STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 560, AFSCME, AFL-CIO, Complainant, vs. AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT ONE, EAU CLAIRE, Respondent.	Case 156 No. 37305 MP-1869 Decision No. 23944-B

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Local Union No. 560, AFSCME, AFL-CIO.

Mr. James M. Ward, Riley, Ward & Kaiser, S.C., Attorneys at Law, 306 Barstow Court, P. O. Box 358, Eau Claire, Wisconsin 54702-0358, appearing on behalf of Area Vocational, Technical and Adult Education District One, Eau Claire.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union No. 560, AFSCME, AFL-CIO, filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on July 18, 1986, in which it alleged that Area Vocational, Technical and Adult Education District One, Eau Claire, had committed prohibited practices within the meaning of the Municipal Employment Relations Act. The Area Vocational, Technical and Adult Education District One, Eau Claire, on July 30, 1986, filed a motion to make the complaint more definite and certain. Local Union No. 560, AFSCME, AFL-CIO responded to the motion in a letter filed with the Commission on August 6, 1986. The parties jointly agreed that the matter be held in abeyance pending an informal inquiry by Robert M. McCormick, the Commission's Assistant Coordinator of Mediations, to narrow or to resolve the dispute. After this informal inquiry, the Commission, on September 11, 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. The Examiner issued an Order Denying Motion To Make Prohibited Practice Complaint More Definite And Certain on September 30, 1986. Hearing on the merits of the complaint was conducted in Eau Claire, Wisconsin, on October 23, 1986. A transcript of that hearing was provided to the Examiner on November 5, 1986. The parties filed briefs and reply briefs by December 15, 1986.

FINDINGS OF FACT

1. Local Union No. 560, AFSCME, AFL-CIO, (the Union) is a labor organization, whose chief spokesperson was, at all times relevant to this complaint, Christel Jorgensen, 3226 Glenhaven Place, Eau Claire, Wisconsin 54703. The Union's principal place of business is 5 Odana Court, Madison, Wisconsin 53719.

2. Eau Claire Area Vocational, Technical and Adult Education District One, Eau Claire, (the Board) is a municipal employer which has its offices located at 620 West Clairemont Avenue, Eau Claire, Wisconsin 54701.

3. The Union and the Board are parties to a collective bargaining agreement in effect from July 1, 1985 through June 30, 1986. That agreement was the first between the parties and contained, among its provisions, the following:

ARTICLE I - RECOGNITION AND IMPLEMENTATION

A. The Board hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and

regular part-time cafeteria employees, excluding all supervisory and confidential employees, and all student employees and call-in substitutes, for the purpose of bargaining collectively on questions of wages, hours and condition (sic) of employment.

. . .

ARTICLE II - MANAGEMENT RIGHTS

Except to the extent explicitly abridged by specific provisions of this Agreement, the Board reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs (as such rights existed prior to the execution of this Agreement). The sole and exclusive rights of Management which are not abridged by this Agreement shall include but are not limited to: . . . determine the services and level of services to be offered by the Board free of liabilities of this Agreement; . . . the right to determine and from time to time redetermine the types of operations, methods and processes to be employed; to discontinue processes or operations or to discontinue their performance by employees of the Board . . . The Board agrees that none of the foregoing rights shall be exercised in such a manner as to violate any of the terms of this Agreement.

ARTICLE XVII - DURATION

A. This Agreement shall be binding and in full force from the date hereof through June 30, 1986.

B. The terms of this contract shall continue thereafter in full force and effect from year to year, unless written notice is given either party to the other on or by January 1 of each year thereafter requesting that the Agreement be amended or cancelled.

The Agreement does not contain any provision which explicitly uses the term "subcontract" and limits or grants Board authority specifically referenced to the term "subcontract."

4. In October of 1985 the Board started making projections regarding its cost of operation for the fiscal year beginning July 1, 1986. The preliminary projections generated by the Board indicated the Board faced up to a $500,000 revenue shortfall for that fiscal year due to the Board's having reached the statutory mill limitation on the tax it could levy. As part of the process by which the Board created a budget for that fiscal year, each department of the Board's total operation was required to generate an operational plan specifying what functions the department would perform in the fiscal year, and what the department would require to perform those functions. The cafeteria operation was included in the operational planning process.

5. In a letter to "VTAE-District One" dated December 10, 1985, Jorgensen stated:

Pursuant to Article XVII of our present labor agreement you are hereby notified, that the above mentioned unit requests to amend the current labor agreement. We will notify you when we are ready to commence negotiations.

6. The organizational plans required of the Board's individual departments were submitted by late January of 1986. Those separate plans were reviewed by the Board's Administrative Council, whose function was to compile the separate operational plans into one composite District-wide operational plan and submit that composite plan to the Board and to the Board's budget planners for the

development of a District budget. Among the six members of the Administrative Council was Arnold Rongstad, who is the Board's Assistant Director for Administrative Services. Included in Rongstad's duties at the time was the overall supervision of the Board's food service operation. Sometime in early February of 1986, the Administrative Council met to review the departmental operational plans. The Council determined that the Board could not fund the various requests of its departments. Rongstad, at that time, asserted that the Board could save money by subcontracting or eliminating its food service operation. The Board's District Director, who is also a member of the Administrative Council, directed Rongstad to determine the amount of any possible savings. Rongstad initiated his research by contacting a representative of Professional Food Service Management, Inc., (PFM) which is a private corporation. PFM at that time, managed the food service operation serving the University of Wisconsin - Eau Claire.

7. In a letter to Rongstad dated February 14, 1986, Jorgensen stated:

> Please be advised, that the above mentioned bargaining unit is ready to commence negotiations. Please call my office to set up a meeting date.

8. The Board's budget preparation process continued throughout February and March of 1986. A representative of PFM contacted Rongstad sometime during this period to request more detailed information regarding the Board's food service operation. Rongstad sought to obtain the requested information by issuing a memo to Linda Stauss dated March 3, 1986, which states:

> I have requested Professional Food Service Management, Inc., to provide me with a proposal to replace the in-house food service. For them to prepare a proposal, it is necessary to provide some sales information for them. More specifically, they would like the sales volume by area, staff line, dinner line, snack line, deli, etc. Further, it would be desirable if we can tell them the product mix, such as the number of servings of soft drinks, coffee, doughnuts, etc. Is it possible to get this information from the cashier register totals? I believe the new cash registers do tabulate in some manner; however, I don't know in what detail it is recorded. If we can't provide the information, PFSM will come in and do a study of the respective areas.
>
> Please get back to me as soon as possible regarding the kind of data we can provide.

