STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PARK LAWN HOME EMPLOYEES, LOCAL 913, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 193 No. 36741 MP-1832
vs.	:	Decision No. 23591-A
MANITOWOC COUNTY (PARK LAWN HOME),	:	
Respondent.	:	

Appearances:

Mr. Bruce F. Ehlke, Lawton & Cates, S.C., Attorneys at Law, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO.

Mr. David C. Hertel, Whyte & Hirschboeck, S.C., Attorneys at Law, 2100 Marine Plaza, Milwaukee, Wisconsin 53202-4894, with Mr. Alfred A. Heon and Ms. Karen K. Duke, on the brief, appearing on behalf of Manitowoc County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on March 27, 1986, in which it alleged that Manitowoc County had committed prohibited practices within the meaning of the Municipal Employment Relations Act. The Commission, on May 1, 1986, 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. Hearing on the matter was conducted in Manitowoc, Wisconsin, on June 11, 1986, and in Madison, Wisconsin, on June 19, 1986. Transcripts of those hearings were provided to the Examiner by July 9, 1986. The parties filed briefs, reply briefs and proposed Findings of Fact, Conclusions of Law and Order by October 16, 1986. The parties reached an agreement to include in the evidentiary record certain documents attached to their briefs by November 28, 1986.

FINDINGS OF FACT

1. Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO (the Union), is a labor organization which has its offices located in care of Post Office Box 370, Manitowoc, Wisconsin 54220.

2. Manitowoc County (the County) is a municipal employer which has its offices located at the Manitowoc County Courthouse, 1010 South Eighth Street, Manitowoc, Wisconsin 54220.

3. The County has owned and operated the Park Lawn Nursing Home from 1961 until July 1, 1986. The Park Lawn Nursing Home, throughout that period of time, was a 99 bed skilled and intermediate care facility giving emphasis to very difficult medical geriatric and supplemental skill level patients. The Home is located at 1308 South Twenty-Second Street, Manitowoc, Wisconsin. The Shady Lane Nursing Home is a 168 bed licensed intermediate care nursing facility serving easier to care for medical geriatric patients. The facility which houses the Shady Lane Nursing Home was built in 1971 and has been, throughout its history of operation, leased by the County to a private non-profit corporation. The Shady Lane Nursing Home operates in the same building complex as does the Park Lawn Nursing Home. The building complex which houses the Shady Lane and the Park Lawn Nursing Homes is covered by a zoning ordinance which identifies the area in which the building complex is located as an "R-5 Multiple Family District." Section 15.09(2) of the ordinance creating the "R-5 Multiple Family District" reads as follows:

Use Regulations: Land shall be used and buildings shall be erected, altered, enlarged, or used for only one or more of the following uses . . . :

1. Multiple family dwellings - two or more units only
1a. Single and two family dwellings
2. Accessory buildings and uses
3. Boarding houses
4. Lodging houses
5. Parks, parkways, and other recreation areas

6. **Conditional Uses:** The following uses are permitted after approval of the City Plan Commission providing there is compliance with the Area and Height regulations of the R-5 District:

   a. Churches and other religious institutions
   b. Schools - public and parochial
   c. Fraternal organizations, philanthropic, and eleemosynary institutions other than correctional institutions
   d. Private clubs and lodges
   e. Hospitals other than animal hospitals
   f. Homes for the elderly and nursing homes and child day care centers
   g. Libraries, museums, art galleries, and concert halls
   h. Governmental buildings
   i. Residential buildings used in connection with the above conditional uses
   j. Mobile Home parks, subject to regulations of the city's mobile home ordinance, Chapter 15 -- Section 15.18 (19) of the Municipal Code.
   k. Accessory buildings and uses

The County was not, as of July 1, 1986, the sole provider of nursing home services in the Manitowoc area. 1/

4. The Union has functioned, from October of 1982 until at least July 1, 1986, as the exclusive collective bargaining representative of certain employes working at the Park Lawn Nursing Home. The Union and the County have been parties to collective bargaining agreements covering the employes represented by the Union. The first such agreement between the parties was in effect, by its terms, "as of January 1, 1983 ... until and through December 31, 1984." The second such agreement was in effect, by its terms, "as of January 1, 1985, ... up to and including December 31, 1985." Both of these agreements contained, as Article I, a provision entitled "RECOGNITION" which reads as follows:

> The County hereby recognizes the Union as the exclusive bargaining agent for regular full-time and regular part-time employees of Park Lawn Home, excluding managerial, professional, supervisory, confidential, all registered nurses, temporary, seasonal and casual employees, for the purpose of collective bargaining on matters concerning wages, hours, and conditions of employment. Specifically excluded from the bargaining unit are the Chief Power Engineer, Head Housekeeper, Kitchen Manager, Administrator, Director of Nursing, Office Manager, Administrative Secretary, Activity Director, Social Worker, and Payroll Clerk.

5. In a memorandum dated March 21, 1985, Holy Family Hospital of Manitowoc announced that it had "submitted a Letter of Intent to the Manitowoc

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1/ Facts contained in the final three sentences of Finding of Fact 3, including the quoted material from the zoning ordinance, are based on matter contained in documents attached to the parties' briefs, and included in the record on the agreement of both parties.

County Board explaining the hospital's plan to study the feasibility of the hospital leasing the ... Park Lawn Home." The County Board, by Resolution 85-1, adopted on April 16, 1985, established certain procedures by which the proposed leasing arrangement could be reviewed and, if appropriate, acted upon. In a letter to the "Chairman and Members of the Personnel Committee of the Manitowoc County Board of Supervisors" headed "Re: Demand to Negotiate", and dated April 30, 1985, Michael Wilson, the Union's representative, stated:

> Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO herein request negotiations concerning the decision to lease sale (sic), assign or otherwise subcontract the Park Lawn Home and the impact of any such decision upon the employees (sic) wages, hours and conditions of employment.

The County Board, by Resolution 85-41, adopted on May 21, 1985, stated, among other things, that:

> WHEREAS the Manitowoc County Board of Supervisors has received notice from Holy Family Hospital that they intend to submit a lease proposal for the Park Lawn Home and the Manitowoc Health Care Center; and
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> WHEREAS Manitowoc County has received inquiries from other businesses regarding possible lease of said facilities;
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> . . .
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> BE IT THEREFORE RESOLVED that Manitowoc County will accept sealed lease proposals until June 28, 1985; and
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> BE IT FURTHER RESOLVED that Manitowoc County will retain the right to accept or reject any bids received; and
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> BE IT FURTHER RESOLVED that, if none of the proposals submitted by June 28, 1985 are found acceptable, Manitowoc County will accept no further proposals for a period of one year from June 28, 1985.

Wilson was aware of the contents of the resolution at the time of its adoption. Holy Famly Hospital did not submit a lease proposal to the County.

6. In the fall of 1985, during the development of a 1986 budget, various members of the County Board became concerned with the volatility of the County's financial exposure to its operation of the Park Lawn Nursing Home, and formed a committee to assess the possibility of leasing the operation. In a letter to "Mr. Donald L. Vogt, Chairman, Manitowoc County Board of Supervisors" dated October 11, 1985, Wilson stated:

> Tuesday evening last, you stated during the County Board's Committee meeting of the whole an agency had contacted you and wondered whether or not the County Board was serious this time about leasing Park Lawn Nursing Home. I am curious as to who made the comment. Also you indicated three (3) agencies had already inquired as to submitting proposals to lease or otherwise indicated interest in leasing Park Lawn Nursing Home. What agencies are these?
>
> Thank you for your anticipated cooperation.

Vogt responded to Wilson's letter in a letter dated October 22, 1985, which stated:

> On October 11, 1985, you sent a letter to me requesting information regarding the identity of those entities that have expressed interest in the Park Lawn Nursing Home. At this time, I do not feel I should share this information with you in as much as the phone calls that I have received have been for informational purposes only. I am of the opinion that none of the representatives are wanting to have their company

> names associated with the Park Lawn Nursing Home until such time as their respective governing boards have determined that they wish to pursue it further. Indeed, the Manitowoc County Board has not even taken the position of pursuing this course of action, and when and if we do, alot (sic) of work is going to go into preparing the specifications for bid proposals so that proposals received will meet the identified needs of Manitowoc County.
>
> I will be very happy to keep you informed regarding the actions taken by the Board, as well as the process to be followed, should leasing be determined to be the desired course of action.

The possibility of leasing the Park Lawn Nursing Home was an item of discussion at County Board meetings conducted on October 28 and November 19 of 1985.

7. The Board approved minutes of its November 19, 1985, meeting state the following: "Chairperson Vogt relinquished his chair to speak ... Park Lawn, he said, is not giving up services and you are not turning away 99 people, you are just contracting for service."

8. The County ultimately decided to request bids for the lease and operation of the Park Lawn Home. To effect this purpose the County developed a document dated December 4, 1985, and headed: "MANITOWOC COUNTY REQUEST FOR PROPOSAL FOR LEASE AND OPERATION OF PARK LAWN NURSING HOME." That document contained, among its provisions, the following:

> PURPOSE:
>
> This Request for Proposal is to solicit proposals for the lease and operation of the Manitowoc County Park Lawn Nursing Home.
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> . . .
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> SCHEDULE:
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> The following schedule of events is anticipated for solicitation and evaluation of proposals:
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> | | |
> |---|---|
> | Dec. 13 | - Advertisement of Intent to Lease - send out announcements. |
> | Dec. 18 | - Availability of Detailed Request for Proposals to all respondents. |
> | Dec. 18-Feb.3 | - Staff provide information and work with interested parties. |
> | Feb. 3 | - Deadline for submission of Proposals. |
> | Feb. 3-Mar. 17 | - Review proposals and negotiate with bidders. |
> | Mar. 18 | - Action by County Board to accept lease contract proposal. |
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> . . .
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> PROPOSAL FORMAT:
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> . . .
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> A. Qualifications and Experience:
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> . . .
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> 3. Provide documentation that the organization currently has staff or can recruit staff

qualified and licensed to manage a nursing home in the State of Wisconsin, under Chapters 456 and 50.04(2). Provide resumes of owners or corporate officers.

4. Provide a list of all nursing homes currently owned and/or operated by the organization. Include, for each home, the facility name, address, telephone number, bed size and level of licensure. Also indicate for each home if owned and/or operated.

. . .

B. Lease Proposal:

Manitowoc County is interested in leasing the Park Lawn Nursing Home to a qualified operator.

(1) Objective of the lease arrangement are to:

- Continue to provide quality care to Manitowoc County residents with a minimum of survey violations, incidents and patient complaints.

- Relieve the county of financial and legal responsibility for the operation of the nursing home.

The request for proposals contained the following as part of a proposed lease agreement:

> Section 5.2 PREFERENCE FOR MANITOWOC COUNTY RESIDENTS. The Corporation shall give preference to Manitowoc County residents for any bed opening.
>
> . . .
>
> Section 13.1 USE OF THE LEASED PREMISES. Tenant covenants that it will use the leased premises only for health care purposes.

