STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CHIPPEWA COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL NO. 2236	Case 137 No. 36871 DR(M)-401 Decision No. 25003

Appearances:

Mr. Mel Bollom, Personnel Director, P.O. Box 550, Chippewa Falls, Wisconsin 54729, appearing on behalf of the County.

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of AFSCME, Local No. 2236.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Chippewa County having, on May 9, 1986, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a proposal made by AFSCME Local No. 2236 during collective bargaining was a mandatory subject of bargaining; and AFSCME having on May 30, 1986, submitted a written response to said petition; and the parties thereafter having agreed to hold the matter in abeyance pending Commission issuance of a decision in Chippewa County, Case 136, No. 36783, MP-1837; and the Commission having on May 28, 1987, issued its Findings of Fact, Conclusion of Law and Order in Chippewa County, Case 136, No. 36783, MP-1837 and having further agreed that the record in Case 136 would be part of the record herein; and the County having on August 5, 1987, advised the Commission that the Commission should proceed to issue its decision on the declaratory ruling petition without hearing or further argument; and AFSCME having, on August 13, 1987, advised the Commission that a hearing should be scheduled regarding said petition; and hearing thereafter having been scheduled for October 5, 1987; and AFSCME having on September 3, 1987, advised the Commission that the Commission may proceed to issue its decision without need of hearing; and the Commission having reviewed the record and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Chippewa County, herein the County, is a municipal employer having its principal offices at 711 North Bridge Street, Chippewa Falls, Wisconsin 54729.

2. That AFSCME, Local No. 2236, herein AFSCME, is a labor organization having its principal offices at 3226 Glenhaven Place, Eau Claire, Wisconsin 54703.

3. That AFSCME is the collective bargaining representative for certain employes of the County in a bargaining unit composed of Health Care Center employes; that during bargaining between AFSCME and the County over a successor agreement to the parties' 1983-1985 contract, AFSCME submitted the following proposal:

> The County agrees, that it will not contract, lease, or sell the Chippewa County Health Care Center or any of its property or physical plant to be used for the same purpose or for a purpose similar to that for which it is being used presently; nor contract, lease, sell, or otherwise assign the responsibilities to care for the patients and residents thereof.

4. That the County, contrary to AFSCME, asserts that the proposal recited in Finding of Fact 3 is a permissive subject of bargaining.

5. That the proposal recited in Finding of Fact 3 primarily relates to the formulation or management of public policy.

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

CONCLUSION OF LAW

1. That the proposal set forth in Finding of Fact 3 is a permissive 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 Chippewa County and AFSCME Local No. 2236 have no duty to bargain within the meaning of Sec. 111.70(1)(a), Stats., over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon, Commissioner

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

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

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing

(Footnote 1/ continued on page 3).

1/ Continued

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

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

. . .

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

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

CHIPPEWA COUNTY

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

POSITIONS OF THE PARTIES

The County

The County submits that the proposal in question restricts the County's authority to discontinue services it deems as not economically in the best interest of the County, a matter which is "reserved to management and direction of the governmental unit." The County argues that the proposal restricts its ability to represent the taxpayer and holds it hostage to providing programs and services that may be outdated or no longer in the best interest of the majority of County residents. The County contends that its interest in managing the County budget outweighs the employes' interest in preventing the County from selling the Health Care Center. In this regard the County cites City of Brookfield v. WERC, 87 Wis.2d 819 (1979). Thus, the County submits that the proposal in question is a permissive subject of bargaining primarily related to the formulation of public policy rather than wages, hours and conditions of employment.