Rongstad sent a copy of this memo to Jorgensen. The state of the Board's then on-going budget preparation process was summarized in a draft of a composite operational plan dated March 3, 1986, which states in relevant part:

PROGRAMS CONTINUING TO BE INTERRUPTED

Health Unit Clerk
Metal Fabrication
Practical Nursing
Welding (1 section)
Wood Technics (1 section)

PROGRAMS/SERVICES BEING CONSIDERED FOR REDUCTION/DISCONTINUANCE/INTERRUPTION*

Program/Service	Level	Estimated Net Staff Impact**
Accounting (1 section)	Associate Degree	- 1.0
Agribusiness Service/Supplies (1 section)	Associate Degree	- .5
Agriculture Coordinator	N/A	- .5
Agricultural Mechanics	Vocational (2 yr)	- 1.0

(Continued on Page 4)

Data Processing Programming (1 section)	Associate Degree	- 1.0
Dairy Farm Operations (1 section)	Vocational (1 yr)	- .5
Farm Hand	Vocational (-1 yr)	- .5
Farm Training	Vocational (1 yr)	- .3
Histotechnology (January section)	Associate Degree	- .5
Marketing (1 section)	Associate Degree	- 1.0
Media Assistant	Vocational (1 yr)	- 1.0
Avocational Classes (discontinue or fund with full fees)		N/A
Cafeteria (contract for operation)		N/A

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*Based on appeal, retention, placement, 1986-87 enrollment, and natural faculty attrition.

**Does not include impact on related course instructors.

9. Jorgensen was aware of rumors regarding the possible subcontracting of the food service operation before she received Rongstad's March 3 memo to Stauss. Jorgensen formally responded to that memo in a letter to Rongstad dated March 7, 1986, which states:

> Re: Subcontracting of Cafeteria Work
>
> . . .
>
> I am in receipt of a copy of your memo to Linda Stauss, dated March 3, 1986, in regard to the above mentioned matter.
>
> Please be advised, that Wisconsin law is very clear that, both the decision to subcontract and any subsequent impact thereof, are both separate mandatory subjects of bargaining.
>
> Please keep me advised as to the Employer's position.

In a separate letter to Rongstad dated March 7, 1986, Jorgensen stated the following:

> Since you have not responded to my February 14, 1986 letter, notifying you that the above mentioned bargaining unit is ready to commence negotiations, I have enclosed a copy of the contract proposal. Please contact me as soon as possible for the purpose of setting up meeting dates.

Attached to that letter were the following contract proposals:

> Article IV - Seniority
>
> Seniority to be based on date of hire.
>
> Article V - Transfer Procedures and Job Posting
>
> G. All temporary assignments shall be voluntary
>
> Article IX - Hours of Work
>
> C. All cafeteria related work outside of regular scheduled hours and classifications shall be offered to bargaining unit employees according to seniority. Such work.....
>
> Exclude the baker and cook classification from the overtime proviso.

Add: Employees that are called in outside their regular scheduled hours shall be guaranteed a minimum of three hours work.

Article X - Vacations

Employees that work throughout the calendar year shall be allowed to schedule vacations.

Article XIII - Wages

B. .....in said classification the rate of pay at the step the employee is presently in.

C. If an employee is required to perform work in a lower rated classification for the convenience of the Employer, he/she shall not be paid at the lower rate of pay.

A 4% wage increase on 7/1/86 and on 1/1/87

Add the following language:

No work presently performed by bargaining unit employees shall be performed by non-bargaining unit employees.

In addition to the above proposals the Union reserves the right to add proposals during the course of negotiations, as well as change or amend any of the above proposals.

10. During March and April of 1986, the Board submitted certain information to PFM regarding its food service operation, and ultimately permitted representatives of PFM to directly observe the food service operation. During this time period Rongstad initiated contact with other food service management companies. On or about April 11, 1986, PFM submitted a written proposal to Rongstad by which PFM guaranteed the Board $10,000 if the Board allowed PFM to operate the cafeteria. Rongstad reviewed the proposal with the Board and the District Director. The Board determined to initiate a formal bidding procedure.

11. On April 21, 1986, the Board and the Union held a negotiations session. The Union submitted the proposals to the Board's negotiators that it had submitted in the March 7, 1986, letter to Rongstad. The Board submitted to the Union the following proposal:

> The District Board proposes to continue the current contract for the period of July 1, 1986 through June 30, 1987.

The parties jointly reviewed the exchanged proposals, but did not enter into actual bargaining regarding them.

12. In a letter to Jorgensen dated April 25, 1986, Stevens L. Riley, the Board's legal counsel, stated:

> This is to inform you that the District One Board is considering contracting out its food service operations, which would affect many of the employees in the cafeteria bargaining unit which you represent.
>
> The District is cognizant of its obligation to bargain over this decision, and we are prepared to meet with you at your convenience regarding it.
>
> While the decision has not yet been made, time is of the essence and we would appreciate meeting at your earliest convenience.

13. The first negotiation session following the April 21, 1986, session occurred on May 1, 1986. At that session, the parties discussed the issue of subcontracting. The Board informed the Union that the subcontracting of the food service operation appeared to be a viable option, and that the Board was in the

process of preparing bid specificiations for such a contract. The Board also stated to the Union the financial reasons supporting its view regarding the viability of the subcontract option. The Board stated to the Union that the food service operation had lost about $30,000 in direct costs in the two fiscal years preceding the fiscal year starting on July 1, 1985. The Board also stated to the Union that beyond such direct costs, the food service demanded certain incidental expenditures for services incidental to the provision of the food service which the Board predicted would total about $30,000 to maintain the operation. During this session, the Board communicated only general figures, and did not supply any supportive data. Jorgensen demanded supportive data from the Board and also demanded a copy of the Board's formal solicitation for bids. The bargaining session of May 1, 1986, lasted not more than three hours.

14. The Board prepared a formal solicitation for bids for the operation of its food service operation and sent that solicitation to various food service management companies, including PFM, on May 12, 1986. The Board also submitted a copy of the formal bid solicitation to Jorgensen, who received it on May 14, 1986.

15. The first bargaining session following that of May 1, 1986, occurred on May 28, 1986. The Union's chief spokesperson was Jorgensen and the Board's was James Ward. The parties' negotiations covered the effect of a decision to subcontract on the custodial bargaining unit and on the cafeteria bargaining unit. The negotiations also addressed the bid specifications and the companies to which those specifications had been mailed. The Board submitted to the Union certain financial data from its audit regarding the past and present operation of the cafeteria. That data indicated the Board had experienced a net loss of $28,126 in the fiscal year ending June 30, 1984, and a net loss of $12,993 in the fiscal year ending June 30, 1985. The Board also submitted to the Union financial data based on a ten months actual and two months projected revenue expense statement for the fiscal year ending June 30, 1986. That data indicated the Board anticipated the cafeteria would show a profit of between $6,000 and $8,000 for that fiscal year. The Board also supplied the Union certain data supporting the Board's estimate that the indirect costs attributable to the Board's operation of the cafeteria were about $32,000. The Union did not at that meeting or any time subsequent to that meeting challenge the accuracy of the financial data submitted by the Board. The Board's negotiators stated to the Union that the Board had not yet made a decision regarding the subcontracting of the cafeteria, but that the Board would meet on June 12, 1986, to make such a decision. Jorgensen asked the Board to address the Union's entire proposal and not just the subcontracting decision. Ward responded that the issue of the subcontracting decision should be addressed first since a decision to subcontract would eliminate the bargaining unit and make the Union's total package proposal a moot point. He further indicated to the Union that the bids would be opened May 30, 1986, and that the Board's decision to enter a subcontract for the operation of the cafeteria would be a purely economic decision which would not be implemented unless the best bid afforded the Board an economic incentive to do so. Ward stated to the Union that the Board would consider any Union proposal which would offer the Board the economic advantage it was seeking in considering the subcontract. Jorgensen understood Ward's statement to indicate a Board desire and willingness to consider retention of the food service operation if the Union would reduce its level of wages and benefits. Jorgensen also indicated to the Board that the Union believed the Board had an obligation to bargain the entire package. Ward acknowledged the Board had a duty to bargain, but stated the most effective means to bargain would be to focus on the issue of subcontracting. The session conducted on May 28, 1986, lasted no more than three hours.