Also attached to the "request for proposal" was a letter containing an "evaluation" of the Park Lawn Home by American Appraisal Associates. The cover letter of the evaluation is dated December 13, 1985. The attachment to that letter headed "SUMMARY" indicates under the heading "Park Lawn Nursing Home" the following:

Sect No.	Year of Constr	Lics Beds	Undepreciated Replacement Cost	Depreciated Replacement Cost	Gross Floor Area	Subject to SF Adjustment
1	1964	99	2,559,890	2,073,511	35,041	NO
2	1963	0	877,912	668,375	19,149	NO
TOTAL		99	3,437,803	2,741,886	54,190	

The County mailed the "request for proposal" to about 320 entities known to operate nursing homes. The County also advertised its "request for proposal" in publications distributed inside and outside of Wisconsin. One such advertisement appeared in the December 15, 1985, edition of the Milwaukee Journal. The advertisement stated, among other things: "99 Bed Skilled Nursing Care Facility offered for LEASE by Manitowoc County, Wisconsin." Among the proposals received by the County in response to its efforts was one from the "Marlys S. Griffiths Group"

dated January 30, 1986. That proposal contained, among its provisions, the following:

> "Our goal is to be ready for survey on a daily basis, and we maintain an effective and amicable professional relationship with the State at all times.
>
> . . .
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> The goal would be to clearly, by our program and effectiveness, reassure the Manitowoc community that all will be well with residents and staff under other than County management, even though some changes will be necessary to do this.
>
> . . .
>
> My chief priority is the privilege of operating Park Lawn and being considered for Shady Lane.

Also included in the proposal was a letter dated January 28, 1986, bearing a signature identified as "Gary A. Johnsen, CPA" to "Marlys Griffiths" headed "RE: Park Lawn Home" which stated the following under the heading "Summary":

> For Park Lawn Home to support itself, a complete revamping of the wage rate structure and fringe benefit package would have to occur. Operational cuts would not adversely affect future operational rates since existing costs exceed Medicaid departmental targets and maximums. However, the cuts could affect your relationship and image within the community.

The proposal also contained a copy of Sections 5.2 and 13.1 which are set forth above. As of February 6, 1986, the Board created Park Lawn Lease Task Force Committee was in the process of narrowing the six proposals received by the County down to one or two. By February 28, 1986, that Committee had selected the Griffiths' proposal as the one which would form a basis for further negotiations, and had in fact reached a tentative agreement with the Griffiths Group on a proposed lease. These events were made known to the Board in a memo to the Board dated February 28, 1986, from the "Finance Committee" and bearing a signature identified as Bob Ziegelbauer, who was the Chairperson of the Finance and Budget Committee. That memo also noted that "Marlys Griffiths of the Griffiths Group will be at our meeting Tuesday night to meet the County Board and answer questions." Griffiths ultimately did appear to answer questions at a Board meeting held on Tuesday, March 18, 1986.

9. At the Board meeting of March 18, 1986, the Board adopted Resolution Number 86-226 which states the following:

> WHEREAS, the County is presently operating a skilled nursing home facility by the name of Park Lawn Home for both private pay and Title XIX patients; and
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> WHEREAS, the economic feasibility of operating said nursing facility has decreased substantially in the past several years; and
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> WHEREAS, it is anticipated that such nursing home facility will be operating at a deficit for the foreseeable future under present conditions; and
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> WHEREAS, the economic viability of said nursing facility is further endangered by anticipated substantial changes in Title XIX funding; and
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> WHEREAS, the County is faced with overall financial difficulty in view of anticipated Gramm-Rudman cuts in State and Federal aid; and

> WHEREAS, a question has arisen as to the propriety of operating a nursing home facility in competition with private industry in the face of projected substantial deficits; and
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> WHEREAS, the County feels it is in the best interests of the taxpayers to redirect the financial assets involved in said nursing home facility to other areas of County government; and
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> WHEREAS, the County has received an offer from Manitowoc Health Care Services, Inc. to lease the real estate and tangible personal property involved in the operation of Park Lawn Home and to purchase the good will and certain other intangible assets of Park Lawn Home; and
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> WHEREAS, the County deems it a proper governmental function to divest itself of its nursing home facility known as Park Lawn Home;
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> NOW, THEREFORE, BE IT RESOLVED, that Manitowoc County hereby elects to discontinue operation of the nursing home facility known as Park Lawn Home effective July 1, 1986, and hereby authorizes and directs the appropriate County officials to enter into that certain Lease Agreement between Manitowoc County and Manitowoc Health Care Services, Inc., attached hereto as Exhibit A, which Lease Agreement provides for the sale of good will and certain intangible personal property and the lease of the real estate and tangible personal property involved to Manitowoc Health Care Services, Inc.

Representatives of the County and of Manitowoc Health Care Services, Inc., (MHCS) ultimately did execute an agreement including at least three amendments, the last of which was signed by County representatives and by Marlys S. Griffiths for MHCS on June 9, 1986.

10. The preamble to the lease authorized by the resolution set forth in Finding of Fact 9 is headed "LEASE" and identifies the County as "Lessor" and MHCS as "Lessee." Article II is entitled "GRANT OF LEASE AND TRANSFER." Section 2.01 provides that the County "leases and demises ... the nursing home facility commonly known as Park Lawn Home ... consisting of the real property described in Section 2.01 (a) below and the tangible property described in Section 2.01 (b) ... " Section 2.01 also defines "Demised Premises" as "such real property and tangible personal property being collectively referred to herein..." Section 2.01 (a) refers to a legal description of the real estate and grants MHCS "the right to use, in common with Lessor and Lessor's other tenants, if any, all walkways, driveways and other common areas and facilities as described on ... Exhibit B ... " Exhibit B is headed "DESCRIPTION OF COMMON AREAS" and states the following: "New Elevator, Work Shop-Basement, Incinerator Room - Basement, Large Activity Area for Church - Basement, Ramp Area - for ambulance, Parking Lot-Visitors to Park Lawn Home use Shady Lane Home parking area, Stairwell-North Wing "A", Gazebo - Yard." The tangible personal property leased by the County is described in Section 2.01 (b) to:

> ... consist of all tangible personal property owned by Lessor which is located on the Real Property and used by Lessor in the operation of the Nursing Home, including without limitation, all fixtures; equipment; office furniture and equipment; furniture; furnishings; beds, linens, blankets and mattresses; telephones and the right to place a referral to a new telephone number on the current telephone lines of the nursing home; fire extinguishers and other safety equipment; dishes; silverware; kitchen equipment and utensils; working tools; emergency and standby equipment; nursing and other operating procedural manuals; all as more fully described on Exhibit C ...

Exhibit C contains a listing of the specific items of equipment and includes an appraisal stating the "Value-in-Use, as of April 2, 1986," of those items. The

aggregate value of those items of equipment is stated to be $286,165. Section 2.02 of the lease, as amended, states:

> Effective upon the Commencement Date, Lessor hereby sells to Lessee the food inventory, supplies and heating oil, then on hand at the Nursing Home, that Lessee desires to purchase, and all of the goodwill of the Nursing Home including all Lessor's right, title and interest in the name 'Park Lawn Home' and such other intangible personal property used in the Nursing Home operation as is listed on Exhibit D attached hereto.

Exhibit D describes the intangible personal property in detail and includes items that range from Applesauce to nursing and office supplies. Exhibit D lists an "amount" for each item, but no total figure for all items. The total figure for all items is approximately $33,976.39. The specific items range in value from $0.23 for a 3x5 Index Card to $1,456 for 40 cases of Cormatic Toilet Paper. Article III of the lease is entitled "TERM" and, in Section 3.01, grants a lease term of July 1, 1986, to July 1, 1990. Section 3.03 provides:

> Inasmuch as nursing home program violations reflect on the long term financial viability of Lessee as tenant and Lesee's ability to perform its obligations under this Lease, it is agreed that Lessor, at Lessor's option, may terminate this lease effective the 1st day of January, 1988, terminating all Lessee's obligation to Lessor effective on such date upon written notice to Lessee, given not later than ninety (90) days prior thereto, in the event that the State of Wisconsin has, prior to such notice of termination, issued Class "B" and/or Class "A" notices of violation under Section 50.04 (4) of the Wisconsin Statutes, except for violations based upon preexisting violations and violations resulting from new owner survey, for more than three (3) unrelated, separate program violations, which Lessee has not contested or which a hearing examiner of the State of Wisconsin has sustained after a hearing thereon; and as a result of which notices of violation, Lessor in good faith reasonably determines that Lessee is not qualified to operate the Nursing Home.

Section 3.04 grants MHCS "two successive options to renew this Lease for additional terms of three (3) years ... "provided the County or MHCS have not terminated the lease under Sections 3.02 or 3.03. Article IV is entitled "RENT" and provides, at Section 4.01, for "a fixed monthly rent of $1,000.00." Section 4.02 provides a formula for "additional monthly rent" based on several variables. Section 4.03 provides "as further additional monthly rent ... an amount equal to the percentages of Lesee's gross revenues for each month of the Lease ... ." Section 4.04 obligates MHCS to "furnish to Lessor a monthly statement of Lessor's gross revenue for such month" and grants the County the right "to annually audit Lessee's records." Section 4.06 obligates MHCS to pay certain "taxes, assessments and levies ... . " Article V is entitled "USE OF DEMISED PREMISES" and, at Section 5.01, provides: "The Demised Premises may be used for any lawful purpose." Article VI is entitled "REPRESENTATIONS AND WARRANTIES OF LESSOR" and includes, among its provisions, certain representations necessary to the transfer of the operation of a licensed nursing home. Article VI, Sections (e) and (g), for example, provide:

> (e) All of the Personal Property is in good operating condition and repair and complies with all applicable requirements of all health, safety and nursing home codes that apply to the operation of the Nursing Home. The amount of the Personal Property is that which would be required to operate 99 skilled care nursing home beds at full capacity in compliance with all applicable requirements of all health, safety and nursing home codes that apply to the Nursing Home.
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> . . .
>
> (g) The Nursing Home is licensed by the Wisconsin Department of Health and Social Services to operate 99 skilled care beds.

. . .

Article VII is entitled "REPRESENTATIONS AND WARRANTIES OF LESSEE" and provides at Section (a) that:

> Lessee is a corporation duly organized, validly existing and in good standing under the laws of the State of Wisconsin with all requisite power and authority to lease the Demised Premises and to operate the Nursing Home ... .

Article VIII is entitled "MISCELLANEOUS COVENANTS OF LESSOR PRIOR TO COMMENCEMENT DATE" and provides, at Section 8.01, the following:

> Without the express prior written consent of Lessee, from the date hereof until the Commencement Date, Lessor shall not: (i) dispose of any asset used in the operation of the Nursing Home, except in the ordinary course of business consistent with past practice . . .

As amended, Section 8.03 provides:

> Lessor shall operate the Nursing Home diligently and substantially in the ordinary course of its business consistent with past practice, and shall keep the business intact ... .

Section 8.07, as amended, grants the County "reasonable access during normal business hours to all properties, books, records, including employe records, contract and documents pertaining to the Demised Premises and the Nursing Home ... ." Article IX is entitled "LICENSURE" and provides:

> Lessee shall proceed with all due diligence and use its best efforts to obtain all nursing home licenses and permits required from any governmental authority for the operation of the Nursing Home as it is now being conducted. Lessor shall use its best efforts to assist and cooperate with Lessee to obtain such licenses and permits, and shall provide Lessee reasonable access to all documents and information in Lessor's possession or control which may be necessary to obtain such licenses and permits. The receipt by Lessee of all such licenses and permits on or before the Commencement Date is a material condition and inducement to Lessee to perform its obligations hereunder from and after the Commencement Date. In the event that Lessee does not obtain all such licenses and permits on or before the Commencement Date, this Lease may, at the option of Lessee, become null and void.

