STATE OF WISCONSIN
CIRCUIT COURT
CHIPPEWA COUNTY

LOCAL 2236, AFSCME, AFL-CIO,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and CHIPPEWA COUNTY,
Respondents.

HEARING

Case No. 89CV2
Decision No. 24521-B

HONORABLE GREGORY A. PETERSON, JUDGE PRESIDING
Date of Proceedings: December 1, 1989

Appearances:
Bruce F. Ehlke, of the firm Lawton & Cates, S.C., 214 West Mifflin Street, Madison, Wisconsin 53703, appeared representing the Petitioner.

David C. Rice, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, Wisconsin 53707-7857, appeared via telephone representing the Respondent Wisconsin Employment Relations Commission.

Joel L. Aberg and Stephen L. Weld, of the firm Mulcahy & Wherry, S.C., 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702, appeared representing the Respondent Chippewa County.

Court Decision

THE COURT: If nothing else, this has been a challenging case or cases I suppose I should say. This is my -- the third time I've been assigned to this case. And to paraphrase the baseball saying, I hope that three times I'm out. Certainly hope this doesn't come around a fourth time.

Before turning to the merits I do want to address the citation of the unpublished Manitowoc County opinion. The County cited it in its brief. Mr. Ehlke objected to that in his brief. And Mr. Aberg responded just a couple of days ago. So everyone has had an opportunity to discuss that issue. The statute does prohibit citation of unpublished opinions as precedent or authority. Mr. Aberg responded by saying that, No. 1, the case was referred to for informational purposes and, second of all, the Union cited a circuit court case and they're not precedent either. Well, the statute doesn't address itself to circuit court cases. In some ways I suppose it could be argued that that's rather inconsistent. But nevertheless, the reason behind this particular statute, as the Supreme Court has

explained in the Tamminen v. Aetna Casualty case, "the non citation rule is essential to the reduction of the overwhelming number of published opinions and is a necessary adjunct to economic appellate court administration." So those reasons don't elate at all to the citation of circuit court cases. That argument I think is simply irrelevant whether or not it's appropriate to cite a court of appeals decision.

That leaves the argument that the citation to the court of appeals unpublished decision was informational. And quite honestly I think that's a disingenuous argument. The citation was clearly intended for precedential if not authoritative reasons. The discussion of that case goes on for some two to two and a half pages, contains quotations from the opinion, statements such as "this rationale can be similarly applied to the case at bar,' "the salient points of legal analysis are identical." If this isn't for purposes of persuasion as precedent or authority, those terms have no meaning.

The Supreme Court in the Tamminen case stated violations of the noncitation rule will not be tolerated." In that case the Supreme Court imposed a $50 penalty for citation of a nonpublished court of appeals case. It did that on the authority of Rule 809.83(2), which I'm not sure strictly applies here. But if it doesn't apply, I would think the circuit court would have the authority under some other rule or perhaps its inherent powers in order to enforce that particular rule. And for the same reasons stated by the Supreme Court in the Tamminen case I'm going to impose a $50 penalty against Mulcahy & Wherry for citation of that unpublished opinion of Manitowoc County in this case.

To the merits of the Petition for Review, an oral decision, particularly when I don't have an outline organizing my thoughts, will not be as thorough as a written decision. Just in terms of management of case load I'm going to attempt to do this orally. And if this goes on appeal, which I suspect it will no matter how I decide, this is the type of case that the court of appeals decides on its own without any deference to the trial court anyway. And I won't make any other statements that will get me in trouble on appeal..

I think there are two things that I have to look at here. First of all, is there substantial evidence to support the findings made by the Commission. Second, if there is substantial evidence, then has the Commission erred in some way its application of the law. And that seems to turn on, as I understand the arguments here, the -- the balancing of interests test.

Is there substantial evidence to support the Commission's findings. The Union argues that the contemporaneous evidence in this case leads to essentially an inescapable conclusion that the County intended not to reduce the level of health care services. Almost a wolf in sheep's clothing argument I suppose in some respects. But there doesn't seem to be any disagreement that it's proper to conclude on these facts, as -- as the Commission did, that this was an economically motivated decision. There's no dispute from the County that the primary problem here was labor costs. And the facts seem to support that kind of a conclusion.

But there is a dispute as to whether or not it's appropriate to conclude from the evidence before the Commission whether or not the County intended not to reduce the level of services. I don't think there's any disagreement nor can there be that that is an inference which can be drawn from the evidence in this record. Mr. Ehlke has ably argued the consequence of those facts today. He's

argued those ably in his brief. He's referred, for example, to the continuing financing under the Medical Assistance program. He's referred to the land contract itself. He's referred to the fact that the County only solicited proposals from active nursing home operators and such things. Again, I think that these facts in the record do support that inference and that finding of fact. But I don't think that they support only that inference and that finding of fact. They similarly support the inferences argued by the County and argued by the Commission.