16. Jorgensen filed with the Commission a "PETITION FOR MEDIATION-ARBITRATION" dated May 28, 1986, covering the bargaining unit of employes then employed at the Board's cafeteria.

17. On May 30, 1986, the Board opened the bid proposals for the operation of the cafeteria. Only two of the companies which had received solicitations submitted a proposal. Rongstad reviewed and evaluated the two proposals in a memo to the Board's District Director, dated June 2, 1986, which reads as follows:

> The bid submittal form used for the food service proposals requested a percent of total net sales and a dollar minimum the bidder would guarantee the District if they were selected as the food service contractor. One of the bidders complied with the bid form, while the second submitted a modification.

> Professional Food Service Management's (PFM) proposal guaranteed the District $30,000 or 8.16 percent of manual food sales, whichever is greater, for their right to operate the manual food service at District One Technical Institute. C. L. Swanson Corporation's proposal required that the District guarantee them $150 per week or 5 percent of net sales, whichever was greater, as a management fee plus any other costs of business which exceed their receipts. They, in turn, would pay District One 50 percent of any amount by which receipts exceeded the cost of business and their management fee.
>
> To analyze the two proposals, a net sales of $400,000 was assumed. PFM's proposal would equate to $32,640 being paid to District One. The Swanson proposal would require District One to pay them $20,000 for management service and, further, would require them to have a cost of sales no higher than 70 percent of net sales to ensure a $30,000 return for District One. It is the staff's opinion that this is highly unlikely.
>
> As can be seen, PFM's proposal is a guarantee, while Swanson's is a gamble. Additionally, the Swanson proposal would require elimination of the staff line as a point of service. Based on the staff evaluation of the proposals as of this date, it is the recommendation to further pursue only the PFM bid.

Rongstad interpreted PFM's proposal to amount to a simple guarantee to the Board of $45,000 for the operation of the food service facility. Rongstand also interpreted PFM's proposal to eliminate the Board's indirect costs of operating the food service facility. After reviewing the PFM proposal, Rongstad initiated a background check into PFM's reputation as a food service operator. As part of that check, Board staff contacted two privately operated colleges and one publically operated university, each of which used PFM as the manager of a food service operation. Representatives of all three institutions recommended PFM. When Rongstad determined he would recommend acceptance of the PFM proposal to the Board, he called Jorgensen and so informed her. This call was made sometime after May 30, 1986, but before June 5, 1986.

18. On June 5, 1986, the parties conducted a formal bargaining session. That session was the first since the session of May 28, 1986, and was to be the last formal session concerning the Board's decision to subcontract the food service operation. The June 5, 1986, session lasted from one to one and one-half hours. Ward summarized the events of that session in a letter to Jorgensen dated June 5, 1986, which reads as follows:

> Because of the threat of litigation communicated during our bargaining session this morning, I feel compelled to memorialize in writing the current status of negotiations over the pending decision over the contracting out of the food service operations at District One.
>
> At the outset of negotiations over the decision to contract out the food service operation, we emphasized that we viewed the decision as primarily a matter of economics. In particular, we informed you that the Administration would recommend to the Board that the food service operation be contracted out if we were satisfied that substantial cost savings would be realized in doing so. Conversely, if substantial cost savings were not likely to result, our recommendation would be to continue the performance of the food service operation by District One employees.
>
> You were previously provided copies of financial statements and other financial data relating to the revenues and expenses generated by the food service operation in recent years. Although projections for the remainder of the 1986 fiscal year point to a slight profit for the first time in several years, this projection does not take into account external costs of approximately $30,000.00 per year. When these external costs

are taken into account, the net loss to District One for the 1986 fiscal year will be approximately $25,000.00 to $30,000.00.

Pursuant to the bid proposal from Professional Food-Service Management, Inc. (PFM), District One will incur no further costs in connection with the food service operation, but will instead be guaranteed payments of at least $45,000.00 for the 1987 fiscal year, even without taking into account anticipated commissions on catering sales. When the conservative estimate of $45,000.00 in annual receipts from PFM is compared to the current operating losses of $25,000.00 to $30,000.00 per year, it can readily be seen that the proposed PFM arrangement could produce a net profit of at least $75,000.00 per year vis a vis the present food service operation. To date, you have not challenged our financial analysis.

An obvious means of lessening the $75,000.00 net profit differential would be to substantially reduce District One's labor costs. However, during this morning's bargaining session, you stated in no uncertain terms that you were unwilling to consider any concessions in current wages and fringe benefits. Absent major concessions along these lines, it is obvious that any cost savings would have to be achieved through other means.

As an alternative to wage and benefit concessions, you suggested that we consider hiring a more highly qualified manager, who would, in turn, maintain a more efficient and less costly operation. In response to this suggestion, we pointed out that the last few managers we have hired have not been able to operate in a profitable manner. Moreover, we indicated that unlike an enterprise such as PFM, we have no other administrative team members with the necessary food service expertise to effectively supervise and evaluate the food service manager's performance, nor to provide any technical backup or support that might be necessary from time to time. Finally, we believe it is simply unrealistic to presume that we could hire a manager who could reduce costs and/or increase revenues to a point where the $75,000.00 differential would be erased. For those reasons, we were forced to reject your suggestion.

You also expressed disagreement over our apparent focus on profitability. You view the food service operation as essentially a service to students and instructors, and feel that our sole concern should be to avoid operating at a loss. We take the position that given the nature of the PFM proposal, the revenues we will derive are merely analogous to lease payments based upon the reasonable rental value of the premises. While a profit component is undoubtedly present, the PFM payments do not represent pure profit in the usual sense. In any event, as a matter of public policy, we frankly believe that if we are able to do so without sacrificing the quality of the service, we have an obligation to maximize the revenues we receive from the food service operation.