Article XI, which is entitled "PROVIDER AGREEMENTS," Article XII, which is entitled "CONDITIONS TO PERFORMANCE," Article XIII, which is entitled "PRORATIONS AND TRANSFERS," and Article XXII, which is entitled "Records," contain various provisions essential to the transfer of an ongoing nursing home operation. Article XIV, which is entitled "REPAIRS, REPLACEMENT AND MAINTENANCE," notes that the Park Lawn and Shady Lane homes are physically integrated. Section 14.01 provides that: "Because of the practical need to coordinate maintenance of the Real Property with adjacent property retained by Lessor, Lessee shall ... enter into a Maintenance Contract with Lessor in the form attached hereto as Exhibit L and incorporated herein by reference, to perform certain maintenance and repair work described therein at the sole cost and expense of Lessee." Exhibit L (N as amended), notes that the Park Lawn and Shady Lane homes have certain commonly metered utilities. Article XVI, which is entitled "SIGNS AND EXTERIOR ATTACHMENTS," Article XVII, which is entitled "UTILITIES," Article XVIII, which is entitled "INSURANCE," and Article XIX, which is entitled "CASUALTY, LOSS OR DAMAGE ," all contain provisions to insulate the County from various expenses incident to the day to day operation of the Home and from losses which might result from such operation. Article XXI is entitled "NO PARTNERSHIP" and provides:

Nothing in this Lease shall create or be construed to create a partnership between Lessee and Lessor, or make them joint venturers, or bind or make Lessor in any way liable or responsible for any debts, obligations or losses of Lessee.

Article XXIII is entitled "REIMBURSEMENT FOR UNEMPLOYMENT COMPENSATION CLAIMS" and, as amended, provides:

> Section 23.01. Lessee agrees that it will, within twenty (20) days after the Commencement Date, extend offers of employment to all reasonably qualified former Nursing Home employees of the Lessor who were represented by Local 913, AFSCME, AFL-CIO ("Union") while employed by Lessor, but in no event to not less than 90% of said former employees. No agreement by Lessee hereunder shall in any way be nor be construed or implied to be an adoption or assumption of any assumption of any agreement between Lessor and Union. Lessee has no obligation to retain the same terms of employment as those in affect with Lessor; it being acknowledged hereby, that it is the intent of Lessee to set new initial wages, hours, and terms and conditions of employment effective on the Commencement Date, provided, that nothing herein shall relieve Lessee of the requirements of Article XXVI of this agreement.
>
> Section 23.02. Lessee shall, within twenty (20) days after written notice from Lessor, reimburse Lessor for any all (sic) unemployment compensation claims paid by Lessor to four or more employees permanently laid off by Lessor on or immediately prior to the Commencement Date pursuant to the requirements hereof, and to whom Lessee does not, within twenty (20) days after the Commencement Date, offer employment. The Lessor shall, at the direction, cost and expense of Lessee contest any such unemployment compensation claim which Lessee may be required to pay.

Article XXVIII is entitled "ASSIGNMENT" and provides at Section 28.01:

> Except in the case of collateral assignments of this Lease executed by Lessee as security for borrowing by it, Lessee shall not assign this Lease, except to Marlys Griffiths, or any entity owned or controlled by Marlys Griffiths, without Lessor's prior written consent. . . .

Article XXIX is entitled "RIGHT OF ENTRY" and empowers the County to "enter into and upon the Demised Premises ... for the purpose of inspecting same and discharging any of its obligations hereunder ... ." Article XLI is entitled "GUARANTY" and provides:

> Lessee is a new corporation of limited assets. In order to induce Lessor to enter this Lease, and in consideration thereof, Marlys Griffiths, as principal shareolder (sic) of Lessee, has, simultaneous with the Lessee's execution of this Lease, executed and given to Lessor her personal and unconditional guaranty of the obligation to pay rent under 4.01 and 4.02.

Exhibit H (J as amended) provides:

> The Pro Forma Balance Sheet of Lessee, which has been delivered to Lessor previously, shall be attached hereto by Lessee on or before the commencement date of the lease. As a newly organized company, it is understood that the Lessee has no financial history and therefore no established capital or other accounts, record of earnings or results of operation. Although the Pro Forma Balance Sheet set forth on this Exhibit H presents a minimal capitalization of Lessee, it is anticipated that Lessee will obtain sufficient capital as of the closing date to comply with the requirements of the lease, the Division of Health of the State of Wisconsin and the operational needs of the nursing home.

There is no provision in the amended lease requiring MHCS to give preference to County residents for any bed opening.

11. The Union mailed the Chairman and members of the Personnel Committee of the County Board a notice, dated July 2, 1984, of its intent to commence negotiations for a 1985 labor agreement. Actual bargaining for a 1985 labor agreement did not commence, due at least in part to a turnover in the position of County Personnel Director, until late in 1984 or early in 1985. The parties' bargaining for a 1985 labor agreement dealt in part with a "Memorandum of Understanding" attached to the 1983-1984 agreement which reads as follows:

> 1. During the term of the 1983-1984 collective bargaining agreement as ratified by both parties, the County will not sell Park Lawn Home.
>
> 2. This Agreement shall be in full force and in effect up to and including December 31, 1984.

During various bargaining sessions for a 1985 labor agreement, the Union proposed to continue and to broaden the scope of the Memorandum set forth above. At various points in those negotiations, the Union advanced proposals seeking to limit the County's ability to sell, lease, assign, transfer or convey the Park Lawn Home. Included among such proposals were the following, set forth in a document dated May 30, 1985:

> ARTICLE XXXV - SUCCESSOR CLAUSE
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> . . .
>
> Manitowoc County agrees that the Manitowoc County Park Lawn Home shall not be sold, conveyed, transferred, leased or toherwise (sic) assigned without first securing the agreement of the purchaser, transferee, lessee, or assignee to assume the County's obligations under the collective bargaining agreement between Manitowoc County and Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO and any successor agreement thereto.
>
> ARTICLE XXXVI - NEGOTIATIONS
>
> The County agrees that it will not sell, lease, assign, convey or transfer Park Lawn Home until such time as all lawful negotiations within the Union have been successfully completed.
>
> ARTICLE - SUCCESSOR EMPLOYMENT
>
> Manitowoc County agrees that the Park Lawn Home shall not be sold, conveyed, transferred, leased or otherwise assigned without first securing the agreement of the purchaser, transferee, lessee, or assignee to retain the current work force.

The County's then incumbent Personnel Director, Bruce Barker, stated the status of the negotiations in a letter to Wilson dated June 24, 1985, which stated:

> I am writing to summarize our conversation of June 19, 1985, regarding the current status of contract negotiations with the Park Lawn and Health Care Center Employees' unions.
>
> At the meeting I indicated that the County had not submitted its petition for investigation-mediation to the WERC. We also discussed the improbability of the Personnel Committee, County Board or an independent arbitrator agreeing to grant the employees a "successor clause" or any type of clause limiting the County's management right to lease or sell the County's Institutions. Obviously a clause regarding the continuation of our current wage scale and staff level would limit our ability to sell or lease either facility.

> As I indicated to you at that meeting, it is my belief that employee job security is closely tied to the financial status of the Institutions and our ability or inability to operate the facilities at a break even point. Because labor costs make up the largest share of our operating costs I believe it is in the best interest of our employees' (sic) to find ways to lower our operating expenses, including our labor costs so that an annual operating deficit can be avoided or at least reduced. One way to do this would be to cut wages, a second way would be to cut staff. I realize neither of these alternatives are attractive to our employees. Another method of reducing labor costs would be to allow greater management flexibility in transferring staff between Park Lawn and the Health Care Center when needed. If we could transfer staff when needed between the facilities we could probably reduce the number of part-time employees needed and in so doing reduce some of the duplication of fringe benefits thereby saving money. The ability to transfer employees from one institution to the other could result in other benefits for County employees. It may give us additional flexibility during heavy vacation periods and also provide some of our part-time employees an opportunity to work additional hours. We also discussed the cost savings which could result from a modification of our sick leave benefits and the annual sick leave payout.
>
> At our meeting you indicated a willingness to discuss these cost saving measures. If you are seriously willing to discuss these matters, I would be willing to discuss these alternatives with the Personnel Committee at their next aeeting (sic) (July 2, 1985). I have discussed these possibilities with our new administrator, Tom Harter, and he has indicated a strong interest in pursuing these matters. I feel some innovative thinking and negotiation in these areas could be very beneficial to the employees and the future operation of the Institutions. Obviously the operation of the institutions in a cost efficient manner is not only in the best interests of the County but also in the best interest of our employees.
>
> Please discuss this matter with the two locals and contact me regarding your position prior to July 2, 1985. If you or any of our employees have additional questions regarding this letter or the matters which we discussed during our meeting, please contact me.

The parties reached no resolution on a 1985 labor agreement through the fall of 1985. On or about December 17, 1985, the parties reached a tentative agreement for such a labor agreement. Wilson, in a letter to the "Chairman and Members of the Personnel Committee of the Manitowoc County Board of Supervisors" dated January 4, 1986, stated the following:

> Park Lawn Home Employees voted to ratify the terms of the 1985 Labor Agreement ... .
>
> Union proposals at Park Lawn Home . . . relating to leasing and successor(s) were withdrawn without prejudice during the course of negotiations.
>
> . . .

On or about January 21, 1986, the County Board ratified the 1985 collective bargaining agreement.

12. The parties' 1985 labor agreement did not contain the Memorandum of Understanding attached to the 1983-1984 labor agreement and set forth in Finding of Fact 11. Included in the provisions of the 1985 labor agreement were the following:

ARTICLE II - COUNTY FUNCTIONS

The County has the sole right to operate the County and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

. . .

E. To relieve employees from their duties because of lack of work or any other legitimate reason;

. . .

I. To determine the kinds and amounts of service to be performed as pertains to County operations, and the number and kinds of positions and job classifications to perform such services, subject to the grievance procedure;

J. To determine the methods, means and personnel by which County operations are to be conducted;

K. To contract out for goods or services, so long as the County does not dissipate the Union;

. . .

ARTICLE XXIX - DURATION OF AGREEMENT

A. This Agreement shall be in effect as of January 1, 1985, and shall remain in force and effect up to and including December 31, 1985. It shall continue in full force and effect thereafter until such time that either party desires to open, alter, amend or otherwise change this Agreement, subject to the provisions of this Agreement.

B. The timetable for conferences and negotiations shall be as follows:

Step 1: In order to reach a satisfactory agreement at a reasonable time, the Union shall notify the Personnel Committee of its intent to negotiate for changes in wages, hours and working conditions, policy, etc. by August 1, 1985.

The above timetable for negotiations shall be subject to adjustment by mutual agreement of the parties. The parties may extend this Agreement after December 31, 1985, upon such terms and conditions as are mutually agreed to.

The agreement provides, at Article VI, a procedure for the resolution of grievances, and, at Article VII, an arbitration procedure for the resolution of grievances not resolved under the procedure contained in Article VI. The agreement also defines and provides various benefits. Among such benefits are the following: Article X, governing seniority; Article XIII providing premium pay for overtime, certain shifts of work, week-end work, call-in work and stand-by work; Article XIV governing the provision of health and life insurance; Article XV governing the provision of payment of the employe's share of participation in the State of Wisconsin Retirement Fund; Article XVI governing longevity pay; Articles XVII and XVIII governing the accumulation and use of sick leave; Article XIX governing certain leaves of absence; Article XX governing funeral leave with pay; Article XXI governing paid holidays; Article XXII governing paid vacations; Article XXIII governing rest periods; Article XXVI governing the purchase of meals at the facility; and Articles XXVIII and XXX which identify

certain fair employment and past practices that are to be recognized as a part of the work environment.

