STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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. Mark Hazelbaker, Corporation Counsel, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, appearing on behalf of Manitowoc County.

## ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Richard B. McLaughlin having, on February 19, 1987, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Manitowoc County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. by refusing to bargain with Local 915, AFSCME, AFL-CIO over the decision to enter into a lease agreement whereby the County sold/leased a health care facility to Manitowoc Health Care Services, Inc.; and wherein he further concluded that the County's decision in that regard did not violate Sec. 111.70(3)(a)5, Stats.; and the County having, on March 10, 1987, filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties having submitted written argument in support of and in opposition to said petition, the last of which was received by the Commission on June 11, 1987; and the Commission 1/ having considered the matter and being fully advised in the premises, makes and issues the following

## ORDER 2/

A. Examiner's Findings of Fact 1-15 and 17 are affirmed.

B. Examiner's Findings of Fact 16 is reversed and set aside and the following Finding of Fact is hereby made:

> 16. 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 real estate and tangible personal property, is primarily related to the formulation or management of public policy.

C. Examiner's Conclusions of Law 1, 2 and 5 are set aside.

See Footnotes 1 and 2 on Page 2.

1/ Pursuant to the request of Local 913, AFSCME, AFL-CIO, Chairman Stephen Schoenfeld elected to recuse himself in this matter based upon his service to the parties as a mediator during the parties' efforts to reach agreement on the impact of the County's lease agreement.

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

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

D. Examiner's Conclusions of Law 3 and 4 are reversed and set aside and the following Conclusion of Law is hereby made:

> 1. 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 tangible personal property and the lease of real estate and tangible personal property, is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.; and therefore the County's refusal to bargain with Local 913, AFSCME, AFL-CIO over said decision did not violate Secs. 111.70(3)(a)4 or 1, Stats.

E. Examiner's Conclusion of Law 6 is affirmed.

F. Sections 1-3 of the Examiner's Order are reversed and set aside and the following Order is hereby made:

> The portions of the complaint alleging that the County violated Secs. 111.70(3)(a)4 and 1, Stats. by refusing to bargain over the decision set forth in Finding of Fact 16 and Conclusion of Law 1 are dismissed.

G. Section 4 of the Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

MANITOWOC COUNTY (PARK LAWN HOME)

MEMORANDUM ACCOMPANYING
ORDERING AFFIRMING IN PART AND REVERSING
IN PART EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THE EXAMINER'S DECISION

In his decision, the Examiner summarized the first issue before him as follows:

> 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?

Initially, the Examiner concluded that the transaction in question could most accurately be described as a lease and not as a subcontract or a lease with a license to operate a nursing home. In this regard, the Examiner noted that the record did not establish an underlying obligation to which the lease between the County and MHCS is subordinate, that no obligation between the County and County residents to operate the Park Lawn Home can be inferred, and that payments under the lease at issue here cannot be reconciled with a subcontract because the payments flow from the lessee ("subcontractor") to lessor ("prime contractor"). The Examiner then noted that in his view the decision to discontinue County operation of the Home and the lease itself are inseparable decisions, with the lease being the vehicle by which the County discontinued operations. The Examiner noted also that it is only the County's operation of the Home which ceased and concluded that the lease itself clearly contemplates the transfer of ongoing nursing home operations.

The Examiner then proceeded to apply the "primary relationship" standard established by the Wisconsin Supreme Court for determining whether a matter is a mandatory subject of bargaining. The Examiner concluded that the essential managerial and public policy interest at stake in this dispute is the County's right to go out of the nursing home business because it sought to insulate itself from the financial volatility produced by operation of the Home. However, the Examiner then concluded that 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 a Lesee-Operator. In this regard, the Examiner acknowledged that Section 5.01 of the lease permits use of the Home premises "for any lawful purpose." However, the Examiner concluded that the significance of the right expressed in that Section must be discounted by the probability that MHCS would never exercise the authority granted, given that the lease itself contemplates the transfer of an ongoing nursing home operation. The Examiner also noted in this regard that MHCS itself seemed "dubiously equipped" to exercise the choices implicit in Section 5.01. Lastly, the Examiner concluded that the authority ceded in Section 5.01 is undercut by the fact that nothing in the context of the negotiations of the lease offers any persuasive reason to conclude the County offered or Griffith's, on behalf of MHCS, accepted anything other than a lease to operate a skilled care nursing facility.