In short, the Union is unwilling to consider wage or benefit concessions as a means of eliminating the $75,000.00 differential between the food service operated by District One and the proposed operation by PFM. For its part, District One has rejected both your suggestion that we attempt to eliminate the differential through better management of the food service operation, as well as the suggestion that we should be satisfied to simply operate at the break-even point. Therefore, it is apparent to us at this juncture that the parties are at impasse in their negotiations over the decision to contract out the food service operation.

> As you know, the Board intends to take up the matter of contracting out the food service operation at its June 12, 1986 meeting. You are certainly entitled to present to the Board your arguments in favor of maintaining the current food service operation in lieu of contracting out. However, as we indicated this morning, we are prepared to recommend to the Board that the food service operation be contracted out to PFM in accordance with the bid proposal it submitted.
>
> We trust this letter accurately sets forth the present status of negotiations over the contracting out of the food service operation. If you feel that this letter contains any material errors or omissions with respect to the pertinent facts, kindly notify me at once. Hopefully, any misunderstandings can be clarified prior to the upcoming meeting of the Board.
>
> As always, if you have any questions, please do not hesitate to contacat (sic) me.

Jorgensen did not respond to this letter.

19. In a memo to "All Cafeteria Employees" dated June 5, 1986, Jorgensen stated the following:

> On June 12, 1986, the Board will make the decision on sub-contracting the cafeteria operation to a private contractor. If the decision is in favor of subcontracting, this could have a direct impact on your wages and benefits. I think, the time has come to get involved and to start contacting your Board members, encouraging them to retain the cafeteria as an in-house operation. I will write a letter to all Board members urging them to do so and I urge you to either call or write - I am enclosing a list of all board members with their addresses and telephone numbers.
>
> After talking to many of you, and to management, it is my opinion, that the cafeteria can be an efficient and, at least, break even operation if it is managed properly and if waste is eliminated. Profit should not be the goal of the operation since it is a service offered to the citizens and tax payers of District One.
>
> We will need to become involved at this point, and I hope, that you will take the time to call or write to your Board members and alos (sic) attend the meeting on Thursday, June 12, 1986 at 7:30 P.M. I will be there, but your support is needed. If you have any questions or need advice prior to contacting board members, please feel free to call me at 835-7124.

In a memo to "Area Board, VTAE-District One" dated June 5, 1986, Jorgensen stated the following:

> On June 12, 1986, you will be voting on whether or not to sub-contract the cafeteria operations to a private contractor. I would like to take this opportunity to urge you to vote to keep the cafeteria as an in-house operation and to make an effort to establish a well run and efficient operation. The employees and I believe, that this can be done with proper management and the elimination of waste.
>
> That waste exists, seems to be an undisputed fact and I would like to quote you just a few examples:
>
> Just recently the bakery cooler was cleaned out due to a break down and a large number of items had to be discarded because they were moldy or unusable. Here are just a few: Approx. 10 #10 (6pounds (sic) each) cans of pie filling; 10 pounds of frosting; 1 1/2 gallons of whipped topping, honey butter; 1/2

> case of apple turnovers; 10 pounds of pie dough and bread dough. Just recently approx. eight pie tins of spinache quiche had to be discarded and approximately 25 pounds of tenderloin at $3.39 @ pound were cut up to make seventee (sic) steak sandwiches - the left overs were used for food class but charged to the cafeteria budget. Broccoli spears are being used for making soup instead of broccoli cuts.
>
> I cannot attach a dollar figure to these items, but I can certainly question the waste and wonder if this is only the tip of the iceberg? As Board members you have a responsibility to question this together with the subcontracting question. The cafeteria has been an in-house operation for a long time and we believe, that with proper management it can continue to remain a successful and possibly profitable operation.

In a letter to the Board's District Director dated June 5, 1986, Rongstad stated the following:

> Invitations were sent to seven food service management companies with operations in Wisconsin and/or Minnesota to submit proposals to provide food service management service at District One Technical Institute. Of the seven companies contacted, three visited the campus to review the current food service operation. Of the three, two (C. L. Swanson, Inc., Madison, and Professional Food Management, Inc., Eau Claire) submitted proposals. Based on evaluation of the proposals and follow-up telephone conversations with current school clients, I would like to recommend that District One enter into a contract with Professional Food Service Management, Inc. Their proposal is to pay 8.16 percent of the total net sales (gross less sales tax) or $30,000 per year, whichever is greater, for the manual food service operation and 10 percent commission on all catering sales. In addition, they would return to District One a minimum commission of $15,000 per year if they are granted management of the vending within the District.
>
> I believe this is a highly favorable proposal for the District by a company with an outstanding reputation in the school food service management business.
>
> PFM also is recommending renovation in the cafeteria area to increase cash sales, and they would finance the up-front cost of $25,000 with their payback to come over the five-year contract.
>
> If you have questions regarding this recommendation, I would be happy to provide additional information.

In a memo to "Cafeteria Staff" dated June 9, 1986, Rongstad stated, among other things, that the Board had "been considering contracting for food service to replace its own food business operation;" that Rongstad would "be recommending that the District contract for its food service operation as of July 1, 1986;" and that PFM had "indicated that it would employ all staff currently working in the cafeteria."

20. The Board conducted a meeting on June 12, 1986, during the course of which the PFM proposal was debated. The District Director spoke in favor of PFM's proposal and communicated Rongstad's recommendation. Jorgensen stated the Union's opposition by stating, among other things, that the Union felt efficient management could create a break-even food service program. The Board voted to accept the PFM proposal and to authorize the execution of an agreement between the Board and PFM for the operation of the Board's food service operation. Such an agreement was executed by representatives of the Board and of PFM on June 12, 1986, following the completion of the Board meeting. The agreement executed by the Board and PFM took effect, by its terms, on June 30, 1986.

21. In a letter to Jorgensen dated June 13, 1986, Ward stated the following:

> In accordance with the Board's decision to accept the proposal of PFM to operate the food service at District One, we have sent written notice to all affected employees that they will be laid off from their employment at District One, effective at the close of business on Friday, June 27, 1986.
>
> Notwithstanding the Board's decision to accept the proposal of PFM and discontinue its own food service operation, we recognize our obligation to bargain the impact of that decision. Accordingly, we are willing to meet at your convenience to engage in further negotiation in regard to the impact of the decision.
>
> In view of the foregoing, I must question the viability of the pending mediation-arbitration petition. While you undoubtedly retain the right to bargain the impact of the decision to contract with PFM for the operation of the food service, I am uncertain as to the extent to which the WERC will entertain a petition for the mediation-arbitration filed by a labor organization representing a bargaining unit with no members actively engaged in employment in the public sector. It may be arguable that the impact of this decision is subject to resolution via mediation-arbitration procedures. However, I doubt that the same is true with respect to bargaining proposals not directly related to that impact.
>
> Kindly let us know your position with respect to the current status of negotiations. In the meantime, if you have any questions, please do not hesitate to contact me.