13. Wilson, in a letter to the "Chairman and Members of the Personnel Committee" of the County Board dated July 1, 1985, stated the following:

> The Union herein serves notice of the desire and intent to commence negotiations on the 1986 Labor Agreement following settlement of the 1985 Labor Agreement, assuming the negotiations for the 1985 Labor Agreement do not also result in a settlement for calendar year 1986.

Wilson, in a letter to Donald A. Rehbein, the Chairman of the County's Personnel Committee, dated January 22, 1986, stated the following:

> Last night the County Board ratified the 1985 Labor Agreement. The Union is prepared to commence negotiations for the 1986 Labor Agreement.
>
> How do you wish to proceed? We are, of course, mindful that Mr. Barker is terminating and (sic) new Personnel Director will be hired. Please advise.

Negotiations sessions were ultimately scheduled by the Union and the County for March 6 and 26 of 1986. At the bargaining session conducted on March 6, 1986, an additional session was set for March 14, 1986. Also at the March 6, 1986, session, the Union advanced, among other proposals, the following:

> ARTICLE XXXVI - JOB SECURITY
>
> A. Bargaining Unit Work: No work presently performed by bargaining unit employees shall be performed by non-bargaining unit employees whether of this Employer or another Employer.
>
> B. Contract, Lease or Sell: The County agrees it will not contract, lease or sell Park Lawn Home or any of the property or physcial plant thereof nor contract or lease or sell or otherwise assign the responsibility for maintenance and care of the residents of Park Lawn Home.
>
> C. Successor Clause: The Employer agrees that Park Lawn Home shall not be sold, conveyed, transferred, leased or otherwise assigned without first securing the written agreement of the purchaser, transferee, lessee or assignee to assume the County's obligations under the collective bargaining agreement between Manitowoc County and Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO and any successor agreement thereto.
>
> D. Successor Employment: Manitowoc County agrees that the Park Lawn Home shall not be sold, conveyed, transferred, leased or otherwise assigned without first securing the written agreement of the purchaser, transferee, lesse (sic) or assignee to retain the current work force.

The bargaining session set for March 14, 1986, was ultimately cancelled, at the County's request. The County, in a letter from Diane M. Schmidt, a Personnel Coordinator, to Wilson, dated March 11, 1986, stated the following concerning its request:

> As you know, on March 18, 1986, the County Board of Supervisors will be voting on a resolution to discontinue the County Nursing Home operation, sell the business of the nursing home and lease the underlying real estate and tangible property to Manitowoc Health Care Services, Inc. In view of

this pending action together with the extensive labor contract proposals presented by Local 913 last Thursday, we find it necessary to request that the negotiation session scheduled for this Friday be cancelled and rescheduled for March 26, 1986, the next scheduled bargaining session.

. . .

14. The County issued, on or about April 29, 1986, a letter from Mark Hazelbaker, its Personnel Director/Corporation Counsel to all the employes represented by the Union, except certain maintenance employes, which states:

> Pursuant to s. 109.07 (1) of the Wisconsin Statutes, and as a result of the action of the Manitowoc County Board of Supervisors to close the Park Lawn Home on June 30, 1986, you are hereby notified that Manitowoc County intends to permanently lay you off on June 30, 1986.

15. The County has consistently refused to bargain with the Union the decision to enter the lease agreement mentioned in Finding of Fact 10. The County and the Union have mutually bargained the impact of the County's decision to enter the lease agreement mentioned in Finding of Fact 10.

16. The County's decision to enter the lease agreement mentioned in Finding of Fact 10 is primarily related to the wages, hours and conditions of employment of County employes and not to the formulation or management of public policy. The Union did not by conduct or by contract waive any right to bargain that decision.

17. The County and the Union did not, expressly or by practice, extend the 1985 labor agreement mentioned in Finding of Fact 12, and have not executed a labor agreement to succeed the 1985 agreement.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

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

3. The County's decision to discontinue its operation of the Park Lawn Home, effective July 1, 1986, by entering into a lease agreement providing for the sale of the good will and certain intangible personal property and the lease of the real estate and tangible personal property involved to MHCS is a mandatory subject of bargaining.

4. The County had a duty to collectively bargain, as defined by Sec. 111.70(1)(a), Stats., the decision to enter the lease agreement noted in Conclusion of Law 3. Since the Union has neither by contract nor by conduct waived its right to bargain that decision, the County's refusal to bargain that decision has violated Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

5. The County's duty to collectively bargain, as defined by Sec. 111.70(1)(a), Stats., and as enforced by Secs. 111.70(3)(a), 1 and 4, Stats., the lease decision described in Conclusion of Law 3 does not conflict with the rights granted the County under Sec. 59.01(1), Stats.

6. There was no collective bargaining agreement enforceable by its terms or by the mutual consent of the parties effective July 1, 1986. The County's execution of a lease agreement with MHCS effective on that date did not, therefore, violate Sec. 111.70(3)(a) 5, Stats.

ORDER 2/

To remedy its violation of Secs. 111.70(3)(a), 1 and 4, Stats., Manitowoc County, its officers and agents, shall immediately:

1. Cease and desist from causing or permitting (by the lease mentioned in Finding of Fact 10) other than County employes within the bargaining unit represented by the Union, to perform those services at the facility known as the Park Lawn Home performed by such bargaining unit personnel prior to July 1, 1986, without first fulfilling its statutory duty to bargain with the Union concerning the decision to do so.

2. Cease and desist from refusing to bargain collectively with the Union regarding the wages, hours and conditions of employment (including the decision to enter into the lease noted in Finding of Fact 10) of County employes represented by the Union and working at the facility known as Park Lawn Home.

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

a. Institute County-operated nursing care services at the facility known as the Park Lawn Home, providing equivalent or substantially equivalent bargaining unit employment opportunities to those which would have existed had the County operated that facility with bargaining unit personnel from and after July 1, 1986.

b. Bargain collectively with the Union regarding the wages, hours and conditions of employment (including the decision to enter into the lease noted in Finding of Fact 10) of County employes represented by the Union and working at the facility known as the Park Lawn Home.

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 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.

c. Offer immediate and unconditional reinstatement to each bargaining unit employe laid off effective June 30, 1986, who would have been employed had the County operated the facility known as the Park Lawn Home with bargaining unit personnel from and after July 1, 1986, to a position equivalent or substantially equivalent to that in which each such employe would have been employed in that facility, without prejudice to the employe's seniority or other rights or privileges.

d. Make whole the former County emloyes of the facility known as the Park Lawn Home who were laid off effective June 30, 1986, for all losses of pay experienced by them as a result of the County's failure to employ bargaining unit personnel to operate that facility during the period from July 1, 1986, through the date the County has complied with c. (reinstatement), above, by payment to each of them, with interest 3/, of the respective sum of money equivalent to that (if any) which each would have earned as an employe had the County operated that facility with bargaining unit personnel during that period, less any earnings from employment or self employment each employe received (which the employe would not otherwise have received) during that period. In the event that each or any employe recieved Unemployment Compensation benefits during all or any portion of the period for which the employe is entitled to make whole relief under the foregoing, reimburse the Unemployment Compensation division of the Wisconsin Department of Industry, Labor and Human Relations in the amount received as regards that period or portion thereof. The foregoing make whole relief is intended to compensate only for losses experienced because of the County's prohibited practice cited herein and is not intended to compensate for losses experienced as a result of unjustified employe failures to mitigate losses.

e. Notify employes by posting in conspicuous employe notice locations in the facility known as the Park Lawn Home and by mailing to each of the bargaining unit employes laid off effective on or about June 30, 1986, at their last known address, a copy of the notice attached to this Order and marked "Appendix A". Such copy shall be signed by a responsible official of the County and shall be mailed and posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to insure that this posted notice is not altered, defaced or covered by other material.

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

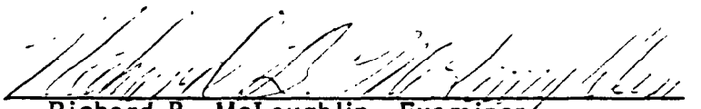
Nothing stated in this Order shall require the omission or commission of any act which would interrupt the provision of ongoing nursing care services to the residents of the facility known as the Park Lawn Home.

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The complaint was filed on March 27, 1986, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year."

4. The portions of the complaint alleging that the County committed a violation of Sec. 111.70(3)(a)5, Stats., by entering into the lease agreement noted in Finding of Fact 10, are dismissed.

Dated at Madison, Wisconsin this 19th day of February, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

We will institute County-operated nursing care services at the facility known as the Park Lawn Home and will bargain collectively with Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO, concerning our decision to lease that facility to Manitowoc Health Care Services, Inc., which uses other than bargaining unit personnel employed by the County.

We will not cause or permit other than County employes in the bargaining unit represented by Park Lawn Home Employees, Local 913, AFSCME, AFL-CIO, to perform services which were performed by bargaining unit personnel prior to July 1, 1986, until we have fulfilled our duty to bargain with the Union about our decision to lease that facility to Manitowoc Health Care Services, Inc.

We will offer immediate and unconditional reinstatement to each bargaining unit employe laid off effective on or about June 30, 1986, who would have been employed at Park Lawn Home had the County operated that facility with bargaining unit personnel, to a position equivalent or substantially equivalent to that in which the employe would have been employed in that facility, without prejudice to the employe's seniority or other rights or privileges.

We will make whole each employe of the facility known as the Park Lawn Home who was laid off effective on or about June 30, 1986, for all losses of pay experienced by the employe as a result of the County's failure to employ bargaining unit personnel to operate the facility known as Park Lawn Home during the period from July 1, 1986, through the date the County offers the immediate and unconditional reinstatement noted in the preceding paragraph, 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 facility known as the Park Lawn Home with bargaining unit personnel during that period, less any earnings from employment or self employment each employe received (which the employe would not otherwise have received) during that period. In the event that an employe has received Unemployment Compensation benefits during all or any part of the period for which the employe is entitled to make whole relief under the foregoing, we will reimburse the Unemployment Compensation division of the Wisconsin Department of Industry, Labor and Human Relations in the amount received as regards that period or portion thereof.

Dated at Manitowoc, Wisconsin _____ day of _____ , 1987.

Manitowoc County

By _____
Name

_____
Title

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

In its initial brief, the Union contends that the complaint poses two fundamental issues for decision. The first is "whether the County's leasing arrangement with (a) priviate nursing home operator was a mandatory subject of bargaining regarding which it has refused to bargain in violation of Secs. 111.70(3)(a)1 and 111.70(3)(a)4, Wis. Stat." The second is "whether the County's contract with the private nursing home operator, and its related termination of the employment of Park Lawn Home employees represented by the union, violated Sec. 111.70(3)(a)5, Wis. Stat." The Union notes that sales, leases, and licenses all involve a transfer of the right to use property. A sale, according to the Union, is a transfer of ownership which "extinguishes any right to use the transferred property that was had by the seller." A lease or a license does not, according to the Union, convey title to the property. The Union distinguishes these two types of transactions thus:

> A lease involves a transfer of the right to the possession and exclusive use of the leased property for any lawful purpose. A license, while it also involves a transfer of the right to the possession of the property, is a limited grant of the right to use that property only to the extent necessary to carry on the licensed activity.

