter and Fager. After the execution of the management agreement, the landfill operated at County set hours, and Maigatter's and Fager's salary reflected a part-time operation without the risk of overtime. That the County Board was unwilling to cede significant control over the landfill's operation is reinforced by the fact that the County did not seek any other applicants besides Maigatter and Fager and did not put the operation out on bids. While County representatives asserted that other contractors or individuals with the experience or training to operate the landfill may not be available in the Kewaunee County area, this assertion could only be verified by a search or by a bidding procedure which the County did not undertake. It is more probable that the County had secured the control over the landfill operation it desired when it hired Maigatter

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10/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

11/ School District of Bruce, Dec. No. 20035-A (Crowley, with final authority from WERC, 2/83).

and Fager, and sought to retain that control without risk of bargaining with the Union by entering into the management agreement with Maigatter and Fager.

Nor does the management agreement between Maigatter and Fager and the County reflect a venture involving a financial investment and an assumption of the risks involved in the undertaking. Maigatter and Fager did not make any investment to assume the operation of the landfill or of their own "business" as landfill operators. Under the management agreement, the County provides all the tools, equipment, buildings, utilities, telephone and fuel necessary to operate the landfill, thus shielding Maigatter and Fager from any risk of price fluctuations regarding overhead costs. Maigatter and Fager did not seek any advice before signing the management agreement, and did not undertake any costs involved in forming a formal business entity. They did assume the financial burden of certain fringe benefits they had received as employees, but this is a little more than an accounting point since their salaries were adjusted to absorb this extra cost. In addition, the County agreed to afford Maigatter and Fager access to its group health plan. What emerges from the management agreement is a contractual arrangement designed to assure the County of Maigatter's and Fager's services while shielding them from the risks typically associated with the formation and operation of a business.

Nor does the management agreement reflect a business arrangement where profit and loss are dependent on Maigatter's and Fager's performance. Maigatter's and Fager's duties at the landfill remain substantially the same without regard to the management agreement, and that agreement provides them little opportunity to realize a profit or absorb a loss. The County Board fixed the landfill hours and Maigatter's and Fager's salary. The result is that Maigatter and Fager can realize no financial gain by working greater hours and risk a contract violation if they operate fewer hours. The County thus received the benefit of a part-time landfill operation which did not risk any overtime payment. Maigatter and Fager, however, retain little, if any, flexibility to increase their "profitability" either by working longer hours or by performing the same work in less time and devoting the time saved to other profitable ends.

Maigatter's and Fager's salary ultimately reflects payment based on the number of hours the landfill is open to the public. This payment is, then, rooted primarily on the time necessary to maintain certain landfill hours and not on the waste processing services provided by Maigatter and Fager.

Maigatter did exercise independent judgment in hiring a replacement for Fager without prior County Board approval. This fact, standing alone, does not, however, evince the independent judgment and initiative characteristic of an independent contractor. Maigatter's and Fager's duties remain substantially unchanged in spite of the management agreement, and the County has a separate contract with Lee to oversee the administration and operation of the landfill. There is, then, little beyond the hire of a replacement employee to evince the independent judgment and initiative typically exercised by an independent contractor.

The management agreement simply does not reflect an arms-length business transaction between the County and independent contractors. Maigatter was approached by Reckelberg with a document which provided, without substantial change, for the management agreement ultimately signed by Maigatter and Fager. Maigatter regarded his alternative to signing this document as the loss of his job, and thus, in effect, a discharge. This view is understandable since Maigatter's loss of his landfill duties reflected more than a loss of a particular client. Maigatter and Fager had no business to fall back on, and no further clients to look to.

In sum, Maigatter and Fager, under the terms of the management agreement, did not become independent contractors as that term is employed by the MERA. The management agreement, with few exceptions, simply preserved the employer/employee relationship the County Board had enjoyed with Maigatter and Fager prior to Commission Decision No. 21344 and which the County Board feared might be altered by the entry of the Union as the bargaining representative for Maigatter and Fager. The management agreement did not, therefore, change Maigatter's and Fager's status as municipal employees entitled to the rights of Sec. 111.70(2), Stats.

The County's actions in contracting individually with Maigatter and Fager effectively overturned the action of the Commission in Decision No. 21344. This action would not necessarily have violated the MERA if Maigatter and Fager were truly independent contractors excluded from the definition of municipal employees under the MERA, or if the County had discharged its statutory duty to bargain with the Union prior to entering into the individual contracts. As noted above, how-

ever, Maigatter and Fager are not independent contractors and the County's acts in negotiating and signing the individual contracts with Maigatter and Fager constituted the County's attempt to avoid the bargaining obligation triggered by Commission Decision No. 21344. The County's actions in bargaining individually with Maigatter and Fager could easily be repeated with any County employee, and served to put County employees on notice of the fragility of the bargaining rights set forth in Sec. 111.70(2), Stats. These actions inevitably have a reasonable tendency to discourage the exercise of employee bargaining rights since the actions undertaken by the County, if unchecked, would eliminate the Commission's authority to enforce the bargaining rights set forth in Sec. 111.70(2), Stats. Because the County's actions have a reasonable tendency to interfere with employee exercise of bargaining rights guaranteed under the MERA, the County's actions constitute an independent violation of Sec. 111.70(3)(a)1, Stats. Under established Commission precedent<sup>12/</sup> this violation is not dependent on whether or not the County intended its actions in bargaining individually with Maigatter and Fager to have the effect of interfering with the bargaining rights of other County employees.

