STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of ASSOCIATION OF MENTAL HEALTH SPECIALISTS Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and ROCK COUNTY	Case 202 No. 35596 DR(M)-382 Decision No. 23656

Appearances:

Habush, Habush & Davis, S.C., Attorneys at Law, by Mr. John S. Williamson, First Wisconsin Center, Suite 2200, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5381, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Mark F. Vetter, Suite 800, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4285, and Mr. Thomas A. Schroeder, Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Association of Mental Health Specialists having on September 6, 1985, filed a petition with the Wisconsin Employment Relation Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the Association's duty to bargain with Rock County over a subcontracting proposal; and hearing on said petition having been held on December 4, 1985, in Janesville, Wisconsin, before Examiner Peter G. Davis, a member of the Commission's staff; and the parties having filed written argument the last of which was received on March 10, 1986; and the Association, by letter dated March 3, 1986, having asked that the Commission conduct oral argument; and the County, by letter dated March 7, 1986, having opposed the request for oral argument; and the Commission by letter dated April 17, 1986, having advised both parties that it was denying the request for oral argument; and the Commission, having considered the record and the parties' arguments, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Association of Mental Health Specialists, herein the Association, is a labor organization functioning as the exclusive collective bargaining representative of certain employes of Rock County and has its principal offices at Suite 2200, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5381.

2. That Rock County, herein the County, is a municipal employer of certain individuals working at the Rock County Health Care Center who are represented for the purposes of collective bargaining by the Association and has its principal offices at 51 South Main Street, Janesville, Wisconsin 53545.

3. That the Association and the County were parties to a 1984 collective bargaining agreement which expired by its terms on December 31, 1984; that said agreement contained the following provision:

ARTICLE II - MANAGEMENT RIGHTS

> 2.01 Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to the right to hire, the right to promote, demote, the right to discipline or discharge for proper cause, the right to transfer or lay-off because of lack of work,

discontinuance of services, or other legitimate reasons, the right to abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work, the right to make reasonable work rules and regulations governing conduct and safety, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods and processes and manner of performing work are vested exclusively in the management. In exercising these functions management will not discriminate against any employee because of his/her membership in the Association. (emphasis added)

4. That during bargaining over a successor to the 1984 contract, the County proposed to retain the provision set forth in Finding of Fact 3 and the Association proposed the deletion of the underlined portion of said language; and that the Association ultimately filed the instant petition alleging that the underlined subcontracting language was a prohibited or, at best, permissive subject of bargaining.

5. That the subcontracting proposal set forth in Finding of Fact 3 primarily relates to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the subcontracting proposal set forth in Finding of Fact 3 is not a prohibited or permissive subject of bargaining and is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That the County and the Association have a duty to bargain under Sec. 111.70(1)(a), Stats., over the subcontracting proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. (Footnote 1 Continued on Page 3)

1/ Continued.

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

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

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(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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

BACKGROUND

The Pleadings

In its petition, as amended, the Association asserts that the subcontracting language which the County seeks to maintain in a successor agreement has been interpreted by the County as permitting the subcontracting of unit work to obtain savings based upon the subcontractor's payment of lower wages to its employes and the subcontractor's imposition of working conditions inferior to those enjoyed by the employes the Association represents. The Association also therein contends that during bargaining the County threatened to subcontract all unit work unless the Association accepts a 25% wage cut, a wage cut which even the County's current offer of a wage freeze for psycho social workers and a 6% increases for nurses demonstrates is unfair. Given the foregoing, the Association submits that the subcontracting proposal is illegal as violative of Secs. 111.70(3)(a)1, 3 and 4, Stats., or, at best, is permissive.