As to those portions of the lease which the County cited to support its Examiner concluded that the lease did not constitute a sham by which the County

Lastly, as to the County assertion that the absence of any lease provision requiring MHCS to accept County referrals of County residents is supportive of the County's total withdrawal from the nursing home business, the Examiner concluded that the absence of such a preference cannot be given the weight the County asserts. In essence, the Examiner concluded that the absence of such a provision, in the context of this case, does not persuasively demonstrate that access to the Home by County residents would be limited.

In summary, the Examiner concluded that although the County had established managerial and public political interest in eliminating a service without first bargaining that decision with a representative of its employes, that right is not "implicated" on the present facts because the County did not choose to go out of the nursing home business.

The Examiner then proceeded to discuss managerial and public political interest implicated by the County Board resolution authorizing the lease. The Examiner noted in this regard that the County interests in responding to declining revenues generated by the Home and avoiding competition with private industry were amenable to resolution through the collective bargaining and budgetary processes.

Having examined the employer interests to be balanced, the Examiner turned to the employe interest at stake and found them to be "more direct and self-evident." He noted that the employes have an obvious interest in continuing employment and the benefits that flow from that employment. He noted that Article XXIII establishes that perhaps none, or perhaps as many as 10%, of the bargaining unit face a loss of employment. He found that the proposal initially submitted by MHCS establishes that the employes face, in all probability, a loss or reduction of benefits and perhaps wages. Lastly, the Examiner noted that the employes faced the potential loss, or potential litigation over, the scope of their Union's ability to bargain on their behalf.

The Examiner then concluded as follows:

> Although certain County assertions regarding the weight to be accorded the managerial and separate public political interest 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 least decision as primarily related to the wages, hours and conditions of employment of County employes.

In this regard, the Examiner noted that the policy issue at stake herein is not whether Park Lawn Home should operate as a nursing home, but rather whether the County or MHCS should operate that nursing home. Thus, the Examiner concluded that the lease decision impacts on the electorate in an indirect fashion more akin to that presented in Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) than in City of Brookfield v. WERC, 87 Wis.2d 819 (1979) which directly posed the issue of a reduction in services not present herein. The Examiner concluded by noting that the issues herein are more "geared to assertion by the County at the bargaining table and by the public through the budget process than through purely political discussions among the public prior to unilateral action by its elected representatives."

Before turning the remaining issues in the case, the Examiner rejected the County's contention that Chapter 59 and 111 cannot be harmonized unless the lease decision is found permissive. The Examiner concluded that acceptance of such an argument would effectively eliminate the rights established by Chapter 111 since a contract of virtually any type under Chapter 59 would serve to relieve the County of its duty to bargain. The Examiner concluded that the Court's primary relationship standard functions to require the necessary harmonization between Chapters 59 and 111.

Having concluded that the lease decision was a mandatory subject of bargaining, the Examiner proceeded to address the issue of whether the Union has waived its right to bargain either by conduct or by contract. As to the County's argument that the Union waived its right to bargain by conduct, the Examiner concluded that the Union had consistently asserted an interest in bargaining the lease decision and thus found that Union waiver by inaction is not supported by the record. Turning to the County argument that the Union had waived bargaining by contract, the Examiner concluded that such an argument was premised upon a

contract being in force beyond the December 31, 1985, expressed expiration of the parties' 1985 agreement. The Examiner concluded that the record did not establish any extension of said agreement or that a separate 1986 agreement existed and therefore, as no bargaining agreement was in effect at the pertinent time, concluded that no waiver of the right to bargain by contract had been demonstrated.

The Examiner next dealt with the County argument that even if no contract existed for 1986, the status quo the County was statutorily obligated to maintain pending the completion of bargaining as to a successor agreement included the Management's Rights clause contained in the 1985 agreement which clause the County asserts included the right to enter into the lease in question. In this regard, the Examiner concluded that said argument must be rejected because the rights asserted by the County cannot be considered to "clearly and unmistakably" apply to the lease. The Examiner further noted in this regard that:

> 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 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 the 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 a finding of Union waiver.

The Examiner also found that the Union's bargaining history conduct during the negotiations over the 1985 agreement did not establish a clear and unmistakable waiver because:

> These acts are as consistent with the view that the Union dropped the proposed contract 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, as with the view that the Union dropped the proposed contract 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. (footnote omitted)

As to the issue raised by the Union that the County's actions violated the 1985 labor agreement and thus Sec. 111.70(3)(a)5, Stats., the Examiner concluded that because no agreement was in effect, it follows that there was no violation of a collective bargaining agreement. He therefore dismissed this portion of the complaint.