#### The Alleged Sec. 111.70(3)(a)2, Stats., Violation

Sec. 111.70(3)(a)2, Stats., makes it a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization . . ." The Union urges that the County violated this section since Maigatter's and Fager's efforts to negotiate their wages with the County make them a "labor or employee organization" and the County assisted them in the formation of this organization in order to avoid their inclusion in a highway department bargaining unit. While the terms "labor or employee organizations" employed in the MERA are broad, that Section demands some sort of organization, however informal. In this case, no substantial evidence of any such organization exists. Maigatter and Fager did apparently propose a salary figure to the Board, but this salary was accepted without question by the Board and appears to have involved no actual negotiation. This reflects less an attempt by Maigatter and Fager to negotiate than the confirmation of a prearranged figure. Maigatter and Fager signed the management agreement as individuals, and just as there is no substantial evidence that they constituted a business organization there is no substantial evidence that they constituted an employee organization. The County did not, then, attempt to create a labor or employee organization with Maigatter and Fager, but did bargain with them as individuals. This individual bargaining violates Sec. 111.70(3)(a)1 and 4, Stats., which has been discussed above. Finding a violation of Sec. 111.70(3)(a)2, Stats., on the present facts would stretch the terms "labor or employee organization" so broadly that the terms would be rendered virtually meaningless. Thus no violation of Sec. 111.70(3)(a)2, Stats., has been found.

#### The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

The Union urges that the County's independent contract with Maigatter and Fager constitutes a violation of Sec. 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . ." Traditional analysis regarding this Section turns on whether an employer undertook discriminatory action against a municipal employee's exercise of protected concerted activity. This traditional analysis is not readily applicable to the present case in which there is no evidence of Maigatter's and Fager's exercise of protected concerted activities or of any interest of Maigatter and Fager regarding whether or not they were included in the bargaining unit represented by the Union. It has not, then, been clearly demonstrated that any adverse consequences of the management agreement affected Maigatter's and Fager's willingness to either join or not to join the Union. The Union's argument centers, then, on the Local Union's exercise of protected rights in filing the unit clarification petition and attempting to bargain for the positions accreted to the bargaining unit as a result of that petition, as well as on the adverse affects of the management agreement on the Local Union and its membership. The possibility of such adverse affects has already been discussed above regarding the County's violation of Sec. 111.70(3)(a)1, Stats. The Union, however, urges that a separate finding of a County violation of Sec. 111.70(3)(a)3,

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<sup>12/</sup> Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Milwaukee, Dec. No. 8420 (WERC, 2/68).

Stats., is necessary since the management agreement was undertaken by the County with anti-union hostility. This contention must be addressed, and the most persuasive guide to address this contention is found in Winnebago County (Dept. of Social Services), Dec. No. 16930-A (Davis, 8/79), in which the Examiner concluded:

. . . a finding of discrimination is warranted if it is shown that the municipal employer's action was motivated by a purpose to chill the exercise of protected rights among the remaining unit employees and if the employer may reasonably have foreseen that its elimination of positions will likely have that effect. . . . 13/

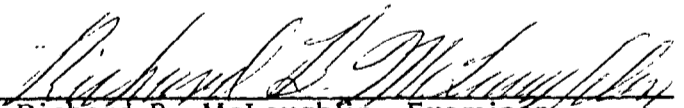
The present record will not support the conclusion that the County wished to undermine the exercise of rights protected by the MERA on the part of the remaining highway department employees. The SWMC took great pride in the creation and operation of the landfill, and was concerned that the operation could not be viably maintained as anything but a part-time operation. Individual members of the SWMC feared the possibility that the Union might increase the hours and the operating costs of the landfill and did not want the Union to extend the collective bargaining agreement covering highway department employees to Maigatter's and Fager's operation of the landfill. It does not follow from this that the management agreement executed by the County and Maigatter and Fager was motivated by a County desire to chill the exercise of protected rights among other highway department employees. At best, it appears the County took considerable displeasure with a Commission decision and acted to rid itself of the adverse consequences of that decision. This behavior has already been addressed above regarding the County's violation of Sec. 111.70(3)(a)1 Stats., and the Union's assertion that the County embarked on a conspiracy to undermine the highway department union cannot be accepted. Thus, no County violation of Sec. 111.70(3)(a)3 Stats., has been found.

#### The Remedy

The remedy appropriate to this case need not be discussed in detail. The notice to be posted has been included in the Order to remedy any chilling effect the County's individual bargaining with Maigatter and Fager may have had on other County employees. The bargaining order remedies the County's refusal to bargain with the Union regarding the wages, hours and conditions of the positions presently occupied by Maigatter and Fager, and reflects that the County cannot subcontract those positions without first discharging its duty to bargain with the Union regarding the decision and the impact of that decision if any such subcontract is contemplated. The Order also restores the status quo concerning Maigatter's and Fager's position in order to recreate as closely as possible the bargaining context that would have existed had the County properly undertaken its duty to bargain with the Union at the time Maigatter's and Fager's positions were accreted to the highway department bargaining unit.

Dated at Madison, Wisconsin this 5th day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Richard B. McLaughlin, Examiner