In its statement filed in response to the petition, the County asserts that under existing Wisconsin precedent, the decision to subcontract is a mandatory subject of bargaining citing United School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977) and Brown County, Dec. No. 20857-B (WERC, 7/85) aff'd, Dec. Nos. 85-CV-2351 and 85-CV-2381 (CirCt Brown, 2/86) appeal pending (CtApp). The County notes that private sector precedent reaches the same conclusion citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). The County also contends that the Association, through its chief representative, has on at least three occasions taken the position, in writing, that the County must bargain concerning any subcontracting decision. The County closes by arguing that if there is a duty to bargain over an actual decision to subcontract, contract language specifically relating to the employer's right to make that decision must also be a mandatory subject of bargaining.

The Hearing

During hearing conducted at the request of the Association, the County asserted that there is no factual dispute before the Commission but offered to stipulate that the disputed language did give it certain rights to subcontract the work of some or all unit members. The Association rejected said stipulation and, over the County's objections as to relevancy, proceeded to present evidence as to bargaining history and the negative impact which subcontracting would have upon unit members. The record established that the County has considered and continues to consider subcontracting but that no decision has been made. The County called no witnesses and moved for attorneys fees and summary judgement.

The Briefs

While acknowledging that subcontracting proposals may generally be mandatory subjects of bargaining, the Association contends that the instant proposal is not because of the following arguments.

1. The challenged provision is repugnant to Section 111.70 because it empowers a municipal employer to make its employes' continued employment depend upon the employes' willingness to give up the right to insist upon being paid wages based on Section 111.70(4)(cm) mandated criteria. Just as municipal employes cannot legally be replaced by private employes because they choose to be represented by a union, so, too, they cannot be compelled to bargain over a provision under which they can be replaced by private employes if they seek and acquire wages under Section 111.70(4)(cm), Stats. See Justice Stewart's concurrence in Fibreboard, supra.

2. The challenged provision, at least where, as here, there are available subcontractors whose employes' wages are substantially less than the wages based on Section 111.70 mandated criteria, transforms the collective agreement, as far as the affected municipal employes are concerned, into an illusory collective

agreement because it confers on the County the option to deny them the benefit of the entire collective agreement; or, to state the same point differently, the challenged provision obliterates the implied covenant of good faith and fair dealing the municipal employer would otherwise owe its employes under the resulting collective agreement. See Harley Davidson Motor Co., Inc., unpublished (Krinsky, 1982) and other arbitraton awards.

3. The challenged provision empowers the employer to modify or nullify de facto the recognition clause.

4. The challenged provision subverts the assumption on which good faith collective bargaining is based--the assumption that both parties are bargaining about the performance of work by the employes represented at the bargaining table.

5. Section 111.70 seeks to give municipal employes power and equality with municipal employers at the bargaining table through the collective bargaining process, including, if necessary, mediation-arbitration, to establish wages, hours and conditions of employment based upon Section 111.70(4)(cm) mandated criteria. If a municipal employer can compel bargaining over a proposal which allows replacement of municipal employes because they insist on exercising statutory rights, the purpose of Section 111.70 is frustrated.

6. While a municipal employer may well be able to legally exert pressure upon municipal employes by threatening to reduce or eliminate services if economic consessions are not forthcoming, the decision to subcontract, unlike a decision to reduce or eliminate service, does not represent a "public policy choice" and thus any analogy about the legitimacy of exerting pressure must be rejected as unpersuasive.

By way of conclusion, the Association asserts that this is not a close case where Section 111.70 gives mixed or equivocal signals. Rather, it is a case where, once the intent behind, and the consequences of, the challenged provision are probed, its subtle but insidious nature stands revealed--and once revealed, the provision itself stands condemned. In short, the Association argues the challenged provision, because it directly conflicts with the purpose of Section 111.70, the realities of collective bargaining under it, the rights of municipal employes and their unions, and the municipal employer's duties to recognize and bargain collectively in good faith with the representatives of their employes, is nonmandatory.

The County asserts that under the "primary relationship" test, the subcontracting proposal at issue is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining. The County submits that its proposal is not inconsistent with Sec. 111.70, Stats., and does not require employes to give up their right to bargain over wages, as asserted by the Association. The County argues that if the Association's position is accepted, employes would be afforded job protections never contemplated by the legislature.