The Union

The Union initially submits that if the County's articulation of the test by which to measure permissive as compared to mandatory subjects of bargaining is correct, then every County decision that involves a reduction in or the elimination of the employes' wages, hours and conditions of employment will be "economically in the best interest of the County" and will outweigh "the employes' interest." Thus, AFSCME asserts that the County has not articulated the correct test for resolving the issue herein. AFSCME contends that the correct test involves a balancing of whether the matter in question involves a significant change in the services or level of services provided to the residents of the County, and thus "a substantial choice among alternative social or political goals," or instead involves "substantial dimensions concerning the wages, hours and conditions of employment of employes." AFSCME alleges that if, for example, the County were to decide to eliminate the Health Care Center altogether, or to sell its buildings, grounds and equipment to a third party to be converted into a warehouse or a golf course, such a decision would not be a mandatory subject of bargaining. In AFSCME's view, such a decision would involve, in fact, the elimination of a service to the County's residents or a significant reduction of the level of that service in the County. On the other hand, AFSCME argues that whether called a "sale," a "lease," a "subcontract" or anything else, if the County's decision merely involves a continuation of substantially the same service, albeit in a different mode or by a different means, then there has been no significant change in social or political goals because the service provided through the Health Care Center continues to be provided to the County's residents. Such a decision, in AFSCME's view, would be a mandatory subject of bargaining to the extent that it has an impact on bargaining unit employes' wages, hours and conditions of employment. AFSCME alleges that the bargaining proposal herein addresses the latter type of decision because of the key phrase "to be used for the same purpose or for a purpose similar to that for which it is being used presently." AFSCME argues that the second clause of the proposal simply requires the County not to subcontract the bargaining unit work currently performed by the employes it represents.

AFSCME argues that in the private sector, the decision to sell a business is not a mandatory subject of bargaining because with the sale the employer gives up the future benefit of an ongoing enterprise. AFSCME contends that this is an absolute right because, despite the substantial impact on employe wages, hours and conditions of employment, the owner alone has the right to make the fundamental decision of a capitalist to convert the profits earned by an on-going enterprise into the one time profit realized from the transfer of the business or its assets to another. Such a decision is not a mandatory subject of bargaining, in AFSCME's view, because in theory nothing that the employes or their union might propose could have any bearing regarding such a fundamental change in the owner's use of his capital. On the other hand, AFSCME alleges that in the private sector an employer's decision to contract out for all or part of the work performed by his employes is a mandatory subject of bargaining because the employer retains the

right to enjoy the future benefit provided by the business and the profits earned therefrom. Thus, AFSCME alleges that, given the impact upon employes, the decision to contract for services is a mandatory subject of bargaining because it involves no fundamental change in policy concerning the benefit provided by the business but, rather, primarily involves the mode or means by which the benefit is achieved.

AFSCME argues that in the public sector the owner is not the person who has invested his capital in the business but rather is the citizen of the governmental unit. It asserts that the "benefit" provided by a governmental enterprise is not profit but rather is the service that results from the particular activity in question. Thus, AFSCME asserts that the test applied in the private sector to determine the duty to bargain are not directly applicable to the public sector. Therefore, AFSCME notes that the Commission and the Court have formulated the "primary relationship" test. AFSCME asserts that in Racine County Unified School District v. WERC, 81 Wis.2d 89 (1977), the Court found that an employer's decision to contract out for certain work did not represent a choice among alternative social or political goals or values because the decision merely substituted private employes for public employes. In that case, AFSCME argues that the result reached was dictated by the fact that there was no decision to relinquish the right to enjoy the future benefit of the service or the particular level of service provided by the employer in question. AFSCME argues that in City of Brookfield v. WERC, supra, the Court found that an employer's decision to reduce the level of services was a permissive subject of bargaining because it was a decision to relinquish in the future the benefit of a certain level and quality of service, a fundamental policy decision by the employer. AFSCME urges that the decisions cited above, as well as the Commission's decision in Brown County, Dec. No. 20857-B (WERC, 7/85), demonstrate that where an employer's decision does not affect the continued enjoyment of the service provided by the activity in question, such decisions must be bargained with the union. Here, AFSCME submits that its proposal only applies to those decisions by the County that, although they may involve a change in the mode or means by which a particular service is provided, do not involve the giving up of the future enjoyment of that service or a significant change in the quality or level of a service. Such decisions, AFSCME argues, do not involve any substantial policy choice because the County's residents continue to enjoy in the future the benefit of the same health care services that the Chippewa County Health Care Center now provides. Thus AFSCME urges the Commission to find its proposal to be a mandatory subject of bargaining.

