

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 150, Complainant,

vs.

WASHINGTON COUNTY, Respondent.

Case 163
No. 67108
MP-4360

Decision No. 32185-A

Appearances:

Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, for Service Employees International Union Local 150.

Nancy L Pirkey, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, for Washington County.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On July 2, 2007, Complainant filed with the Commission a "Request To Initiate Grievance Arbitration" with Washington County regarding the Samaritan Health Center. The Commission captioned the request as Case 162, No. 67086, MA-13748. Complainant filed with the Commission on July 12, 2007 a complaint of prohibited practices alleging that Respondent had violated Sec. 111.70(3)(a)1, 4 and 5 Stats., by unilaterally subcontracting laundry and housekeeping operations at the Samaritan Health Center. The Commission captioned the complaint as noted above. Between the filing of the arbitration request and the filing of the complaint, Complainant and Respondent discussed whether they could stipulate to a grievance arbitrator and whether they could stipulate to an expedited arbitration process. The cover letter to the complaint is dated July 11, and notes that the parties had agreed that I serve as arbitrator. In an e-mail dated July 11, Peter Davis, the Commission's General Counsel, indicated that the Commission would attempt to assign a staff member to serve as a conciliator prior to July 31 and would attempt to assign an arbitrator to render an arbitration award by July 31. In an e-mail to Davis dated July 12, Respondent stated,

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. . . the County is willing to proceed as quickly as possible to arbitration with Arbitrator McLaughlin. However, the County is not willing to stipulate to expedited arbitration, nor is it willing to agree to the appointment of a different arbitrator so that a hearing can be held by July 31st. . . The County does reserve the right to file a motion to defer parts of the complaint to grievance arbitration. . . .

I advised the parties in an e-mail dated July 13 that I could not hear the matter and issue a decision by July 31. Complainant responded in an e-mail dated July 13, specifying a number of options for expedited hearing, including “interim relief staying the subcontracting, either after a hearing, or just on the basis of oral argument as early as Monday before the contract is signed.” In an e-mail dated July 16, Respondent declined to agree to another arbitrator or to any of the options set forth by Complainant.

On July 17, 2007, Complainant filed a fax with the Commission requesting that, “the arbitrator issue an interim order to avoid irreparable harm to the parties pending full determination of the grievance submitted to him.” The request sought,

. . . that the arbitrator contact the parties for a telephone conference call . . .
(t)o determine if interim relief is needed prior to county signing a contract . . .
on Thursday morning July 18, 2007. If the arbitrator determines that irreparable harm will result from signing the contract, he should issue a cease and desist order forthwith. If he determines that signing the contract itself will not cause irreparable harm, then he should arrange for oral argument or a hearing to present evidence as to whether or not an interim cease and desist order should issue prior to August 1, 2007.

In an e-mail to the parties dated July 18, I noted, “I cannot offer the service you seek in the timeframe you seek it.” On July 18, Respondent filed a response to Complainant’s July 17 request for interim relief, denying that the matter posed a basis for injunctive relief. In a letter filed with the Commission on July 26, Complainant noted that the conciliation had concluded without a resolution of the dispute and that the parties sought to combine the complaint and arbitration matters for purposes of hearing.

On August 6, 2007, Respondent filed its answer to the complaint together with a “Motion To Defer Complaint To Grievance Arbitration.” On August 13, Complainant filed a response to the motion. On August 17, the Commission issued an order appointing me Examiner on Case 163, No. 67108, MP-4360; I conducted a pre-hearing conference with the parties; and issued a notice setting hearing for August 29. On August 20, the Commission assigned me to act as Arbitrator in MA-13748, and I issued a notice confirming hearing on August 29.

The parties, Examiner, and witnesses met for hearing at 10:00 a.m. on August 29, 2007 in West Bend, Wisconsin, but hearing could not be called to order until 11:30 a.m. due to the failure of a court reporting service to supply a reporter, necessitating delay to secure an alternative court reporting service. Hearing was continued to, and completed on, October 5, in West Bend, Wisconsin. On September 26, Christine Moran filed a transcript of the first day of hearing, and on October 15, Mary Lorentz filed a transcript of the second day of hearing. The parties filed briefs and reply briefs by December 11.

FINDINGS OF FACT

1. Service Employees International Union Local 150, referred to below as the Union, is a labor organization which maintains its offices at 8021 West Tower Avenue, Milwaukee, Wisconsin 53223. The Union employs Carmen Dickinson as its Director of Bargaining and Staff Development and Becky Kroll as an Administrative Organizer.

2. Washington County, referred to below as the County, is a municipal employer, which maintains its offices at 432 East Washington Street, P.O. Box 1986, West Bend, Wisconsin 53095. The County operates the Samaritan Health Center (Samaritan), which is a skilled care nursing facility and The Fields of Washington County (the Fields), which is an assisted care facility. At all times relevant here, Edward Somers has served as the Administrator of Samaritan, and in that capacity he oversees the operation of Samaritan and the Fields. Somers reports to the Samaritan Committee, which is the governing board that oversees the operation of Samaritan and the Fields. The Samaritan Committee is a five person board, composed of County Board members. The County operates Samaritan and the Fields as two of four enterprise funds. The County Board expects its enterprise funds to generate revenue from their own operations that is sufficient to cover the expenses of operation. The other two County enterprise funds are the Highway Department and the Family Park Golf Course.

3. The Union serves as the exclusive collective bargaining representative for certain Samaritan employees. The Union and County have been parties to a collective bargaining agreement for those employees for many years. The most recent labor agreement is in effect, by its terms, from January 1, 2007 through December 31, 2008. The agreement includes the following provisions:

ARTICLE 1 – RECOGNITION AND BARGAINING UNIT

Section 1.01. The County recognizes the Union as the exclusive bargaining agent for the following Washington County employees at SAMARITAN HEALTH CENTER working twenty (20) hours or more per week:

Plant Operations/Domestic Services Workers
Plant Operations/Custodians
Plant Operations/Maintenance Workers

Certified Nursing Assistants – Regular and Casual
Cooks
Dietary Aides
Activity Aides

Note: Position of Nursing Assistant Helpers eliminated; two incumbents will remain in the position of Nursing Assistant Helper; but no new employees will be allowed to move into this job classification.

Section 1.02. In accordance with Wis. Stats Sec. 111.70, the County recognizes the right of employees to be represented by a labor organization of their own choice in conferences and negotiations with the County on questions of wages, hours and conditions of employment, and the further right of such employees to refrain from any and all such activities. . . .

ARTICLE 2 MANAGEMENT RIGHTS

Section 2.01. The County retains and reserves the sole right to manage its affairs in accordance with all applicable law, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and classifications thereof to perform such services; the right to direct the work force; the right, subject to the terms of this Agreement related thereto, to establish qualifications for hire, to test, and to hire, promote, retain, transfer and assign employees; the right, subject to the terms of this Agreement related thereto, to determine the specific hours of employment, the length of the work week and the details of employment of the various employees; the right, subject to the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action for just cause, except as provided in Section 4.01; the right to lay off employees; the right to contract out for goods or services; the right to maintain efficiency and effectiveness of operations by determining the method, the means and the personnel by which such operations are conducted; and to take whatever actions are necessary to carry out the duties of the various departments and divisions in emergency situations. . . .

Section 2.03. In addition to the foregoing, the County reserves the right to make, adopt, enforce and amend from time-to-time, reasonable rules and regulations relating to personnel policy, procedures and practices, and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, assignment of personnel or the technology of performing the work. These rights are unqualified and shall not be abridged, delegated or

modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. These rights shall not be used for the purpose of discrediting or weakening the Union. . . .

. . .

ARTICLE 6 – CLASSIFICATION AND COMPENSATION

Section 6.01. The established pay ranges for the classifications set forth in Appendix A shall be interpreted and applied as follows . . .

. . .

ARTICLE 18 – LAYOFF

Section 18.01. In the event the County reduces its work force, the last employee hired within a job classification shall be the first (1st) laid off. When increasing the work force, the last employee laid off shall be the first (1st) recalled. Full-time employees shall have seniority over part-time employees within the same job classification. . . .

Section 18.04. Should the County deem it necessary to shut down or contract out the operation of the Samaritan Health Center during the lifetime of this Agreement, the County will provide the employees and the Union with a minimum of forty-five (45) calendar days of notice of the date of shutdown.

ARTICLE 19 - GRIEVANCE PROCEDURE

Section 1. Any grievance which may arise out of the interpretation of the provisions of this Agreement between the county and an employee(s), or the County and the Union, shall be handled as follows:

All grievances shall be processed in accordance with the following procedure:

STEP 1. The employee and/or the Union Coordinator or Work Site Leader shall present the grievance to the department supervisor. The department supervisor shall have ten (10) calendar days in which to respond.

STEP 2. If a satisfactory settlement is not reached as outlined in Step 1, the Union may appeal the grievance in writing within ten (10) calendar days following receipt of the Step 1 answer to the Administrator. The Administrator shall have ten (10) calendar days in which to respond.

STEP 3. If a satisfactory settlement is not reached as outlined in Step 2, the Union may appeal the grievance in writing to the County Director of Human Resources within ten (10) calendar days following receipt of the Step 2 answer. The Director of Human Resources shall have ten (10) calendar days to respond.

. . .

Section 19.04. Grievances over suspensions or discharges may be commenced at Step 2 within the time periods listed in Section 19.03, but the Administrator will then have twenty (20) calendar days in which to respond . . .

Section 19.05. Time periods listed in this Article may be extended by written agreement between the Administrator and a Union representative at Steps 1 and 2, and between the County's Director of Human Resources and a Union representative at Steps 3 and 4. . . .

The labor agreement provides Group Health Insurance benefits at Article 9; Wisconsin Retirement System benefits at Article 10; Vacation benefits at Article 14; and Sick Leave benefits at Article 15. At Appendix A, the agreement states a wage schedule, consisting of six steps, running from "Start" through "54 Mos." The wage range for the "Plant Operations/Custodian" classification, effective January 1, 2007, runs from \$12.40 to \$15.97. For the "Plant Operations/Maintenance Worker" classification, effective January 1, 2007, the wage range, effective January 1, 2007, runs from \$14.44 to \$17.04. For the "Domestic Service Worker" classification, the wage range, effective January 1, 2007, runs from \$10.00 through \$12.80.

4. BSG Maintenance of Green Bay, Inc., (BSG) was incorporated in 1999 and offers building maintenance services to a variety of facilities. The Chief Executive Officer of BSG is Steven Brandt, who shares ownership of BSG with his wife, Michelle Brandt. In August of 2006, BSG made a mass mailing to all nursing homes in Wisconsin. Somers received a BSG postcard offering to view the facility, without charge, for the purpose of submitting a proposal to provide housekeeping services. Somers returned the contact and requested a BSG proposal, which BSG provided in late August of 2006. Somers was then in the process of assembling a 2007 budget for Samaritan and the Fields. He reviewed, but did not formally respond to the BSG proposal. He was, however, aware that the proposal offered to perform housekeeping services at a lower cost than Samaritan was then paying. He determined at that point that Samaritan would probably have to cut costs and that he might have to recommend employee layoffs to the Samaritan Committee. In late October of 2006, Somers attended a training session provided by the Wisconsin Association of Homes and Services for the Aging. At that conference, BDO Seidman, an accounting firm, presented a report comparing costs per patient day from public and private sector nursing homes throughout Wisconsin. The report drew data from 2005 Medicaid Cost Reports filed with state and federal auditing authorities by facilities receiving Medicaid reimbursement. Somers read the report to indicate that Samaritan's labor costs for housekeeping services were roughly

\$4.00 per hour per patient day higher than the median cost for such services in what BDO Seidman viewed as the relevant labor region. Somers interpreted this data to confirm the need for Samaritan to cut its housekeeping labor costs.

5. The County and the Union met to collectively bargain the agreement noted in Finding of Fact 3 above in October of 2006. The County proposed the following among its “Additional Bargaining Proposals”:

The County proposes to make some changes in staffing that will result in the layoff of certain employees (to be discussed at the bargaining session). The layoffs will be effective January 1, 2007.

The proposal affected at least one laundry position, two custodial positions and two positions classified as Nursing Assistant Helper. The affected custodians were among the most senior members of the bargaining unit, and the affected laundry position was occupied by an employee high on the seniority list. The County notified the affected employees of the layoff in letters dated October 17, 2006. The Union responded to the layoff notices by filing a grievance, dated October 27, asserting the layoffs abolished “job classifications in order to subvert benefit obligations” and failed “to follow seniority procedures”. The cover letter accompanying the grievance specifically notes the layoff of the laundry position “was out of seniority in the domestic service classification” and that the layoff of the custodians was “for the purpose of avoiding negotiated fringe benefits to which the incumbents are entitled.” The cover letter noted the Union’s hope to “avoid needless litigation.” The parties had a negotiations session set for November 9, and on November 6, the County issued a letter to the employees who had received the October 17 notices of layoff. That letter is headed “Decision to rescind layoff” and states:

Upon further reflection we have determined that elimination of your position will not accomplish financial goals set for next year. Therefore, we are rescinding your layoff. We will be looking at other avenues to achieve operational savings in 2007. Rescinding your layoff is not a guarantee of future employment.

On December 18, 2006, the parties reached a tentative agreement on what became the 2007-08 labor agreement noted in Finding of Fact 3 above. The Union ratified the tentative agreement prior to the County Board vote to ratify it, which took place on January 9, 2007.

6. The Samaritan Committee met on January 4, 2007 to consider a number of items, including a number of reports from Somers. Included in those reports was one involving the then-pending tentative agreement noted in Finding of Fact 5. The minutes of that meeting note another report thus:

Domestic Services – Mr. Somers was approached by an outside services provider for housekeeping and laundry that claims they can provide large

savings for Samaritan. Mr. Somers will issue an RFP to get some hard numbers to bring back to the committee for consideration.

At its April 4, 2007 meeting, the Samaritan Committee authorized Somers to prepare a formal Request For Proposals (RFP) for Samaritan's Laundry and Housekeeping Services. Somers prepared the RFPs in conjunction with the County's Purchasing Department. The RFPs did not mention County employee wages or benefits and contained no direction to interested parties that they hire County employees or maintain their wages and benefits. Samaritan issued the formal RFPs on April 23, 2007, through newspaper advertisement. The RFPs required interested vendors to participate in a pre-proposal meeting and a walk-through in early May, and set a May 21 deadline for the submission of a proposal. Samaritan Committee notes from its May 10 meeting state, "Six firms showed up for the pre-bid walk through for housekeeping and four firms for Laundry." The County received five bids for Housekeeping and four for Laundry. Vendors submitted bids to the County purchasing department, which did not release cost information on the bids until after the deadline for submitting an RFP had passed. Prior to the release of the bid costs, Somers and other Samaritan administrators reviewed the bidding vendors by checking their references and reviewing the completeness of their proposal. They gave a preference to vendors who submitted an RFP for Laundry and for Housekeeping. ABM Janitorial and BSG were the two highest scoring vendors following this review. After the bid deadline passed, a representative of the County's purchasing department supplied the committee with the cost figures and assisted in their evaluation, including interviews of ABM Janitorial and BSG. As the reviewing committee calculated the impact of the bids against the 2007 Samaritan budget for housekeeping, custodial and laundry services, not including the impact of the rescinded 2006 layoffs, the BSG bid reduced County costs by a total of \$234,165.00 and the ABM Janitorial bid reduced County costs by \$171,478.00. Somers documented the committee's evaluation process and presented a report to the Samaritan Committee at its meeting of June 7, 2007. Committee notes document the report thus:

Mr. Somers recommended that the Samaritan Committee contract with BSG . . . for Housekeeping, Laundry and Custodial services. The firm came with excellent references from other Nursing Home clients and agreed to interview current staff for positions with their firm. BSG . . . agreed to hold their price for seven years. . . .

The Samaritan Committee approved Somers' recommendation thus approving the execution of a contract with BSG, since the County Board did not have to ratify the Samaritan Committee's action. The June 7 notes reflect that Somers requested during the interview with the two finalists that the vendors offer employment to County employees if the County accepted their bid. Somers issued a notice of the Samaritan Committee's action in a June 8 letter to Kroll which states,

On June 7, 2007, pursuant to Article 2, Management Rights, the Samaritan Committee made a financial decision to subcontract Housekeeping, Custodial, and Laundry services with BSG Maintenance. BSG Maintenance will begin operations on August 1, 2007.

BSG has agreed to meet with the current staff members to interview for positions with their firm. The current employees last day of employment with Washington County . . . will be July 31, 2007.

Somers mailed layoff notices dated June 8, 2007 to County employees affected by the BSG contract. The notices state:

Your position at Samaritan Health Center is being eliminated. This will result in your being laid-off from employment at Samaritan Health Center effective August 1, 2007. You are welcome to apply for any open position with Washington County for which you are qualified. If you have any questions regarding separation benefits please feel free to contact the Washington County Human Resources Department.

Somers issued this notice to eighteen employees. On July 19, 2007, the County executed a Maintenance Services Agreement with BSG to provide housekeeping and laundry services starting on August 1, 2007. The agreement provides that it “shall automatically renew in twelve (12) month increments for a total initial term of seven years”. The agreement provides that Samaritan can terminate the agreement “for any reason, without cause” on ninety days written notice to BSG and that either party can terminate the agreement for cause “in the event of a material breach by one party”.

7. The County did not discuss its decision to subcontract housekeeping and laundry services with the Union during their collective bargaining for the labor agreement noted in Finding of Fact 3. At a Labor-Management Meeting held on April 16, 2007, Somers informed Kroll that the Samaritan Committee had authorized the issuance of RFPs for the provision of housekeeping and laundry services. Kroll understood Somers to be notifying the Union that the Samaritan Committee was considering subcontracting. She and Somers discussed the issue briefly, with Kroll commenting on her unfavorable experience with one of the vendors she understood the County to be in contact with as well as her recommendation that the County use union contractors. The Union removed Kroll and Dickinson from its service for a short period of time starting on April 19. In a letter dated May 9, 2007 to Karon Kraft, then the County’s Principal Human Resources Analyst, Kroll stated:

We have received no notice of subcontracting; however rumors to that effect have been circulating at Samaritan . . . Please inform us, in writing, if the County has intentions to subcontract, what the County intends to subcontract, when the County intends to subcontract, and who the County intends to subcontract with. In addition, we are requesting any proposals the County has issued and any specs associated with those proposals. If the County has entered into any contracts, we are requesting copies of those contracts.

If the County is considering subcontracting, the union requests that the County not proceed unless and until the Union has the opportunity to negotiate

concerning the decision whether or not to subcontract, as well as the effect on the bargaining unit.

Please respond to the request as soon as possible but no later than Monday, May 14, 2007 . . .

Kraft referred this letter to Somers, who answered by e-mail dated May 9, 2007. The e-mail included as attachments, the RFPs noted in Finding of Fact 6 and a letter dated May 11, which states:

. . . On April 16, 2007, I announced to the union at the labor management meeting the county's intent to solicit bids for outside contractors to provide housekeeping, custodial and laundry services at Samaritan. At this point we are merely soliciting proposals to see if it will be financially advantageous for Samaritan to subcontract these services.

The Wisconsin Medicaid program has been providing minimal rate increases in recent years that do not cover the ever increasing costs of operating a nursing home. We have been placed in a position of financial hardship and have no choice but to pursue cost saving measures.

Pursuant to your request, I am attaching to the e-mail and written letter, copies of the Requests for Proposal for housekeeping and laundry services and addenda.

Please consider this letter written notice of Washington County's intent to subcontract housekeeping, custodial and laundry services at Samaritan Health Center.

Kroll received these documents by e-mail on May 9, thanking Somers for "your prompt response" and noting, "the union reserves its right to grieve any violations of the Collective Bargaining Agreement based on information obtained from our request."

8. On a grievance form dated May 18, 2007, the Union grieved, in writing, "the County's proposed subcontracting of housekeeping, custodial and laundry services as a violation of the collective bargaining agreement." Kroll filed the form, at Step 2, by mail and by fax. The grievance form alleges the County had violated, "Articles 1, 2, 6, 8 and all other applicable contract provisions." In a letter dated June 6, 2007, Somers responded to the grievance thus:

On May 18, 2007 I received a grievance you filed on behalf of the bargaining unit regarding subcontracting Housekeeping, Laundry and Custodial services at Samaritan. Pursuant to Article 19, Section 19.04 of the Collective Bargaining Agreement you elected to begin the grievance procedure process at step 2. In

the grievance you allege that Articles 1, 2, 6 and 8 of the Collective Bargaining Agreement are being violated.

I do not find any violations of the Collective Bargaining Agreement in the articles you mention. Article 2, Section 2.01 clearly states that management has “the right to lay off employees; the right to contract out for goods or services”. The County is making this change for financial reasons, not to discredit or weaken the union.

Kroll received Somers’ response on June 8. In a letter to Kraft dated June 8, Kroll noted receipt of Somers’ response, stating “we are requesting to proceed to the next step of the grievance procedure.” Her letter noted the Union’s desire for “an expedited grievance/arbitration procedure” with a deadline of June 30, 2007, and notified the County of the Union’s choice of an arbitrator. Her letter also states,

We are asking that the County refrain from taking action to sub-contract until the grievance/arbitration process has been completed.

Finally, the Union has requested the following information:

1. Any proposals the County has issued and any specs associated with these proposals,
2. Copies of the BSG contract, maintenance quotes,
3. Copies of any other competitive bids and quotes,
4. Any and all financial information for Washington County and Samaritan that would be used to support the County’s claim that this is a financial decision,
5. All financial information that shows the cost savings of providing this service through a sub-contractor versus in-house.
6. Because the County has informed the Union that BSG has agreed to interview current staff, we are requesting any and all information on BSG wages, benefits and policies.

We are requesting that this information be provided no later than Friday June 15, 2007. Our previous request for information was ignored by the Administrator of Samaritan; we hope that you will provide this information in an expedited manner so that the Union does not have to resort to legal action.

Kraft was on vacation on June 14 and June 15. She phoned and e-mailed Kroll on June 14. Her e-mail notes that she “will respond within the ten-day period as per the contract language.” It also notes that Somers was out of the office until June 18. Nancy Pirkey, the County’s labor counsel, responded to Kroll’s June 8 letter in a letter dated June 14, which was issued by letter and by fax. Pirkey’s letter advises Kroll that Kraft “will be responding to the Union’s request for expedited arbitration . . . when she returns next week.” Pirkey’s letter adds,

I have been asked to respond to your request for information. The County intends to provide the information the Union has requested, to the extent we are legally required to do so. However, we will not be able to respond to your request by June 15th. The County is collating the information it has available, and will forward the information to you by the end of next week.

Kraft issued her Step 3 response to the grievance in a letter to Kroll dated June 19, 2007. Her response denies the grievance, asserting,

The “County has the express right to contract out for goods and services as recognized . . . in Article 2”. The County made this decision for economic reasons and not to undermine or weaken the Union.

Kraft’s Step 3 response also noted that the County: saw “no need to agree to an expedited arbitration process”; declined to agree to the Union’s choice for arbitrator; offered its own choices for an arbitrator and stated its view of the contract if the Union could not agree to the County’s suggested arbitrators. In a separate letter to the Kroll dated June 19, Kraft responded to the Union’s request for information thus:

. . .

Consistent with the union’s numbering of information requested in their June 9, 2007 letter, the following is a summary of the information now being provided:

1. The union was provided with the Request for Proposals for housekeeping and laundry services and addenda on May 11, 2007 by both e-mail and certified mail pursuant to their May 9, 2007 request.
2. A copy of the BSG contract and price quote is attached. This information was not provided on May 11, 2007, as it was not available.
3. The other competitive bids are attached. Again this information was not provided, as it was not available May 11, 2007.
4. The 2007 Samaritan Health Center operating budget for Housekeeping and Laundry is attached. The union did not request this information in their May 9, 2007 letter.

5. Attached is the summary sheet that was provided to the Samaritan Committee on June 7, 2007 illustrating cost savings versus the 2007 budget. Keep in mind, the 2007 budget does not reflect the wages and benefits of the two custodians and the domestic services worker whose lay-off notices were rescinded during the 2007-2008 contract negotiations (detailed costs for these 3 positions can be found on the last page of the attached documentation). Again, the union did not request this information in their May 9, 2007 letter.
6. We do not have information regarding BSG wages, benefits and policies. BSG has indicated they will be contacting all current employees directly via US Mail regarding employment opportunities.

On July 2, the Union filed the complaint of prohibited practice captioned above. The Union had not, prior to the complaint of prohibited practice, challenged the timeliness of the County's Step 2 and Step 3 grievance responses. Kraft issued an e-mail to BSG's corporate address dated July 24, which states,

. . . send me the salary schedule/pay plan for your employees; any employee benefit information you make available to your employees; as well as any other pertinent employee benefit information. This is now public record, as you are contracting with Washington County . . .

She received no response to this e-mail. She attached it to an e-mail dated August 6, which states, "I need to have the requested information in my hands no later than . . . August 9 . . . as it relates to a legal matter that is pending." Kraft followed this e-mail with several phone calls to Steven Brandt. BSG did not respond until August 14. When Kraft received the BSG response, she forwarded it to Kroll.

9. Somers believed, as he began to prepare Samaritan's 2007 budget in August of 2006, that Samaritan would generate a significant shortfall for that year. The layoffs proposed by the County in October of 2006 reflect that concern. He had not, at the time of implementing the layoffs, determined to pursue the subcontracting of Housekeeping and Laundry services. His review of the BDO Seidman report noted in Finding of Fact 4, however, lent increasing force to his consideration of the subcontracting option, as did the ongoing development of a 2007 budget. As one of the County's enterprise funds, Samaritan and the Fields have had to budget from at least 2005 through 2008 on the assumption of no funds from the County levy. Samaritan primarily receives revenue from the Medicare program, Medicare HMOs, the Medicaid program and private pay individuals. Samaritan is also eligible for funding through the intergovernmental transfer program (ITP), which is a state/federal subsidy provided to County nursing homes for direct patient care costs. Medicaid payments are typically the funding source for from seventy to eighty percent of Samaritan's residents. Medicare payments are the funding source for from five to ten percent of Samaritan's residents. Reimbursements through the Medicare program and through Medicare

HMOs are more generous than through the Medicaid program. Medicaid reimbursements do not cover Samaritan's costs of operation per patient day. In 2006, Samaritan operated at a loss set in the County's audited financial statement at \$2,499,378.00. \$1,888,595.00 of that loss reflects construction activity at the Fields. Samaritan's operating loss for 2006, net of this transfer for construction, was \$610,783.00. Samaritan's net assets for 2006 were \$3,072,292.00. The County may undertake construction at Samaritan in the summer of 2008, if the Board approves the changes later in 2007. Those changes are driven by State subsidies for property rather than direct care. Those incentives are designed to encourage institutions with over a seventy percent Medicaid resident census to decrease total bed counts, but increase the number of private pay rooms. The County dropped the proposed layoffs during the 2006 negotiations primarily because the County concluded that the savings realizable from those layoffs would not realize what Somers deemed sufficiently significant savings to make the layoffs worth pursuing. This conclusion accelerated the momentum toward the implementation of a subcontract in those areas of Samaritan's operation which Somers deemed out of line with labor market conditions, and prompted Somers to request the authorization from the Samaritan Committee to actively pursue bids from private contractors for Samaritan's housekeeping and laundry needs.

10. The financial impact of the BSG contract was devastating to the affected employees. Robert Reksten's experience is illustrative. Prior to his layoff effective August 1, 2007, Reksten earned \$15.97 as a Custodian, and had served as a County employee for twenty-nine years. He initially declined, then accepted a position with BSG. That position pays him \$9.00 per hour. He had, prior to his layoff as a County employee, accrued vacation of two hundred hours per year. At BSG he will receive one week of vacation after a year of service. He had sick leave and pension benefits as a County employee and none as a BSG employee. BSG employees must complete an eligibility period of employment to qualify for health insurance, but Reksten has no plans to take the benefit, which he concluded was unaffordable.

11. The BSG contract substituted private employees to perform the same work provided, prior to August 1, 2007, by County employees. The provisions of Sections 2.01 and 2.03 bearing on subcontracting have been in the parties' labor agreements since 1974. Throughout this period, Samaritan has had linen service provided by private contractors. The layoff of employees prompted by the BSG contract is the first time since at least 1974 that a County decision to contract out produced a layoff. The County decision to contract with BSG was motivated by its desire to reduce costs in an area Somers concluded was out of line with the relevant labor market.

CONCLUSIONS OF LAW

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

3. County employees whose positions were eliminated with the implementation of the BSG contract were each a “Municipal employee” within the meaning of Sec. 111.70(1)(i), Stats., prior to the effective date of the BSG contract on August 1, 2007.

4. The County’s decision to contract with BSG for certain laundry and housekeeping services performed by County employees prior to August 1, 2007 represents a mandatory subject of bargaining, which is addressed by the contract provisions noted at Finding of Fact 3. The County was not obligated to collectively bargain its decision to contract with BSG or the impact of that decision under Secs. 111.70(3)(a) 1 and 4 Stats., beyond its duty to process the May 18, 2007 grievance and related information requests in good faith.

5. The County processed the May 18, 2007 grievance and related information requests in good faith consistent with its duty under Secs. 111.70(3)(a)1 and 4, Stats.

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 18th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

WASHINGTON COUNTY

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

THE PARTIES' POSITIONS

The Union's Initial Brief

After an extensive review of the evidence, the Union contends that the County's decision to subcontract the Domestic Services Department, including the jobs of all Housekeepers, Custodians and Laundry positions, violated the parties' labor agreement, including the recognition clause, the seniority clause and those agreement provisions establishing wages and benefits. The subcontract affected eighteen Union-represented employees and did no more than substitute BSG employees for County employees. Arbitrators in the private and in the public sector have concluded that in the absence of specific contract language, an employer cannot undermine the contract provisions noted above by substituting non-unit for unit labor.

That the County asserts it realized cost savings "cannot justify its actions". The County realized no increased efficiencies through its subcontract. Rather, it used the "subcontractor to hire employees at a lesser wage and benefit rate." To affirm the County's rationale for the subcontract simply permits it to evade its responsibility under the negotiated labor agreement.

Section 2.01 does not authorize the subcontract. Reading the section as a whole does not support the contention that the County can unilaterally subcontract. Rather, the section "only reiterates that the County has the rights and responsibilities provided by law." The law restricts the County's ability to subcontract if there is "a collective bargaining representative." Beyond this, the section is subject to other agreement provisions, and as noted above, the subcontract undermines a host of agreement provisions. Section 2.03 underscores the significance of this conclusion, since the subcontract discredits and undermines the Union. The evidence establishes this point. More specifically, over thirty years of practice establishes that the County has never "subcontracted where the resulting contract caused the layoff of employees". The Union's successful challenge of the October, 2006 layoffs further confirms the point. Arbitral precedent confirms that even where contract language permits subcontracting, the subcontract cannot undermine other agreement provisions. Analysis of the economic benefit realized through the subcontract falls short of establishing that Samaritan's survival "was at stake."

Beyond this, the County's processing of the grievance violates the contract, since it failed to answer the grievance at Step 2 within the required ten days. That the Union filed the grievance at Step 2 has no bearing on this point, since "the present grievance did not address a suspension and discharge" which would have permitted a twenty day response timeline. The

County's Step 3 response was also untimely, since it was "one day late." As the remedy appropriate to the County's violation of the labor agreement, the Union requests, "that the arbitrator sustain the grievance and hold that the County violated the parties' collective bargaining agreement by subcontracting the domestic service department". Complainant further requests an order that the County "reinstate bargaining unit employees to perform the work under the terms of the existing collective bargaining agreement and to make employees whole for all losses resulting from its contract violation." To resolve potential remedial disputes, Complainant "requests that the arbitrator retain jurisdiction for sixty (60) days".

The County further contends that the subcontract violates the MERA. Since the subcontract did no more than substitute contracted employees for County employees at a reduced rate, the decision and the impact of the decision to subcontract constitute mandatory subjects of bargaining. Complainant requested to bargain both the decision and its impact and never waived the request.

Nor will the record support a conclusion that Complainant waived the right to bargain through contract language. Such a waiver must "be clear and unmistakable." Commission case law establishes that the broad management rights the County asserts as a waiver cannot be considered clear and unmistakable. Reading Section 2.01 as Respondent asserts would undermine the recognition and seniority clauses as well as provisions granting wages and benefits. Even if these provisions are considered clear and unambiguous, consistent past practice shows no County assertion of the right to subcontract in a manner that causes layoff. Successful Union challenge to the October 2006 layoffs confirms this. Consideration of NLRB precedent further underscores that waiver of bargaining cannot occur under an "insufficiently specific" management rights clause. Broad zipper clauses cannot fill this void, and in any event, the Union never waived impact bargaining.

The County violated its statutory duty to bargain by engaging "in a calculated effort to avoid bargaining with the Union over the decision to subcontract domestic services". Samaritan considered subcontracting as early as August of 2006, yet failed to give any notice of its intent during the collective bargaining that followed shortly after. The Union requested bargaining on the decision to subcontract and its impact on May 8, 2007 "before the decision was reached or the impact was felt by bargaining unit employees." Commission and NLRB case law demands that "bargaining must occur when there is a meaningful opportunity" whether the bargaining concerns the decision to subcontract or its impact.

County delay "in responding to the Union's grievance violated its duty to bargain." The delay violates Sec. 111.70(3)(a)5, Stats., as well as Article 19. There should be no requirement to exhaust the grievance procedure "since the grievance procedure clause is precisely what has been violated." Since timely grievance processing is no longer possible, no further grievance processing should be ordered.

The County also "failed or delayed in providing the Union with requested information." Proposals submitted under the RFPs requested by the Union on May 8, 2007

were not provided until June 19. BSG wage and benefit information sought by the Union on June 8, 2007 was not supplied until August 14. Information sought by the Union to establish any financial basis for the subcontract was not supplied until hearing. County failure to supply requested information prior to hearing standing alone violates its duty to bargain. The untimeliness of its response underscores the violation. County assertion that it provided information when it became available cannot withstand scrutiny and ignores that it was under a duty to secure the information.

The Union concludes that to remedy Respondent's violation of MERA, the Commission should order "the County cease and desist from its prohibited practices, return to the status quo ante by reinstating bargaining unit employees to perform their previous job assignments . . . and . . . make employees whole for all losses." In addition to documenting County violations of law, the Commission should order the County to "post a notice" and should "provide further relief as the (Commission) deems just and proper."

The County's Initial Brief

After an extensive review of the evidence, the County argues that the prohibited practice complaint poses four major allegations. The first major allegation is that the County refused "to bargain over the decision and effects of the subcontracting of laundry and housekeeping operations at Samaritan". The second is that the County cannot subcontract "without prior notice to the Union." These two major allegations are similar, and neither is persuasive because the County's "unilateral right to subcontract work and layoff employees has already been bargained and incorporated into the current collective bargaining agreement."

The County does not dispute that its decision to subcontract and the impact of that decision pose mandatory subjects of bargaining under Commission and judicial precedent. More specifically, the County contends that CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86) "is instructive here." Although the language at issue in that case is not identical to that posed here, in each case, the contract provides "the express right to subcontract for goods or services." The language of Section 2.01 is "clear and unambiguous language that gives the County the right to subcontract for goods or services without limitation". The only limitation on that right is set by Section 18.04, which provides a notice requirement in the event of the contracting of the entire operation of Samaritan. Even though that contingency is inapplicable here, the County chose to follow it. In any event, the County acted well within the authority granted it through the bargaining process and is not required to again bargain on the issue of subcontracting once it chose to assert its contractual rights.

The next of the Union's major allegations concerns whether the County "delayed processing of the Union's grievance . . . thereby prejudicing the ability of the Union to resolve the dispute before subcontracting occurs." As preface to analysis of this point, the County argues that any claim that it responded to the grievance in an untimely manner "must be deferred to arbitration." Relevant Commission case law puts the determination of timeliness within the province of a grievance arbitrator. The Union seeks to use "the prohibited practice

complaint process . . . to avoid having the procedural defense of waiver raised in the arbitration proceeding.” The Commission should not encourage this by usurping an arbitrator’s authority.

The final major legal contention raised by the Union is that the “County did not provide wage and benefit policies that would be applied to any County employees who applied for jobs with the subcontractor.” This traces to the Union’s request for information of June 8, 2007. The County complied, to the extent it could, on June 19. It could not supply the Union with specific information on BSG wages, benefits and policies “because it did not have such information.” It never requested such information during the bidding process because it was not relevant and was, in any event, confidential. That the County has a duty under MERA to supply “information which is relevant and reasonably necessary to collective bargaining and the administration of an existing collective bargaining agreement” does not extend to the Union’s June 8 request. County request that BSG offer employment to its existing employees does not translate into “the right to access” BSG’s “confidential wage and benefit information.” If the contract mandated that employees suffer no loss due to a subcontract, then the Union’s request would be different. Here, however, the governing language places no limitation on the County. Even if it did, it is not clear that the Union represents County employees for purposes of interviewing with BSG. When BSG executed the subcontract, then the County acquired the right, under Chapter 19, Stats., to request the information sought by the Union. The County exercised this right and supplied the Union with the requested information on August 14. Under relevant Commission case law, this response was sufficient.

Nor can the contract provide the Union the remedy it seeks. Section 2.01 “expressly and unequivocally” provides the County the authority it exercised “when it subcontracted the housekeeping and laundry services work, and consequently laid off the bargaining unit members who previously performed such work.” Beyond Section 2.01, Section 18.04 “recognizes and reinforces the County’s right to subcontract work.” This section governs the entire operation of Samaritan, but the County elected to meet the notice requirement it imposes on the County. More to the point, Section 18.04 reinforces the authority exercised here. Beyond this, Section 18.01 establishes the layoff procedure followed by the County after it exercised its authority under Section 2.01. These provisions are clear and unambiguous and arbitral authority confirms such provisions must be given their bargained intent.

The Union attempts to avoid this web of contract provisions through “several arguments aimed at emotional persuasion.” That the layoff of employees “is an extremely difficult and emotional decision” cannot justify substituting arbitral inference for contractual authority. The financial decision reached by the County “to ensure the financial health of Samaritan, thereby serving the interests of its residents” must be given the contractual force it deserves. Acceptance of Union recourse to the recognition clause, the seniority clause or to various wage and benefit provisions would mean an employer could never layoff or subcontract, “because separating employees from employment by its very nature denies employees recognition, compensation and seniority.”

Nor can recourse to Section 2.03 assist the Union. Applying that language to the subcontract “mistakes the motive for an action with the action’s effect.” The evidence establishes that the County never acted “for the purpose” of discrediting or undermining the Union. That the County gave up laying off employees during negotiations in 2006 does not establish a County waiver of its contractual rights. The County did no more than give notice to the Union of potential layoffs. That it chose to act in a broader fashion as it became aware of the increasing depth of its financial difficulty cannot support the remedy the Union seeks in the grievance.

Union assertions that the County failed to timely respond to the grievance are unpersuasive. The Union waived these claims by not asserting them in the grievance procedure. Even if the claims were not waived, the County’s responses were timely. The Union chose to assert the grievance at Step 2 and the County responded within the twenty days permitted by the contract at Step 2. Beyond this, the Union unpersuasively stretches the timelines of Step 2 and Step 3 by asserting that the day on which the County was aware of the Union’s position must count as the first day of the governing contractual timelines. This means of counting ignores arbitral precedent establishing that timelines run from the day after receipt of a grievance or a grievance response.

Thus, viewed legally or contractually, neither the complaint nor the grievance has merit. Each must be dismissed.

The Union’s Reply Brief

After an analysis of the errors of fact contained in the County’s initial brief, the Union contends that the County’s reading of Article 2 ignores “significant portions of the contract language on which it relies.” The County isolates the narrow reference to contracting out in Section 2.01 which ignores that the reference is the object of a broader sentence that makes the listed right subject to the other terms of the agreement and to applicable law. Past that, Section 2.03 further limits the County’s authority to contract in a manner that undercuts other agreement provisions or discredits the Union. County assertion that the contract grants it the “sole discretion” to subcontract in a manner that lays off employees rests more on arrogance than on contract language.

The County’s brief recognizes that Section 18.04 bears on the grievance and requires the County to contract only where necessary. Arbitral precedent establishes that an employer cannot implicitly deem a subcontract necessary. The evidence shows no County consideration of the necessity of the subcontract. At most, the evidence shows the County considered the contract a means to reduce, rather than to eliminate, a budget shortfall. This falls short of establishing necessity.

County arguments concerning the October, 2006 grievances miss the point. The Union challenged the County’s proposal to alter certain jobs because the proposed alterations violated the labor agreement. This establishes that the County’s right to layoff had to be consistent with other agreement provisions. The same is true of its right to contract.

That the County did not contract based on anti-union animus misinterprets Section 2.03. It is essentially undisputed that the County contracted out solely to reduce costs because Somers perceived certain unit members to be “too highly compensated.” His elimination of their positions strikes at the core of the Union’s reason for being. Whether or not active animus animated the County, evasion of the contract “was the natural result of their decision.” That Somers and County Board members were aware that BSG was a non-union contractor further erodes the County’s position that it did no more than exercise a contractual right.

County failure to answer the grievance within a ten day time frame violates the grievance procedure. The assertion that the Union invoked a twenty day time limit by filing the grievance at Step 2 ignores the clear contractual requirement that the twenty day time limit applies to suspension and discharge cases. Processing of the October, 2006 grievances has no bearing on this point. The Union was under no obligation to raise its timeliness concerns prior to the hearing. Commission case law cited by the County focuses on “an employer’s use of time limits to avoid addressing a dispute concerning contract interpretation.”

Because the decision to subcontract is a mandatory subject of bargaining not waived by contract language, County failure to bargain the decision violates MERA. Beyond that, County failure to bargain the impact of its decision also violates MERA. RICHLAND CENTER does not establish a Union waiver of bargaining. Unlike RICHLAND CENTER, this agreement “requires advance notice to subcontract”; the record manifests no relevant bargaining history on subcontracting; and the Union has never indicated any unwillingness to enter into “mid-term bargaining.” Thus, even if the contract permits subcontracting, the law still requires the County to engage in bargaining on the decision and its impact.

The County’s brief supplies no basis to justify its failure to provide information. The County did not need the authority of Chapter 19 to request wage information from BSG. There is no basis justifying its two-month delay in supplying wage and benefit information or its four-month delay in providing “the labor cost comparison . . . and the alleged operational loss”. Just as this delay violates MERA, the delay in processing the grievance establishes a violation of law.

As a matter of contract, the record demands that “the arbitrator find that the County violated the parties’ collective bargaining agreement, sustain the grievance and order the County to terminate its contract with BSG, reinstate bargaining unit employees in their former positions . . . and make them whole for all losses resulting from its contract violation.” As a matter of law, the record demands a finding that the County violated MERA “by refusing to bargain over the decision and impact of the decision and failing to timely provide information and delaying in the processing of the Union’s grievance”. To remedy this violation, the Examiner should issue a cease and desist order; require the notice to be posted; reinstate the affected employees; make them whole for all losses; and “provide such other and further relief as he deems just and proper.”

The County's Reply Brief

After a review of the flaws in the Union's depiction of relevant fact, the County argues that the contract provisions cited by the union "cannot override clear and unambiguous language in the Management Rights clause." Union analysis of arbitral precedent is flawed by the fact that "in all but one of the cases cited by the union, the contract was silent on the issue of subcontracting of work." The sole exception concerns contract language which "was different than the language at issue here". More persuasive and recent arbitration awards demand express limitation of the right to subcontract, and those cases creating "an implied covenant of fair dealing" fall short of establishing the Union's case, which unpersuasively rests on ignoring clear and unambiguous contract language.

The record will not support a conclusion that the County failed to provide the information the Union requested. The County did supply information at hearing which was not previously supplied to the Union, but the Union never requested that information. The County fully responded to the Union's May 9 request for information on the same day. Union complaint that the County "failed to provide the proposals submitted by the various vendors" ignores that the Union's May 9 request never sought them until June 8. The County responded within ten days to that request. Union assertion that the County had a duty to supplement this response seeks to substitute County action in place of a Union request.

On June 19, the County supplied all the information it had in response to the Union's June 8 request. Union request for information documenting the financial basis of the County's decision was fully met. That the County supplemented this information at hearing shows nothing more than the Union's failure to request information beyond that relied on by the County in making the decision, and the Union's brief ignores that it "simply did not request the information it now claims that the County failed to provide."

The County had no duty to bargain the decision to subcontract and its impact because the Union has waived bargaining based on contract language. Case law and arbitral precedent cited by the Union cannot obscure the waiver. The language establishing the waiver is clear and unambiguous. Even if it was not, there is no relevant bargaining history. Nor is there any substantial evidence of past practice. County failure to exercise its right to contract "does not create a past practice", which demands consistent action over time "that is clearly enunciated and acted upon".

The County had no duty to secure wage and benefit information from BSG "before it officially received the information". If the County had no duty to bargain the decision or the impact of its decision to contract out, then it was under no duty to supply information it did not possess. Nor can the Union persuasively contend the County should have provided the information "before a decision was made on the subcontracting of work." The Union's request for information came on June 8, while the vote to contract out occurred on June 7. The assertion that this information was necessary so that the Union could evaluate potential violation of wage and benefit provisions ignores that the Union filed a grievance on May 18, a

month prior to the request for information. The record shows delay constituting no more than “a good faith error.”

Various Union suggestions on how the County could have alleviated its budget shortfall are irrelevant because the County was under no duty to pursue them prior to exercising its right to contract out. To the extent the suggestions are relevant, they misconstrue the evidence. While addressing the matter at the table or through interest arbitration “may have been one option available to the County”, there is no contractual or legal requirement that “the County first attempt to obtain wage and benefit concessions” prior to exercising its contractual right. In any event, this presumes the Union would have cooperated and the evidence belies this presumption. Union assertion that the County “customarily” holds a meeting before issuing a Step 3 answer ignores that the contract imposes no such obligation and that the Union failed to raise the issue prior to hearing. The record establishes that the grievance should be dismissed “because the County acted within its contractual rights in contracting out the housekeeping and laundry operations.” The complaint must be dismissed “because the County did not have a duty to bargain the decision or effects of the subcontracting of work, the County provided all relevant information to the Union, and the County complied with the grievance procedure in the collective bargaining agreement.”

DISCUSSION

At the pre-hearing conference and at hearing, the parties made a series of agreements on processing the complaint and the grievance. They agreed that the evidence produced at hearing is common to each matter and that I should address the complaint and grievance arbitration matters separately, through simultaneously issue decisions.

The complaint alleges County violations of Sec. 111.70(3)(a)1, 4 and 5, Stats., by its subcontract with BSG. In my view, duty to bargain issues under Secs. 111.70(3)(a)1 and 4, Stats., govern the complaint. The companion arbitration addresses issues that could arise under Sec. 111.70(3)(a)5, Stats.

As preface to the duty to bargain issues, it is necessary to address issues regarding application of Sec. 111.70(3)(a)5, Stats. The County filed a motion to defer the complaint to grievance arbitration, and the Union asserted at hearing that County violations of its duty to process the grievance under Article 19 could have a statutory dimension. Neither of these lines of arguments carried the weight in the parties’ briefs that they did earlier in the process.

Ignoring the awkwardness of determining whether I as Examiner should defer to me as arbitrator, the complaint does not pose issues meaningfully addressed under Sec. 111.70(3)(a)5, Stats. The labor agreement contains a provision for binding grievance arbitration. Where grievance arbitration is available to resolve a breach of contract claim, the Commission typically refrains from asserting its statutory jurisdiction to interpret a labor

agreement, see *MONONA GROVE SCHOOL DISTRICT*, DEC. NO. 22414 (WERC, 5/85) AT 6-7. Deferral to arbitration is a distinguishable point, which typically arises where grievance arbitration is available to resolve contract interpretation issues that may be determinative of prohibited practice allegations other than breach of contract, *STATE OF WISCONSIN*, DEC. NO. 25281-C (WERC, 8/91) AT 15. The Union asserts that County processing of the grievance undermined its ability to bargain and that this poses statutory issues. This assertion is better addressed under Secs. 111.70(3)(a)1 and 4, Stats., than under Sec. 111.70(3)(a)5, Stats. Issues of overlap or of conflict between the statutory and contractual forum may exist, but addressing the issues posed in this case under Sec. 111.70(3)(a)5, Stats., unnecessarily complicates the law noted above, which is designed to afford the greatest possible respect and latitude for bilaterally established dispute resolution processes. Beyond this, either deferral or the assertion of Sec. 111.70(3)(a)5, Stats., jurisdiction undermines the procedural agreements reached to guide this litigation.

This focuses the parties' dispute on Secs. 111.70(3)(a)1 and 4, Stats. Their arguments focus on duty to bargain issues, thus relegating the alleged violation of Sec. 111.70(3)(a)1, Stats., to derivative status. The duty to bargain dispute poses two fundamental issues. The first is whether the County violated its duty to bargain the decision or the impact of its decision to subcontract with BSG. The second is whether County conduct surrounding the subcontracting process violated its duty to deal with Union in good faith. The second issue spans conduct prior to the bargaining for the 2007-08 labor agreement, the bargaining for that agreement and the processing of the grievance under its terms.

The preface to the first issue is whether the subcontract poses a mandatory subject of bargaining. The parties agree that it does, and the evidence confirms this. In *UNIFIED S.D. NO. 1 OF RACINE COUNTY v. WERC*, 81 Wis. 2d 89, 102, the Court noted that the "primary relationship" standard distinguishes whether a particular decision is a mandatory or a permissive subject of bargaining. The standard demands answering the question "whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy" 81 Wis. 2d at 102. In *RACINE*, the Court determined that a subcontracting decision which "merely substituted private employees for public employees" is mandatory, 81 Wis. 2d at 102. The record establishes that this is precisely what the County did with BSG.

The first issue thus turns to whether the County met its obligation to bargain the subcontracting decision and its impact. As the parties note, the Commission stated the standard governing this dispute in *CITY OF RICHLAND CENTER*, DEC. NO. 22912-B (WERC, 8/86) AT 4, thus:

The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters on which the Union has otherwise clearly and unmistakably waived its right to bargain.

Commission application of this standard spans a considerable period, see CITY OF BROOKFIELD, DECS. NO. 11489-B, 11500-B (WERC, 4/75); SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94); CITY OF MADISON (FIRE DEPARTMENT), DEC. NO. 27757-B (WERC, 10/94); and CITY OF БЕЛОIT (FIRE DEPARTMENT), DEC. NO. 27961-C (WERC, 7/96). The Commission has stated the standard in various ways, but traditionally determines whether the existing contract defines employees' rights. This determination does not turn on a whether the parties specifically discussed the issue in dispute. Rather, its purpose is to determine whether "the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck", DEC. NO. 27757-B AT 10. Specific disputes over what was agreed to are left for grievance arbitration, see DEC. NO. 27775-C AT 12, citing with approval JANESVILLE BOARD OF EDUCATION ET. AL., DEC. NO. 15590-A (Davis, 1/78), AFF'D BY OPERATION OF LAW (DEC. NO. 15590-B, WERC, 2/78). I read RICHLAND CENTER to demand that a conclusion of waiver by contract must rest on clear and unmistakable evidence.

RICHLAND CENTER turns on language governing subcontracting. The language in RICHLAND CENTER limited the employer's right to subcontract "bargaining unit work" to cases which "shall not result in the layoff or reduction of hours of regular employees." Specific application of the contract provisions at issue here is stated in the companion grievance arbitration and will not be repeated here.

More to the point, the determination here is whether that language clearly and unmistakably addresses the County's right to subcontract. In my view, it does. Section 2.01 generally authorizes the County to "contract out for . . . services." Section 18.04 addresses contingencies involving shut down or subcontracting of Samaritan's operation. Read together, the two provisions address complete and partial subcontracting. The provisions are not unlimited, and demand reconciliation with a web of other contract provisions, including Section 2.03. This cannot obscure that the labor agreement addresses the issue of subcontracting with sufficient clarity for each party to be "entitled to rely on whatever bargain they have struck."

A glance at the evidence underlying Finding of Fact 10 underscores the force of the Union's concern with the application of the labor agreement to the BSG contract. This cannot, however, obscure that the statutory issue is whether the parties' agreement is enforceable without further bargaining. The Union seeks less to enforce matters already addressed by the labor agreement than to negotiate alternative language. Its arguments seek to imply into the unrestricted grant of authority to contract out for services in Section 2.01 the express limitation negotiated by the parties in RICHLAND CENTER. As a matter of interpretation, whether this is warranted by the evidence poses an issue of contract, not statute.

The Union asserts that the language of Section 2.01 is similar to that addressed by the Commission in SHEBOYGAN COUNTY, DEC. NO. 27692-B (WERC, 3/95) and to KEWAUNEE COUNTY, DEC. NO. 21624-A (McLaughlin, 11/84); AFF'D DEC. NO. 21624-B (WERC, 5/85). In SHEBOYGAN COUNTY, the language provided the County,

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. DEC. NO. 27692-B AT 7.

The Commission found this language insufficient to establish a County right to subcontract, concluding that it “expresses the County’s right to require County employees to perform work at any location”, DEC. NO. 27692-B AT 11. The Commission did not directly address the provision in KEWAUNEE COUNTY, which provided,

The county . . . shall have the sole right to contract for any work it chooses, direct its employees to perform such work, wherever located in its jurisdiction . . . DEC. NO. 21624-A AT 2.

The Union’s assertion that these provisions are similar is persuasive, and its assertion that the Commission expressly found the SHEBOYGAN COUNTY language too ambiguous to support a waiver of bargaining concerning subcontracting is accurate. However, the ambiguity in SHEBOYGAN COUNTY led the Commission to consider past practice and bargaining history, which led to its conclusion that the provision refers to work within the county’s control. This distinguishes it from Section 2.01, which grants the County “the right to contract out for . . . services.” The “contract out” reference distinguishes this complaint from the “contract for” reference in SHEBOYGAN COUNTY, because of the impossibility of an employer contracting out work to its own employees. Highway department contract provisions underlie the contract in KEWAUNEE COUNTY, and the Commission in Sheboygan County looked to a highway department contract in its review of bargaining history, DEC. NO. 27692-B AT 10. This bears on this complaint, since highway departments contract for work with outside parties at locations selected by the outside parties, unlike a skilled care nursing facility. The “contract out” reference at issue here is more akin to the contract language addressed by the Commission in VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96). In that case, the Commission concluded that had the employer successfully negotiated a provision granting the right “To contract or subcontract out all work”, the employer “would not have had any obligation to bargain further . . . because they would have already acquired the right to subcontract”, DEC. NO. 28032-B AT 16.

Similar considerations govern the County’s duty to bargain the impact of the subcontracting decision. Whether or not the duty to bargain impact can be distinguished from the duty to bargain the decision is not posed on this record. The parties have litigated the matter as an all or nothing proposition. The Union’s demand to bargain impact is limited to Kroll’s May 9 letter. The subsequently filed grievance and complaint seek no less than the restoration of the status quo, demanding that the BSG contract be overturned and that the bargaining process be returned to its start, at least with regard to the employees terminated through the BSG contract. The result is defensible, but needs a legal or contractual basis. To grant it on this record renders Sections 2.01 and 18.04 meaningless. To render contract provisions meaningless undercuts the assertion that impact bargaining demands the restoration of the status quo ante. The cited provisions are part of the status quo ante and must be given

meaning. To conclude otherwise weakens the bargaining process by undercutting the labor agreement that codifies it. Cf., SPARTA MANUFACTURING CO. INC., DEC. NO. 20787-A, (McLaughlin, 11/83), AFF'D BY OPERATION OF LAW DEC. NO. 20787-B (WERC, 12/83), AND CASES CITED AT FOOTNOTE 11/ AT 13, regarding Commission rejection of ability to pay as a defense to the enforcement of an arbitration award against an employer.

The record poses no issue regarding Union waiver by conduct of the right to bargain the decision or impact of the BSG contract. Kroll's May 9 letter addresses this. Her response to Somers at the April 16 Labor Management meeting does not constitute a waiver. It was, at most, an initial response that did not reflect input from her unit or her Union. In my view, it reflects an accurate reading of the governing contract provisions. Those provisions, however, not Kroll's statement, ground the conclusion of waiver by contract. Standing alone, her statement is not persuasive proof of waiver. This should not obscure that there is no persuasive evidence of conduct seeking impact bargaining after May 9. This does not establish waiver. Rather, it underscores the all or nothing nature of the issues posed.

This turns the analysis to whether County conduct toward the Union surrounding the subcontracting process violated its duty to deal with Union in good faith. Prominent among the Union's arguments is whether County failure to notify it of the decision to subcontract during bargaining for a 2007-08 labor agreement represents a course of conduct by which the County shielded its subcontract from meaningful Union involvement.

Evidence of this course of conduct does not support the Union's view. It shows less the unfolding of a predetermined County design than the evolution of cost control efforts over time. The evidence supports Somers' credible testimony that the "design" reflects ongoing cost control concern. The County did not seek the initial contact from BSG in August. Somers responded to a BSG solicitation by taking a BSG bid. He did not respond to the bid. The October BDO Seidman report played a significant role in building momentum toward subcontracting, but there is no reason to believe that report would have carried the weight it did absent Samaritan's 2007 budget problems in light of ongoing County policy to force Samaritan to fund its own operations without assistance from the County levy. The BDO Seidman report arrived with the collective bargaining process for a 2007-08 labor agreement. The County layoff proposal manifests the cost-cutting initiative. The proposal folded against determined Union resistance, but that resistance did not change the underlying cost containment momentum, as noted in the November 6 letters rescinding the layoffs.

The layoff notices imply, but do not specifically notify the Union that the County's cost containment efforts could reach subcontracting. The evidence indicates less that this is subterfuge than that the County was concerned enough about cost containment that the failure of the layoffs to yield the savings it sought made subcontracting more probable. It falls short, however, of establishing specific County intent to subcontract.

As the Findings of Fact note, the subcontracting process acquired momentum from the Samaritan Committee's January, 2008 meeting. That meeting, however, did no more than

start preliminary consideration of the bid process. The RFP process did not move forward until the April meeting where the Samaritan Committee authorized it. At a Labor Management meeting roughly two weeks later, Somers notified the Union of the RFP process. Nothing in this chain of events supports a conclusion that the County acted in bad faith to shield the Union from the process. Rather, the County explored a cost reduction process it believed it had the contractual authority to explore.

This process acquired its final momentum when the County received bids. The BSG and ABM Janitorial bids gave the process compelling momentum, once the County had researched each company's reputation and confirmed savings sufficient to warrant action were available through vendors the County approved of.

Union attempts to stop the process commence with Kroll's May 9 letter, which, as noted above, establishes that the Union sought to bargain the decision and its impact. The letter includes the Union's first request for information, which was for the RFP proposals. Somers responded on the same day. Kroll's response acknowledges the completeness and the timeliness of the response as well as notifying Somers that the Union did not intend to acquiesce to the subcontract.

This sets the background to the grievance procedure as well as to the Union's attempt to secure information from the County regarding its actions. Neither the processing of the grievance nor the County's responses to the information requests supports an inference that the County sought to frustrate the Union's attempt to bargain with the County. Rather, those responses manifest an ongoing dispute between the parties regarding whether or not the County had authority in the labor agreement to contract out to BSG.

The dispute regarding the contractual propriety of the County's response to the May 18 grievance is detailed in the companion arbitration award. For the purpose of the statutory duty to bargain issue, it is sufficient here to note that the evidence falls short of establishing a County attempt to undermine the grievance procedure. Rather, the evidence affirms the good faith of Somers treating the grievance as a Step 2 submission to which he timely responded. Kroll's Step 3 response is, at most, a day late, but the evidence discloses a good faith effort to comply with grievance timelines and an arguably timely response. County responses to the grievance do not warrant a conclusion that it acted in bad faith.

The parties do not dispute the standard governing the Union's information requests, see, for example, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98), and CITY OF MILWAUKEE, DEC. NO. 31936 (WERC, 11/06). The record does not show that the County failed to provide the Union, in good faith, the information it requested that was relevant and reasonably necessary for the Union to discharge its obligation to represent the employees affected by the BSG contract. The County responded to Kroll's June 8 letter by June 19. The response is complete with the exception of information regarding the BSG wage and benefit package. The Union notes the County missed its deadlines and the County questions whether it had the legal authority to compel BSG to provide it the missing

information prior to Kraft's August 6 e-mail. In my view, the arguments obscure that the County's duty is to respond to the information requests in good faith, with information that is relevant and reasonably necessary to the Union to discharge its duty to represent unit members. The timing of the response is, in any event, secondary to the resolution of the waiver by contract issue. If there is no waiver of bargaining by contract, the timing of the information response may be critical. If, as concluded above, there is a waiver of bargaining through the contract, the timing of the response is less than critical, provided it reflects good faith.

The evidence establishes a good faith County response. The County provided the Union with the requested information as soon as it had it. That the County introduced more information about the financial basis of its decision at hearing than through Kraft's June 19 response cannot obscure that the County gave the Union the information that the Samaritan Committee acted on. Information regarding the BSG wage and benefit package is the sole item of information that shows an arguably significant delay. That information is unrelated to the grievance, which challenges the County's contractual authority to enter into the BSG agreement. At most, the delayed information concerns impact bargaining and the Union made no demand to bargain the impact of the decision after Kroll's May 9 letter. Rather, the Union requested in Kroll's June 8 letter that the subcontracting process not proceed until completion of the grievance arbitration process. The Union filed the complaint on July 2. This underscores that the process was not about actual impact bargaining. Rather, it concerned whether law or contract could force the County to restore the status quo ante regarding the subcontracted services. Against this background, it is unpersuasive to conclude that County conduct regarding the processing of the grievance or the information requests manifests bad faith or a violation of the statutory duty to bargain.

In sum, the record establishes that the parties have a fundamental dispute regarding whether or not the County's subcontract with BSG violated the labor agreement. Union arguments concerning County bargaining behavior, County responses to the grievance and County responses to its information requests are adjuncts to its basic position that the County lacked the authority under the agreement to subcontract with BSG. The evidence will not, however, support a conclusion that County conduct surrounding the subcontract manifests a violation of its statutory duty to bargain.

Perhaps the most troubling issue posed by the Union focuses less on a course of conduct than on the single fact that the Samaritan Committee discussed the possibility of the RFP process prior to County ratification of the 2007-08 labor agreement, without contemporaneously notifying the Union. This pushed the subcontract out of the collective bargaining process and into the contract enforcement process. While a persuasive policy case can be made for bringing the subcontracting process to the bargaining table, this single fact falls short of establishing a breach of the County's statutory duty to bargain. Throughout the effective term of the 2007-08 agreement and its predecessor, the County believed that it had the contractual authority to subcontract. Focusing on January of 2008, this good faith belief was only a belief, but one that permitted to County to weigh whether it chose to bring the matter to negotiations or to rely on its view of the contract. To conclude that a party who

believes it has strong contractual language must bring the application of that language to overall contract negotiations as a matter of its duty to bargain in good faith unduly stretches the duty at possible detriment to the wide latitude given to parties to bargain their own agreements.

Thus, even if the bargaining process arguably would have been better served by the County's placing the subcontracting issue to the Union during bargaining for the 2007-08 agreement, the evidence falls short of establishing a basis to compel this result. The County had the same authority to contract out under Section 2.01 in August of 2007 that it did in January of 2008, and would have had the same right under the Commission's status quo doctrine had the contract expired, see *VILLAGE OF SAUKVILLE*, cited above. More to the point, the subcontracting decision evolved over time and the evidence will not support a conclusion the County improperly shielded the Union from that process. The parties' agreement addresses contracting out, and this establishes that the County met its duty to bargain. Union attempts to restore the status quo ante obscure that the County's authority under Section 2.01 is part of the status quo ante. Against this background, the Union's arguments seek less to restore the status quo than to permit its alteration by affording it a chance to bargain greater protection than the contract contained. Adopting the Union's position poses the quandary of concluding that the 2007-08 agreement should be enforced as the codification of good faith bargaining, but that the process that led to it should be treated as evidence of bad faith. To resolve this by enforcing the agreement as to employees not subject to the BSG agreement, but reopening it for those subject to it would not restore the status quo, but create a bargaining environment totally dissimilar to that of October of 2007.

The Order stated above dismisses the complaint, which addresses the all or nothing nature of this litigation. This cannot obscure the harshness of the result. "Cost reduction" under the BSG solicitation represents the gutting of the employee wage and benefit package. The conclusions stated above establish nothing beyond the County's right to enter that subcontract under the labor agreement. Harsh as that result may be, a failure to enforce the contract as written undercuts the collective bargaining process that produced it.

Dated at Madison, Wisconsin, this 18th day of March, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

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