As a remedy to the County's violations, the Examiner ordered the County to: (1) cease and desist from causing or permitting by lease the performance of services at Park Lawn Home by non-bargaining unit employes 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 of County employes formerly working at the Home; (3) institute County-operated nursing care services at the 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; (4) 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 from and after July 1, 1986; (5) make whole former County

employes of the Home who were laid off effective June 30, 1986 for all losses of pay; (6) and post an appropriate notice.

POSITIONS OF THE PARTIES ON REVIEW

The County's Initial Brief

In seeking reversal of the Examiner's decision, the County asserts that the Examiner's decision demonstrates that the Examiner agreed with the County that the business transaction in question was purely and simply a sale of business and a lease of residual assets motivated by legitimate and compelling economic considerations. Furthermore, the County contends that the Examiner's decision makes it clear that the Examiner rejected the contentions of the Union that the sale and lease was in some way a "sham" that allowed the County to "pull the strings" from behind the scenes and thus retain control of the situation. Finally, the County argues that the Examiner agreed with the County's position that City of Brookfield stands for the proposition that an economically motivated decision by a municipality to lay off employes is a non-mandatory subject of bargaining. Despite the Examiner's acceptance of all the major propositions advanced by the County, the County asserts the Examiner concluded that the mere presence of a commerical lease of residual assets, even though there has been a legitimate and acknowledged transfer of the ownership of the business and, therefore, of the business' ultimate direction and control, is enough to change the transaction from a permissive to a mandatory subject of bargaining. The County asserts that the Examiner cited no legal precedent nor advanced any logical explanation for his position that a mere lessor of operating assets is engaged in the business of the lessee.

The County asserts that the Examiner reached the foregoing erroneous conclusion because he wrongly assumed that the Brookfield test is "whether the County has gone out of the nursing home business." The County asserts that the test enunciated by the Court in Brookfield is whether the County has legitimately laid off its employes for economic reasons. The County also contends that the Examiner completely ignored the fact that under the primary relationship test established in Racine, the question is whether the policy dimensions of a decision predominate over the interests of the affected employes. The County argues that the Racine decision stands for the proposition that where there is "change in the basic direction" of the activities of the County, the "policy dimensions of the decision" always predominate. The County alleges that in the present case there can be no argument but that the County's decision to sell, lease and lay off its employes is a basic change in the direction of its activities. Even if the Examiner correctly concluded that the test is a question of "going out of the business," the County concludes that both common sense and overwhelming legal precedent mandate the conclusion that the business activities of a lessee under a standard commerical lease cannot be imputed to the landlord. The County asserts that this is particularly true in the nursing home business wherein the County surrendered its nursing home license as part of the sale of the Home. Because it has yielded its nursing home license, the County asserts that it cannot as a matter of law be in the nursing home business.

The County further asserts that Brookfield mandates reversal of the Examiner's decision because Brookfield establishes that a budgetary layoff which results in the partial elimination of a municipal service is a management prerogative not subject to the balancing test. The County argues that logically this holding in Brookfield must apply with equal force to a budgetary layoff involving the total elimination of a municipal service.

The County also submits that the Examiner erred by placing little if any emphasis on the financial aspects of the transaction from the view point of the County taxpayers. The County asserts that it has a statutory obligation to act for "its commercial benefit" and thus that a municipality has the absolute right to utilize any commercially reasonable transaction in the implementation of budgetary layoffs which under Brookfield are not bargainable. In this regard the County asserts that its duty to bargain ought not differ when it acts to the financial advantage of the taxpayers by selling the intangible assests of a ongoing business with a contemporaneous lease of the residual assets instead of simply closing down the nursing home and leaving the building unoccupied. The County asserts that in either situation it has disengaged itself from a losing business venture and laid off employes involved in the business enterprise. This being the case, the County asserts that if one method is a permissive subject of

bargaining, it necessarily follows that the other is as well. The fact that the business enterprise continues in the hands of a different owner should not, in the County's view, make any difference because all the County has done is exercised its statutory right to make budgetary layoffs in a manner which works to its "commercial benefit."