The Union has consistently asserted its petition for mediation-arbitration for a successor agreement to that noted in Finding of Fact 3 is viable.

22. The Union filed the complaint of prohibited practice which is the subject of this decision on July 18, 1986. The Board responded in an answer filed with the Commission on October 9, 1986. Paragraph 3 of that answer states the following:

> . . . the Respondent admits that at the time it entered into the contract with PFM as more particularly described above, it was engaged in negotiations with the Complainant over a successor to the existing collective bargaining agreement between the parties which was to expire on June 30, 1986, but affirmatively alleges that the decision to contract, with PFM, as well as the actual execution of said contract all occurred during the term of the then-unexpired collective bargaining agreement and that such actions were not in violation of any provision of said collective bargaining agreement; the Respondent further affirmatively alleges that it bargained in good faith with the Complainant over the decision to subcontract its food service operation, and did not implement its decision to contract with PFM until an impasse had been reached in such negotiations.

23. The Union never agreed to the Board proposal noted in Finding of Fact 11. The Board never agreed to any of the Union proposals noted in Finding of Fact 9. The parties' negotiations regarding the Board's decision to contract for the operation of its food service operation were at impasse on and throughout June 5, 1986, and remained at impasse up to and including June 12, 1986. The Union and the Board bargained in good faith regarding the Board's decision to contract for the operation of its food service. The Board's contract with PFM does not violate the terms of the collective bargaining agreement which is noted in Finding of Fact 3.

CONCLUSIONS OF LAW

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

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

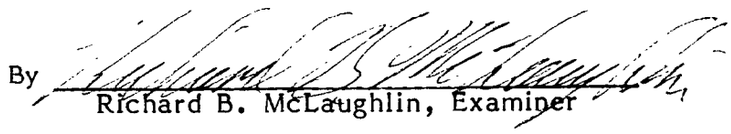
3. The Board's decision to contract the operation of its food service operation is a mandatory subject of bargaining over which the Board had a duty to collectively bargain, as defined in Sec. 111.70(1)(a), Stats., with the Union. The Board's decision to contract the food service operation was initially considered and ultimately executed within the term of the collective bargaining agreement noted in Finding of Fact 3. The Board's contract with PFM did not violate the provisions of that collective bargaining agreement, and was not executed until after the Union and the Board had reached an impasse in bargaining the decision. The Board executed the contract with PFM at a time when the Board's impasse with the Union regarding the bargaining of the decision continued to exist. The Board did not, therefore, execute the contract with PFM until it had fully met its duty to collectively bargain with the Union, and the execution of the contract between the Board and PFM did not violate Secs. 111.70(3)(a)4 or 1, Stats.

ORDER 1/

The complaint filed by the Union on July 18, 1986, is dismissed.

Dated at Madison, Wisconsin, this 6th day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

1/ 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

The Union, in its initial brief, states the issues for decision thus:

> Did the Employer by its (in)actions in "contracting-out" its Food Service Operation violate the Municipal Employment Relations Act (MERA); especially Sections 111.70(3)(a)1 and 111.70(3)(a)4 Wis. Stats. (1983-84)? and
>
> If so, what remedy is appropriate?

The Union states its position on these issues thus: "The Act was violated by the Board Employer. In short the Board did not bargain to impasse and did not exhaust impasse resolution procedures before implementing its last offer." The Union, in support of its positions, initially argues that Unified School District No. 1 of Racine County v. WERC, 2/ governs the present matter and establishes "that the "decision" to "contract-out" (is) mandatorily bargainable under MERA if based primarily upon economic considerations such as those at bar." According to the Union, the Board did not bargain the decision to subcontract in the present matter. The Union further argues that the Commission in City of Brookfield 3/ "specifically rejected an "impasse" defense to a Sec. 111.70(3)(a)4 Complaint." According to the Union, the Board "violated the Brookfield Doctrine by unilaterally implementing part of its last offer thereby destroying the status quo, violating MERA and making further attempts at collective bargaining a mockery."

While questioning in passing whether the transaction between PFM and the Board is more akin to a lease than a subcontract, the Board acknowledges that the law establishes that "an economically motivated subcontracting decision is a mandatory subject of bargaining" and asserts that its unilateral implementation of a decision to subcontract the food service is proper under existing law. Specifically, the Board notes that the subcontract with PFM was executed during the term of a collective bargaining agreement in effect from July 1, 1985, through June 30, 1986. Beyond this, the Board asserts that Article II of that collective bargaining agreement granted the Board "the right to subcontract the food service operation to PFM," and from this the Board concludes that "it had no legal obligation to bargain with the complainant prior to its implementation of the subcontracting decision." Beyond this, the Board asserts that the 1985-86 contract contains no express limit on its right to subcontract under Article II, and that the relevant bargaining history establishes that the Union dropped a language proposal to include a maintenance of standards provision in the 1985-86 labor agreement. These factors establish, according to the Board, that the Union did not limit the Board's rights under Article II during negotiations. In addition, the Board argues that the Union has not filed a grievance or any allegation of a Board violation of Sec. 111.70(3)(a)5, Stats., but has asserted a no-subcontracting clause for inclusion in a successor to the 1985-86 agreement, thus establishing the Union's tacit acknowledgement of the existence of the contractual right the Board asserts here. The Board concludes that all of these facts, viewed in light of established Commission case law, establish that the Union waived any right to bargain a subcontracting decision during the term of the 1985-86 labor agreement. In addition to the asserted waiver, the Board argues that: "Despite having no legal obligation to do so, the Respondent bargained in good faith with the Complainant over the decision to subcontract the food service operation to PFM, and implemented that decision only after an impasse had been reached in negotiations." After a review of the record, the Board concludes that the evidence of impasse is clear, but even if it was not, "given the Complainant's silence in the face of the Respondent's declaration of an impasse . . . Complainant should . . . be equitably estopped from now denying that an impasse existed." In addition, the Board argues that: "In analyzing the issue of a statutory refusal to bargain in this situation, it is necessary to distinguish between the bargaining surrounding the subcontracting decision and the bargaining over the provisions of

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2/ 81 Wis.2d 89 (1977).

3/ Dec. No. 19802-C (WERC, 11/84).

a successor agreement, and the pertinent inquiry is limited to the question of whether, standing alone, the Respondent has violated its statutory duty to bargain in regard to the subcontracting decision." Specifically, the Board argues the issue of bargaining regarding a successor agreement is not relevant to the present matter, but even if it was, the Board never refused to bargain regarding such an agreement, but simply suggested the subcontracting issue be given first priority. The Board finally argues that: "The pending mediation-arbitration petition has prospective application only, and by virtue of the fact that the subcontracting decision occurred during the term of the existing collective bargaining agreement and was aurhorized by the language of that agreement, it is immaterial that the Complainant has included among its bargaining demands for a successor agreement provision barring subcontracting when it would lead to the loss of bargaining unit work."

