

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEBOYGAN COUNTY SUPPORT SERVICES	:	
LOCAL 110, AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	Case 210
	:	No. 49303 MP-2741
vs.	:	Decision No. 27692-A
	:	
SHEBOYGAN COUNTY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703, by Mr. Bruce F. Ehlke, appearing on behalf of the Union.

Mr. Alexander Hopp, Corporation Counsel, 601 North Fifth Street, Sheboygan, Wisconsin 53081, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 27, 1993, Sheboygan County Support Service Local 110, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Sheboygan County had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 2, 3 and 4 of the Municipal Employment Relations Act. On June 22, 1993, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on July 15, 1993, July 16, 1993, and August 2, 1993, in Sheboygan, Wisconsin. The record was closed on November 4, 1993, upon receipt of post-hearing written argument. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Sheboygan County Support Services Local 110, AFSCME, AFL-CIO (a/k/a Supportive Services), herein Union, is a labor organization, and its principal offices are located at 1207 Main Avenue, Sheboygan, Wisconsin 53083.
2. Sheboygan County, herein County, is a municipal employer, and its principal offices are located at 601 North Fifth Street, Sheboygan, Wisconsin 53081.
3. The County and the Union are parties to a labor agreement which by its terms, is effective January 1, 1992 through December 31, 1994. Article 3, MANAGEMENT RIGHTS RESERVED, of this labor agreement contains the following:

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote

or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

By way of further enumeration and not as a limitation because of such enumeration, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the various details of the employment in the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business.

The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the Employer.

The Union agrees that it will, at all times, promote, the proper operation of County government and will make diligent efforts to protect the public interests of Sheboygan County.

Sheboygan County may adopt reasonable rules and amend the same from time to time and the Union agrees to cooperate in the enforcement thereof.

Article 24, SENIORITY, of the labor contract contains the following:

Sheboygan County shall, during the life of the herein contract, for the employees covered by the same, recognize seniority as herein provided.

A. Accumulation

1. Full-time Employees

Seniority shall be accumulated on a month-to-month basis or major portions thereof for continuous months of

service. Absence from work because of illness, layoff, suspensions for less than thirty (30) days or authorized leave shall not interrupt the accumulation of seniority.

2. Part-time Employees

Seniority shall be accumulated on a prorated basis.

. . .

C. Layoff

For the purpose of layoff, the County recognizes seniority therefore, whenever the County determines it is necessary to decrease the work force and to layoff (sic) employees, such layoff shall, subject to the following procedures, be in inverse order of the employee "seniority". The order of layoff shall be as follows:

1. Temporary Employee/Position: Temporary employees in the involved department in which the work force is being reduced shall be laid off first.
2. Probationary Employees/Position: Probationary employees in the involved department in which the work force is being reduced shall be laid off second.
3. Part-time Employees/Position: Part-time employees in the involved department in which the work force is being reduced shall be laid off third.
4. Full-time Employees/Position: Full time (sic) employees in the involved department where the work force is being reduced shall be laid off fourth.

In determining the above priorities and carrying out layoffs, the following conditions shall apply:

- a. Seniority: Seniority for layoff purposes shall date from the

employees (sic) more recent starting date of employment with the bargaining unit.

- b. Full-time Employee: Full time (sic) employees who are laid off have the right to elect to induce layoff consideration (bumping) of any less senior employee. The employee must have the training and experience to carry out the work responsibilities. Bumping may not be exercised against employees in a higher position.
- c. Part-time Employees: Part time (sic) employees shall be given the opportunity of taking a full-time job from another employee with less seniority (seniority being given the part-time employee on a pro-rated basis.) In that event the part-time employee shall be able to utilize the prorated seniority and bumping privileges. The employee must be qualified to perform the position to which they are bumping. In the event such part-time employee shall refuse to take a full time (sic) job, he/she shall be on layoff status.
- d. Exceptional Employees: After all temporary and probationary employees have been laid off, further layoffs will be made as provided above, except the County shall have the right to deviate from the above procedure by retaining employees who would be laid off according to seniority but whom it considers to have specialized training, licensing or testing, to the extent of ten percent (10%) of the employees laid off. Fractions shall be taken to the next whole number. Prior to layoff, the County shall notify the Union of any proposed deviations from seniority and its reasons therefor.
- e. Notice of Layoff: Affected employees and the Union shall be notified in

writing ten (10) calendar days prior to the effective date of the layoff and such notice shall contain:

1. The reason for layoff
 2. The effective day of layoff
 3. The last day of pay status.
- f. Recall from Layoff: An employee who has been laid off for less than a twenty-four (24) month period, shall be reinstated when a vacancy for which the employee is qualified occurs according to the inverse order of the layoff. Employees who have been demoted in lieu of layoff shall be reinstated to their former position when a vacancy occurs in such position.

A laid off employee, refusing a position of similar work and class from which he/she was laid off or who fails to respond to an offer of reinstatement via a certified letter within three (3) days of receipt of such letter, shall be removed from the seniority list, in addition, the County can contact the employee by phone.

An employee who has been laid off for twenty-four (24) months or more shall be considered on permanent layoff status.

This language of Article 3 which states that "The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the Employer" was agreed upon by the parties when they negotiated their initial collective bargaining agreement, which agreement was effective January 1, 1968. Ethel Miller, who retired from County employment in 1988, was a member of the Union team which negotiated the initial collective bargaining agreement with the County. At hearing, Miller, who did not have any bargaining notes from the initial contract, recalled that the term "subcontracting" was never used during negotiations and that there was no representation that the language of Article 3 was intended to be a subcontracting provision. According to Miller, the language of Article 3 meant that the County "could ask any of the county employees to work wherever their work might take them if it was within the courthouse or in another location."

4. The County's Department of Human Services (DHS) consists of four divisions, i.e., Public Health, Aging, Social Services, and Committee Programs. The DHS Division of Aging operated the Stagecoach Bus service (Stagecoach), which service provided bus transportation to the elderly and the handicapped. In 1992, the DHS transportation budget was approximately \$350,000. The DHS is governed by the Sheboygan County Human Services Board (HSB), which Board is comprised of eleven members, seven of whom are County Board members. The four HSB members who are not County Board members are appointed by the County Board. Gary Johnson has been the Sheboygan County Human Services Director since January of 1989. Johnson has authority to transfer monies within the DHS budget. At any given time, DHS has one hundred contracts to perform work for the Department. When a program is initially contracted out, DHS managerial and supervisory staff develop specifications, prepare a request for proposals, advertise the request for proposals, and analyze the responses to the request for proposals. After DHS selects a vendor, Johnson signs the contract with the vendor. Johnson has authority to execute any contract which is within the DHS budget. Depending upon the size of the contract, or the political ramifications of the contract, members of the HSB may participate in the subcontracting decision. Prior to the subcontracting of the Stagecoach service, Union Representative Helen Isferding was aware that HSB has contracted out work. With the exception of the use of Manpower to perform secretarial services during a transitional period when the County combined the Office on Aging and another department, Isferding was not aware that the County had ever subcontracted the work of the Union's bargaining unit members.