Assuming, for the sake of argument, that the test to be applied herein is whether the County has "gone out of the business," the County asserts that the mere existence of a lease does not mean that the County continues to operate the Home. In this regard, the County notes the unequivocal testimony of its expert witness at hearing which indicated that MHCS was the owner and operator of the nursing home business. The County asserts that the expert witness established that the lease aspect of the transaction is a very normal way to sell a business in that it is a financing device to facilitate the sale by allowing MHCS to take over the nursing home operation with a minimum capital investment. In this regard, the County asserts that the lease aspect of this transaction is the equivalent of the "land contract" in Chippewa County, Dec. No. 24521 (WERC, 5/87). The County further argues that it has "gone out of the business" because uncontroverted evidence in the record establishes that: the County does not share in the profits nor bear any of the losses of the nursing home business being operated by MHCS; there is nothing in the lease which requires MHCS to provide nursing home services to Manitowoc County residents and the County has no right to refer patients to the nursing home; the employes of the nursing home are employed and paid by MHCS and the County provides no funds to MHCS out of which employe wages are paid; MHCS is the sole judge of the level of services furnished to patients except as inhibited by state law relative to minimum standards of care; MHCS, in its sole discretion, is free to terminate the nursing home operation at any time; the only commitment MHCS has made is to make rental payments for the initial term of the lease; and during or at the end of the initial lease term MHCS has the unfettered right to move the nursing home operation anywhere it wishes and the operation does not revert to the County.

The County further argues that if the Examiner's interpretation of the law as to the duty to bargain is correct, then the Municipal Employment Relations Act unconstitutionally divests the County Board of its delegated powers and transfers them to non-elected arbitrators.

Concluding its arguments as to the bargainable nature of its decision, the County asserts that the Examiner's decision makes the financing device by which a legitimate sale of a business occurred the critical factor in his analysis. The County asserts the Examiner, in singling out the lease, has focused on the wrong aspect of the transaction. The County submits that a business transfer is such a basic change of direction that it demands a finding that it is a permissive subject of bargaining. The County argues that to rule otherwise is to invite absolute chaos for there are an infinite number of ways to finance a sale transaction.

Turning to the question of Union waiver, the County asserts that the parties' 1985 contract exclusively reserved to the County certain Management Rights including the right to "relieve employees from their duties because of lack of work or any other legitimate reason or any other" and to "determine the methods, means and personnel by which County operations are to be conducted." (emphasis supplied) The County alleges that the Union obviously understood that this language gave the County the absolute right to sell and/or lease the nursing home in its discretion. For this reason, the County notes that the Union was careful to bargain into the 1983-84 contract a provision that "the County will not sell Park Lawn Home." During bargaining for the 1985 contract, the County sought and obtained deletion of the language which prohibited the sale of the Home. The County asserts that the Union knew that the County wanted the right, in its discretion, to sell or lease the nursing home facility and freely agreed to delete or withdraw any contractual prohibition or restriction to such a course of action. After the 1985 contract expired, the County contends that it was bound to maintain the status quo which included, in the County's view, the right to sell or lease the Home. The County asserts that in spite of clear contractual language and extensive supportive bargaining history, the Examiner found that while the Union may well have waived its rights, the Examiner was not completely sure of this fact and thus could not find that a waiver took place. The County contends that the Examiner's reliance upon supposition as to the Union's motivation for deleting the 1983-84 prohibition is irrelevant herein. The County argues that the only important point is that the Union knowingly deleted the prior prohibition on the sale and knowingly withdrew its successorship proposals. The County asserts

that if waiver is only possible when the "subjective motivation" of a party is known, then the doctrine of waiver becomes meaningless. The County further argues that the Examiner's theory that a right is not "clear" unless it is "tested" is without precedent in legal authority or concept. The County notes that if all rights had to be "tested" first, the Commission would never again have to decide if a waiver had taken place in a labor case. The County asserts that the Examiner's failure to recognize this waiver by the Union "clearly and unmistakably" indicates that the Examiner first decided upon the result he desired and then attempted to justify his subjective decision by means of legal concepts of his own making.

The County asserts that the Examiner could not have reached the conclusion he did herein if he had excluded numerous inadmissable, irrelevant and immaterial pieces of evidence prejudical to the County. In this regard, the County asserts that the Examiner erred by admitting and considering evidence of the motives and intentions of individual County supervisors; by admitting heresay and other evidence as to "legislative history" of the Park Lawn sale agreement; and by permitting the Union's expert witness to testify.