The County alleges that the grievance arbitration decisions cited by the Association involving subcontracting are inapposite to resolution of the instant dispute. Said decisions generally involve circumstances where the employer acted in bad faith or to circumvent existing language. Here the County is seeking through good faith bargaining to obtain the right to subcontract in certain identified circumstances.

The County also notes that the Association's argument presumes that because the County desires to negotiate its subcontracting proposal, the proposal will automatically become part of the parties' collective bargaining agreement. That argument ignores the fact that the Association is not required to agree to the proposal. If the proposal is not agreed upon by the parties, it may be submitted to a mediator-arbitrator who will determine whether it should be included in the agreement. It is in that process that the employes' so-called "countervailing" power is protected and exerted. It is also in that process that the employer's power to provide for the economic well-being of the municipality and its taxpayers exists. The employer may also attempt to place pressure on the employes to make economic concessions through its proposals. That is how the process works--whether the Association likes it or not.

The County further argues that the Association's conduct during bargaining acknowledged the mandatory nature of the subcontracting proposal and that given the clarity of the law as to the issue at hand, it must be concluded that the Association acted in bad faith when filing the petition. The County therefore asserts that an award of attorneys fees to the County is appropriate citing MTI v. WERC, 115 Wis.2d 623 (CtApp 1983).

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 set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. Prohibited subjects of bargaining are those proposals or provisions which violate public policy or statutes and thus are void as a matter of law. Board of Education v. WERC, 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977). The Commission has also found proposals which require the relinquishment of certain MERA rights to be permissive or nonmandatory subjects of bargaining. Deerfield Community School District, Dec. No. 17503 (WERC, 12/79), aff'd Dec. No. 80-CV-260 (CirCt Dane, 1/81); Monona Grove School District, Dec. No. 22414 (WERC, 3/85); Waupun School District, Dec. No. 22405 (WERC, 3/85). The advent of mediation-arbitration under Sec. 111.70(4)(cm), Stats., has not altered the courts' view of the definitional standards to be applied when determining the bargainability of a proposal. See Blackhawk Teacher's Federation v. WERC, 109 Wis.2d 415 (CtApp, 1982); Brookfield, supra; West Bend Education Association v. WERC, 121 Wis.2d 1 (1984); School District of Drummond v. WERC, 121 Wis.2d 126 (1984). Nor has mediation-arbitration altered the manner in which the Commission applies those standards to a dispute. See Racine Unified School District, Dec. Nos. 20652-A, 20653-A (WERC, 1/84); aff'd, Case No. 84-CV-431 (CirCt Racine, 10/84); aff'd, Case No. 85-0158 (CtApp 1986, unpublished).

We commence our analysis by noting neither party asserts that there are management or public policy interests impacted by the subcontracting proposal which are sufficient to predominate over the impact upon wages, hours and conditions of employment. Our analysis of the proposal leads us to concur with the parties' judgment in that regard. Therefore, unless it violates law or public policy or requires the relinquishment of a MERA right, under the balancing test mandated by our Supreme Court the proposal would be found to be a mandatory subject of bargaining.

The Association asserts that the proposal before us is a prohibited or permissive subject of bargaining essentially under two related theories. Both theories are predicated on the fact that the instant subcontracting proposal gives the County the right to subcontract if the wage and benefit package bargained by the exclusive representative of the unit employes makes it no longer "economical" to use County employes to perform the work.

As to the Association's first contention that this proposal is illegal because it threatens employes for exercising a statutorily protected right, we find the Association's analogies flawed and unpersuasive. The Association asserts, in essence, that there is a statutory right to certain wage levels based upon the mediation-arbitration criteria established in Sec. 111.70(4)(cm)7, Stats. No such right exists. The statute only creates a right to have disputes over which party's package offer on disputed issues including wages should be included in a contract resolved by reference to specified criteria. The criteria themselves do not generate a wage rate to which employes are entitled. The County's proposal does not deprive employes or the Association of a right to use the statutory process for resolving wage disputes within the package offer context. Thus, this proposal does not deprive employes or the Association of their statutory right to bargain over wages.