5. Corby Felsher has been the Chairman of the Sheboygan County Board since April of 1992. As Chairman, Felsher presides over the thirty-four (34) member County Board, but does not have any specific committee assignment. In early May of 1992, Felsher became aware of the fact that DHS was considering the purchase of new buses to replace existing Stagecoach buses. On May 19, 1992, Felsher called Johnson and asked that DHS postpone making a decision on purchasing new buses until Felsher had an opportunity discuss the possibility of privatizing the transportation services with representatives of DHS. It was unusual for the County Board Chairman to contact Johnson about DHS operations. On May 20, 1992, Felsher met with Johnson; Robert Danforth, the County's Financial Director; Lynne Denis, Human Services Special Project Supervisor; Jim McCabe, Human Services Division Manager on Aging; James Gilligan, Chairman of HSB; and Robert Meek, Vice Chairman of HSB, to discuss whether or not it would be efficient to privatize Stagecoach. At this meeting, Danforth, Johnson and Denis were told to develop specifications and a Request for a Proposal (RFP) to privatize Stagecoach. In July, HSB was presented with the RFP to privatize Stagecoach. The process used to develop this RFP was the process which was normally used by DHS when contracting out programs. On July 21, 1992, HSB decided to purchase four new buses. Two of these buses were purchased by the County and two were purchased with federal funds provided by the City of Sheboygan. The County has a contract with the City of Sheboygan to provide transportation services.

6. The Stagecoach RFP, which was primarily developed by Danforth and Johnson, was discussed at the August 11, 1992 meeting of the HSB, at which time it was decided to advertize the RFP. The RFP was published in a Milwaukee paper and a Sheboygan paper on August 17, 1992. Additionally, the RFP was sent to area vendors. Two vendors responded to the RFP, i.e., Nichols and G & G Enterprises (a/k/a Handicare). A Review Committee comprised of Denis, Danforth, Meek and Gilligan was appointed to review the two responses to ensure that the two vendors had complied with the RFP specifications. On September 22, 1992, Bill Treviranus, a lay member of the HSB and an advocate for the elderly, was added to the Review Committee. The Review Committee met on September 22, 1992 to review the two responses. On October 5, 1992, Sheboygan Corporation Counsel Hopp provided Johnson with the following:

This letter is to confirm our telephone conversation in which I indicated to you that the Human Services Board has the authority to contract with outside sources to provide services it has an obligation or desire to render.

County Code Section 10.07 specifically permits the Human Services Board to determine:

". . . with the advice of the County Human Services Director whether services are to be provided directly by the County Department of Human Services or contracted for with other providers and make such contracts . . ."

This means the issue of whether or not bus services should be provided by contract or by Human Services staff personnel is the direct responsibility of the Human Services Board, and until such time as the County Board requires approval of those contracts, such issues have been specifically delegated to the Human Services Board.

In view of the express delegation above referred to, it is clear that the Human Services Board has the authority to and responsibility for deciding when private vendors are to be utilized. Because of the past philosophy that County Board committees should carry out their delegated responsibilities, it seems to me that it would be inappropriate to select only one contract for County Board approval and not all the others.

It is my recommendation that the Human Services Board continue to make the decision as to whether it provides bus service with its own staff or whether it contracts this service to private vendors. By doing so, it preserves for itself the right to deal with all of the contract issues.

In October of 1992, the Review Committee held several meetings, which included meeting with the two vendors, Nichols and G & G, and an inspection trip. Danforth and his staff were primarily responsible for providing a financial analysis of each vendor's bids. On or about November 6, 1992, the Review Committee completed a financial analysis of the two responses and determined that privatization would result in a savings of approximately \$172,000. The minutes of the HSB meeting held on Tuesday, November 10, 1992, which was attended by Union Representative Isferding, contain the following:

Mrs. Wondergem reported that a motion will be introduced at the November 10th County Board meeting to delete \$100,000 from the transportation budget in preparation for privatization of transportation services. Mr. Johnson is requesting that Human Services Board members clarify, on the County Board floor, that if privatization is not entered into, the \$100,000 will be taken from the contingency fund.

On November 10, 1992, the County Board reduced the 1993 DHS transportation budget by \$100,000. On November 11, 1992, the Review Committee met to draft its recommendation regarding the privatization of Stagecoach. At a HSB meeting of November 17, 1992, the Review Committee made the following recommendation to the HSB:

The Review Committee assigned to evaluate responses to the Request for Proposals to contract for the provision of Transportation Services to elderly and disabled persons in Sheboygan County is making the following recommendations:

- 1.) The Transportation Program of Sheboygan County Human Services, otherwise known as the Stagecoach, contract out to a private company for provision of services equal to those presently provided by Sheboygan County.
- 2.) In consideration of cost savings, (see attached Exhibit 1), estimated to be at a minimum of \$100,000, the contract be awarded to G. & G. Enterprises, Handicare Transportation, whose main offices are located in Manitowoc, WI, with the following conditions:
 - a.) a satellite office and vehicle space be located in or near the City of Sheboygan

- b.) the management of G.& G. (sic) Enterprises has a full understanding of the program requirements prior to signing and undertaking a contract
- c.) the provider and County staff agree to a monitoring program to assure service needs and vehicle maintenance expectations are being met

The minutes of the HSB meeting of Tuesday, November 17, 1992, include the following:

**RECOMMENDATION REGARDING PRIVATIZATION OF
TRANSPORTATION SERVICES**

Mrs. Denis distributed and discussed a recommendation from the Review Committee assigned to evaluate responses to the Request for Proposal for contracting for transportation services to the elderly and disabled. The Committee reviewed proposals from Nichols and G & G Enterprises (Handicare) and is recommending contracting with G & G Enterprises. Chairman Gilligan stressed that, if privatization is approved, it must be assured that the quality of services and vehicle maintenance be maintained. Mr. Johnson noted that any complaints regarding services will be investigated. In a letter to Mrs. Denis, Mr. Curtis Green, President of G & G Enterprises, suggested that monthly meetings with the Human Services staff be held to discuss any concerns. Mr. Danforth noted that monthly financial statements from the provider will be reviewed. Mrs. Denis stated that Statutes require that we re-bid every five years. Supervisor Nelson stated that the Review Committee did an excellent job in evaluating the responses. Following further discussion, Supervisor Meek moved and Supervisor Seider seconded to accept the recommendation to contract with G & G Enterprises for the provision of transportation services equal to those presently provided by Sheboygan County with the following conditions: 1) a satellite office and vehicle space be located in or near the City of Sheboygan, 2) the management of G & G Enterprises has a full understanding of the program requirements prior to signing and undertaking a contract, and 3) the provider and county staff agree to a monitoring program to assure service needs and vehicle maintenance expectations are being met. Motion carried on a role call vote with all members voting aye.

On November 17, 1992, Denis sent the following letter to Stagecoach employes:

The Human Services Committee voted at their Tuesday, November 17, 1992 meeting to approve the recommendation to contract out for transportation services. The vendor selected is G. & G. Enterprises (Handicare) out

of Manitowoc. Curt Green is one of the owners and will be working closely with County Staff towards the transition, which includes locating offices and garage space, and hiring of personnel.

Attached is a time line to give some idea of tasks that need to be accomplished. Please note that these dates are not absolute, and may change as we work towards transition. When I say "we", I mean all of us will be involved in the process.

If you have questions or concerns, I would prefer you ask me and if it's something I cannot answer, I will direct you to the appropriate source.

7. Carol L. Zoran, an Economics Support Specialist with the County, is President of the Union. On July 21, 1992, the HSB Chairman received the following letter, dated July 20, 1992, from Zoran:

Local 110, AFSCME demands to negotiate the decision to subcontract, and/or any alteration or change in the wages, hours or working conditions of the bus drivers in the Division of Aging of the Sheboygan County Human Services Department, or the impact of any change.

Gilligan is also a member of the County Board. HSB forwarded the letter to the County Personnel Director, Corporation Counsel and Financial Director. The County Personnel Director, who is the Chief Spokesperson in the County's labor negotiations, did not respond to the Union's letter until November 6, 1992. The County Personnel Director met with members of the Review Committee on November 6, 1992 and was informed that the Review Committee intended to recommend the privatization of the Stagecoach service. At that meeting, the Personnel Director advised the Review Committee and the Chairman of the HSB that there was a requirement to negotiate with the Union on the privatization decision and the impact of the privatization decision. Following the meeting, the Personnel Director returned a call to Union Representative Isferding, informed Isferding of the Review Committee's recommendation, and indicated that it would be necessary to meet to discuss the issue. At the HSB meeting of November 17, 1992, Charles Nelson, the Chairman of HSB, as well as HSB members Norbert Abromaitis and Kurt Nyenhuis were told that the decision to privatize Stagecoach could not be finalized until the County had negotiated with the Union. The Personnel Committee of the County Board delegated responsibility to negotiate with the Union on the privatization of the Stagecoach service to Conway, Denis and McCabe, with the understanding that Hopp, Johnson and Danforth were to be used as resource personnel. The County negotiating team understood that HSB would reconsider its November 17, 1992 decision to privatize Stagecoach if they and the Union could negotiate a cost savings of \$100,000 which would not reduce the level of Stagecoach services. The County negotiating team did not have authority to agree to a reduction in the level of Stagecoach services. The County negotiating team had effective authority to reach tentative agreements with the Union's negotiating team. Such tentative agreements, however, were subject to ratification by the HSB. Any tentative agreement involving a change in the labor contract was required to be ratified by the Personnel Committee and the County Board. During negotiations with the Union on the privatization of Stagecoach, Conway reported on the status of the negotiations to the County Personnel Committee. Since at least 1978, the County Personnel Committee has been a part of the County's labor contract

negotiation team. During Conway's tenure as the County Personnel Director, she has been the Chief Spokesperson in the County's labor negotiations. Corporation Counsel Hopp, rather than the County Personnel Committee, has represented the County in its insurance negotiations with the unions which represent County employes. The County Personnel Committee was not present when the Union and the County negotiated on the privatization of the Stagecoach service. Nor was any other member of the County Board present during these negotiations. On November 20, 1992, Personnel Director Conway sent the following to Union Representative Isferding:

I am writing as a follow-up to our phone conversation of November 6, 1992 in which I requested a meeting to discuss the information being considered by the Human Service Board regarding the operation of the bus system.

I wish to continue our discussion with regard to this issue and the Human Services Board decision that the County's operation of the bus system can be more economically done by contracting with a private carrier to provide the service. My understanding is that the Human Services Board made this decision based on savings ranging from \$100-\$160,000.00.

I am requesting that we meet to negotiate this decision and determine whether or not, with the assistance of the involved parties, a better solution or an equivalent solution, or an alternate solution is available that would produce the same results without affecting the services to the beneficiaries of the program. In the event we are unable to find such a solution, we should then negotiate the impact of that decision, and if possible, it seems to me that we ought to try and see if we can place the impacted people in other areas of County employment.

These are significant issues and it is my hope that we can reach solutions that are satisfactory and acceptable to all parties involved. In order for you to prepare for these discussions, I am enclosing a copy of the statistical data that was submitted to the Human Services Board and are prepared to supply you with any other information that is available which you may require.

Because of the significance of these decisions to the people involved, it obviously is in everyone's best interest if we meet soon, before the issue becomes polarized and then interfere with the negotiations. May I suggest that we have our first meeting during the week of November 30. Our preference at this writing is Friday, December 4 at 8:00 a.m. The meeting can be at the Human Services Building Fourth Floor conference room or at an alternate site if you feel a neutral site would better serve this purpose.

Please contact me to confirm the acceptability of the above meeting time or to propose an alternate time that is more convenient to your schedule. I

anticipate that Jim McCabe, Lynne Dennis and myself will be part of the committee to meet with you along with Alex Hopp, Bob Danforth and Gary Johnson to be utilized as resource people in the discussion of this matter.

Thank you for your cooperation in this regard and I look forward to hearing from you.

On December 4, 1992, County Personnel Director Conway sent the following letter to Joseph Champeau, Donald Daehn, Elaine DeRouin, June DuMonthier, Loretta Gabrielse, Stephen Gries, Peggy Kress, Ione Liebenstein, Robert Poleet, William Russell and Carl Scharrer:

As you are aware, the Human Services Board has made the decision that the County's operation of the bus system can be more economically done by contracting with a private carrier to provide the service.

We have requested a meeting with the representatives of your bargaining unit and that meeting is scheduled for 7:30 a.m. Wednesday, December 16, 1992.

As an employee who may be affected by this decision I am advising you that if you wish to be considered for other positions within Sheboygan County I encourage you to stop at the Personnel Office and complete an application. This application will allow us to be aware of where your experience and background

can be utilized in other positions throughout the County. Our intent is to work with you and the bargaining unit to assist in this transition.

If you have any questions or concerns, feel free to contact me or your bargaining representatives. If you wish to have an application sent to you through the mail, please call and we will forward one to you.

On December 16, 1992, the Union and the County met to negotiate on the privatization of the Stagecoach. The financial data provided to the Union, compared the cost of the bids made by Nichols and G & G to the County's costs of operating the Stagecoach service. The data, which had been prepared under the direction of Danforth and had been used by the Review Committee and the HSB, indicated that the County could save as much as \$36,765 by subcontracting the Stagecoach service to Nichols and as much as \$172,000 by subcontracting the Stagecoach service to G & G. At the December 16, 1992 meeting, Union Representative Isferding stated that she thought the negotiations were a sham because the decision to privatize had already been made. Conway responded that the County had not entered into any contract with G & G. Corporation Counsel Hopp advised the Union that the County was concerned about saving jobs and wanted to work with the Union to save jobs. Members of the Union negotiating team requested and were furnished with an explanation of the financial data relied upon by the County and voiced a concern about the quality of G & G services. Isferding stated that the Union needed to have the County's data reviewed by their accountant and that the Union would arrange a meeting with Danforth and their accountant to review the data. The parties discussed which employees would be affected by a decision to subcontract the Stagecoach service. The County asked what the Union wanted to do about the impact of a subcontracting decision and there was a discussion of the bumping process. The County stated that it would follow the layoff language contained in the contract. The parties agreed to meet again on January 15, 1993. When the parties met on January 15, 1993, Conway presented a written statement of proposed ground rules, which differed from the ground rules that had been used during the most recent labor contract negotiations between the parties. Conway advised the Union that the HSB would ratify any agreement reached between the parties. The Union was informed that the County negotiation team would consider any proposals made by the Union and the Union asked questions about the financial data which had been provided by the County. The County responded to the Union's questions and explained the bids, the costs of the bids, and the projected savings of each bidder. Isferding stated that a budget analyst from the International would visit Sheboygan on January 20, 1993 and requested to meet with Danforth on that date to review the County's financial analysis on the privatization of the Stagecoach service. The Union reiterated that it had concerns about G & G. A member of the Union's negotiating team indicated that it appeared that the primary issue was salaries and benefits. The parties agreed to meet again on January 25 and February 1, 1993. The County understood that the meeting with the International budget analyst, Kerri Korpi, was scheduled for 10:00 a.m. on January 20, 1993. Isferding and Korpi did not arrive until noon on January 20, 1993. Isferding cancelled the meeting of January 25, 1993 to provide the Union with the opportunity to obtain further financial information. The Union negotiating team and the County negotiating team met on February 1, 1993, at which time Isferding questioned the criteria used on RFP. The County responded that it had used the same criteria for each bidder. When the Union expressed concern about the experience and qualifications of G & G, the County responded that the County had interviewed clients of G & G. When Conway asked if the Union had any proposals to save costs, Isferding presented and explained a four page typewritten document which contained fourteen suggestions for savings, which the Union estimated would

save at least \$144,448.69. Suggestion #1 was to cut Route 8 for a savings of approximately \$16,000; Suggestion #2 was to delete Sunday route for a savings of approximately \$5300; Suggestion #3 was to change contract language to allow for split shifts for Bus Drivers and delete three day notice requirement for a savings of approximately \$6,200; Suggestion #4 was to change contract language to have Bus Drivers work a 40 hour week for an overtime savings of \$2,328.18; Suggestion #5 was to eliminate Senior Aide and One Driver and create a Dispatcher/Driver classification for a savings of approximately \$12,000; Suggestion #6 was to allow calling out of casual drivers with no estimation of savings; Suggestion #7 was to allow only one Bus Driver at a time to be on vacation with no estimation of savings; Suggestion #8 was to return to former level of management and eliminate Lynne Denis' position for a savings of \$45,000; Suggestion #9 was to delete "Will Calls" for a savings of approximately \$2,000; Suggestion #10 was to transport Comprehensive Center's Rehabilitation clients for a savings equivalent to current contract with Heidenreiter; Suggestion #11 was to eliminate Sheboygan Falls trips to pick-up mail and hot boxes for a savings of \$3,774; Suggestion #12 was to decentralize money collection for a savings of approximately \$14,400; Suggestion #13 was to hire own mechanic and purchase parts where Handicare purchases parts for a savings of approximately \$37,000; and Suggestion #14 was to save approximately \$179 of overtime. Following receipt of the Union's suggestions for savings, Conway suggested that the parties adjourn the meeting to provide the County with an opportunity to review the Union's proposals. Isferding reiterated her opinion that decision on subcontracting had been made, but agreed to meet again on February 15 and 22, 1993. Prior to the February 15th meeting, Danforth analyzed the Union's fourteen suggestions for savings; concluded that the Union had underestimated some cost savings and had overestimated some cost savings; and further concluded that the Union's suggestions resulted in valid cost savings of \$48,179.48. The County considered valid cost savings to be those in which Danforth had verified the Union's costs and which did not decrease the level of Stagecoach services. When the Union negotiators and the County negotiators met on February 15, 1993, Conway responded to the Union's fourteen suggestions point by point and advised the Union that the proposals would not work. When the Union was advised that the Union's proposals would not work, one of the Bus Drivers asked what would make it work and Conway responded that the Union had to save \$100,000. Upon being advised that the County considered the Union's savings to be substantially less than \$100,000, Isferding indicated that the Union would review and verify the cost savings contained in its proposals. During the meeting, Isferding asked for and received an explanation of the contract with RCS and Heidenreiter. There was also a general discussion of wages and fringe benefits. Prior to February 22, 1993, Isferding contacted Conway to inform her that the Union was not prepared to meet on February 22nd and a meeting was scheduled for March 22, 1993. The March 22nd meeting was

attended by Korpi, who questioned Danforth about his data. At this meeting, the County reviewed the Union's proposals and the County's response to the proposals. Conway advised the Union that she did not see a lot of other options being presented by the Union and that County team had no option but to save \$100,000. Conway asked if the Union had anything new which they wished to present and Isferding responded "not just at this moment." Conway presented information regarding individual employes affected by layoff and employe bumping rights, as well as information on employes who might be eligible for retirement. Isferding stated that she did not think that the parties were at impasse and indicated that she wanted a meeting with HSB. Isferding wished to speak with HSB about rumors that she had heard regarding the experience, capability and financial status of Handicare. Isferding, who understood that the County's negotiating team could not accept any proposal which changed the level of services, wished to discuss the issue of change in the level of services with HSB. The Stagecoach RFP indicated that all proposals would be evaluated by the County staff and points assigned on the basis of four factors: Cost, Experience and Capabilities, Financial Capacity; Vehicle Type; and Maintenance and Facilities. When Isferding asked for the point differential between Handicare and Nichols, she was advised that the County had not awarded points and had looked only at costs. Following the March 22nd meeting, Isferding contacted people in Manitowoc to discuss rumors regarding Handicare's level of service, but did not contact HSB to schedule a meeting to discuss the subcontracting of Stagecoach. On March 25, 1993, Conway sent the following to Isferding:

Over the past several months we have met to address the situation with regard to the privatization of the transportation services in the Unit on Aging.

Throughout our discussions, the County negotiating committee has made every effort to realistically evaluate the suggestions of the bargaining committee which would effect the savings to the program.

At our last meeting it became apparent there was no where to go and that the proposals presented would not realize the cost reductions that are anticipated by contracting the service.

It is now necessary to proceed with the implementation of the contracted services.

Mr. Kurt Green, of Handi-Care, has been contacted and it is anticipated that a contract will be in place to transfer the services as of May 1, 1993.

Based on this projection, I have advised the affected employees that as of April 30, 1993 the positions will be eliminated and the layoff will occur.

In order to further coordinate this process, I will be available to meet at your convenience to discuss the impact of this layoff. Please call to confirm a date if you so desire.

Isferding did not call to confirm a date to discuss the impact of the layoff. Nor did the Union respond to Conway's letter of March 25, 1993 by providing the County with any proposals on the impact of the decision to subcontract the Stagecoach service. During the negotiations which occurred between December 16, 1992 and March 22, 1993, the Union's proposals focused on the decision to subcontract, rather than the impact of the decision to subcontract. When Isferding received Conway's letter of March 25, 1993, she concluded that Conway was cutting off discussions and responded by filing grievances on the subcontracting. Prior to the commencement of the Stagecoach negotiations, the County had not told Isferding that the County believed that it had a contractual right to subcontract the Union's work. On March 25, 1993, the County's Human Services Director sent the following to Stagecoach employees:

The Human Services Board, at their meeting of November 17, 1993, reviewed the information prepared by the study committee and recommended that the transportation services to the elderly and disabled could be provided more efficiently through the utilization of a contracted service.

In response to this recommendation, a committee was formed to meet with your bargaining unit representatives to negotiate this change. The parties have met and discussed this issue. After several meetings, there has been no practicable proposals from the bargaining committee which would effect the projected savings anticipated through the use of contracted services.

Based on this inability to find the savings in the present system, I regret to inform you that it is necessary to implement lay-off of the employees in the transportation division.

Effective April 30, 1993, your position of transportation coordinator will be eliminated. According to the provisions of the labor agreement, you are eligible to "bump" less senior employees, in positions in lower classifications, providing you have the training and experience to carry out the work responsibilities.

I have also been advised by the Personnel Department, that all departments have been requested to

notify the personnel department of any available positions so that you will have the opportunity to apply for and be given consideration for such positions.

So that "bumping" may be coordinated efficiently, Penny Buchanan-Elsner, of the Personnel Department, has been designated as the contact person. If you wish to utilize a "bump" please contact your union representative regarding the contract provisions.

Your written request to "bump" must be made to the Personnel Department by Friday, April 9, 1993.

The Human Services Departments and the Personnel Department will make every effort to assist you in this transition.

If you have any questions, please contact your union representative or the Personnel Department.

8. The decision to subcontract the Stagecoach service was implemented on May 1, 1993. The County administered tests to laid off Stagecoach service employes to determine if the employes were qualified to "bump" into another position. Laid off Stagecoach employes who applied for a position within the County's Register of Deeds office were given the same test which had been given to entry level employes for approximately eight years. One laid off employe, Stephen Gries, attempted to bump into the position of Printers Assistant and was required to take a typing test. The position description for Printers Assistant, developed in April of 1992, lists several qualifications, including the "Ability to type at least 40 wpm accurately." The typing qualification was added to the position description when the County computerized the Printing Department and added data entry duties to the position. Since the incumbent in the Printers Assistant position obtained the position prior to the time that the typing qualification was added to the position description, the incumbent was not required to take a typing test as a condition of employment. When data entry duties were added to the position, the incumbent attended a typing class and obtained the requisite typing skills. The Union has grieved the testing of laid off Stagecoach employes who sought to "bump" into other positions.

9. Felsher did not participate in the development of the Request for Proposals and did not participate in any Human Services meetings regarding the Stagecoach privatization, except the final meeting of the Review Committee. After the proposals were received by HSB and prior to January 1, 1993, the President of G & G Enterprises, Curtis Green, contacted Felsher to ask what the County was doing with the proposals. When contacted by Green, Felsher reported on the status of the RFP process. Felsher understood the Corporation Counsel to have stated that, following the decision to privatize, the County would have to negotiate the impact of the decision with the Union. On or about August of 1992, Felsher stated that "We don't propose to spend a great deal of time negotiating; We're losing money as we speak; We'll be giving them the options; Failure to become a partner with us to resolve this will result in immediate cuts in staff." These statements, which were made when Felsher addressed a meeting of the Sheboygan Kiwanis Club, referred to cuts in Medicaid funding involving County institutions and were not a reference to the Stagecoach privatization, or any other matter involving the Stagecoach service. On or about September 1, 1992, Felsher also stated that "Good government should be run just like a good business" and "people and personalities shouldn't stand in the way of making good financial decisions." During the time in which the

Review Committee was reviewing the proposal, Felsher stated "The bottom line is just for that--the bottom line" and "I can't look a \$200,000 savings in the eye and not accept it for the taxpayers." These statements, which were reported in a local newspaper, were in reference to the Stagecoach privatization. Between November 17, 1992 and December 17, 1992, Felsher stated "They can file grievances until they're blue in the face; it's not going to stop us from privatizing the bus service at the potential savings of hundreds of thousands of dollars" and that the Union negotiations are "just a requirement of the law and will have no impact on the privatization effort" and "The political decision has been made. There will never ever be another one. It's done." On or about May 1, 1993, Felsher stated, "It's over. I have no idea what the bargaining unit hopes to accomplish with this. I'm here to tell you it's over." When Felsher said "it's over," he was referring to the negotiations with the Union on the Stagecoach privatization. Felsher further stated that "A year from now we'll look back and say that savings was underestimated." A local paper, published on or about September 1, 1992, reported that, during the Kiwanis club meeting, Felsher said that it was impossible to negotiate contracts with the unions that the county can live with and that the only alternative is to privatize some operations and consolidate others to reduce the payroll. Felsher does not recall making these statements, but acknowledges that he may have made these statements.

10. The labor agreement for Sheboygan County Highway Department employes effective from January 1, 1966 to December 31, 1967, contained the following:

ARTICLE ONE
MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified the employee shall receive all wages and benefits due him for such period of time involved in the matter.

The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes. But in the event the Employer desires to subcontract any work which will result in the lay-off of any county employees, said matter shall first be reviewed with the Union.

The Employer shall have the exclusive right to determine the hours of employment and the length of the work week, and to make such changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Highway Department. The Union agrees at all times, as far as it has within its powers, to further the interest of Sheboygan County.

In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof. Intoxicating liquors, including beer and wine, shall not be consumed by any Highway Department employee during working hours either on or off county premises. To the end that there may be no misunderstanding with regard to the above, all employees are directed to refrain from entering upon any premises wherein intoxicating liquors are sold during working hours, except in extreme emergency situations.

Miller and Marvin Grosskreutz, a retired County employe who was a member of the union team which negotiated the initial Highway contract, agree that the language contained in the Highway contract, i.e., "The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes. But in the event the Employer desires to subcontract any work which will result in the lay-off of any county employees, said matter shall first be reviewed with the Union.", served as a model for the language which was incorporated into Article 3 of the supportive services contract.

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

CONCLUSIONS OF LAW

1. Complainant Sheboygan County Support Services Local 110, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.
2. Respondent Sheboygan County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.
3. Complainant has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent Sheboygan County has interfered

with, restrained or coerced employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and therefore, has not established an independent violation of Sec. 111.70(3)(a)1, Stats.

4. Complainant has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent Sheboygan County has initiated, created, dominated or interfered with the formation or administration of any labor or employee organization or contributed financial support to it and, thus, has not established a violation of Sec. 111.70(3)(a)2, Stats.

5. Complainant has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent Sheboygan County's decision to test the qualifications of laid off employes who sought to "bump" into other County positions was motivated, in whole or in part, by Union animus or hostility towards the concerted protected activities of employes, and, therefore, has not established a violation of Sec. 111.70(3)(a)3, Stats.

6. Respondent Sheboygan County's decision to subcontract the Stagecoach service was primarily related to the hours, wages and working conditions of employes represented by Complainant and, thus, is a mandatory subject of bargaining.

7. Article 3 of the parties' collective bargaining agreement expressly provides Respondent Sheboygan County with the right to subcontract bargaining unit work and, therefore, there is a waiver by contract of the County's statutory duty to bargain Respondent Sheboygan County's decision to subcontract the Stagecoach service with the Complainant.

8. By inaction, Complainant has waived its right to bargain the impact of the County's decision to subcontract the Stagecoach service upon the wages, hours and working conditions of employes represented by the Complainant.

9. Article 24 of the parties' collective bargaining agreement expressly addresses "bumping procedures" for laid off employes and, therefore, there is a waiver by contract of any statutory duty of Respondent Sheboygan County to bargain over "bumping procedures," including the administration of tests to determine whether or not laid off bargaining unit employes are qualified to "bump."

10. Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Respondent Sheboygan County has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 3/

The instant complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 4th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

3/ 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

SHEBOYGAN COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 27, 1993, the Union filed a complaint with the Wisconsin Employment Relations Commission alleging that the County violated Sec. 111.70(3)(a)1, 2, 3 and 4, Stats., when it failed to maintain the status quo of County employes providing Stagecoach services and retaliated against employes by testing laid off Stagecoach employes who wished to bump into a position. Respondent denies that it has committed any prohibited practices.

POSITIONS OF THE PARTIES:

Complainant

The collective bargaining agreement does not provide the County with the right to contract out bargaining unit work. The provision relied upon by the County recognizes the County's right to contract with third parties for additional work to be done by County employes and the County's right to assign County employes to do such work, regardless of where such work might be located. The County has the statutory duty to bargain the decision to subcontract the Stagecoach service prior to implementing the decision and the duty to bargain the impact of the subcontracting decision.

The "bargaining" between the County and the Union occurred after the County had made the decision to subcontract, was superficial and involved County representatives who lacked authority to execute a tentative agreement. The County failed and refused to make any counter to the Union's cost saving proposals. The County discontinued meeting with the Union before the Union could address any of the non-economic factors that the County had said were important to the subcontracting decision and before the Union could meet with County representative who had authority over the subcontracting decision. The manner in which the County structured its negotiations with the Union did not constitute bargaining in good faith as required by Sec. 111.70(3)(a)4.

The County asserts that, in the past, it has subcontracted work that is "similar" to work being done by bargaining unit employes and that, early in 1992, DHS had subcontracted with Handicare to pick up clients in the evening "one or two times a month." It is not evident that the Union was aware of this "subcontracting." Nor is it evident that the "similar" work was sufficiently similar to bargaining unit work, such that knowledge of it being contracted out would have alerted the Union to the fact that bargaining unit work was being contracted out.

A union's waiver of its right to bargain regarding a mandatory subject of bargaining must be clear and unmistakable. The Union has not waived its right to bargain regarding the County's decision to subcontract the Stagecoach service or the impact of that decision.

Following receipt of layoff notices, affected employes attempted to exercise their contractual bumping rights, but were denied those rights because they failed to pass tests for new positions. These new tests were unreasonable because they required knowledge that was not related to the positions sought, were not provided for by the parties' collective bargaining agreement and had not been bargained with the Union.

The County has failed to bargain its decision to contract out for the management and operation of the stagecoach bus service and also has failed to bargain the impact of that decision in violation of Sec. 111.70(3)(a)4, Stats. Sheboygan County has discriminated against employees and violated Sec. 111.70(3)(a)4, Stats., by requiring employees affected by its subcontracting decision to pass tests prior to bumping into a position. To remedy these violations, the County should be ordered to reinstate the affected employees and to make the affected employees whole. Additionally, the County should be ordered to restore the status quo, pending fulfillment of its statutory duty to bargain with the Union on any decision to contract out bargaining unit work and the impact of such a decision.

County

The complaint alleges that the County has violated Secs. 111.70(3)(a)1, 2, 3 and 4, Stats. It is difficult to relate any part of the record to the elements of subsections 1, 2 and 3 and, thus, the brief is directed to subsection 4 and the issue of "refusal to bargain."

The County's Personnel Director responded to the Union's demand to bargain as soon as she became aware that there had been a political decision that privatization of the Stagecoach service was a viable alternative. Although it had no legal duty to do so, the County did bargain with the Union over its decision to privatize Stagecoach.

The County has the right to determine the composition of its negotiations team. The County negotiation team, which consisted of skilled people who were fully aware of the details of the Stagecoach operation and the related financial issues, had full authority to carry out all their responsibilities. The County's negotiation team met with the Union over a four month period to negotiate the decision to privatize. The proposals submitted by the Union were reviewed by the County's negotiation team and fully discussed with the Union's negotiation team. As negotiations proceeded, the County's Personnel Committee and the HSB were kept apprised of negotiations.

The County's negotiation team, which attempted to obtain \$100,000 in savings, without a reduction in services, and to save employe jobs, bargained in good faith. The Union's negative approach to the negotiations and its refusal to address the real cost issue, i.e., wages and benefits, caused the negotiations to fail.

The County's statutory duty to bargain may be waived. In this matter, there has been an express waiver and a waiver by conduct. The express waiver is found in the language of the labor contract which provides the County with "the right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the employer." While the Union argues that the specific language means that the County could contract for "outside work," such a construction is inconsistent with the express language of the contract. The limitation upon the County's right to subcontract found in the Highway contract is not contained in the supportive services contract.

By their prior conduct, the parties have demonstrated that they agree that Sheboygan County can subcontract its work without bargaining with the Union. As the DHS Director testified, DHS enters into and has in effect over 100 subcontracts which, at any given time, have a value in the millions of dollars. DHS has subcontracts involving work which is similar to the work performed by employees of the bargaining unit. DHS has even subcontracted some of the Stagecoach services.

On March 22, 1993, it became apparent that the negotiations were at impasse. At that time, as well as by the Personnel Director's letter of March 25, 1993, the County offered to bargain impact issues. To date, the Union has refused to do so.

The record does not demonstrate any Union animus. The testing of job applicants has been done by the County over the years.

DISCUSSION

As the County recognizes, the Union's arguments primarily relate to the allegation that the County violated Sec. 111.70(3)(a)4, Stats., by failing to bargain the decision to subcontract Stagecoach and by failing to bargain the impact of the decision to subcontract Stagecoach. Sec. 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

Under Wisconsin law, a matter which is primarily related to wages, hours and conditions of employment is a mandatory subject of bargaining, while a matter which is primarily related to the formation and choice of public policy is a permissive subject of bargaining. 4/ A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2),

4/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. 5/

Decision to Subcontract Stagecoach Services

In Unified School District No. 1 of Racine County vs. WERC, 81 Wis.2d 89 (1977), the Wisconsin Supreme Court adopted a test for determining whether or not a particular decision to contract out work is primarily related to wages, hours and conditions of employment or is primarily related to the formation and choice of public policy. As in Racine, the County's decision to subcontract did not represent a choice among alternative social or political goals or values. Rather, the decision to subcontract the Stagecoach service was motivated solely by the desire to save money. Given the substantial wage, hours and conditions of employment dimensions and the absence of a significant public policy dimension, the Examiner is satisfied that the decision to subcontract the Stagecoach service is primarily related to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining. 6/

The Union and the County are parties to a collective bargaining agreement which, by its terms, is effective January 1, 1992 through December 31, 1994.

5/ Green County, Dec. No. 20308-B (WERC, 11/84)

6/ Brown County, Dec. No. 20857-B (WERC, 8/85).

Thus, at all times material hereto, the parties have been subject to the terms and conditions their labor contract. As Examiner Shaw stated in City of Wisconsin Rapids: 7/

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. 9/ Where a collective bargaining agreement exists which expressly addresses a subject, it determines the rights of the parties' and consequences of certain actions, 10/ but determinations as to whether or not a waiver exists are made on a case-by-case basis. 11/

9/ City of Richland Center, Dec. Nos. 22912-A, B (Schiavoni, 1/86) (WERC, 8/86)).

10/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); Janesville School District, Dec. No. 15590-A (Davis, 1/78); and City of Richland Center, supra.

11/ Racine Unified School District, Dec. No. 13957-C (WERC, 1/83); City of Richland Center, Ibid.

In arguing that the County has the contractual right to subcontract the Stagecoach service, the County relies upon the provision of Article 3, MANAGEMENT RIGHTS RESERVED, which states that "The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the Employer." The Union denies that this provision provides the County with the right to subcontract the Stagecoach service and argues that the purpose of the provision is to recognize the County's right to contract with third parties for additional work to be done by its employes and the County's right to assign the employes to do such work regardless of where the work might be located.

The Union's construction of the provision is not reasonable in that it ignores the fact that the provision references work that the County "possesses." Work possessed by the County is not work belonging to a third party. Giving effect to the plain language of Article 3, the undersigned is satisfied that the

7/ Dec. No. 27466-A (5/93).

language of Article 3 expressly provides the County with the right to subcontract work that the County possesses and to direct County employes to perform work that the County possesses wherever that work is located.

This language of Article 3 was agreed upon by the parties when they negotiated their initial collective bargaining agreement, which agreement was effective January 1, 1968. Ethel Miller, who retired from County employment in 1988, was a member of the Union team which negotiated the initial collective bargaining agreement with the County. At hearing, Miller, who did not have any bargaining notes from the initial contract negotiations, stated that the term "subcontracting" was never used during negotiations and that there was no representation that the language of Article 3 was intended to be a subcontracting provision. According to Miller, the language of Article 3 meant that the County "could ask any of the county employees to work wherever their work might take them if it was within the courthouse or in another location." 8/ Miller, however, does not claim, and the record does not establish, that Miller's interpretation of Article 3 was based upon any County representations, or upon any factor other than Miller's reading of the contract language.

Miller and Marvin Grosskreutz, a retired County employe who was a member of the Union team which negotiated the initial Highway contract, agree that the Highway language served as a model for the language which was incorporated into Article 3 of the supportive services contract. The relevant Highway contract language is as follows:

The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes. But in the event the Employer desires to subcontract any work which will result in the lay-off of any county employees, said matter shall first be reviewed with the Union.

Grosskreutz recalls that, at the time the language was negotiated, the Highway Department contracted for work, such as blacktopping. According to Grosskreutz, this language was developed to clarify that the County had the right to send employes to work wherever the County had a contract for work.

As the County argues, the language contained in Article 3 of the supportive services contract differs materially from the language of the Highway contract. Not only does the Highway contract provide a limitation upon the County's right to subcontract work which is not found in the supportive services contract, but also the first sentence references the County's right to "contract for any work it chooses." (Emphasis supplied)

8/ T., Vol. II at 8.

Given the differences in the language of the two provisions, Grosskreutz's testimony concerning the parties intent with respect to the language contained in the Highway contract does not provide a reasonable basis for interpreting the language contained in the supportive services contract. Indeed, the fact that the language of the supportive services contract does not mirror that of the Highway contract indicates that the parties did not intend to provide the supportive services employes with the same benefit which was provided to the Highway employes.

Neither Miller's testimony, nor any other record evidence, demonstrates that the parties mutually intended the language of Article 3 to be given any meaning other than that which is reflected in the plain language of the Article. The plain language of Article 3 expressly provides the County with the right to subcontract bargaining unit work. Since the County's right to subcontract the Stagecoach work is expressly embodied in the parties' collective bargaining agreement, there has been a waiver by contract of the County's statutory duty to bargain with the Union on the decision to subcontract the Stagecoach service.

Impact of Decision to Subcontract

As both parties recognize, the County has a statutory duty to bargain with the Union on the impact of the decision to subcontract the Stagecoach service upon the wages, hours and working conditions of bargaining unit employes. The Union's request to bargain the impact of the subcontracting decision was made in Carol Zoran's letter of July 20, 1992. It is undisputed that the County did not respond to this letter until November 6, 1992, when County Personnel Director Louella Conway telephoned Union Representative Helen Isferding, advised Isferding that the Review Committee had recommended the privatization of the Stagecoach operation and informed Isferding that it would be necessary to meet to discuss the issue.

By a letter dated November 20, 1992 and addressed to Isferding, Conway confirmed the telephone call of November 6, 1992, indicated that the HSB had decided that it would be more economical to subcontract the Stagecoach service and stated, inter alia, as follows:

I am requesting that we meet to negotiate this decision and determine whether or not, with the assistance of the involved parties, a better solution or an equivalent solution, or an alternate solution is available that would produce the same results without affecting the services to the beneficiaries of the program. In the event we are unable to find such a solution, we should then negotiate the impact of that decision, and if possible, it seems to me that we ought to try and see if we can place the impacted people in other areas of County employment.

The County Personnel Committee delegated the responsibility to negotiate the Stagecoach subcontracting issue to Conway, Human Services Specialist Lynne Denis, and Human Services Division Manager on Aging Jim McCabe. Additionally, Corporation Counsel Alexander Hopp, Human Services Director Gary Johnson, and County Financial Director Robert Danforth were assigned as resource persons. As the County argues, the County negotiating team had effective authority to enter into tentative agreements with the Union.

The Union and the County negotiating teams met on December 16, 1992; January 15, 1993; February 1, 1993; February 15, 1993; and March 22, 1993. At the initial bargaining session, the Union negotiating team was provided with a financial analysis of the Stagecoach operation and of the two bids which had been received by the County in response to the RFP. 9/ The Union negotiating team requested and was furnished with an explanation of the financial data relied upon by the County. 10/ There was a discussion regarding which employees would be affected by a subcontracting decision. The County asked the Union what it wanted to do about the impact of a subcontracting decision on the employees and there was a discussion of the bumping process. 11/ The County stated that it would follow the contractual layoff procedure. The Union indicated that it would need time to review the financial data provided by the County.

When the parties met on January 15, 1992, the County responded to questions from the Union negotiating team regarding the financial information which had provided by the County. Isferding indicated that a budget analyst from the International would visit Sheboygan on January 20, 1993 to review the County's financial data. The County told the Union negotiating team that they were willing to consider any proposals made by the Union. 12/

When the parties met on February 1, 1993, the Union questioned the qualifications of G & G. The County responded that they had interviewed clients of G & G. The Union presented the County with a typewritten list of fourteen proposals for savings and the County responded that they would review the Union's proposals.

Prior to the meeting of February 15, 1993, Danforth analyzed the Union's proposals and determined that there were valid cost savings of \$48,179.48. When the parties met on February 15, 1993, the County advised the Union that it had reviewed the Union's proposals, responded point by point to the Union's proposals and advised the Union that the proposals would not work. 13/ When

9/ Testimony of Carol Zoran. T., Vol. I at 62-63.

10/ Testimony of Zoran. T., Vol. I at 63.

11/ Testimony of Diane Schmahl. T., Vol. I at 82.

12/ Testimony of Schmahl. T., Vol. I at 84.

13/ Testimony of Schmahl. T., Vol. I at 89.

asked by the Union what would work, Conway responded that the Union needed to save \$100,000. Isferding replied that the Union would review its proposals to verify the cost savings.

When the parties met on March 22, 1993, the Union's budget analyst, Kerri Korpi, was present and questioned Danforth about his financial data. Conway recalls that, shortly after the meeting began, the Union caucused. Conway further recalls that when the Union returned from the caucus, they advised the County that they had reviewed the numbers and that there was no where else to go. 14/ Isferding recalls that, following a discussion in which the County reiterated that the Union's proposals would not work, Conway asked if the Union had anything new and Isferding responded "Not just at this moment." 15/ Isferding stated that the parties were not at impasse and that she wanted to meet with the HSB. 16/ At the conclusion of the meeting, Conway presented information on individuals affected by the subcontracting of Stagecoach, gave information on bumping rights and who might be eligible for retirement and discussed the contract provisions.

On March 25, 1993, Conway sent the following letter to Isferding:

Over the past several months we have met to address the situation with regard to the privatization of the transportation services in the Unit on Aging.

Throughout our discussions, the County negotiating committee has made every effort to realistically evaluate the suggestions of the bargaining committee which would effect the savings to the program.

At our last meeting it became apparent there was no where to go and that the proposals presented would not realize the cost reductions that are anticipated by contracting the service.

It is now necessary to proceed with the implementation of the contracted services.

Mr. Kurt Green, of Handi-Care, has been contacted and it is anticipated that a contract will be in place to transfer the services as of May 1, 1993.

Based on this projection, I have advised the affected employees that as of April 30, 1993 the positions will be eliminated and the layoff will occur.

In order to further coordinate this process, I will be available to meet at your convenience to discuss the impact of this layoff. Please call to confirm a date if you so desire.

14/ T., Vol. III at 79.

15/ T., Vol. II at 41.

16/ T., Vol. II at 41-42.

The County implemented the decision to subcontract the Stagecoach service on May 1, 1993.

As discussed supra, the parties' collective bargaining agreement provides the County with the right to subcontract bargaining unit work and, thus, the County did not have a statutory duty to bargain the decision to subcontract the Stagecoach service with the Union. Nonetheless, County negotiators did meet with the Union to discuss the subcontracting decision and considered all proposals made by the Union. Contrary to the argument of the Union, it is not evident that the County negotiators did not bargain in good faith.

In Conway's letter of November 20, 1992, as well as in Conway's letter of March 25, 1993, the County offered to bargain the impact of the decision to subcontract Stagecoach. Moreover, during the negotiation sessions which were held between December 16, 1992 and March 22, 1993, the County also indicated a willingness to negotiate the impact of the decision to subcontract the Stagecoach service. 17/

The Examiner is satisfied that the County responded to the Union's July 20, 1992 request to bargain the impact of the decision to subcontract the Stagecoach service by offering to bargain such impact. The Examiner is further satisfied that this offer to bargain impact occurred prior to the implementation of the County's decision to subcontract the Stagecoach service.

Isferding acknowledges, that during the negotiation sessions which were held between December 16, 1992 and March 22, 1993, the Union proposals focused on the decision to subcontract, rather than the impact of the decision to subcontract. 18/ Isferding further acknowledges that she made no response to Conway's letter of March 25, 1993, other than to file a grievance. 19/

The County was not responsible for presenting proposals on the impact of its decision to subcontract. 20/ Rather, it was incumbent upon the Union to make proposals regarding the impact of the decision to subcontract.

The Complainant correctly notes that a waiver of bargaining must be established by clear and unmistakable evidence. 21/ In this case, the evidence establishes a clear and unmistakable waiver by inaction based upon the Union's failure to make any proposal to the County regarding the impact of the decision to subcontract the Stagecoach service. Accordingly, the Examiner has not found the County to have violated its statutory duty to bargain the impact of the decision to subcontract the Stagecoach service.

Job Testing

The evidence establishes that one laid off employe, Stephen Gries, attempted to bump into the position of Printers Assistant and was required to

17/ Testimony of Schmahl. T., Vol I at 94.

18/ T., Vol. II at 43-44.

19/ T., Vol. II at 54-55.

20/ Hartford Joint School District #1, Dec. No. 27411-A (Jones, 4/93).

21/ City of Richland Center, Dec. No. 22912-B (WERC, 8/86) and the cases cited therein.

take a typing test. The position description for Printers Assistant, developed in April of 1992, lists several qualifications, including the "Ability to type at least 40 wpm accurately." The typing qualification was added to the position description when the County computerized the Printing Department and added data entry duties to the position. Since the incumbent in the Printers Assistant position obtained the position prior to the time that the typing qualification was added to the position description, the incumbent was not required to take a typing test as a condition of employment. However, when data entry duties were added to the position, the incumbent attended a typing class and obtained the requisite typing skills.

While the record establishes that tests were given in the Register of Deeds office, the evidence concerning this testing is scant. According to Schmahl, "it asked questions of an entry-level person such as what kinds of surveying instruments and they'd have to be able to read maps, things like that . . ." 22/ While Union witnesses believed the test to be new, the testimony of Personnel Director Conway demonstrates that this test had been given to applicants for entry level positions in the Register of Deeds Office for approximately eight years. 23/

Complainant argues that the imposition of the tests violated Sec. 111.70(3)(a) 4, Stats., because the tests were unreasonable in that they required knowledge that was not related to positions being sought, had not been previously required, and had not been bargained with the Union.

Article 24, SENIORITY, of the parties' collective bargaining agreement contains a layoff procedure which expressly addresses "bumping" rights. Under this procedure, full-time employes may bump into the position of a less senior employe, provided that "the employe must have the training and experience to carry out the work responsibilities" and part-time employes may bump on the

22/ T., Vol. I at 98.

23/ T., Vol. III at 84.

basis of seniority, provided that the "employee must be qualified to perform the position to which they are bumping." Assuming arguendo, that the decision to test the laid off employes were a mandatory subject of bargaining, there has been a waiver by contract of any statutory duty to bargain over "bumping procedures," including the administration of tests to determine whether the laid off employe is qualified to "bump" into a position. 24/

Complainant alleges that employes were denied their contractual bumping rights because they failed to pass unreasonable tests required by the County. Complainant, however, did not raise any breach of contract claim prior to hearing and such a claim was not litigated at hearing. Moreover, grievances are pending regarding the imposition of the tests. 25/ The issue of whether or not the County has violated the collective bargaining agreement is not appropriately before the Examiner and has not been addressed by the Examiner.

At hearing, the Union confirmed that it was alleging that the County had violated Sec. 111.70(3)(a)3, Stats., by testing employes who wished to "bump" into positions. Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employe was engaged in lawful, concerted activities protected by Sec. 111.70(2), Stats.;

24/ While the Examiner has not found it necessary to determine whether or not the decision to test is a mandatory subject of bargaining, she notes that in City of Waukesha (Fire Department), Dec. No. 17830 (5/80), the Commission stated as follows:

Another portion of the Association's proposal which we find to be a non-mandatory subject of bargaining is that which requires the City to give an oral interview, and also states that said "interview will be given by a board of not less than 3 composed of the Chief and such staff officers as he may select," because it goes to the management's right to determine if a written examination or an oral interview is necessary, and if one is desired, and which and how many management officials will conduct the interview. Such matters related primarily to the City's management function, as noted in our decision in City of Beloit. 9/

9/ Dec. No. 11831-C, 7/74, aff. 73 Wis.2d 43 (1976).

25/ Testimony of Schmahl. T., Vol. I at 97.

2. The employer was aware of that activity;
3. The employer was hostile toward that activity;
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 26/

Zoran's testimony establishes that the parties have not previously used the contractual bumping procedure in a layoff situation. 27/ Thus, the fact that the County had not previously administered a test in a bumping situation is not persuasive evidence of discriminatory conduct by the County. The record does not establish that the County's decision to require testing of employes affected by the subcontracting decision was motivated, in any part, by hostility towards the Union, or any employe for engaging in concerted protected activity. Accordingly, the Examiner has not found the County to have violated Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)(1)

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Section 111.70(2), Stats., provides as follows:

(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

As discussed above, a municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. Complainant has not been shown to have violated Sec. 111.70(3)(a)4, Stats., and, thus, there is no derivative violation of Sec. 111.70(3)(a)1, Stats. Complainant did not argue and the record does not demonstrate that the County has committed any independent violation of Sec. 111.70(3)(a)1, Stats.

26/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87).

27/ T., Vol. I at 68.

Section 111.70(3)(a)2, Stats.

Under Sec. 111.70(3)(a)2, Stats., it is a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it, . . ." While the complaint alleges that the County has violated Sec. 111.70(3)(a)2, Stats., Complainant has not addressed this allegation in written argument. Nor does the record demonstrate that the County has violated Sec. 111.70(3)(a)2, Stats.

Conclusion

The Examiner finds no violation of Sec. 111.70(3)(a)1, 2, 3, or 4, Stats. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 4th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/