Even if the Commission sustains the Examiner's conclusion that the sale/lease transaction in question is a mandatory subject of bargaining, the County asserts that the Examiner's remedial Order is still inappropriate and should be vacated. The County asserts that the Examiner has ignored the fact that the County and MHCS have entered into a perfectly legal business transaction and that it is beyond his authority or that of the Commission to confiscate property of a private corporation. Thus the County argues that the Examiner's order is legally impossible to comply with and hence invalid. The County also asserts that because it surrendered its nursing home license, it is unlawful for the County to operate a nursing home. Thus the County contends that it is being forced by the Examiner to perform an act contrary to all law respecting private property rights and nursing home licensure.

In conclusion, the County asserts that the decision of the Commission in this case should not be a difficult one since the law is clear that the County committed no prohibited practice by unilaterally selling Park Lawn Home to MHCS and leasing the underlying real estate. The County asserts that there is no denying the employe interests impacted in this case and in many other decisions which will be made by counties. However, the County asserts that this is no less true of thousands of other major decisions made each day by local government. The County asserts that the level of taxation, the number of allocated positions, etc. all have undeniable, even at times devastating, effect on employes. However, the County argues that the fact that employes may seem to have a great deal to lose does not decide the issue. Here, the County asserts that it decided to get out of the nursing home business by selling its nursing home operation, and helped to finance the sale by leasing the real property involved. The County asserts that the unambiguous provisions of the transactions show that it made a hard choice, changed its direction, exercised its political authority. The County asserts that it made this hard choice to protect the interest of its citizenry. The County argues that it is not now for the Commission to deny the people of Manitowoc County their democratic right to direct the course of their government. The County asserts that "the people have spoken - Park Lawn is now a private institution."

The Union's Responsive Brief

The Union urges the Commission to affirm the Examiner's conclusion 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 4, Stats. The Union asserts that the County's leasing arrangement merely grants a private nursing home operator a license to operate the Park Lawn Home and does not, contrary to the County's arguments, constitute a sale of that facility. The Union alleges that the plan meaning of the words used in the lease demonstrates that the arrangement in question merely grants a private nursing home operator a license to operate the Park Lawn Home. The Union further argues that the history and context of the County's leasing arrangement make clear that the arrangement is merely a subcontracting for the services of a private nursing home operator. The Union in this regard asks that the Examiner's Findings of Fact and Conclusions of Law be modified to reflect that the County's lease, in essence, is merely a licensing arrangement.

Even if the County's leasing arrangement could be reasonably construed to constitute a sale of the Park Lawn Home, the Union contends that the County's decision does not represent a substantial choice among alternative social or political goals and thus is a mandatory subject of bargaining. The Union argues in this regard that whether called a "sale," a "lease," a "license," a "management contract," or anything else, if the County's decision merely involves a continuation of the same or substantially the same service, albeit in a different mode or by a different means, then there has been no significant change in social or political goals: the service provided by the nursing home continues to be provided to the County's residents. Thus, the Union urges the Commission to find that the Examiner correctly applied the "balancing test" mandated by Racine when finding the County's decision to be a mandatory subject of bargaining.

The Union contends that the Examiner properly found that it had not waived its right to bargain over the leasing arrangement. In this regard, the Union notes that it made repeated efforts to bargain over the matter during bargaining over a successor to the parties' 1985 agreement. As to the County's argument that the Union's failure to include language in the parties' 1985 collective bargaining agreement limiting the County's right to lease the Home constitutes a waiver of the right to bargain, the Union asserts that all the absence of such express language signifies, at best, is that during 1985 the County was not bound by contract not to lease the Home. However, the Union asserts that the absence of such express language in the contract did not constitute a waiver of the statutory right to bargain concerning the leasing of the Home in either 1985 or 1986. Further, the Union argues that even if the language of the parties' 1985 agreement is considered to have remained in force during 1986, the absence of express language barring the County's leasing of the Home would not automatically permit the County to lease the Home. The Union argues that the 1985 agreement contains provisions which limit the County's right to subcontract. The Union also contends the record establishes that express language relating to a leasing arrangement was not included in the 1985 agreement only because the parties did not reach a tentative agreement for 1985 until the year was almost over and the issue appeared to be moot. The Union argues that in withdrawing its leasing and successor employer proposals at that point, it unequivocally reserved the right to reintroduce those proposals in the negotiations regarding an agreement for 1986. In summary, the Union asserts that the County's waiver arguments should be rejected as being unsupported in the record or by Commission case law.