To distinguish the two transactions, the Union asserts that an "economic realities" or "predominance" test must be employed to "determine its predominant or essential purpose, in fact." The Union contends that applying such a test in this case establishes that "Manitowoc County merely has arranged for the continued operation of its Park Lawn Home as a nursing home, and that it has granted Marlys Griffiths a non-assignable license to conduct that activity for it." In support of this conclusion, the Union points to the provisions of Articles II, IV, V, VI, VII (a), IX, XIII, XIV, XVI, XVIII, XIX, XXVIII and XXIX, as well as to Sections 2.02, 3.03 and 4.04, and to Exhibits C, D and E. The Union also argues that: "The history and context of the County's leasing arrangement make clear that it merely is subcontracting for the services of a private nursing home operator." The Union asserts that the letting of public contracts is a business function of the County, and that to ascertain the object and meaning of the contract, a review of the "background and history of the contract" is appropriate. Even if the contract could be considered a legislative function of the County, the Union argues that a review of the relevant legislative history would be appropriate. Pointing to statements of various County Board members, the contents and the mailing of the County's December, 1985, request for proposals, the newspaper advertisement by which proposals were requested, Griffith's response to the County's request, and a County supplied document entitled "checklist of concerns," the Union concludes that the contract between the County and Griffiths is a contract for management services. In the alternative, the Union argues that: "Even if the County's leasing arrangement reasonably could be construed to constitute a sale of the Park Lawn Home it does not represent a substantial choice among alternative social or political goals." It follows from this, according to the Union, that the transfer, however characterized, is a mandatory subject of bargaining. Established Commission case law establishes, according to the Union, that:

> ... where the employer's decision involves no fundamental change in policy concerning the benefit provided by the enterprise -- the continued enjoyment of the service provided by the activity in question, such decisions must be bargained with the employees and their union.

Because the leasing arrangement does not represent a substantial choice among alternative social or political goals, it constitutes a mandatory subject of bargaining which, the Union asserts, it did not waive its right to bargain over. In fact, according to the Union, from the spring of 1985 until the lease was executed in 1986, the Union consistently asserted its right to bargain over the transfer, and to the extent bargaining did not occur during that period, the Union asserts

that the absence of bargaining can be directly traced to the County's conduct. Because the leasing arrangement is not a choice among alternate social or political goals, because that arrangement is primarily a response to financial considerations which are "fully capable of being bargained with the union," and because the Union did not waive its rights to bargain, the Union concludes that the County's conduct violates Secs. 111.70(3)(a)1 and 4, Stats. Regarding the second issue posed by the present facts, the Union asserts that: "Manitowoc County's leasing arrangement and termination of the employment of the employees represented by AFSCME Local 913 dissipated the Union in violation of the collective bargaining agreement and Sec. 111.70(3)(a)5, Wis. Stat." Although the 1985 labor agreement had expired by its terms, the Union asserts that under the parties' past practice the labor agreement continued in full force until the negotiation of a successor agreement. Because the leasing agreement required the termination of the employment of the County employes at Park Lawn Home, it follows, according to the Union, that the County violated Article II, Section K of the continued 1985 labor agreement by dissipating the Union.

In its initial brief, the County contends that the complaint poses the "extremely narrow" issue of "whether a county can go out of a non-essential business and permanently layoff its employees without first bargaining the decision with the Union." The County argues that "(t)he decision by Manitowoc County to go out of the nursing home business and permanently layoff its employees is a permissive subject of bargaining since it clearly relates primarily to the formulation of public policy and only incidentally to wages, hours and working conditions." The County contends it follows that it had no obligation to bargain the decision with the Union before agreeing to the lease/sale. The County asserts that the decision to permanently close an operation is recognized in the private sector as a permissive subject of bargaining, and may well be "so basic" a proposition in the public sector "that the outcome is self-evident." A conclusion that the decision to close down the operation of a County held business is a mandatory subject of bargaining would imply, according to the County, that "governmental units in Wisconsin will lose control of their economic destiny." The County contends that the permissive nature of the lease/sale involved in this case is well rooted in Commisison case law, Chapters 59 and 111 of the Wisconsin Statutes, and at least one trial court decision. In addition to this, the permissive nature of the decision is well rooted, according to the County, in administrative and judicial precedent from Michigan and from New York. The County also argues that, Union assertions notwithstanding, the transfer in the present matter is "a sale and lease" effecting "a bona fide business transfer." Noting witness testimony and the provisions of the lease/sale document itself, the County concludes:

> ... the County has (emphasis from text) made the difficult choice. It has relinquished completely its right to provide nursing home services to County residents via the Park Lawn facility. Park Lawn may or may not in the future continue as a nursing home. The choice is that of the buyer/lessee and undoubtedly will turn on the economics of the situation. If it does continue, the County will have no control over its operation. The level of services and admittance policies again is the choice of the buyer/lessee. In short, Park Lawn is now a proprietary nursing home controlled by an independent third party who is free to operate it in accordance with commercial considerations.

Because the lease/sale cannot be considered a subcontract, and because the County's decision to withdraw from the business of operating a nursing home is a "substantial choice among alternative social or political goals," it follows, according to the County, that the decision is permissive and cannot serve as a basis to conclude the County has failed to bargain in good faith with the Union. In the alternative, the County asserts that: "Even if it is assumed, arguendo, that the decision to close the nursing home was a mandatory subject of bargaining, the Union contractually waived its right to bargain and this waiver was continued in effect by virtue of the 'status quo.'" Although the County does not agree with the Union's contention that the parties extended the 1985 labor agreement, the County asserts that whether that agreement is considered binding or a part of the "status quo" which continues "until changed through collective bargaining," the Union must be considered to have waived its right to bargain "over a close down decision." The County specifically contends that Sections E, I and J of Article II give the County the authority to take the action reflected in the

lease/sale agreement, and that it follows that the Union has contractually waived its right to bargain that decision. Whatever doubt could possibly exist regarding this waiver is dispelled, according to the County, by "a review of the bargaining history of the parties ... ." Specifically, the County notes that the Union, in bargaining for a 1985 labor agreement, unsuccessfully attempted to continue and to broaden a "Memorandum of Understanding" from the 1983-1984 labor agreement which "specifically addressed the issue of a sale of the Park Lawn Nursing Home." The County asserts this bargaining history establishes that the Union waived its right to bargain the lease/sale decision since "where, as here, an issue is fully discussed in the collective bargaining process and thereafter deleted from the parties' final agreement, it serves as a waiver against the party who advocated the proposal." Finally, the County asserts that: "Under the circumstances, a contractual violation, as alleged by the Union in its complaint, is a literal impossibility." Specifically, the County reiterates that "the Agreement clearly authorizes the County to make the unilateral decision to close down the nursing home." In addition, the County asserts that since the parties never agreed to extend the 1985 labor agreement, "the possibility of a contract violation is precluded in this case by the simple fact that no contract existed on March 26, 1986" (emphasis from text).

The Union, in its reply brief, asserts that it "did not waive its right to bargain regarding Manitowoc County's leasing arrangement with a private nursing home operator." Specifically, the Union contends that the absence of the "Memorandum of Understanding" from the 1985 labor agreement demonstrates only that "during 1985 the County was not bound, by contract, not to lease the Park Lawn Home" and does not establish that the Union waived its right to bargain a lease decision in 1985 or 1986. In addition, the Union argues that several provisions of the 1985 labor agreement would operate to limit "the County's right to subcontract the entire work of the bargaining unit." In any event, the Union asserts that the Commission case law cited by the County to support a finding of waiver on the present facts is not on point, and in any event, bargaining history and the context of the 1985 negotiations establish that the Union has not by conduct or by contract waived its right to bargain the leasing arrangement. The Union also reaffirms its contention that the "County's refusal to bargain regarding its leasing arrangement with a private nursing home operator constituted a violation of Secs. 111.70(3)(a)1 and 111.70(3)(a)4, Wis. Stat." The Union distinguishes the statutes and case law cited by the County and concludes that the County's argument attempts to posit an "economic significance" test regarding the leasing decision which "admits of no logical point at which a line can be drawn between management decisions that concern mandatory bargaining subjects and those that are permissive." The Union contrasts its own position to the County's thus:

> ... it is not the position of the Union that all public sector employer decisions that have "economic significance" are mandatory subjects of bargaining. It is not the Union's position, for example, that a public sector employer must bargain regarding a decision to discontinue a service altogether, or a decision significantly to reduce the level at which a service is provided ...
>
> It is the position of the Union, however, that where a public sector employer merely has arranged for the continued providing of the same service, or substantially the same service ... then there has been no fundamental change in policy concerning the benefit provided ... and the decision to enter into the new arrangement is a mandatory subject of bargaining.

Since the decision to enter the leasing arrangement is mandatory, since the Union did not waive its right to bargain that decision, and since the County did not bargain the decision, it follows, according to the Union, that the County has violated its statutory duty to bargain with the Union.

The County, in its reply brief, asserts that: "The Union has made no effort to dispute its waiver by contract." Specifically, the County argues that the Union has, by acknowledging the extensive bargaining that preceded the 1985 labor agreement and did not include the Union's "leasing and successor employer proposals," acknowledged that "the collective bargaining process was the proper forum for the Union to press its demands to a satisfactory resolution." Since the

1985 labor agreement did not restrict the County's right to sell or lease the facility, it follows, according to the County, that "the Union cannot now be heard to complain about the benefit of its bargain ... ." and must be considered to have waived its right to bargain the lease/sale decision. In addition, the County argues that: "Extensive portions of the Union's brief are totally irrelevant, and should be ignored by the Commission." Specifically, the County asserts that the lease/sale provisions are clear and unambiguous and extrinsic evidence is, therefore, irrelevant. In addition, the County asserts that as a matter of law or of business practice the statements of individual Board members are irrelevant to an attempt to discern the intent of the Board. To the extent any legislative history can be considered relevant, that history can be discerned, according to the County, from the "recitals of purpose" adopted by the Board as a whole. Those recitals, according to the County, only serve to support the County's contentions. The County next argues that "Manitowoc County's position is squarely supported by an opinion of the Attorney General of the State of Wisconsin, 4/ which is entitled to great weight." The County then argues that the Union's use of Commission case law is flawed since the cases cited involve subcontracting and are relevant to the present matter only if the nursing home services received by Park Lawn residents are being provided by the County. A review of the record establishes, according to the County, no less than six reasons to conclude that nursing home services are not being provided by the County: the sale/lease "does not require the lessee to accept County residents referred by the County;" the employees providing the services are employees of the lessee; the sale/lease "does not require the lessee to maintain any level of services to patients of the nursing home;" the sale/lease does not obligate the lessee "to furnish nursing home services to anyone, much less the County;" the sale/lease makes "the lessee the owner of the enterprise;" and the sale/lease "provides that the lessee may use the premises for any lawful purpose, in addition to utilizing it for a nursing home business." The County next argues that: "Nursing home services as provided at the Park Lawn Nursing Home are not services that a County must furnish to its residents and the Park Lawn Nursing Home is but one of many homes operating in the area." The County concludes its reply brief by addressing a number of factors which the County contends correct a series of "misstatements" in the Union's brief.

DISCUSSION

The Issues Presented

The complaint alleges County violations of Secs. 111.70(3)(a)1, 4 and 5, Stats. To address those allegations requires that three issues be resolved:

1. Is the County's decision to discontinue its operation of the Park Lawn Home, effective July 1, 1986, by entering into a lease agreement providing for the sale of the good will and certain intangible personal property and the lease of the real estate and tangible personal property involved to MHCS a mandatory subject of bargaining?

2. If so, has the Union waived its right to bargain that decision?

3. Has that decision violated the provisions of a collective bargaining agreement between the County and the Union?

Issue 1: The Legal Framework

Sec. 111.70(1)(a), Stats., defines the duty of a municipal employer to collectively bargain with the representative of its employes, and is enforceable through Sec. 111.70(3)(a)4, Stats., and, derivatively, through Sec. 111.70(3)(a) 1, Stats. Sec. 111.70(1)(a), Stats., provides:

> "Collective bargaining" means ... the mutual obligation ... to meet and confer ... in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, ... (including) the reduction of any

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4/ 36 Op. Att'y. Gen. 515 (1947).

> agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise ... affects the wages, hours and conditions of employment of the employes ... (T)he public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commerical benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

The Wisconsin Supreme Court, in Beloit Education Association v. WERC, has stated that this definition creates three categories: (1) mandatory subjects where collective bargaining is required; (2) permissive subjects where collective bargaining is permitted, but not required; and (3) prohibited subjects where collective bargaining is not permitted. 5/ The Beloit Court also posited a "primary relationship" standard to determine the application of the mandatory or permissive categories to a given set of facts 6/. In Unified School District No. 1 of Racine County v. WERC, the court stated that standard thus:

> The applicable standard ... is 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. 7/

The primary relationship standard must be applied on a case by case basis. 8/ Further case law refinements will be noted in the discussion below.

Issue 1: Application Of The Legal Framework To The Facts

Application of the legal framework to the facts demands a determination of whether the lease decision is primarily related to the wages, hours and conditions of employment of County employes, or to the formulation or management of public policy.

Before addressing those facts a digression is necessary in light of the parties' extensive argument on the characterization of the transaction between the County and MHCS. The County characterizes the transaction as a lease and a sale. The Union characterizes the transaction as a lease with a license to operate or as a subcontract for management services.

The parties' characterizations serve more to underscore their conflicting conclusions than to assist in addressing the facts. The Racine court drew from Beloit the mandatory/permissive spectrum and the primary relationship standard, and emphasized the breadth and flexibility of the standard by stating it to apply to "a particular decision." Beyond this, the Racine court posited the policy considerations which make the placement of "a particular decision" on the mandatory/permissive spectrum meaningful. The Racine court noted the "principal limit on the scope of collective bargaining is concern for the integrity of political processes," 9/ and used the primary relationship standard as a vehicle to separate mandatory subjects, in which an employer can represent "managerial

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5/ 73 Wis.2d 43, 50 (1976).

6/ Ibid., at 54.

7/ 81 Wis.2d 89, 102 (1977).

8/ Ibid.

9/ Ibid., at 99.

(and) ... any separate public political interest" 10/ at the table, from permissive subjects, in which "no group should act as an exclusive representative ... and discussions should be open." 11/ These policy considerations, not a conclusory label applied to a decision, make the primary relationship standard function. The standard is applied case by case and thus may offer limited guidance to the parties. Any broader conclusion would not, however, further clarify the law. If the label attached to a particular decision could dictate the mandatory/permissive nature of the decision, the result is less a clarification of the law than an invitation to parties to apply labels to transactions with less regard to the substance of the transaction than to a desired result. 12/ What emerges from Racine is that any particular decision, however characterized, must be analyzed through the primary relationship standard in light of the court's policy considerations.

Against this background labelling a transaction is, if anything, a secondary consideration. However, because the parties have extensively argued the point, which may present an issue on appeal to the Commission, it is necessary to touch on the parties' arguments.

The lease cannot persuasively be characterized as a subcontract. "Subcontract" has been defined as "(a) contract subordinate to another contract, made or intended to be made between the contracting parties, on one part, or some of them, and a stranger." 13/ The record establishes neither an underlying obligation to which the "subcontract" between the County and MHCS is subordinate or identifiable parties to such an obligation. No obligation between the County and County residents to operate the Park Lawn Home can be inferred. In addition, payments under the lease at issue here cannot be reconciled to a subcontract since such payments flow from lessee ("subcontractor") to lessor ("prime contractor").

The Union's characterization of the lease as a lease and a license to operate a nursing home is more persuasive, but not sufficiently so to warrant referring to the transaction as anything other than a lease. The Union defines a lease/license as "an agreement whereby the owner of ... property ... grants another party the right to occupy and use the property, but only for a time ... (and) only for a specific purpose." This definition underscores that the lease effects the transfer of the operation of an ongoing nursing home. Section 5.01 of the lease is, however, incompatible with the cited definition. Ultimately, however, the use of the term "license" is unpersuasive because the term, standing alone, offers no assistance in determining whether the transaction should be characterized as mandatory or permissive. In sum, there is no persuasive reason to treat the County's decision as anything other than what the County stated it to be in Resolution 86-226 -- a "Lease Agreement." This discussion will refer to the agreement as the lease.

The statement of the first issue reflects this by almost directly incorporating the language of the County resolution authorizing the transaction. Two differences must, however, be noted. The first is that the resolution separates the discontinuance of the County operation of the Home from the authorization of the lease by the term "and." This could imply the discontinuance of operations and the lease are separate decisions. The statement of Issue 1 uses the term "by" to state the actions represent an inseparable decision, with the lease being the vehicle by which the County discontinued operations. The second difference is that while the resolution refers to the County's election to "discontinue operation" of the Home, Issue 1 refers to the County's election to discontinue "its" operation. The lease contemplates the transfer of ongoing nursing home operations. All or significant parts of Articles II, III, IV, VI, VII, VIII, IX, XI, XII, XIII, XXII, and XXIII directly apply to the transfer of

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10/ West Bend Education Association v. WERC, 121 Wis.2d 1, 15 (1984).

11/ Racine, 81 Wis.2d at 100.

12/ An analogous situation can be seen in the commercial/tax law area involving sales and leases, see White and Summers, Uniform Commercial Code, (West, 1980) esp. at 877-883.

13/ Black's Law Dictionary, Revised Fourth Edition, (West, 1968).

ongoing nursing home operations. The insertion of "its" between the terms "discontinue operations" clarifies that the "operation of the Nursing Home facility known as Park Lawn Home" continues, but effective July 1, 1986, under the direction of a lessee.

It is now necessary to apply the primary relationship standard. As further specified in West Bend, this demands isolating and weighing "the managerial interests of the public employer, together with any separate public political interests, ... against the interests of the employees." 14/

The managerial and public political interests relevant here are succinctly set out in the sixth, seventh and ninth of the "Whereas" paragraphs from Resolution 86-226, which authorized the lease, and which is set forth in Finding of Fact 9. The remaining paragraphs contain various factual recitations which can be assumed to be accurate for purposes of this decision and need not be specifically discussed. The record does not disclose any County managerial interest independent of the resolution. Viewed as a whole, the paragraphs establish the County sought to insulate itself from the financial volatility based in its operation of the Park Lawn Home. The lease effected this purpose by removing the County from the day to day operation of the Home (see, for example, Articles II and XXIII); by assuring the County of a positive flow of income (see, for example, Sections 4.01, 4.02, 4.03, and 14.01); and by insulating the County from the possibility that the Home could act as a drain on County finances (see for example, Sections 4.06, 18.01, 18.02, 19.01, and Articles XVII and XXI).

The employes' interest in the lease is evident. The Union and the County had, through negotiations and practice, created an established work environment including the provision, by contract, of various benefits. Some of those benefits are noted in Finding of Fact 12. The employes had an interest in the continuation of their employment, in the benefits that flowed from that employment and in bargaining any changes that might affect their wages, hours or conditions of employment.

With these respective interests as background, it is necessary to weigh them against each other. In this case, the employe interests are immediate and undisputed, while the County's are more abstract and disputed. To establish a background for the weighing process, the weight to be accorded the County's interests will be examined in light of the parties' arguments before an attempt to weigh those interests directly against those of County employes. The County's asserted interests will be first addressed at their broadest.

The broadest County argument, in which the considerations of the sixth, seventh and ninth "Whereas" paragraphs come together, is that the County has an essential right, as the manager of public policy, to go out of the nursing home business.

The existence of such a right is implicit in existing Wisconsin law. Federal courts have expressly addressed the point regarding private sector employers, 15/ but the persuasiveness of this precedent has been undercut by the Racine court's declaration that: "There are important economic and policy reasons why the legislature would distinguish between collective bargaining in the public and the private sector ... ." 16/ Nevertheless, the existence of a right for a municipal employer to go out of business is implicit in City of Brookfield v. WERC, 87 Wis.2d 819 (1979) in which the court determined that an economically motivated decision to lay off five firefighters as a means to implement a fire department budget reduction was a permissive subject of bargaining. If such a reduction of

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14/ See footnote 10/ above.

15/ See Textile Workers Union of America v. Darlington Manufacturing Company, 380 US 263 (1965), for the complete closing of a business. See First National Maintenance Corporation v. NLRB, 452 US 666 (1981) for the partial closing of a business.

16/ 81 Wis.2d at 98, see related discussion 98-101.

service is permissive, then it must follow that the elimination of a service, whether an essential service or not, 17/ is permissive.

The existence of such a right is not, however, determinative in giving weight to the County's asserted interests because the County did not, in fact, go out of the nursing home business, but rather changed its role in the business from that of Owner and Operator to that of Lessor to Lessee-Operator. Though the County's assertion that it relinquished such control over the Home that it must be considered to have left the business raises a close issue, the assertion is ultimately unpersuasive. As a result, the weight to be accorded this broadest argument of the County must be curtailed.

Basically, the County argues that it gave up any right to insist that MHCS operate a nursing home; that it gave up the day to day and ultimate business control over the Park Lawn Home; and that it gave up any right to demand that MHCS accept County referrals of its residents. These points, all considerable and ably argued, will be addressed both in regard to the lease itself and to the context in which the lease was negotiated. 18/

The County accurately points out that Section 5.01 permits MHCS to use the premises "for any lawful purpose." The County's relinquishment of some control must be acknowledged, but the significance of the relinquishment must be discounted by the probability that MHCS would exercise the authority granted. As background, it is important to recall that the lease itself contemplates the transfer of an ongoing nursing home operation, and thus the right granted in Section 5.01 is speculative and exercisable at some indefinite point in the future.

At a minimum, then, the County did not give up the operation of a nursing home in Section 5.01, but the possibility that a lessee/operator might at some future point give up that operation. Beyond this, the lease indicates MHCS was dubiously equipped to exercise the choices implicit in Section 5.01. Article XLI establishes that MHCS is "a new corporation of limited assets." Exhibit H establishes that the newly formed corporation has no "financial history ... established capital or other accounts, record of earnings or results of operation" and committed itself to "obtain sufficient capital as of the closing date to comply with the requirements of the lease, the Division of Health of the State of Wisconsin and the operational needs of the nursing home." The probability that this newly formed entity would capitalize itself to undertake the significant obligation of operating a 99 bed nursing facility only to venture into an entirely new field must be questioned. Beyond this, Article IX allows MHCS to void the lease if it fails to acquire the requisite licensure to operate a home. Why such a right would be afforded an entity truly interested in the options implicit in Section 5.01 must be questioned. Article XXVIII establishes, in addition, that MHCS could not assign its interest in the lease to a party more likely to utilize the authority of Section 5.01 without the County's "prior written consent." While it is true, as the County points out, that the zoning ordinance covering the Home

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17/ See Racine, 81 Wis.2d at 100: "Nor is it singularly important whether a decision involves an employer's 'essential enterprise'".