The Association's second basic theory in essence asks that we change the bargainable status of an otherwise mandatory proposal simply because of the negative impact the subcontracting provision could have upon unit employes. The Association asks that we insulate it from the potential consequences to job security which seeking certain levels of compensation may produce. The Association, at bottom, asks that we turn the give-and-take of the collective

bargaining process into a no lose proposition for employes. We decline that invitation because it is not supported by any relevant precedent or by the basic premises of collective bargaining.

Perhaps the most salient proposition which the Association's argument fails to acknowledge is that the right to collectively bargain is the right of both municipal employers and employes' collective bargaining representative to seek a settlement, at least on mandatory subjects, which best serves their respective interests. Obviously, to the extent that one party or the other is successful, such a result may prove undesirable to the opposite party. However, success or potential success in pursuing an otherwise mandatory proposal is not a basis for determining that the proposal is no longer mandatory. For instance, a wage proposal does not become nonmandatory simply because it would be onerous upon the employer if placed in the contract. Indeed, we have noted that wage proposals which, if placed in a contract, might result in level of service reductions are not rendered nonmandatory because of this consequence. See Racine Schools, Dec. Nos. 20652-A, 20653-A, supra. School District of Janesville, Dec. No. 21466 (WERC, 3/84). Furthermore, nowhere in its Racine decision does the Wisconsin Supreme Court conclude or suggest that bargaining over economically motivated subcontracting is to be the one way street the Association contends herein it should be. The Court was not under any illusions and did not offer any guarantees that the result of the bargain would be painless for employes.

It is also noteworthy that the collective bargaining process does not compel a party to voluntarily agree to a proposal which it deems undesirable, although the parties must comply with a lawfully issued interest arbitration award. 2/ The Association has the opportunity and the right to resist continued inclusion of the subcontracting provision in the next agreement between the parties through the statutory processes including, if necessary, binding interest arbitration. Lastly, it is clear that the collective bargaining process has the potential to produce a compromise by which parties reach a satisfactory resolution of competing interests. The process contemplates and approves of the possibility that wage concessions may be exchanged for job security thereby eliminating the need for economically motivated subcontracting. Although the private sector "essential enterprise" test has been found inappropriate to public sector scope of bargaining determinations in Wisconsin, e.g., Racine Schools, supra, at 100-101, 103, the following description by the U.S. Supreme Court in Fiberboard, supra, provides an example of the potential nature and role of collective bargaining in relation to subcontracting decisions:

> The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters perculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the

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2/ Sec. 111.70(1)(a), Stats., specifies:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided in s. 40.81 (3), with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. (emphasis added)
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> See also Secs. 111.70(3)(a)7 and (3)(b)6 Stats., requiring award compliance.

. . .

conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discusions with this particular Local." Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. While "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position," Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 404, 30 LRRM 2147, it at least demands that the issue be submitted to the mediations. As the Court of Appeals pointed out, "it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly." (at 213-214)

Given the foregoing, we do not find the County's subcontracting proposal to be a prohibited or permissive subject of bargaining because it does not violate law or public policy or require the relinquishment of a MERA right. As discussed earlier herein, the proposal is primarily related to wages, hours and conditions of employment and thus is a mandatory subject of bargaining.

We reject the County's request for attorneys fees. While we have found the contentions advanced by the Association to be without merit, we do not find that they exceeded the bounds outlined in Chairman Torosian's concurring opinion 3/ in Madison Schools, Dec. No. 16471-D (WERC, 5/81), aff'd in pertinent part, MTI v. WERC, supra. Accordingly, we do not find it appropriate to order attorneys fees in the instant circumstances.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

3/ See Footnote 3 on page 9.

3/ That opinion read:

> While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, (Dec. No. 12053-A, B (WERC, 12/73)) the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intentions ". . . to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."
>
> In my opinion limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process.