Contrary to the Examiner's decision, the Union asserts that the 1985 collective bargaining agreement remained in full force and effect at the time of the leasing arrangement. Given that the 1985 agreement limited the exercise of the County's right to "contract out for goods and services" provided that "the County does not dissipate the Union," the Union herein asserts that the County's action constituted a breach of the collective bargaining agreement and thus violated Sec. 111.70(3)(a)5, Stats.

As to the County's arguments regarding the nature of the remedy ordered by the Examiner, the Union asserts that there is nothing in the law, nor in the record, to suggest that if in fact the County has given up its license to operate the Home, it will not readily be able to obtain that license again upon the termination of its lease. Thus, the Union asserts that it is entirely within the power of the County to comply with the Order issued by the Examiner. Moreover, the Union asserts that to the extent that compliance with the Examiner's Order might prove difficult, that is the County's problem to resolve and not the problem of the Commission or the employes injured by the County's unlawful actions. Until it can restore the situation, the Union asserts that the County, by reinstating the bargaining unit employes to their County employment, simply will remain liable to continue to make them whole for any losses experienced. The Union argues further that neither the County nor MHCS can now be heard to complain of lost property rights inasmuch as they entered into the lease agreement knowing that it was potentially unlawful. The Union therefore requests that the Commission affirm the Examiner's Order.

The County's Reply Brief

The County asserts that the Commission's decision in Chippewa County, which was issued after the Examiner's decision herein, warrants reversal of the Examiner. As in Chippewa County, the County asserts that there was a sale of the right to place the nursing home beds in service and generate revenues therefrom in this case. The County asserts that this transaction is part of a

larger transaction which included a lease of real estate. In the County's view, the real estate lease functions as both a financing mechanism for the sale and as the consideration for the County to enter into the transaction. The County asserts in this regard that there are three key realities present herein:

(1) MHCS is not bound to continue to operate Park Lawn Home at its present location, in the manner in which Manitowoc County operated it, or in any manner at all;

(2) At the end of the term of the lease, MHCS can decide to relocate the beds; and

(3) At the end of the lease term or in the event MHCS ceases operations, the nursing home operation does not revert to the County as the right to operate a nursing home has been sold.

The County further argues that inasmuch as the Union failed to file a cross-petition for review of the Examiner's decision, it has waived its right to object to the Examiner's rejection of the Union's arguments that the transaction in question was a license or subcontract.

The County also cites the May 1987 decision of Waukesha County Circuit Court Judge Zick in Local Union No. 2490 AFSCME, AFL-CIO v. Waukesha County, No. 86-CV-3597 as being supportive of its position. It asserts that based upon City of Brookfield, Judge Zick granted an employer Motion for Summary Judgment of a union's refusal to bargain complaint involving a sale of a county nursing home business and a lease of remaining tangible assets.

As to the issue of waiver, the County reiterates that by assenting to deletion of restrictive contract language, the Union knowingly, freely and willingly dropped the only restriction which would have otherwise prevented the County from using its authority under the Management's Rights clause to sell the Home and lay off its employes for lack of work.

In summary, the County urges reversal of the Examiner's decision.

Union's Supplemental Brief

The Union disputes the County's assertion that the Commission's decision in Chippewa County is dispositive herein. The Union asserts that the facts in the instant case differ markedly from those existing in Chippewa County, given that the contract in question, by its very title, is a "lease" which contains a variety of covenants and restrictions relating to the services to be provided. The Union further argues that the Waukesha County Circuit Court decision cited by the County in its reply brief is factually inopposite herein as well. The Union urges that whether the Commission looks at the substance of the transaction, as was done in Racine, supra, and Brown County Dec. No. 20857-B (WERC, 7/85) or to the form of the transaction, as in Chippewa County, either approach leads to the same affirmance of the Examiner.

DISCUSSION:

In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Wisconsin Supreme Court concluded that a matter is a mandatory subject of bargaining if it primarily relates to "wages, hours, and conditions of employment" and a permissive subject of bargaining if it primarily relates to the "formulation or management of public policy." The essential issue presented to us on review of the Examiner's decision is whether the County's decision to discontinue its operation of the Park Lawn Home by entering into a lease agreement with Manitowoc Health Care Services, Inc. is a mandatory or permissive subject of bargaining. In our view, the application of the rationale we enunciated in Chippewa County to the record herein requires that we reverse the result reached by the Examiner in his thoughtful, well crafted decision and conclude that the County's decision is on balance a permissive subject of bargaining.