In reply to the Board's brief, the Union asserts there is "no way" a Union waiver of its right to bargain the subcontracting decision can be found on the present facts. Specifically, the Union notes the parties were bargaining that decision and questions "if there was no need to bargain, why were the parties bargaining?" (emphasis from text). The Union further argues the parties' bargaining regarding the subcontract decision establishes their mutual intent to resolve that issue at the table. Beyond this, the Union asserts: "Waiver is an affirmative defense and must be raised by the pleadings; it wasn't." In addition to addressing the waiver issue, the Union asserts that the Board did not specifically address Brookfield and that Brookfield establishes that "(t)he destruction of the status quo and the unilateral implementation of part of one's last offer is not permitted under current Wisconsin law."

In reply to the Union's brief, the Board contends that the Union's "reliance on Brookfield is misplaced." Initially, the Baord argues: "The Brookfield decision, especially when viewed in light of related decisions of the Commission, cannot be interpreted as holding that a municipal employer may not act in accordance with its rights under an existing collective bargaining agreement merely because a mediation-arbitration proceeding involving a successor collective bargaining agreement is pending." More specifically, the Board argues that: "In contrast to the unilateral action taken by the City of Brookfield, the Respondent's decision to subcontract with PFM did not alter the status quo, and the Brookfield decision is therefore inapplicable." According to the Board, in the present matter, unlike Brookfield, the employer action at issue was specifically authorized by the terms of an unexpired collective bargaining agreement. The Board contends that it follows from this that it has not altered the status quo and thus the Commission's rejection of the impasse defense in Brookfield "is inapplicable." Beyond this, the Board argues: "To the extent that it might otherwise be an open question, related decisions of the Commission have made it clear that Brookfield does not apply to disputes arising during the term of an existing collective bargaining agreement, and Brookfield therefore has no application to the Respondent's decision to subcontract with PFM during the term of the agreement." The Board contends that established Commission cases, including decisions arising after Brookfield, demonstrate that availability of an impasse defense in the presence of a petition for mediation-arbitration turns on whether the employer action at issue occurs during the term of a collective bargaining agreement. Present Commission case law establishes, according to the Board, that "mediation-arbitration is not (emphasis from text) available to resolve a bargaining dispute occurring during the term of a collective bargaining agreement." Even if this were not the case, the Board argues that its unilateral implementation of the subcontract is appropriate under Brookfield because it is specifically authorized under Article II of the labor agreement. The Board then contends that: "The Complainant's proffered expansion of the Brookfield holding to prevent the Respondent from exercising its right to subcontract under the existing collective bargaining agreement merely because of the pendency of mediation-arbitration proceedings would represent unsound policy from a labor relations standpoint and must be rejected." Specifically, the Board asserts "the extension of the Brookfield decision urged by the Complainant would permit the Complainant, through the expedient of filing a mediation-arbitration petition, to alter the status quo (emphasis from text) by preventing the Respondent from acting in accordance with its rights under the Agreement." Such a result, according to the Board would make "a collective bargaining agreement for a definite term . . . a sham and illusion." Specifically applied to the present facts, such a result would, according to the Board, work "a substantial hardship" on the Board by thwarting the Board's ability to timely respond to a pressing fiscal problem.

DISCUSSION

The complaint filed by the Union alleged Board violations of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats. At hearing on the complaint, the Union withdrew the allegations regarding Secs. 111.70(3)(a)2 and 3, Stats. The issues thus turn on whether the Board's execution of the contract between it and PFM for the management of the food service violated its statutory duty to bargain with the Union, which is enforced by Sec. 111.70(3)(a)4, Stats., and, derivatively, by Sec. 111.70(3)(a)1, Stats. The Union's allegations question whether the Board had a duty to bargain the subcontract decision and whether the Board met that duty.

The existence of an underlying duty to bargain the decision is not disputed. The Board has, however, questioned in passing whether the transaction between it and PFM can accurately be characterized as a subcontract. The Board does persuasively note that the transaction "does not fit comfortably into the classic mold." The term "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." 4/ The record establishes neither an underlying obligation to which the "subcontract" between the Board and PFM is subordinate or identifiable parties to such an obligation. In addition, payments under the agreement between PFM and the Board cannot be readily reconciled to a subcontract since such payments flow from PFM ("subcontractor") to the Board ("prime contractor"). Whether the transaction can more accurately be characterized as a subcontract or as some form of a lease is not, however, a critical point to the resolution of the issues presented in this matter. The parties' pleadings mutually refer to the transaction as a subcontract. More significantly, the characterization of the transaction is not a necessary factor in the application of the relevant legal standard which, the parties mutually acknowledge, is the court's decision in Unified School District No. 1 of Racine County v. WERC in which the court stated:

> 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. 5/

The court's primarily related standard is flexible and broadly stated to apply to "a particular decision." Presumably, the standard covers both leases and subcontracts. 6/ The Board has acknowledged its sole motivation in considering subcontracting was economic advantage. The record discloses no persuasive reason to believe any issue of the formulation or management of public policy was involved in the Board's decision making process. It follows that the decision to subcontract the food service is primarily related to the wages, hours and conditions of employment of the employes, and thus, that the decision, however characterized, is a mandatory subject of bargaining.

The dispositive point in the present matter is, then, whether the Board met its duty to bargain the decision to subcontract with the Union. Resolution of this point poses mixed questions of fact and law. The fundamental issue of law disputed by the Union is whether Commission case law recognizes "an impasse defense." The Union correctly observes that the Commission limited the availability of the defense of impasse in public sector labor disputes in City of Brookfield. Contrary to the Union's assertion, however, the Commission in Brookfield limited, but did not eliminate, the availability of the defense. The Commission, in Brookfield, stated:

> (T)he compulsory final and binding interest arbitration provisions of Sec. 111.70(4)(cm) make inappropriate an

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

5/ 81 Wis.2d 89, 102 (1977).

6/ See Manitowoc County (Park Lawn Home), Dec. No. 23591-A (McLaughlin, 2/86).