For example, the County only solicited proposals from active nursing home operators. One might argue that these would be the people most likely to be interested in purchasing the facility. The purchase here envisioned the continuation of Medical Assistance financing. Certainly a feasible way to hope that the payments set forth in the agreement could be made. The vehicle used or the device used to make the transaction was a land contract. Granted, the County would get the property back I suppose if the purchaser didn't fulfill the terms under the contract. But the land contract did not give the County any control over the use to which the property was put. I do see an important distinction between contracting for services, as was done in Brown County and Racine County in those appellate court cases, and a contract to sell real estate, even if the contract to sell real estate involves the recognition that the buyer will initially continue to provide similar services, even if the negotiation for the contract involves a hope by the seller -- here, the County that the buyer will continue to provide those services.The contract in this case, which is in the record, was a straightforward sale of the real estate. The County retained title until full payment is made. But to repeat what I said earlier, the County had no control whatsoever over the services that were being provided by the purchaser.

Under those circumstances, I think the record supports the findings that the Commission made in this case -namely, that this was simply an economically motivated choice of the County to no longer provide the services for the County, to provide the services of the health care facility. The Commission was not required to further find that the County itself intended not to reduce the services level that it had previously provided.

The second issue, again, as I understand the argument, is whether or not the Commission correctly applied the primarily related test by identifying and balancing the interests involved in this case. The Commission in its decision recognized that the employee interests here are substantial. And I don't see the language immediately. Bit I recall some statement in the opinion about how there could not be more substantial interests involved for an employee than the continuation of an employee's job. Maybe that was in someone's brief. But in any event that certainly is the case. The Commission also concluded, however, that the decision of a municipal employer to discontinue providing a particular service is a fundamental employer interest. Now, I understand Mr. Ehlke's argument to be that that's not really an interest of an employer, unless I've -- that the Commission improperly identified the employer's interest or really failed to identify those interests. And maybe I misunderstood. But in any event I think the Commission is correct in characterizing this interest of the County as being a fundamental employer interest. The statutes, it's Chapter 49 point -- I don't recall what it was, but it was one of the sections argued at our very first hearing in this case that gives a county the authority to decide whether or not to provide these kinds of services, sets up the authority for the County to do this or not to do this. It's a fundamental interest of the County to make that kind of a political decision do we or don't we want to provide health care services to our citizens.

Chippewa County admittedly for economic reasons decided that it no longer wanted to provide those services. The Commission has concluded in balancing the interests of the county and being able to make that kind of a fundamental policy decision and the interests of the employees that the Commission's decision is primarily related to issues of public policy. I think it has appropriately or correctly I should say, appropriately may be a decision of choice and I may or may not have decided the case in the same way, but in any event it has correctly applied the law. And I don't see that it has made an error in the application of that law. And for that reason I'm going to affirm the decision of the Commission and dismiss the Petition for Review. Thank you very much.

MR. EHLKE: Thank you. We'd like a transcript.
MR. RICE: Judge.
THE COURT: Yes, Mr. Rice.
MR. RICE: Just two things. I'd like to receive a copy of the decision portion of the transcript. And the second thing would be to inquire as to whether you'd want Mr. Aberg or Mr. Weld or I to draft an appropriate order.
THE COURT: I would like someone to do it. I'll leave it up to you folks to decide. Do I have a volunteer?
MR. RICE: I'm happy to do it unless they would prefer to do it. I do recall there's a canon portion of this case though that they're involved in. Maybe it would be more appropriate to have them do the order.
MR. WELD: We're prepared to do it.
COURT: All right. Mr. Weld indicates that his office will prepare the order.
MR. RICE: Very good. Thank you, Judge.
THE COURT: Okay.
MR. RICE: Thanks for allowing me to appear by telephone.
THE COURT: That's fine.
(Whereupon, the proceedings herein were adjourned.)

STATE OF WISCONSIN
COUNTY OF EAU CLAIRE

I, Jill M. McLaughlin, Official Circuit Court Reporter for Eau Claire County, State of Wisconsin, hereby certify that the foregoing is a true, correct, and complete transcript of the Court Decision in the foregoing matter, held on the 1st day of December, 1989, as contained in my Stenograph shorthand notes, and all matters pertaining thereto.

Dated this 5th day of December, 1989.

/s/ Jill M. McLaughlin
Jill M. McLaughlin, RPRJ