In Chippewa County, we were confronted with determining whether the municipal employer therein had a duty to bargain over the decision to sell a health care facility. We held:

> With respect to the Union argument regarding the structure of the sales agreement, we see little significance in the fact that the County entered into a land contract. It could have just as easily given a deed and obtained a 40 year mortgage on the same terms. What is significant is that the land contract contains no requirement that the purchaser continue to operate the facility as a health care center or to keep the same or similar residents in the event that the purchaser continues to operate the facility to provide health care. There are no conditions or reservations for the County to have any further involvement in the purchaser's operation of the health care center. The land contract was a straight sale of the Health Care Center with no further involvement of the County in its future operation. Essentially, the County has gotten out of the business of being a health care provider.
>
> With respect to the selection of the purchaser, it seems logical that anyone wishing to sell a certain type of business would advertise that fact to those most likely to be interested and serious purchasers. Contacting those already in that trade would be efficient and most likely to lead to serious offers as well as attract the best price. The fact that a purchaser's willingness to continue to operate the facility as a health care center might appeal to the County and thus be a significant factor in the selection of a purchaser does not constitute a requirement that the purchaser continue to operate a health care center or render the sale a de facto subcontracting arrangement.
>
> The Union contends that no public policy choices are implicated here because after the sale the services to citizens were the same as before but are merely provided by a different entity. We are of the opinion that this argument expands the concept of level of government services beyond that expressed in Brookfield or Racine. Brookfield and Racine involved the level of services provided by or through the municipal employer rather than the more generic question of whether services will be provided to citizens by any entity. Here the concern is the level of County health care services and not the level of health care services available to County residents from any source. The County decided to reduce its health care services and got out of the health care services business entirely. As the Court stated in Brookfield, the decision to reduce the level of services provided by a municipal employer is a policy decision which is left to the elected body of the community citizenry to determine. We think that the decision to sell the Health Care Centr was just such a policy decision. The County Board, as elected representatives of the citizens of the County, can unilaterally determine the level of services that the County will provide. Thus, we conclude under the facts presented in this case that the decision to sell the Health Care Center was a permissive subject of bargaining. Inasmuch as the decision to sell was permissive, the County did not violate Secs. 111.70(1)(a)4 and 1, Stats. For the foregoing reasons, we have dismissed the complaint in its entirety.

As the above quoted portion of the Chippewa County decision indicates, the critical determination to be made is whether the County has gotten out of the business of being a health care provider. The significant factors which we looked to in Chippewa County when making this determination included (1) whether the terms of the transaction require that health care services continue to be provided or that the same residents/patients be kept if the purchaser elects to operate the facility to provide health care and (2) the extent, if any, that the County continues to have involvement in the operation of the facility.

Here, the record demonstrates that Section 5.01 of the lease does not limit the use of the leased facility to the operation of a nursing home but rather permits use "for any lawful purpose." The lease does not contain a requirement that the lessee give any preference to County residents if it continues to operate the premises as a health care facility. Lastly, we are satisfied that the Examiner correctly found that the lease effectively removes the County from any role in the operation of the facility. Under these circumstances, and where, as here, the term of the lease is of sufficient length 3/ so as to satisfy us that the transaction does indeed represent a bona-fide decision to cease providing the services in question, we conclude that Manitowoc County did indeed get out of the business of being a health care provider through the instant sale/lease transaction. Under Chippewa County and our understanding of the Wisconsin Supreme Court's decision in City of Brookfield, the County need not bargain over such a "level of services" decision despite the substantial impact on employe wages, hours and conditions of employment.

Having reached this conclusion, we need not reach the waiver argument raised in the alternative by the County. Although the Union did not petition for review of the Examiner's dismissal of the Union's breach of contract claim, we hereby conclude that the Examiner properly dismissed that claim based on his finding that no contract existed on July 1, 1986.

Dated at Madison, Wisconsin this 29th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

---

3/ The lease is for a term of 4 years with the lessee having 2 successive options to renew the lease for additional terms of 3 years to run consecutively to the initial term. While in all probability the facility will only be used as a nursing home by the lessee, the possibility remains under the terms of the lease agreement, that the lessee, at her option, could utilize the facility, for a period of up to 10 years for any other lawful purpose.