18/ This statement reflects one of the parties' evidentiary arguments. The "history" of the lease, as reflected in Finding of Fact 8, is relevant but not essential to this decision. The facts are not essential because the conclusions reached above are rooted on the face of the lease and stand whether the history of the lease is considered or not. The discussion above separates the sources of a conclusion, however, to reflect the evidentiary dispute. Regarding the dispute itself, it is important to note the history of the lease is not reviewed to establish the meaning of the duty established by law or contract, as legislative history or "parol evidence" might be where language establishing a legal or contractual duty is unclear. The limited use of such guides is to avoid implying a duty not negotiated by the contracting parties or created by the legislature. In this case, recourse to the lease's history is solely to illuminate the impact on the County and its employes of a lease which had not, at the time of hearing, been implemented. This does not interpret any duty created by the resolution or the lease agreement between the County and MHCS.

would permit various uses, it is also true that Article XIV and Exhibits B and L establish that the Home is physically integrated with an adjacent nursing home. Exhibit B identifies various areas common to the two facilities, including an elevator, a stairwell and yard area. Given the physical integration of the two facilities, the number of options available to the MHCS as a practical matter must be questioned. In sum, while Section 5.01 establishes that the County did cede some control over the future of the Home to MHCS, the lease as a whole offers considerable reason to doubt MHCS was likely to exercise that control.

Considerations apparent in the process leading up to the lease further undercut the weight to be accorded the authority ceded in Section 5.01. The County advertised the Home for "LEASE", prepared a request for bids "FOR LEASE AND OPERATION" of the Home and distributed the request only to entities known to operate nursing homes. The bid ultimately accepted was from an organization whose sole apparent operation was the provision of services related to the operation of nursing homes. The proposal which prompted the negotiations leading to the lease stated its "chief priority is the privilege of operating Park Lawn and being considered for Shady Lane," and stated as one of its goals "to clearly, by our program and effectiveness, reassure the Manitowoc community that all will be well with residents and staff under other County management ... ." Griffiths herself appeared before the County Board to answer questions regarding the proposal. Nothing in the context of the negotiations of the lease offers any persuasive reason to conclude the County offered, or Griffiths, on behalf of MHCS, accepted, anything other than a lease to operate a skilled care nursing facility.

The County also asserts that it relinquished day to day control over the Home and the ultimate control of the business operation. Here too, the assertion is ably argued and has some persuasive force. Contrary to the Union's assertions, there is no reason to believe the various provisions reserving the County rights of access and entry such as Sections 4.04, 8.07 and Article XXIX, grant the County anything other than rights typically reserved a landlord. The lease does not constitute a sham by which the County introduced a not quite independent entity to manage the Home. Nevertheless, a series of provisions (see, for example, Sections 3.03 and 3.04 as well as Article VI, Sections (e) and (g), as well as Article IX) establish that the County assured itself of an ongoing nursing facility with the assurance of at least a certain specific level of quality. In addition, while the County asserts MHCS is the owner of a business which, at the expiration of the lease, could be removed from the County owned facility, the fact remains that in leaving the facility the newly formed corporation would take perishable items, employes, patients and intangible items such as the Home's name, and would leave behind equipment valued at $286,165 and a facility with a "depreciated replacement cost" in December of 1985 apparently in excess of $2,000,000. It is apparent, then, that while the County withdrew its presence as a day to day operator of the business, it retained a substantial presence as a lessor in the provision of nursing home services. Without such a presence, MHCS could not have agreed to capitalize itself as it did yet operate a significant facility.

The final basic County assertion to be addressed here regards the absence of any lease provision requiring MHCS to accept County referrals of its own residents. This basic assertion subsumes a number of related County arguments offered to distinguish the lease from the subcontract in Racine by showing that nursing home services will not be "provided by" the County under the lease. As background, it is necessary to recall that the distinction of the lease from a subcontract is not essential here since the lease has already been found not to be a subcontract. The issue here is not whether the result in Racine controls the present matter on its facts, but whether the weighing process demanded by the primary relationship standard applied in Racine establishes that the lease is primarily related to wages, hours and conditions of employment of County employes or to the formulation or management of public policy. For the purposes of this weighing process, the issue is whether the absence of a preference for County residents in the lease indicates so complete a County withdrawl from the provision of nursing services at the Park Lawn Home that the County can be said to have eliminated its role in the provision of such services.

A review of the record establishes that the absence of such a preference cannot be given the weight the County asserts. Initially, it must be noted that the assertion unpersuasively assumes that the County's withdrawl from the day to day operation of the home, in spite of the County's retention of ownership of the

facility and related equipment as well as the retention of assurances of the ongoing provision of a certain quality of nursing services, can constitute a complete withdrawl from the provision of nursing care services. Even if the assumption could be considered persuasive, the County has not proven the absence of a preference in the lease for County residents can be given the weight it asserts. The record does not indicate how, if at all, the County either defined "residence" in the County or how the County used that definition when it operated the facility. Nor does the record show how, if at all, MHCS can be expected to deviate from the County's practices. Nor can it be inferred that the absence of such a preference in any way limits or eliminates the Home's role as a potential source of nursing care for County residents. The City of Manitowoc is located in the center of Manitowoc County on its eastern border. There are no counties to the east of Manitowoc. Thus, the market for non-County residents would appear to be limited. Further, the absence of such a clause arguably may represent the County's intent to avoid creating a disincentive for MHCS to take in County residents. If the law remains the same as it was at the time of the Attorney General opinions relevant to the County's argument, 19/ then any County attempt to control the identity of residents admitted by MHCS could have denied MHCS certain reimbursement. In sum, the absence of a lease provision mandating a preference for County residents again raises a point of mixed significance for the weighing process. It does underscore the County's withdrawl from the day to day operation of the Home. It does not, however, demonstrate that the withdrawl in fact constitutes either a limitation or an elimination of the Home's role as a potential source of nursing care for County residents.

In sum, although the County has, under Brookfield, an established managerial and public political interest in eliminating a service without first bargaining that decision with the representative of its employes, that right is not implicated on the present facts. Since the County did not, by its lease with MHCS, choose to go out of business, the policy considerations asserted by the County to flow from such a decision cannot be given the controlling weight the County asserts.

It is now necessary to tie the discussion to the specific points raised in the resolution. The sixth of the "Whereas" paragraphs raises the joint concerns of operating the Home in the face of declining revenues and projected deficits and in competition with private industry. That these concerns are matters of management and public political policy must be acknowledged. The weight to be accorded the County's interest in the policies must, however, be discounted. In West Bend, the court cautioned the Commission not to ignore that "the public is represented by the District in collective bargaining and that the public may participate in dealing with ... economic issues ... in the budget process." 20/ The County could, through collective bargaining and through the budget process, refuse to operate the home unless it operated on a break-even or on a profit-making basis. Such action addresses the deficit related policies of the sixth paragraph and demonstrates the amenability of the bargaining and budget processes to the policy considerations of that paragraph. Regarding the attendant concern of the County's competing with the private sector, it must be noted that while the County withdrew from competing with private sector homes in the day to day provision of skilled care services in a nursing home, it must also be noted that the County chose to retain ownership of a substantial nursing home facility and over a quarter of a million dollars worth of equipment essential to the operation of a nursing home. The County thus retained a substantial economic presence in the provision of nursing services, but chose to assert that presence as a lessor, not as an operator.

Similar considerations apply to the seventh paragraph. The redirection of "financial assets" is a statement of public political policy. Here too, however, the "financial assets" actually redeployed in the lease appear to be considerably less than the value of the assets tied into the lease. In addition, to the extent the "redeployment" references that the lease insulated the County from subsidizing the home and brought the County some revenue, then it must be noted that such

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19/ See Footnote 4/ above. A related decision can be found at 35 Op. Atty. Gen'l. 110 (1946).

20/ 121 Wis.2d at 16.

goals, as noted above, are also assertable through the collective bargaining forum and the budget process.

The County, in the ninth paragraph, articulates a concern it expands to question the relationship of Chapters 59 and 111, Stats. This relationship will be addressed below. For the present, it is sufficient to note there is no reason to doubt that the lease is anything other than a "proper governmental function" authorized by Chapter 59. The issue for the weighing process necessary to determine the mandatory/permissive nature of the lease is more procedural in nature and questions whether the County must fulfill its duty to bargain under Chapter 111 before the lease is implemented under Chapter 59. The ninth paragraph, then, begs the issue of the mandatory/permissive nature of the decision and does not constitute, in itself, a public policy issue relevant to the primary relationship standard.

The weight to be ascribed to the employes' interests is more direct and self evident. The employes have an obvious interest in continuing employment and in the benefits that flow from that employment. Article XXIII establishes that perhaps none, or perhaps as many as ten percent of the bargaining unit face a loss of employment. The proposal initially submitted by Griffiths establishes that the employes face, in all probability, a loss or reduction of benefits and perhaps wages. Section 23.01 establishes that MHCS will not assume a labor agreement or, conceivably, the bargaining obligation between the County and the Union. The employes thus face the loss of contractual benefits negotiated over time with the County. Beyond the loss of the bargaining position they had reached with the County, the employes face the potential loss, or potential litigation over the scope of their Union's ability to bargain on their behalf. In sum, the interests of the employes are direct and self evident.

Although certain County assertions regarding the weight to be accorded the managerial and separate public political interests have been rejected in part, those interests are due considerable weight and directly weighing those interests against the employes presents a close issue. Nevertheless, directly weighing the County's interests against its employes' indicates the lease decision is primarily related to the wages, hours and conditions of employment of County employes. Stating why is best guided by examining a tension between the Racine and Brookfield cases.

The tension results from the parties' conflicting uses of the decisions. The County asserts the present facts are governed by the following language from Brookfield:

> We hold that economically motivated lay offs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government. 21/

This language, if extended as far as the County asserts, would overturn the result in Racine. In Racine, the District chose to reduce an anticipated budget increase by subcontracting its food service. If the District had issued notices of permanent layoff to its employes at the time of their termination the case would fall within the cited language from Brookfield. This apparent inconsistency is, however, apparent only. The Racine and Brookfield cases are distinguishable factually, and are consistent on the impact of their dissimilar facts on the underlying rationale of the primary relationship standard. The Brookfield court noted that the five layoffs were "a means to implement a fire department budget reduction" 22/ and would "reduce the level and quality of services provided," but that this result was "a policy decision by a community favoring a lower municipal tax base." 23/ Presumably, the reduction in services posed a fundamental point for a public political debate affecting the electorate

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21/ 87 Wis.2d at 830.

22/ Ibid., at 825.

23/ Ibid., at 832.

immediately and directly regarding the level of fire service. Presumably, the ultimate action of the public's elected representatives would reflect the outcome of the debate. The decision in Racine to subcontract did not involve a reduction of services but whether the District or a private contractor would manage the food service. The impact of this issue represents a less fundamental impact on the electorate and inevitably on the political debate by posing not the direct question of the level of services to be provided, but the less direct question of who should provide a given service. The likelihood and, consequently, the benefit of open political debate is far lower for the latter type of issue than for the former. Thus, the court in West Bend considered issues of the latter type to permit public debate through the budget process and representation of public interests through the employer at the bargaining table.

The lease is dissimilar to the facts in both Brookfield and Racine, but is, regarding the impact of the decision on the political process, more like Racine than Brookfield. Unlike Racine, the bargaining unit employes have something less than a full guarantee of employment. Unlike Brookfield, however, no layoffs have been mandated as a necessary means to implement the lease decision, and any reduction in level of service is purely speculative. In fact, the lease, by demanding a monthly rent presumably at fair market value and further compensation from MHCS arguably provides MHCS with an incentive to operate the facility at its full capacity, as the County had. Article VI, Sections (e) and (g) underscore that the Lease contemplates ongoing operation at full capacity. Thus, as in Racine, the lease decision impacts the electorate in an indirect fashion unlike the decision in Brookfield which directly posed the issue of a reduction in services. The issue for public debate is less whether Park Lawn should operate as a nursing home, than whether the County or MHCS should operate that nursing home. The inevitable impact of such a decision on the political debate is exemplified by the following passage from Board minutes of its November 19, 1985, meeting: "Park Lawn, he said, is not giving up services and you are not turning away 99 people, you are just contracting for service." 24/ This sort of debate poses managerial and public political issues more geared to assertion by the County at the bargaining table and by the public through the budget process than through purely political discussion among the public prior to unilateral action by its elected representatives.

In sum, the County's managerial interest together with separate public political interests in the lease decision, when weighed against County employes' interests establish that the lease decision is primarily related to the wages, hours and conditions of employment of County employes. The lease decision is, therefore, a mandatory subject of bargaining.

One final point requiring discussion remains. The County has drawn on the considerations stated in the ninth "Whereas" paragraph of the resolution authorizing the lease to assert Chapters 59 and 111 cannot be harmonized unless the lease decision is found permissive. This argument relates not to the mandatory/permissive nature of the decision, but asserts that requiring bargaining on the decision could result in a prohibited subject of bargaining. The necessary harmonization of Chapters 59 and 111 has, however, been effected by the court's adoption and application of the primary relationship standard. Sec. 59.01(1), Stats., presumably authorizes the County to enter subcontracts. 25/ In Racine, the court determined a municipal employer can be required to bargain a decision to subcontract. That decision, though it did not address Sec. 59.01(1), Stats., applies to this case, since Sec. 111.70(1)(j), Stats., defines "Municipal Employer" to include a county. The harmonization required is that where "a particular decision" primarily relates to the wages, hours and conditions of employment of employes, then Chapter 111 Stats., specifies a bargaining process

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24/ The cited passage, noted in Finding of Fact 7, recites the comments of "Chairperson Vogt." Vogt affirmed the accuracy of the minutes' summary of his position, but the accuracy of the remarks is of less consequence than what the remarks indicate about the type of discussion which can be expected to flow from the lease issue.

25/ Sec. 59.01(1) Stats., provides: "Each County ... is ... empowered to ... lease ... real estate for public uses ... to make such contracts and to do such acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it."

which must be completed prior to the implementation of a contract authorized under Sec. 59.01(1), Stats. Any other conclusion would effectively eliminate the rights of Chapter 111, Stats., since a contract of virtually any type under Chapter 59, Stats., could serve to relieve a county of its duty to bargain under Chapter 111, Stats. The court's primary relationship standard effects, then, the necessary harmonization between Chapters 59 and 111, Stats.

Issue 2: The Legal Framework

The right to bargain regarding mandatory subjects of bargaining is a right waivable by conduct in failing to demand, 26/ or to take advantage of opportunities to bargain, 27/ and by contract. Waiver of the right to bargain collectively during the term of a contract does not extend to matters covered by the contract or to matters on which the Union has otherwise clearly and unmistakably waived its right to bargain. 28/ A waiver of the right to bargain outside the term of a contract "must be clear and unmistakable." 29/

Issue 2: Application Of The Legal Framework To The Facts

The County has asserted that the Union has waived its right to bargain both by conduct and by contract. The asserted waiver by conduct was argued primarily through the pleadings and will be dealt with first. The Union cannot be said to have waived by conduct its right to bargain the lease decision. Through Wilson's letter of April 30, 1985, the Union demanded the right to bargain the then rumored transfer of Park Lawn Home to Holy Family Hospital. Even following the end of any possibility of such a transfer, the Union asserted its interest in the possibility of any other transfers, in spite of Resolution 85-41, as can be seen in Wilson's letter to Vogt of October 11, 1985. The Union further asserted proposals to limit any potential transfer of the Home throughout the parties' bargaining for a 1985 labor agreement, as evidenced by proposals dated May 30, 1985, as well as by Barker's letter to Wilson of June 24, 1985. In 1986, the Union demanded bargaining the day after the 1985 agreement had been ratified by the County, and at the first bargaining session set for negotiating a 1986 agreement, the Union again asserted proposals to limit any potential transfer of the Home. The County's consistent refusal to bargain the lease decision is not disputed. Against this background, finding a Union waiver by inaction is impossible.

The County more extensively argues that the Union has by contract, as reinforced by bargaining history, waived its right to bargain the lease decision. To underscore its assertion, the County points specifically to the Union's unsuccessful attempts to extend the duration or broaden the scope of the side letter contained in the 1983-1984 agreement; to the Union's dropping of its various "successorship" proposals for a 1985 labor agreement; and to the Union's agreement to the continuation of the management rights clause of the 1985 labor agreement.

This argument has two dimensions. The first assumes that a contract existed in 1986 by which the Union waived its bargaining rights. The second assumes that even if no contract existed for 1986, the County's statutory duty to maintain the status quo pending the completion of the bargaining process for a successor to the 1985 agreement continued the management rights granted by the 1985 agreement by which the Union waived its bargaining rights regarding the lease decision. Neither dimension establishes a clear and unmistakable Union waiver of its bargaining rights. The first is unpersuasive because there is no evidence of a mutually agreed upon extension by the parties of the 1985 agreement and there is no evidence of any agreement covering 1986. The 1985 agreement provided at Article XXIX, Section A that "(i)t shall continue" beyond December 31, 1985, "until such time that either party desires to ... change this Agreement ... ." The Union had, by letter dated July 1, 1985, and by its conduct in bargaining through-

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26/ City of Appleton, Dec. No. 17034-D (WERC, 5/80).

27/ City of Stevens Point, Dec. No. 21646-B (WERC, 8/85).

28/ City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

29/ School District of Drummond, Dec. No. 17251-B (WERC, 6/82).

out 1985, notified the County of its desire to change the agreement, thus precluding extension of the agreement by Article XXIX, Section A. Even if the Union had not done so, Article XXIX, Section A, is by its terms, "subject to the provisions of this Agreement." Article XXIX, Section B demands mutual agreement for an extension of the agreement beyond December 31, 1985. No such mutual agreement has been proven. Thus, following December 31, 1985, the 1985 labor agreement was not in effect. No separate 1986 agreement has been shown. There being no bargaining agreement in effect, there can be no waiver of the right to bargain by contract.

The second dimension asserted by the County is more troublesome, but cannot be considered persuasive because the rights asserted by the County under Article II, Sections E, I and J cannot be considered to "clearly and unmistakably" apply to the lease. The provisions can plausibly be read to describe County rights over an ongoing operation, presuming the existence of such an ongoing operation. This is not to say the County lacks the right it asserts under Article II, but that the right is not clear and unmistakable, and is thus an arguable right. If exercised during the term of the agreement, a grievance would undoubtedly have arisen. The County's rights under Article II, Sections E, I and J do not become clear and unmistakable because the County's duty after the expiration of the 1985 agreement was not to continue the contract but to maintain the status quo in the time period between the expiration of the 1985 contract and agreement, if any, on a successor. During the term of the 1985 agreement, the arguable nature of the County's asserted right could have been made certain through the grievance procedure and grievance arbitration. In the period following the expiration of the contract, the arguable nature of the right would have to be tested through the bargaining process. However, as already noted, the County has consistently refused to bargain the decision. This refusal precludes finding a Union waiver.

Nor does the Union's failure to extend or to broaden the side letter or its drop of the successorship proposals in the bargaining for a 1985 agreement alter this conclusion. These acts do not establish a clear and unmistakable waiver since they are as consistent with the view that the Union dropped the proposed contractual bars to the transfer of the Home as an indication of its willingness to assume the risk of addressing the issue in the 1986 bargaining 30/, as with the view that the Union dropped the proposed contractual bars in acquiescence to the County's asserted right. The dropping of the proposals could, in addition, conceivably indicate that the Union felt they raised permissive issues of bargaining or even simply the risk that the County could seek a declaratory ruling, thus delaying negotiations to test the point. If any of these possible views are true, no Union waiver beyond the expiration of the 1985 agreement can be found. The evidence does not make it possible to conclude with any assurance which, if any, of these views is accurate. As a result, no finding of waiver is possible.

Issue 3: The Legal Framework

Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "(t)o violate any collective bargaining agreement ... ." Where no collective bargaining agreement is in force, no violation of Sec. 111.70(3)(a)5, Stats., can be found. 31/

Issue 3: Application Of The Legal Framework To The Facts

The statement of the legal framework and its application to the facts is virtually synonoymous. As noted in the discussion of Issue 2, no mutual extension of the 1985 agreement has been proven, and no separate agreement for 1986 has been shown. There is no persuasive evidence that an express continuation of the parties' agreement has ever been made. Barker denied such an agreement was ever reached to extend the 1983-1984 agreement. The Union has, however, asserted such

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30/ Wilson's letter of January 4, 1986, noting the leasing and successorship proposals were withdrawn "without prejudice" is consistent with this view.

31/ Milwaukee Board of School Directors, Dec. No. 20139-D (WERC, 6/85).

extensions can be found in the parties' practice. Wilson testified that the parties have processed grievances in the gaps between their contracts. Barker could not recall any grievances being processed in the gap between the 1983-1984 and the 1985 contracts. The record is not sufficiently developed to permit any reliable conclusions on this point. Even if it was, the record does not offer any basis to know if the processing of such grievances represented the parties' mutual willingness to consider the expired agreement to be fully in force, or if the processing of the grievances represented the parties' attempt to resolve individual and isolated problems without regard to agreement provisions not specifically at issue. Similar considerations apply to Union assertions that dues deduction and fair share payments continued in the gap between contracts. Even assuming the record is sufficiently clear on the point to accept the accuracy of the testimony, the record does not demonstrate that the County did so as an acknowledgement of the extension of the contract or as an acknowledgement of what it considered its statutory duty to maintain the status quo.

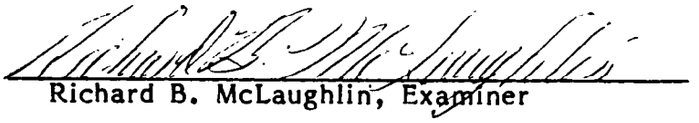
Thus, there is no persuasive reason to conclude the 1985 labor agreement was continued by the parties into 1986. Since there has been no showing that the parties reached a successor agreement, it follows that there was no collective bargaining agreement in effect as of July 1, 1986. There can be, then, no violation of a collective bargaining agreement by the County's implementation of the lease on that date. Accordingly, no violation of Sec. 111.70(3)(a)5, Stats., can be found, and those portions of the complaint alleging such a violation have been dismissed.

The Remedy

The remedy stated above has been taken directly from the Commission's decision in Brown County. 32/ Certain changes have been made which do not warrant separate discussion here, and simply reflect that the Brown County remedy has been tailored to the specific facts of this case. The Commission discussed the remedy in Brown County at some length, and the essential points of that discussion are applicable here and will not be repeated. 33/ Two minor points should, however, be touched upon. The first is that the final paragraph of that part of the Order dealing with remedying the County's violation of Secs. 111.70 (3)(a)1 and 4, Stats., has been added to underscore the primary significance of assuring ongoing and uninterrupted care to the residents of Park Lawn Home. The parties are undoubtedly sensitive to this point, but, even so, stating the obvious cannot hurt. The second point is that the Order assumes that the effective date of the layoffs, June 30, 1986, occurred as stated in the County's permanent layoff notices. The Order, in addition, assumes that the lease became effective on July 1, 1986, as stated in Section 3.01. If these dates have been altered subsequent to the hearing on this matter, the dates in the Order should be considered to apply to the altered dates.

Dated at Madison, Wisconsin, this 19th day of February, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

32/ Dec. No. 20857-B (WERC, 7/85).

33/ Ibid., see discussion at 17-20. Brown County did involve a subcontract, not a lease. Because each case involves wrongful unilateral employer action, however, the remedial issues are sufficiently similar to make the Commission's analysis appropriate here.