> application of the private sector impasse defense principles to disputes subject to mediation-arbitration . . . we interpret MERA to mean that where . . . there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. In other words, in negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining. 7/

The limitation ignored by the Union centers on the Commission's express limitation of its conclusion to "negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats." The nature of this limitation is rooted in Dane County Handicapped Children's Education Board, in which the Commission stated:

> . . . we conclude that the mediation-arbitration provisions contained in Sec. 111.70(4)(cm)6, Stats., are only applicable to deadlocks which occur in: (1) reopened negotiations under a binding collective bargaining agreement to amend or modify a specific portion of an existing collective bargaining agreement subject to a specific reopener provision; (2) negotiations with respect to the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term; or (3) negotiations for an initial collective bargaining agreement where no such agreement exists. Said provisions are therefore inapplicable to deadlocks which may arise in other negotiations which may occur during the term of a collective bargaining agreement. 8/

Brookfield thus implied a distinction between negotiations for a succeessor agreement and "other negotiations" arising during the term of a collective bargaining agreement. This distinction was made explicit in Green County, a companion case to Brookfield, in which the Commission stated:

> . . . we find nothing anomalous about an interpretation of the legislative scheme wherein an impasse defense is available as regards in-term unilateral changes in subjects not covered by the existing agreement but not available in post-expiration disputes. The critical difference is the non-availability of a statutory method for resolving such in-term disputes as compared with the availability of such a procedure for resolving negotiations disputes concerning new agreements and arising out of formal reopener provisions contained in existing agreements. 9/

Whatever doubt may have surrounded the availability of the defense of impasse regarding disputes arising during the term of a collective bargaining agreement and not subject to resolution by statutory interest arbitration, was resolved by the Commission's decision in City of Eau Claire. 10/ In that case the Commission remanded the matter to the Examiner who had "found a determination of impasse unnecessary on the theory that implementation without mutual agreement was permissible during the term of a collective bargaining agreement only where a defense of waiver, estoppel or necessity is proven." 11/ The Commission deemed

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7/ Dec. No. 19822-C at 8-9, citations omitted.

8/ Dec. No. 17400 (WERC, 11/79) at 12.

9/ Dec. No. 20308-B (WERC, 11/84) at 16.

10/ Dec. No. 22795-B (WERC, 3/86).

11/ Ibid., at 2.

the remand necessary because the Examiner had "misconstrued the City of Brookfield and Green County." 12/ The Commission remanded the matter because "a finding as to whether the parties were at an impasse in the private sector sense is both appropriate and necessary." 13/

In sum, the availability of the defense of impasse in the present matter is a primarily factual issue, and turns on whether the subcontracting decision constitutes a negotiations matter which arises during the term of a collective bargaining agreement and which is not subject to mediation-arbitration.

The impasse defense as pleaded by the Board consists of three elements. The first is the Board's unilateral action to subcontract the food service occurred during the effective term of the collective bargaining agreement. The second is that the unilateral action did not violate the collective bargaining agreement. The third is that the implementation of the subcontract decision did not occur until after an impasse had been reached in the negotiations over the decision to subcontract. These elements, if proven, state a valid defense under the Dane County, Brookfield, Green County, and Eau Claire line of cases.

The Board has proven the three elements of the impasse defense. Regarding the first, the subcontract was planned, researched, put out on bids and executed all during the term of the collective bargaining agreement between the Board and the Union. Similarly, there is little dispute about the application of the second element to the facts. There is no contract provision prohibiting or limiting the Board's right to subcontract. The only provision asserted by the parties is Article II. That provision is not a limitation on the Board's authority, and arguably specifically authorizes the Board's actions.

The asserted defense thus turns on the third element. The Commission, in Eau Claire, specifically incorporated the definition of impasse offered in Taft Boradcasting Co.,:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed. 14/

The application of this definition to the facts turns on the facts of each case, and both the Commission and the Board have refused to tie themselves to a complete list of the relevant factors. 15/ For the determination in this case, only the express factors from the Taft decision will be examined.

The first two Taft factors -- bargaining history and the good faith of the parties in negotiations -- are virtually inseparable. The Union has not seriously asserted that the Board has bargained in subjective bad faith, and no persuasive evidence of such bad faith bargaining exists. The Board submitted to the Union all of the financial and bid solicitation data the Union requested and did so promptly. The Union did not in bargaining, and does not now, challenge the accuracy of any of that data. The Board did not advise the Union of the initial policy setting discussions at which the possibility of a subcontract was first considered, but did through the March 3, 1986, memo, advise the Union of the possibility of a subcontract before the research into the potential savings of such an arrangement had acquired significant momentum. Riley's letter of April 25, 1986, advised the Union of the seriousness of the Board's intent, and did so in advance of the parties' first substantive bargaining session. The

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12/ Ibid., at 3.

13/ Ibid., at 4.

14/ Ibid., at 4, citing Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967).

15/ See Dec. No. 22745-B at 4, and 64 LRRM at 1388. See generally, Morris, The Developing Labor Law, (BNA, 1983) esp. Chapter 13.

Board's approach throughout the bargaining involved the candid disclosure to the Union of its economic motivation in researching the subcontract and its willingness to pursue Union proposals which could offer it the economic results a subcontract would. The Union did not in bargaining and does not now challenge the underlying revenue constraints that prompted the Board's research of a subcontract. There is, in addition, no dispute that the Board considered the limitation or elimination of a number of programs, as the Board's March 3, 1986, draft composite operational plan shows. On balance, then, the Board's good faith in bargaining has not been seriously challenged.

The Union's bargaining response to the Board was consistently two-fold. First, the Union sought to have the Board consider its total package proposal for a successor agreement. Second, the Union questioned the efficiency of the Board's management of the food service operation. On these points the parties' positions quickly hardened. The Union never moved from its initial proposals and never indicated to the Board its willingness to regard the subcontract decision as an economic competition in which the Union would participate with private contractors. The Board never altered its position that the food service would prove an expendable operation if a private contractor offered the Board an appropriate incentive. These admittedly hard positions on the part of each party are less indicative of bad faith bargaining than of the parties' mutual acknowledgement of an unbridgeable gap.

Against this background, the length of the negotiations and the significance of the issue in dispute offer a mixed picture. The parties conducted only three substantive bargaining sessions, none of which exceeded three hours in length. In Taft, the parties had conducted more than 23 bargaining sessions before the employer took unilateral action. Against this background, the number and the length of the sessions in the present matter tend to indicate that an impasse could not have been reached. This may, however, simply highlight the differences between private sector bargaining in the mid 60's and public sector bargaining in the mid 80's. More significantly, however, there is no persuasive evidence the Union demanded or the parties mutually desired any more bargaining. Nor is there persuasive evidence that further bargaining could have narrowed the gap between the parties. If anything, the record on this point underscores the parties' conflicting perspectives on whether the subcontract decision presented an issue for mid-term or successor negotiations. Such a consideration plays no role in the impasse definition adopted by the Commission since, as already noted, the subcontract was initially considered and ultimately executed during the effective term of a collective bargaining agreement.

The final relevant factor under Taft is not significantly in dispute. Ward's letter of June 5, 1986, summarized the parties' opposed stances. The Union did not respond to that letter. From this, it is apparent that the parties remained at the close of the June 5, 1986, session precisely where they were at the start of that session. Both were aware that the PFM bid offered the Board the potential of $45,000 in revenue and an additional savings in indirect costs of from $25,000 to $30,000. At no point in this, or any other session had the cost difference been narrowed at all. The Union continued to assert the same bargaining proposals it had advanced since the exchange of initial proposals, as well as its position that the Board should operate the food service more efficiently and should be content to operate the food service as a break-even operation. Ward's June 5, 1986, letter characterized the parties' positions as being at impasse and the Union did not dispute that characterization. The evidence establishes that characterization was an accurate statement of the parties' contemporaneous understanding at the close of the June 5, 1986, meeting. Jorgensen's June 5, 1986, letters to the Union and to the Board, together with her later presentation to the Board of June 12, 1986, indicate no flexibility from the Union's position of June 5, 1986.

The Taft factors, applied to the present facts, establish that the parties were at impasse in the bargaining on the Board's decision to subcontract at the close of the negotiations session of June 5, 1986. Nothing occurred between June 5, 1986, and the execution of the subcontract between PFM and the Board on June 12, 1986, to indicate the impasse did not continue to exist.

In sum, the Board's unilateral action in executing the subcontract with PFM occurred during the term of a collective bargaining agreement between the Board and the Union. The execution of the subcontract did not violate the terms of that

collective bargaining agreement. The Board bargained in good faith with the Union to the point of impasse on its decision to subcontract, and implemented that decision during a period of time in which the impasse continued to exist. It follows, under the Dane County, Brookfield, Green County and Eau Claire line of decisions that the Board has fully discharged its duty to bargain with the Union. There is, then, no Board violation, in the present matter, of Secs. 111.70(3)(a)4 and 1, Stats.

To complete the record for purposes of Commission review, if any, it is necessary to address certain additional arguments raised by the parties. The Union asserted in bargaining and through its filing of a mediation-arbitration petition that the Board, under Secs. 111.70(3)(a)4 and 1, Stats., can be compelled to bargain the terms of a successor agreement to that noted in Finding of Fact 3. The argument is, then, that the presence of proposals for a successor agreement while the Board considered the subcontract decision, precludes any in-term unilateral action by the Board.

This argument cannot be considered persuasive. Doing so would effectively overturn Dane County, Brookfield, Green County and Eau Claire. The present state of the law on the point, including the cited cases, does grant an employer greater freedom to unilaterally act in-term than post-term. The Union's argument assumes improper behavior in manipulating in-term negotiations to an impasse to permit unilateral action. The argument is not persuasive on the present facts or as a matter of law. Regarding the facts, there is no persuasive evidence that the Board bargained in bad faith in the present matter. The Board did not manufacture the revenue shortfall and has not been proven to have manipulated the shortfall or the resulting negotiations to destroy the Union. As a matter of law, the cited cases establish the availability of the impasse defense in-term. Beyond this, the improper employer actions the Union's argument assumes cannot be checked by considering the presence of successor proposals, standing alone, to convert an in-term dispute to a post-term dispute without creating further difficulty in the law. In the present matter, for example, Article XVII, Section B of the agreement between the Board and the Union requires "written notice" of an intent to reopen the contract "on or by January 1." Serving as written notice relevant successor proposals as soon as an agreement was ratified could operate to convert any in-term dispute to a successor dispute. The check on improper employer behavior cannot be persuasively rooted in complicating the definition of what constitutes a dispute arising during the term of a collective bargaining agreement. Rather, the check must be grounded on the case by case determination of good faith in negotiations. A deliberate attempt to manipulate an issue into an in-term dispute through improper bad faith or surface bargaining would not constitute the good faith negotiations effort necessary to afford an employer the defense of impasse to a unilateral change allegation under Secs. 111.70(3)(a)4 and 1, Stats. Evidence of such improper bargaining is not present in this matter.

The next area to be addressed presents a web of problems. The Board has argued its contract with PFM is specifically authorized under Article II, which grants the Board the right to "discontinue processes or operations or discontinue their performance by employees of the Board." The duty to bargain collectively during the term of an agreement does not extend to matters clearly and unmistakably covered by the agreement. 16/ If the Board assertion regarding Article II is correct, then the Board had no duty to negotiate with the Union regarding the decision. The Union has countered that the Board failed to plead this matter, which the Union characterizes as an affirmative defense, 17/ and further that a decision accepting the Board's assertion would deny the Union of its right to due process. 18/ The differences of the parties on these points are manifold. What is undisputed is that the Union has not filed a grievance on the matter and has not pleaded any Board violation of Sec. 111.70(3)(a)5, Stats. The parties did acknowledge at the hearing that:

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

17/ See Wis. Adm. Code, Section 12.03(4)(b).

18/ Citing General Electric Co. v. WERC, 3 Wis.2d 227 (1958).

> . . . to the extent either party's argument call into question the interpretation of contract provisions . . . the parties mutually understand that the examiner and the reviewing commission, if the commission reviews the examiner, would be understood by the parties to have the authority to look into the contract and to, as appropriate or as necessary, interpret that contract. 20/

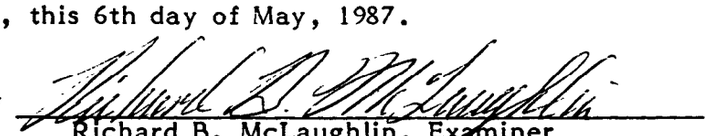
It is not necessary to determine if the Board's assertion regarding Article II is an affirmative defense, whether the pleadings or related prior correspondence adequately state that defense or the ramifications of those issues to complete the record for appellate purposes. It is sufficient for those purposes to note that none of that web of arguments offers any persuasive reason to change any conclusion reached above. The provisions of Article II, if considered properly in issue can only support the Board's case. That article, on its face, constitutes a clear and unambiguous grant of authority to the Board to take the action it did with PFM. Being such a grant, the provisions would constitute an express Union waiver of its right to bargain the Board's in-term execution of the contract with PFM, without regard to the presence of successor proposals. 20/

No express Findings of Fact or Conclusions of Law regarding the points relating to the interpretation of Article II have been made, however. Without regard to whether such findings or conclusions would violate the Union's due process rights, it is apparent the issue pleaded and litigated by the parties turns on paragraph 3 of the Board's answer which does not state a specific interpretation of Article II, but instead asserts that the Board fully discharged its duty to bargain at the negotiations table in the spring of 1986 in a manner which did not violate the labor agreement between the Union and the Board. While the parties' acknowledgement of the Examiner's authority to examine the contract can be read broadly, I understand it to indicate no more than that the parties acknowledge that the contract would have to be consulted on its face to determine if the Board's actions in contracting with the PFM "were not in violation of any provision of said collective bargaining agreement." The absence of evidence of bargaining history or other purported guides to contract interpretation at the hearing is consistent with this view.

In sum, the fundamental issue presented in this matter focuses on paragraph 3 of the Board's answer, and Article II raises, at most, a secondary point which offers no reason to question the conclusions reached above and, if anything, offers further support to the Board's arguments.

The final point to be addressed need only be touched upon. The parties have not specifically raised an issue requiring the bargaining of the impact of the Board's subcontracting decision and no such issue has been addressed in this decision.

Dated at Madison, Wisconsin, this 6th day of May, 1987.

By 
Richard B. McLaughlin, Examiner

19/ Transcript at 7.

20/ See Milwaukee County, Dec. No. 18216-B (Davis, 2/81), aff'd by Operation of Law, Dec. No. 18216-C (WERC, 2/81).