DISCUSSION

In our view, our decision in Chippewa County, Dec. No. 24521 (WERC, 5/87) requires that we find this proposal to be a permissive subject of bargaining. In Chippewa County we concluded:

> The parties are in agreement on the legal standards applicable to the instant matter. 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 formulated the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats. A decision of a public employer is a mandatory subject of bargaining if it is primarily related to wages, hours and conditions of employment and is a permissive subject of bargaining if it is primarily related to the formulation or management of public policy. In Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977), the Court held that the District's decision to subcontract its food service program did not affect its policies and functions but merely substituted private employes for its public employes and the decision was a mandatory subject of bargaining as it primarily related to wages, hours and conditions of employment of employes. In City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the Court held that the City's decision to layoff employes resulting from budgetary constraints was primarily related to the formulation of public policy and was a permissive subject of bargaining. The issue

presented to us is whether the County's decision to sell the Chippewa County Health Care Center is a permissive or a mandatory subject of bargaining.

The Union admits that if the County had closed down the Health Care Center altogether or decided to raze it or sell the buildings and grounds to a third party for uses other than a health care center, such a decision would be permissive because the level of services would have changed and the rationale in Brookfield would apply. The gist of the Union's argument is that here the level of services to citizens of the County has not changed and will not change because the manner in which the County sought prospective purchasers and structured the sale agreement virtually guaranteed that the purchaser will continue to provide essentially the same services.

With respect to the Union argument regarding the structure of the sales agreement, we see little significance in the fact that the County entered into a land contract. It could have just as easily given a deed and obtained a 40 year mortgage on the same terms. What is significant is that the land contract contains no requirement that the purchaser continue to operate the facility as a health care center or to keep the same or similar residents in the event that the purchaser continues to operate the facility to provide health care. There are no conditions or reservations for the County to have any further involvement in the purchaser's operation of the health care center. The land contract was a straight sale of the Health Care Center with no further involvement of the County in its future operation. Essentially, the County has gotten out of the business of being a health care provider.

With respect to the selection of the purchaser, it seems logical that anyone wishing to sell a certain type of business would advertise that fact to those most likely to be interested and serious purchasers. Contacting those already in that trade would be efficient and most likely to lead to serious offers as well as attract the best price. The fact that a purchaser's willingness to continue to operate the facility as a health care center might appeal to the County and thus be a significant factor in the selection of a purchaser does not constitute a requirement that the purchaser continue to operate a health care center or render the sale a de facto subcontracting arrangement.

The Union contends that no public policy choices are implicated here because after the sale the services to citizens were the same as before but are merely provided by a different entity. We are of the opinion that this argument expands the concept of level of government services beyond that expressed in Brookfield or Racine. Brookfield and Racine involved the level of services provided by or through the municipal employer rather than the more generic question of whether services will be provided to citizens by any entity. Here the concern is the level of County health care services and not the level of health care services available to County residents from any source. The County decided to reduce its health care services and got out of the health care services business entirely. As the Court stated in Brookfield, the decision to reduce the level of services provided by a municipal employer is a policy decision which is left to the elected body of the community citizenry to determine. We think that the decision to sell the Health Care Center was just such a policy decision. The County Board, as elected representatives of the citizens of the County, can unilaterally determine the level of services that the County will provide. Thus, we conclude under the facts presented in

this case that the decision to sell the Health Care Center was a permissive subject of bargaining. Inasmuch as the decision to sell was permissive, the County did not violate Secs. 111.70(1)(a)4 and 1, Stats. For the foregoing reasons, we have dismissed the complaint in its entirety.

As indicated above, we have rejected the AFSCME argument that no public policy choices are implicated if the services to the citizens are the same as before but are provided by a different entity. As we noted in Chippewa County, the issue is one of determining the level of services provided by or through the municipal employer rather than whether services will be provided to citizens by any entity. Where a municipal employer decides to get out of the health care service business, it need not bargain that choice with the union even though another entity may continue to provide said services to the citizens. To the extent that the proposal before us herein precludes the County from unilaterally choosing to get out of the business of providing health care services, we conclude that the proposal is a permissive subject of bargaining.

Dated at Madison, Wisconsin this 25th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner