Engmann
10/22/06

In the Matter of the Final and Binding
Interest Arbitration of a Dispute Between

RICHLAND COUNTY (PINE VALLEY HEALTH CARE CENTER)

and

PINE VALLEY MANOR EMPLOYEES UNION LOCAL 3363, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 155
No. 64439
INT/ARB-10375
Decision No. 31606-A

Arbitrator: James W. Engmann

Appearances:

Mr. Jon E. Anderson, Attorney at Law, and Kim M. Gasser, Paralegal, LaFollette, Godfrey & Kahn, Attorneys at Law, One East Main Street, P.O. Box 2719, Madison, WI 53701-2719, appearing on behalf of Richland County and Pine Valley Health Care Center.

Mr. Jennifer McCulley, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of Pine Valley Manor Employees Union Local 3363, Wisconsin Council 40, AFSCME, AFL-CIO.

ARBITRATION AWARD

Richland County (County or Employer) is a municipal employer which maintains its offices in the Richland County Courthouse, 181 West Seminary Street, P.O. Box 310, Richland Center, WI 53581-0310. As part of its functions, the County operates the Pine Valley Healthcare and Rehabilitation Center (Center or Pine Valley). Pine Valley Manor Employees Union Local 3363, Wisconsin Council 40, AFSCME, AFL-CIO, (Union) is a labor organization which maintains its offices at 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, and which, at all times material herein, has been the exclusive collective bargaining representative for all regular full-time and regular part-time employees in the employ of the County at its Healthcare and Rehabilitation Center, but excluding the administrator, managerial employees, supervisors, registered nurses, all other professional employees, confidential employees, craft employees, temporary employees, seasonal and casual unscheduled employees, and all other employees of Richland County, for the purpose of collective bargaining with the Employer on questions of wages, hours and conditions of employment, pursuant to a certification by the Wisconsin Employment Relations Commission (Commission), Case XXXVII, No. 33057, ME-2335, Decision No. 21601, dated May 31, 1984.

The Employer and the Union have been party to a series of collective bargaining agreements, the last

of which expired on December 31, 2004. The parties exchanged their initial proposals and bargained on matters to be included in the 2005-06 successor agreement. On January 31, 2005, the Union filed a petition with the Commission requesting the Commission to initiate arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act (MERA). An investigation was conducted by a member of the Commission staff on May 23 and November 8, 2005, which reflected that the parties were deadlocked in their negotiations. On or before January 18, 2006, the parties submitted their final offers and stipulation on matters agreed upon, after which the Investigator notified the parties that the investigation was closed. The Investigator also advised the Commission that the parties remain at impasse. On February 8, 2006, the Commission certified that the conditions precedent to the initiation of arbitration as required by statute had been met and ordered the parties to select an arbitrator from a panel of arbitrators submitted by the Commission.

The parties selected the undersigned to serve as the impartial arbitrator in this matter and advised the Commission of its selection. On March 8, 2006, the Commission appointed the undersigned as arbitrator to issue a final and binding award, pursuant to sec. 111.70(4)(cm)6. and 7. of the Municipal Employment Relations Act, to resolve said impasse by selecting either the total final offer of the Employer or the total final offer of the Union. Hearing was held on June 1, 2006, in Richland Center, WI, at which time the parties were afforded the opportunity to present evidence and make arguments as they wished. The hearing was not transcribed. The parties filed briefs and reply briefs, the last of which was received September 11, 2006, after which the record was closed. Full consideration has been given to all of the testimony, exhibits and arguments of the parties in issuing this Award.

FINAL OFFERS

The parties have agreed upon a wage increase, though both sides include it in their final offer. In addition, the County proposes to add a clause to section 4.01 of the Management Rights clause, as indicated in boldface below. The County also proposes to add the side letter stated below.

Union:

> Schedule A – Wages: increase all wages by 2% on 01/01/05, by 1% on 07/01/05, and by 2.5% on 01/01/06.

Employer:

> **Article 4 - Management Rights**
>
> 4.01 The management of Richland County and the Pine Valley Healthcare and Rehabilitation Center and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, promote, demote, discharge or otherwise discipline, and to

layoff employees. Further the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify operational methods or controls, **to contract out work,** and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement.

SIDE LETTER BETWEEN
PINE VALLEY MANOR EMPLOYEES UNION
LOCAL 3363, AFSCME, AFL-CIO
AND
RICHLAND COUNTY

Re: Subcontracting

Richland County and Local 3363, AFSCME agree that where proposed subcontracting involves work historically performed by members of the bargaining unit, the union reserves the rights it has under the law to bargain the impact of such a decision. (Such impact bargaining may included, but is not limited to, issues of displacement, retraining, outplacement, severance pay, unemployment compensation, etc.) The County agrees that it will provide notice of any proposed decision to subcontract work historically performed by members of the bargaining unit to both the AFSCME representative and to the President of the Local at least thirty (30) days prior to any final action on such a decision. Thereafter, at the demand of either party, the parties will collectively bargain concerning the impact of such decision as may be required by law. The right to bargain over the impact of subcontracting may not be waived except by written instrument from the Union. Richland County agrees that it will not refer to the subcontracting provision contained in the management rights clause (§4.01) of the main body of the Local 3363 agreement or the existence of this sideletter in any future interests arbitration proceedings between the County and any other AFSCME locals within Richland County.

Schedule A – Wages: increase all wages by 2% on 01/01/05, by 1% on 07/01/05, and by 2.5% on 01/01/06.

ARBITRAL CRITERIA

Section 111.70(4)(cm) MERA states in part:

7. 'Factor given greatest weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel

shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. 'Factor given greater weight.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost of living.

h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITIONS OF THE PARTIES

Employer on Brief

The Employer argues that the grim financial condition of the Center demands that the County strike a balance between costs and continued levels of service for its residents; that the statutory criteria under Section 111.70, Wis. Stats., requires the arbitrator to give "greater weight" to the economic conditions of the employer's jurisdiction than to any of the other traditional factors enumerated in the statute; that the impact of the facility's budgets undeniably fall within the "greater weight" definition, as well as the "interests and welfare of the public" criterion; that the Wisconsin Association of Homes and Services for the Aging recently stated Wisconsin's nursing homes are in financial peril; that in the past five years, 38 homes have close; that more will quickly follow as half of all homes are at financial risk; that Pine Valley's financial statistics are synonymous with the experience of other public nursing homes around the state; that Pine Valley is dependent on federal and state funds to operate its business; that Medicaid funds about two-thirds of the nursing home residents in the state; that Medicaid payments doe not begin to cover the cost of care that nursing home residents receive; that at Pine Valley, there has been an increasing shift in the facility's resident population to Medicaid, thus drastically impacting the revenue stream from the private pay residents to those who are Medicaid dependent; that Pine Valley has incurred federal and state budget cuts which has all but crippled its ability to maintain County support for its 2005 and 2006 budgets; that Pine Valley is losing money; that the loss in 2005 was $272,141; that the two primary stressors on the facility's budget are the employee wage and benefits costs; that the facility has reduced the number of licensed beds from 135 to its current census of 104; that the Center's budget is nearly $6 million, with approximately $1.2 million attributable to health insurance benefits alone; that nursing home services are not mandated services; that in 2005, it cost Pine Valley $196.85 per resident per day to operate the Center; that the Medicaid reimbursement formula returned $116.64 per resident per day; that nursing homes can only survive their Medicaid losses and keep their doors open by

shifting costs and Medicaid losses; that Pine Valley experienced a 20.41% five-year increase in its operating expenses; that during the same time, its operating revenue increased 10.20%; that the actual loss in 2005 was $1,123,021; that in addition to funds from the federal Intergovernmental Transfer Program, the County transferred $206,100 to Pine Valley, which brought the shortfall to $272,141, as stated above; that the gap between revenues and expenses is growing every year; that reliance on the County to absorb the Center's losses is not an effective means to run a business; that it is time to acknowledge that further cost-cutting measures are necessary to keep this sinking ship afloat; that the Center needs the flexibility to service its residents as cost efficiently as possible; that implementation of subcontracting measures to help reduce costs will help address the economic crisis and will give the politicians a strong message that Pine Valley is running in a business-like fashion; and that greater weight must be applied to the economic circumstances surrounding this County-owned business if future budgets are to reach the zero balance mode.

The County also argues that the subcontracting opportunities sought by Pine Valley are only those of non-core services; that specific services that have been earmarked for subcontracting include the housekeeping and laundry divisions; that preliminary projections estimate a minimum of $80,000 in savings if the Center subcontracts these services; that these two areas focus on the fewest number of employees that would be affected by the ultimate decision to out-source; and that other public nursing facilities have been successful in subcontracting various non-core components of the operations, specifying Manitowoc, Racine and Grant Counties.

In addition, the County argues that the external comparable data overwhelmingly supports its final offer in this proceeding; that comparables for this unit were determined in a previous arbitration to include the contiguous counties of Grant, Iowa, Sauk and Vernon; that even though Iowa County's nursing home is a non-union environment, the Arbitrator included it in the comparables; that for purposes of this proceeding, it would seem appropriate to disregard Iowa County because of its non-union environment and, therefore, lack of specific language to review in this dispute; that the County does not want Iowa County lost in the shuffle of this particular proceeding as its contiguous nature does impact on the parties' wage rate and benefit level assessments; that the County proposes the inclusion of Monroe and Lafayette Counties for this proceeding; and that the Union agrees to a comparable pool as stated above, not including Iowa County, for this proceeding; that in every unionized nursing home presented in the comparable pool, the topic of subcontracting has been directly addressed in the collective bargaining agreements; that the County is seeking nothing more than what other counties already have; that the external comparables provide clear support for the County's final offer; that the County's proposed language is consistent with other language included in the comparable contracts; that it provides the Union with the safety net of impact bargaining should a subcontracting decision ultimately be made; and that, internally, other County departments already employ various degrees of subcontracting as a means of providing cost-effective services to its residents, measures similar to what the County is seeking for Pine Valley.

In conclusion, the County argues that subcontracting is an emotional issue for members of any bargaining unit; that the Union claims that acceptance of the County's final offer will have a profound effect on the employees; that if something is not done to alleviate the financial stress

experienced because of the depleting revenue sources, a topic far more reaching than subcontracting will surely be on future County Board agendas; that failure to act here will also have a profound affect on employees; that the County expects that the Union will argue that the County has not offered a *quid pro quo*; that this is not the type of change that can be purchased; that, moreover, purchasing such a change given the County's financial picture is not a reasonable option; that the proposed sideletter, as part of the County's final offer, provides the quid pro quo that the Union will need to address any subcontracting determinations; that the external comparables support the County's final offer; that both the County and the Union have a mutual interest in the fiscal well being of Pine Valley; that the County's final offer supports this shared interest in a reasonable way; and that, therefore, the County's final offer should be selected.

Union on Brief

The Union argues that there is no evidence in the record that the "factor given greatest weight" under the statute would prohibit the County from paying for either party's offer; that, therefore, this factor is not an issue; that in terms of the "factor given greater weight," there is no difference in the economic value of the offers; that neither party has put into evidence documentation that would show that the County's economic conditions are any different than the comparables; that, therefore, this factor should not play a role in this decision; that both parties have proposed using the same comparables of Grant, Monroe, Lafayette, Sauk and Monroe Counties; that Iowa County should not be included because it is unrepresented; that Iowa County was included in the comparables in the previous arbitration because of its same general characteristics as Richland County; that arbitrators have long held that unrepresented employees should not be compared to represented employees; that such comparisons carries little or no weight because the terms and conditions of employment are unilaterally established, rather than bargained; that it is understandable if this Arbitrator is reluctant to disrupt the established comparability pool; that, however, this Arbitrator should consider not including Iowa County in this case because this is a language case and does not involve economics; that in Iowa County, the county is under no obligation to bargain the decision and impact of subcontracting with the nursing home employees as there is no representation; that regardless of economic or non-economic issues, unrepresented unit should not be considered; and that, therefore, Iowa County should not be considered as an appropriate comparable in this case.

The Union also argues that, in terms of internal comparables, it is clear that the County is looking for something above and beyond what the other units have regarding subcontracting language; that three of the four other bargaining units have contracts that are silent on subcontracting; that the Courthouse collective bargaining agreement does allow subcontracting but only if there are no layoffs or reduction of regular hours of the employees; that what the County is looking for with this unit is an unfettered hand to subcontract; that any services that the County subcontracts in the Courthouse and Professional units are positions that the Union has never represented; that it is not uncommon in Professional units to have outside entities, such as the Wisconsin Workforce Development, performing services for a county; that as for the Highway unit, the County did not put into evidence anything that shows that the Highway unit lost jobs to subcontracting; that the fact that the Highway Department bids out for large road projects is not an indication that subcontracting

happened or that employees lost their jobs due to the County's decision to hire out for some services versus performing them in-house; that the County has not made the case that the internal comparables support the change they are seeking with Pine Valley; that, in fact, it shows just the opposite; that none of the existing County bargaining units have the type of language that the County is seeking; that three of the four units reflect silence regarding subcontracting, as does the current Pine Valley contract; and that the status quo is what the Union is seeking.

In terms of external comparables, the Union argues that they show a clear pattern of restrictions on subcontracting; that all of the comparables except for Sauk County have more restrictions than what the County is seeking for language in this case; that in Grant County, the Union has the right to bargain both the decision and the impact of proposed subcontracting; that in Lafayette and Monroe Counties, the employer cannot subcontract work if it results in the layoff of current employee; that in Lafayette, the prohibition also covers reduction of hours; that in terms of Vernon County, the employer is only allowed to contract out for goods; that the other language the County sites does not refer to subcontracting; that it is wrong for the County to represent this as subcontracting language; that when analyzing the external comparables, it is clear to see that the language and the rights that the County is seeking in this case are far and above the rights that the other counties currently have; and that, therefore, the external comparables do not support the County's proposal.

In addition, the Union argues that arbitrators use several measures to determine if an employer has the right to the subcontracting language that it is seeking; that the County has not shown a compelling reason to make the change; that they have not offered a quid pro quo for the change; that they have not offered clear and convincing evidence that the language change is needed; that the burden is on the moving party; that the County has not shown how allowing it the unfettered right to subcontract will address the problem; that there is no argument that Pine Valley is running a budget deficit; that, unfortunately, so is every other county owned nursing home in this state; that it is hypocritical of the County to expect their nursing home to make money and not need any taxpayer subsidization, but that other services, such as highway, social services, courthouse and the sheriffs department, do not have the same expectation; that those departments are not required to make money and are subsidized by taxpayer dollars; that the County has never shared a specific proposal regarding subcontracting and how having the unrestricted right will help them save money and help Pine Valley be self-sufficient; that the County has not offered a quid pro quo for the language change; that arbitrators have consistently held that a quid pro quo is required when a party is asking for a language change; that even when a quid pro quo has been offered, arbitrators have assessed whether or not it is enough to purchase the change in language; that the wage offer the parties have agreed to is exactly the same wage settlement of the County's four other represented units; that the County is expecting the Union to give up the right to bargain on the decision of subcontracting and have offered nothing in return; that, therefore, for that reason alone, the Union's offer should be selected as most reasonable; that the County has only proposed subcontracting language one time in the parties' entire bargaining history; that was when the parties bargained their first contract; that the County dropped their subcontracting proposal; that the first time the County proposes subcontracting language in 21 years, it arbitrates the language; that this goes against arbitral thought regarding the bargaining relationship; that by not proposing this change in prior negotiations,

by not having an exact proposal regarding subcontracting, and by being allowed unlimited right to subcontract, the County has not met its burden of proof; and that, therefore, the Union's offer should be viewed as most reasonable.

Employer on Reply Brief

The Employer argues that Pine Valley is a business operation in a volatile industry; that as a business it has struggled with serious budget deficits over the past years because of significantly depleting financial aid from state and federal agencies; that it is a business whose political leaders question its continued viability and reject its unbalanced budgets; that, in short, it is a business that needs significant help; that management needs the flexibility to secure subcontracting bids in order to harness additional cost savings; that, bottom line, Pine Valley is a public business that needs the economic opportunities available for all businesses through subcontracting; that cost effective services are at the core of any business; that Pine Valley in no exception; that management must bring the million dollar deficit under control; that the Union's position is that the deficit is not its problem and that eradication of the deficit should be based upon taxpayer subsidies rather than through business efficiencies; that the services noted by the Union as receiving tax dollars – Sheriff, Highway – are mandated services the County is required to provide; that the establishment and operation of a County-owned nursing home is not a mandated service; that unlike other services the County provides, the County can choose to close its nursing home business at any time; that as Pine Valley is a business owned and operated by the County, it is not unreasonable for the County to expects its business to be as self-supporting and as free of deficit as possible; that to that end, opportunities to assess all cost factors are a necessary component of any business's survival plan; that the Union urges that the County's hands remained tied in its effort to corral cost-savings measures; that the Center has operated in the red for a long time; and that help is needed and needed now.

In addition, the Employer argues that the Union has not presented any additional evidence to eliminate Iowa County as a comparable; that the Union argues that when subcontracting has occurred within the County, it involved positions that the Union never represented; that union representation is not at dispute here; that what is at issue is whether the County will be able to effectively and efficiently operate its business in a realistic fashion; that Pine Valley's administrative team is looking for opportunities that other department heads with the County have possessed and exercised for some time; that outsourcing, subcontracting, and leasing are reasonable opportunities for public sector entities to provide cost-effective services; that it does not matter that none of the existing County bargaining units have the type of language the County is seeking; that the County has shown that Pine Valley is in dire economic shape; and that it is critical that comparable degrees of subcontracting flexibility be provided in order to keep the ship afloat.

The Employer also argues that the Union's interpretation of the external comparable contracts ignores the reality that subcontracting among area nursing homes is supported; that contract language from the five unionized external units provides clear opportunity for the employer to subcontract; that the statutory criterion of external comparability overwhelmingly supports the incorporation of

subcontracting language in this case; that the County's final offer acknowledges the external forces with the additional step of providing the Union with the safety of "impact bargaining" should a subcontracting decision ultimately be made; and that the County's final offer is externally reasonable, internally consistent and extremely fair, given the Center's economic circumstances.

In regard to the traditional "three-point analysis," the County argues that it has shown a need for subcontracting, has external support and has established its case with clear and convincing proof; that Pine Valley's ever increasing deficit justifies the need; that the cost saving achieved through re-allocation of select services is a compelling reason; that because of the overwhelming comparable support, a monetary quid pro quo is not needed; that, moreover, providing a monetary quid pro quo is inconsistent with the dire financial circumstances attendant to this proceeding; and that the County's final offer sets forth contractual mandates for the impact bargaining guarantees appropriate protection for those employees who may be impacted by a subcontracting decision.

Union on Reply Brief

The Union argues Pine Valley's financial struggle is not new information; that this has been the trend in the nursing home industry for the last several years; that the Union has never argued anything different; that, in fact, the Union has acknowledged that Pine Valley is running a deficit; that so is every other public nursing home in the state; that even though other public nursing homes are in the same financial difficulty, they have not sought to have the unilateral right to subcontract out all the services of the nursing home; that the County is proposing that right in this case; that the County is proposing that it has the unilateral right to contract out any or all of the services that Pine Valley provides without bargaining or even showing a compelling need of gained efficiency or savings; that the County has not proven that there is a need to have this unfettered right; and that the County has not shown that by having this right, this will solve the financial problems of Pine Valley.

In terms of the comparables, the Union argues that the County is seeking more than what the comparables have in asking for no limits to be placed on its right to subcontract; that whereas all of the external units have subcontracting language in their contract, each subcontracting provision has some limit on it; not one of the external comparables has the same unrestricted language that the County is proposing here; that what the County is seeking is above and beyond the rights that any of the external comparables have; that when evaluating the internal comparables, the County's proposal is not even close to what the other County contracts have; that only the Courthouse unit has subcontracting language; that the Courthouse unit's language only allows subcontracting if it does not result in layoff or reduction in regular hours of the employees; that the other three units are silent on the issue; that as to the County's argument that all units are engaged in subcontracting to control their costs, the services subcontracted had never been performed by the units or the jobs were never represented by the Union; and that it is clear that neither the external nor the internal comparables support the County's proposal.

In terms of the analysis arbitrators use to evaluate proposed changes in contract language, the Union argues that the County failed to provide clear and convincing evidence that its offer passes any of

the traditional tests; that the first prong of the test is that the present contract language has given rise to conditions that require amendment; that there is no information presented showing this; that the second prong of the test is that the proposed language may reasonably be expected to remedy the situation; that the County has presented no hard evidence to support this; that the third prong of the test is that alteration will not impose an unreasonable burden on the other party; that under the Employer's final offer, the most the Union can do is bargain for a severance package; that the Union's position in future bargaining will be seriously weakened, if not lost, because the threat to subcontract any or all work will be present at every negotiation session; that viable cost saving options proposed by the Union during bargaining can be totally disregarded, even if they would go a long way toward saving the Center; that the fourth prong of the test involves the nature of the quid pro quo; that the County does not even address this point; that the County's offer makes a significant change to a long established contractual right that this bargaining unit has had without providing a quid pro quo which would provide fair value for establishing a new status quo; that the County's assertion that the language in its final offer would be used only for non-core services, such as housekeeping and laundry, is not stated in its final offer which applies to all employees in all departments; and that, all in all, the County's offer is unreasonable.

Discussion

This case is about subcontracting. As the County insightfully notes in its brief, this is an emotional issue for any bargaining unit. Certainly, for those employees who may be subject to subcontracting, it must raise severe financial fears as to how, once they are out of work, they will pay the house payment and the medical insurance payments and the car payments and the fuel payments and the payments for those things their children need for school, such as clothes and shoes, lunch money, and materials and supplies. There is nothing in the record to suggest that the reason for the subcontracting is because of the inefficient or incompetent work of these employees. I surmise that these are hard working people, people with some seniority at the Center, people who pay taxes and shop locally, ordinary people who are in the middle of forces much bigger than they are, forces over which they have no control. The possibility of working for the subcontractor holds little joy because they most surely will take a pay cut or lose benefits; otherwise, how can the subcontractor provides these services more economically than the County is presently doing?

The dire financial situation for Pine Valley also causes an emotional response from those who want our County nursing homes to continue and to thrive so they may provide competent and compassionate care for our elders, those people who walked before us, who survived the depression, who won the war against fascism, and who created an a post-war economy from which we have all benefitted. They raised their kids, including some of us, worked their jobs in a day when America produced things other than computer print outs and electronic data, things people could actually use, before it because easier to buy our clothes and computers from third world countries, and they paid their taxes, some times begrudgingly, but paid them none-the-less so this country could be strong militarily, so our schools could educate their children, America's future leaders, so our communities could have police and fire protection from things that can devastate lives, and so our infrastructure could encourage and support a growing economy. Those generations born from about 1906 to 1930,

pre baby-boomers, have reached pay-back time when we as a society have the opportunity to show our respect and our gratitude by providing appropriate room and board and medical care to those who once took care of us but who no longer can take care of themselves.

All these emotional issues comes to mind in this contract dispute in Richland County over whether the County can have the right to subcontract some of its services at the Pine Valley Center in an economy move to provide for the continuation of the Center and the services it provides. But it is the legal issues, not the emotional ones, that are before this arbitrator. So let's put the emotions aside on focus on the first legal issue that needs to be decided: the external comparable pool.

External Comparable Pool

These parties have been to arbitration before where the external comparable pool was determined to be comprised of the four counties contiguous to Richland County: Grant, Iowa, Sauk and Vernon Counties.[1] In that case, the Union argued against the inclusion of Iowa County as the employees of Iowa County's nursing facility are not represented for purposes of collective bargaining. Arbitrator Johnson decided that since the contiguous counties, including Iowa, had the same general characteristics as Richland County and since contiguity was a better rationale that any rationale put forth by the Union, he would include it. Arbitrator Johnson also included Monroe County, as proposed by the County, but he did not include Lafayette County, as proposed by the Union, because of the lack of applicable wage rate and settlement data.

In the present case, the parties agree to continue to use Grant, Sauk and Vernon Counties as comparable, as well as Monroe County. They also agree to include Lafayette County. They still disagree about the inclusion of Iowa County, with the Union arguing vehemently and citing cases that disavow the use of non-represented units as comparables, especially in language issue cases. The Employer argues for its inclusion, stating that this case is, ultimately, a financial case, not a language case.

Arbitrator Greco has stated his position well, a position with which I agree, as follows:

> As a general proposition, I agree that non-unionized settings should not be considered as comparables when resolving language disputes because those settings do not reflect the give and take found in collective bargaining relationships. However, I am extremely reluctant to disturb an earlier set of comparables established through an interest arbitration proceeding even when some of those comparables involve non-unionized settings.[2]

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[1] Richland County (Pine Valley Manor), Decision No. 28017-A (Johnson, 9/94). While contiguous, Vernon County's use as a comparable is limited as it does not operate a nursing facility.

[2] School District of Sturgeon Bay, Decision No. 30884-B (Greco, 12/04).

But the County on brief offers me a solution as follows:

> The County has included Iowa County as a comparable in "ghost" standing for future bargaining and interest arbitration proceeding purposes. Granted, for the purposes of this proceeding, it would seem appropriate to disregard Iowa County because of its non-union environment and, therefore, lack of specific contract language to review for this dispute. The County does not want Iowa County lost in the shuffle of this particular proceeding, however, as its contiguous nature does impact on the parties' wage rate and benefit level assessments. (footnote omitted)

So be it. I will use the comparables as agreed to by the parties while not upsetting or modifying the comparable pool established by Arbitrator Johnson. If Iowa County is to be excluded as a comparable, the Union will have to convince an arbitrator down the road to do so.

Financial Background[3]

The Wisconsin Association of Homes and Services for the Aging (WAHSA) has stated, "Wisconsin's nursing homes are in financial peril." In the past five years, 38 homes have closed, and WAHSA has said that "more will quickly follow as half of all homes are at 'financial risk'."

In recent years, Pine Valley, as all other nursing homes, has incurred federal and state budget cuts. Medicaid funds about two-thirds of the nursing home residents in Wisconsin, but Medicaid payments do not cover the cost of care these residents receive; indeed, Medicaid pays $198.3 million less than it costs nursing homes to provide the care.

At Pine Valley, Medicaid pays $116.64 per resident per day when it cost Pine Valley $196.85 per resident per day to run the Center. Part of this shortfall is off-set by charging private-pay patients $210.79, thus having the private pay residents supplement the Medicaid patients. But private pay residents are a minority of the patients at Pine Valley and, if anything, the number of private pay patients will decrease.

The Intergovernmental Transfer Program (ITG) is a federal program intended to offset direct care Medicaid deficits that county nursing homes experience. As recent as 1996, ITG offset paid 100% of the Center's direct care Medicaid deficit. Even up through 2003 and 2004, the Center received close to a 90% reimbursement ratio. In 2005, the ITP offset bottomed out at 39.63%, which is well within the statewide experience, with the offset to decrease again in 2006.

And then there is the state "Bed Tax" which requires a facility to pay the state $75 per bed per

[3]Much of this information comes from the County's exhibits and briefs.

month. In 2006, Pine Valley will pay the state $93,600 as a "Bed Tax."[4]

Counties have the prerogative of providing fund transfers to offset or even eliminate operating losses that nursing homes may be experiencing, and Richland County has historically transferred money to Pine Valley to help balance its budget. Indeed, the County appropriated $206,100 to subsidize Pine Valley, but it still lost $272,141 in 2005. And the County appears unwilling to appropriate more money from its property tax revenue to subsidize Pine Valley; instead the County is considering selling and/or closing the Center.

The largest expenses are employee wages and benefit costs, with $1.2 million of the Center's $6 million budget attributable to health insurance benefits. Layoffs do not appear to be an option as credible testimony at hearing stated that the Center was operating with a "lean staff" and, thus, any layoffs would affect core services which would have the domino effect of negatively affecting the census which ultimately could have the effect of forcing the County to close down the Center.

The Center has implemented a number of cost-saving measures. It reduced the number of its beds from 135 to 104, thereby saving money from the Bed Tax. It also allows the Center to reduce its employee costs through attrition and layoffs. In addition, the Center "reshopped all of its vendors" which is, as I understand it, a spin on the classic bidding process. This has reduced costs by gaining specific rate cuts and decreasing deliveries.

The County begins its brief discussing the "grim financial condition of Pine Valley Healthcare," and, indeed, it is.

"Greatest Weight" Criterion

Per the statutory criteria found in Section 111.70, Wis. Stats., this arbitrator "shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer."

On brief, the County combines this criterion with the "greater weight" and "interests and welfare of the public" as follows:

> The statutory criteria under Section 111.70, Wis. Stats., requires the arbitrator consider the economic conditions in the jurisdiction of the municipal employer. The Legislature and arbitrators have recognized this under the "greatest weight", "greater weight" and "interests and welfare of the public factors. Greater weight must be given to the economic conditions within the County's jurisdiction than to any of the

[4]Obviously I must lack some important information because it makes no sense to me for governments to fund programs and then tax them, getting back part of the money they had given. I am sure our wise politicians have their reasons, but it baffles me.

other traditional factors enumerated in Sec. 111.70(4)(cm)7r. Indeed, the impact of the facility's budgets undeniably fall within the "greater weight" definition with spillover into the "interests and welfare of the public" criterion. (citations omitted).[5]

The County does not mention the "greatest weight" criterion again in its brief or at all in its reply brief. The arbitrator is aware of state imposed limitations, but that criterion is not argued by the County in support of its proposal. The Union argues that there is no evidence in the record that this factor would prohibit the County from paying for either party's offer and, therefore, the Union believes that this factor is not at issue.

With this in mind, let me state that I have reviewed the party's arguments or lack thereof regarding this criterion and note that neither party has argued that there are any state laws or directives lawfully issued by a state legislature or administrator officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer such as to impact the decision in this matter. Indeed, the County has already agreed to the "cost" of this contract in that it has reached agreement with the Union on all the financial aspects of this bargain. Even if the Union should prevail, that will add no financial burden on the Employer which it has not already agreed to bear. If the Employer should win, its cost would only go down, supposedly, by its decision to subcontract. As there is no risk that accepting either offer will exceed any state imposed financial limitations, this criterion will not impact the decision in this matter.

"Greater Weight" Criterion

Under the statutory criteria found in Section 111.70, Wis. Stats, this arbitrator "shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r."

As noted above, the financial situation is grim. I am convinced of that. Even the Union agrees to the financial reality that Pine Valley is running a budget deficit. The Union's answer is simple: the County should subsidize Pine Valley, as it does the Highway, Social Services, Courthouse and Sheriff's departments, none of which, the Union argues, are required to make money or even to break even.

But the Union misses the point that money is tight all over the place and that, while the County is required to provide many services to its residents, nursing care is not one of them. The County does not need to be in the business of providing a nursing home, and it is a business, as the County argues again and again.

To support its position, the County cites Arbitrator Weisberger as follows:

At the hearing, the Employer presented testimony that, as part of the State of

[5]County Brief in Chief at page 6.

> Wisconsin's plan to close its existing multi-billion dollar state budget gap, the City of Princeton was informed toward the end of 2003 that its share of state revenues would be reduced by approximately $50,000. This recent and unavoidable economic loss to the City does not mandate "limitations on expenditures that may be made or revenues that may be collected by a municipal employer" (a requirement for the application of 111.70 (4)(cm)(7) "greatest weight" factor) since the City retains discretion as to how to address this state revenue loss. **This appreciable loss of state revenues is a fiscal fact which cannot be disregarded, however, particularly since Princeton has already begun the difficult process of making significant cuts in various City department budgets to meet this financial challenge**. Even though the literal wording of 111.70 (4)(cm)(7) appears to make it inapplicable to the facts in this proceeding, **an argument may be made that the same facts relating to the 7 significant reduction in Princeton's portion of state revenue sharing funds must be considered as part of the "greater weight" factor of 111.70 (4)(cm)(7g) relating to "economic conditions in the jurisdiction of the municipal employer."** Again it may be argued that a literal interpretation of the "greater weight" factor precludes consideration of the impact of the state budget crises upon Princeton since there has been a state-wide adverse impact upon Wisconsin municipalities. This technical reading, however, appears inappropriate when Princeton's $50,000 loss of state revenue sharing is considered in the light of other "local conditions" found in the Princeton area such as unemployment especially in manufacturing, a recent population decline, lower County annual wages and per capita income than Wisconsin averages, and an older population on limited incomes. Accordingly, the Arbitrator agrees with the Employer that **adverse local economic conditions in Princeton, including the loss of some state revenue sharing payments, are entitled to greater weight than any of the factors set forth in 111.70 (4)(cm)(7r)**. She does not believe that this section requires proof of an inability to pay by the municipality before the "greater weight" factor is considered applicable. (emphasis added by County).[6]

But in terms of the statutory criteria, especially the criterion that the arbitrator shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the traditional factors, the financial plight of the nursing home is not the dominant financial factor; indeed, the criterion requires the arbitrator to give greater weight to the economic conditions in the jurisdiction of the municipal employer. The municipal employer in this case is not Pine Valley but Richland County.

Contrary to the case cited above, there is nothing in the record that shows the County has been told its shared revenues will be greatly decreased, that the County has made significant cuts in various department budgets to meet this financial challenge, that the County's unemployment rate has increased, that its population has decreased, that its wages and per capita income are lower than

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[6]City of Princeton – Electrical Utility, Decision No. 30700-A (Weisberger, 03/04).

average, or that a higher percentage of its residents are living on limited incomes, all of which were present City of Princeton cited by the County above.

Indeed, there is little in the way of evidence as to the economic conditions of Richland County, much of which can be summarized in Tables 1 and 2 below

Table 1: Comparable Data Comparison[7]

County	Population	Per Capita Value	Full Value Statistics[8] and % change	State Shared Revenue and % change
Grant	50,552	$38,927	$1,985,537 (6.53%)	$2,571,137 (+0.24%)
Lafayette	16,311	$42,472	$700,286 (6.25%)	$1,828,174 (+0.05%)
Monroe	42,626	$41,843	$1,893,340 (5.89%)	$2,625,109 (+0.43%)
Sauk	58,595	$83,902	$5,087,705 (10.18%)	$857,121 (-0.15%)
Vernon	28928	$41,197	$1,216,000 (6.02%)	$1,268,395 (-0.44%)
Richland	18,098	$45,009	$849,706 (5.20%)	$1,370,315 (+0.45%)

Table 2: Comparable Tax Information[9]

County	Effective Full Value Tax Rates	Total Property Tax Statistics	County Tax Statistics
Grant	$21.27 (0.55%)	$44,836,998 (6.43%)	$8,969,098 (8.74%)
Lafayette	$23.77 (-1.37%)	$17,729,969 (3.73%)	%5,240,276 (6.06%)
Monroe	$23.46 (3.17%)	$46,573,846 (8.75%)	$12,277,186 (15.16%)
Sauk	$18.36 (-1.71%)	$98,841,475 (7.91%)	$23,021,243 (3.87%)
Vernon	$22.97 (-0.86%)	$29,566,851 (4.85%)	$7,692,051 (6.52%)
Richland	$22.00 (2.67%)	$20,916,270 (6.38%)	$5,673,773 (-0.28%)

[7]See Union Exhibits 7 a and b and County Exhibits 44, 48 and 49. Percentages are a comparison between 2003 and 2004.

[8]Stated in millions.

[9]See County Exhibits 46-48. Again, percentages are a comparison between 2003 and 2004.

While the county tax statistic is cause to pause, the per capita value and effective mill rates appear healthy, while the other indicators fall where one might assume they would for the second smallest of the six comparables. In other words, there is little or nothing that the County can point to which would require or even allow this arbitrator to give greater weight to economic conditions in the jurisdiction of the municipal employer. While the financial situation of Pine Valley is dire, the County's financial health appears to be within the range it should be.

Therefore, the "greater weight" criterion will not be controlling the outcome of this case.

Interest and Welfare of the Public Criterion[10]

The County argues vigorously and vehemently that the interest and welfare of the public in maintaining a health center and that a health center as a business can only continue if it does not cause a deficit. To assist in eliminating the deficit, the County argues that it needs the economic tool of subcontracting non-core services as a cost saving measure. This will keep the Center open and, therefore, meet the interest and serve the welfare of the public.

The Union, on the other hand, argues that the interest of the public is served by having public employees appropriately compensated, not by outsourcing work to be done at a lower cost, thereby decreasing employee earnings, and not by getting rid of employees it currently has.

And they are right. They are both right. We want the Center kept open so the County's residents in need of such care have a place close to home to go. We want employees appropriately compensated so they can contribute to the community and the tax base which can help keep the health center open. Therefore, this criterion will not decide this case.

Change of the Status Quo Analysis

The County has proposed a change in contract language, that is, the status quo, and as such has the burden of proving the necessity for such a change. The burden has been expressed in many ways. In another subcontracting case, this one involving school bus drivers, Arbitrator Baron stated it as follows:

> Traditionally arbitrators consider whether a need exists (sometimes requiring a "compelling reason for the arbitrator to change the language," Barron County, Krinsky, Dec. No. 16276, 1978), meaning that a legitimate problem exists. A further consideration is whether the moving party has offered a quid pro quo for the change. Arbitrator Sherwood Malamud, in D.C. Everest, (Dec. No 24678-A, 1988) added

[10]This criterion also includes "the financial ability of the unit of government to meet the costs of any proposed settlement." In a sense, there is no cost involved in this case; even if there was, the County has not made an argument about its inability to meet the costs and, therefore, this part of the criterion is not included in the analysis.

another facet to the analysis, i.e., that proof has been established by clear and convincing evidence.[11]

With emphasis added by Arbitrator Baron, she continued by quoting Arbitrator Rice as follows:

> The arbitrator holds strongly to the view that basic changes in a collective bargaining agreement, such as a change in a salary schedule or a method of reclassifying employees, should be negotiated voluntarily by the parties unless there is evidence of a compelling need to change the existing language. In such a circumstance the parties (sic) seeking the change has the burden of demonstrating not only that a legitimate problem exists that requires contractual attention, but that its proposal is reasonably designed to effectively address that problem.[12]

Arbitrator Petrie stated it this way:

> The proponent of innovation or change in the status quo ante must normally establish that a legitimate problem exists which requires attention and that the disputed proposal reasonably addresses such problem, and must frequently advance an appropriate quid pro quo in support of such proposal.[13]

Let me offer the following articulation of the mover's burden: to show that there is an actual, significant and pressing need for change of the status quo; that the proposed change addresses the need in as limited a manner as possible; that comparables are consistent with and supportive of the proposed change; and that a proper quid pro quo is offered to compensate, at least in part, the party resisting the change.

Has the County shown that there is an actual, significant and pressing need for change to the status quo?

The County has entered testimony, evidence and argument as to the dire financial circumstances facing Pine Valley. Nobody disputes that the Center is running on a deficit. The deficit is getting bigger as time progresses. Something needs to be done. If it so chose, the County could make up the deficit which it has done, in part, in the past. Apparently, the political climate is such that the County will not extend itself financially in that way. So the County comes to this arbitration arguing that it needs the authority and the flexibility that subcontracting language offers to make up the deficit.

The record is clear: the County has shown that there is an actual, significant and pressing problem.

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[11]See, i.e., Mineral Point Unified School District, Decision No. 28879-A (Baron, 7/97).

[12]Northeast Wisconsin VTEA, Decision No. 26363-A (Rice, 1991), cited at page 14.

[13]Village of Saukville, Decision No. 28426-A (Petrie, 2/96).

The Center is facing very difficult financial times and drastic action must be taken to reduce the budget. The County has met its burden of proving there is a compelling need to either subcontract or take some other action of major significance to properly deal with the budget's shortfall.

But I note that the record is also clear that of the stated targets for subcontracting, laundry and house keeping, the savings of subcontracting these activities is "$80,000 or more." Even with some of that "more", this is a far cry from the hundreds of thousands of dollars that the Center is coming up short. This is not, therefore, the total solution to the County's problem; at most, it lessens it by about 30%.

Does the proposed change address the need in as limited a manner as possible?

When a need for change to the status quo has been shown, the proposed language must be reviewed, first, to see if it meets the needs, and, second, if it does so in as limited a matter as possible. Having a need does not grant the moving party an open book to write however much it wants into the contract to meet that need. And here is one place the County's offer fails. Its language offers no limitations to its ability to subcontract. None.

But at hearing and on brief, the County asserts time and again that it is only targeting non-core areas, laundry and housekeeping, and not core areas, such as nursing. So it may be, but the language offered by the County would allow it to subcontract not only laundry and housekeeping but the entire operation: activities aides, certified nursing assistants, food service personnel, maintenance workers, everything, and in so doing, the language does not require the County to protect current employees from reduction in hours or layoff, to demonstrate a reasonable business need, or to bargain the decision to subcontract itself.

If the County is truly interested only in subcontracting laundry and housekeeping, how hard is it to draft language that limits the County's right to subcontract to those non-core areas? In a case involving the subcontracting of school busing services, the employer offered such limiting language, stating: "Employer specifically retains the right to subcontract its transportation services."[14] If the County is dedicated to the proposition that it will only subcontract these two non-core areas, why not propose language which says, "to contract out laundry and housekeeping work"? Put that in front on an arbitrator and you have an interesting case.

But even though the County has run into problems in this part of the analysis, it perhaps can redeem itself as we look at the next area: comparables.

Are the internal comparables consistent with and supportive of the proposed change?

In terms of internal comparables, the County argues that its departments employ cost savings similar to what the County is seeking at Pine Valley; that is, other County departments already employ various degrees of subcontracting as a means of providing cost-effective services to residents.

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[14] School District of Sturgeon Bay at page 2.

Table 3: Subcontracting Provisions: Internal Comparables[15]

Bargaining Unit	Contractual Language	Language Location	Subcontracting Activity
Courthouse	Yes: County will not subcontract the work of a regular bargaining unit employee if said subcontracting results in the lay-off or the reduction in regular hours of the employee.	Side Letter	Various clerical positions within Health and Human Services Division.
Highway	No language		large road projects that the Department's staff is no longer able to absorb (i.e., earth work and crushing gravel).
Professional	No language		Various professional positions within Health and Human Services
Sheriff	No language		
Center: Union	No language (status quo)		
Center: County Proposal	"to contract out work"; Where proposed subcontracting involves work historically performed by members of the bargaining unit, the union reserves the rights it has under the law to bargain the impact of such decisions.	Article 2 - Manage-ment Rights and Side Letter	

The County points to the Highway Department which bids out large road projects that the Department's staff is no longer able to absorb; for example, earth work and crushing gravel. It points to the Courthouse where various clerical positions within Health and Human Services Division are subcontracted or leased. It also points to the Professional unit where various positions within Health and Human Services are subcontracted or leased. Finally, the County argues that it is imperative that it be provided with similar tools for future success at Pine Valley.

[15]A variation of this chart appears as Union Exhibit 14E, at Union Brief, page 11, and at County Brief, page 27.

The record does not show how or when these incident of subcontracting originated. The Union asserts they do not involve employees whom they represent; in any case, the Union has not grieved any of these situations. What the record does show is that of the County's four other bargaining units, three have no language concerning subcontracting. The one unit that does, the Courthouse unit, has a side letter which states, "...the County will not subcontract the work of a regular bargaining unit employee if said subcontracting results in the lay-off or the reduction in regular hours of the employee." In none of the units is there language which has the scope that the County's proposal has here: "to contract out work." Indeed, it seems clear that if the County attempted to subcontract more services offered by its other units, it would run into huge difficulties without contract language to support it.

In its proposal, the County does include a side letter which grants the Union the right to bargain the impact of its decision to subcontract, but the decision itself resides solely with the County. Nor is there any protection for employees hours or positions, such as is included in the Courthouse unit contract. Not only is there no protection from lay-off or reduction in hours in the County's proposal, it is clear that the goal of the county is to lay-off and reduce hours for affected employees.

In terms of the internal comparables, the County has a little support in that one unit includes subcontracting language and does allow subcontracting but only if employees are protected from reduction in hours and lay-off. But in terms of its proposal – unconditional right to subcontract – such language is found nowhere among the County's other units. Thus, it is clear that the County's proposal is neither consistent nor supported by the internal comparables.

Are the external comparables consistent with and supportive of the proposed change?

The County points to the external comparables and says, all have subcontracting so we win. Whoa, slow down. It is correct that Grant, Lafayette, Monroe, Sauk and Vernon Counties, the comparables, all include subcontracting in their contract, and on that point they do indeed support the County's position. But that is not the end of the story. The specific subcontracting rights granted by these contracts has a wide range. Sauk County has the right to contract with other for goods and services "for sound business reasons," a limitation not in place in the County's proposal. In Grant County, the union has the right not only to bargain the impact of a subcontracting decision but the decision itself! You will not find that in the County's proposal. In Monroe County, subcontracting can occur as long as it does not result in layoffs of present employees. Again, one won't find that in the County's proposal. And in Lafayette County, subcontracting is limited such that no regular full-time employee will suffer a layoff or reductions in hours as a result of the county's subcontracting. Again, those protections are absent from the County's proposal.[16]

[16]The contract in Vernon County does not specify the county's ability to subcontract. The County argues that various parts of the management rights clause, read together, allow for subcontracting. The Union argues that it does not and that, if it does, it allows it only for goods, not for services. This is mucky, and it is not necessary to resolve it. The other four comparables provide enough data.

Table 4: Subcontracting Provisions – External Comparables[17]

Comparable County	Subcontracting Provided in Contract?	Services Currently Subcontracted
Grant	Yes – Side letter: Management has whatever rights it has under law to subcontract and where the subcontracting involves work historically performed by members of the bargaining unit, the union reserves the rights it has under the law to bargain the decision and/or the impact of such a decision	Laundry
Lafayette	Yes: No regular full-time employee will suffer a layoff or reduction in hours as a result of the County contracting out for a service.	
Monroe	Yes: To contract out for goods or services, provided that such contracting out for goods and services shall not result in layoffs of present employees.	P/T, O/T or Speech Therapy when needed and Laundry
Sauk	Yes: To contract with others for goods and services for sound business reasons and, if a subcontract results in the layoff of bargaining unit personnel, the Employer agrees to bargain the effects thereof.	
Vernon	Yes: To relieve employees from their duties because of lack of work or other justifiable economic reasons; To contract out for goods; To determine the methods, means, and personnel by which Vernon Manor operations are to be conducted.[18]	P/T, O/T or Speech Therapy when needed

It has been stated that arbitrators are to place the parties in the position they would have been if both had been reasonable and settled the matter on their own. In most cases, that does not happen. In most cases, the choice is the party who comes closest to that ideal. So it is here. The two offers provide the opposite end points a of continuum beginning with

[17]Variations of this chart appear as County Exhibit 5, in the County's brief at page 26, and in the Union's brief at page 13.

[18]The Union disputes that this is subcontracting language and argues that, if it is, it applies only to goods, not to services.

1. County's proposal where it has unfettered rights to subcontract except to bargain the impact to
2. Sauk County where the decision to subcontract must be for sound business reasons and, if layoffs occur, to bargain the impact, to
3. Grant County where, if the subcontracting involves work historically performed by the bargaining unit, the parties bargain not only the impact of the decision but the decision itself, to
4. Monroe County which prevents subcontracting which results in layoffs to
5. Lafayette County which prevents subcontracting if it results in layoffs or reduction in hours to the
6. Union's proposal which is status quo and prevents all subcontracting.

So the County is asking for more in terms of subcontracting than any of the comparables have. The Union, on the other hand, is offering nothing in terms of subcontracting, though all of the comparables have subcontracting language. What if the Union had offered subcontracting language but limited it to situations that would not involve lay-off or reduction in hours of employees? That would have been an interesting case, giving the Union two comparables in support of its proposal. What if the County had offered subcontracting only for sound business reasons or offered to bargain the decision? That too would have been an interesting case with two comparables supporting this kind of language.

Let us be clear: the Union is offering nothing, not even language that protects it members from reduction in hours and layoffs, in terms of subcontracting. It is attempting to keep any subcontracting language out of the contract, which flies in the face of all of the comparables, at the risk of ending up with language that allows unconditional and unlimited layoff authority. Granted, it is difficult for unions, faced with the politics and the fear of their members, to offer something like subcontracting language, but in this case one might think that the Union would find the County's proposal so absolute that any offer less encompassing would be preferable. But it does not make that offer. This is an all or nothing case for the Union. So be it.

Let us also be clear that the County is asking for carte blanche, unrestricted power, a proposal it is difficult to envision any union accepting it at the bargaining table. It is attempting to gain subcontracting powers that it could not get at the bargaining table and that none of the external comparables have, none of them. This is an all or nothing case for the County. So be it.

Does the County offer a proper quid pro quo to compensate, at least in part, the Union which is resisting the change?

The County answers this question in three ways. First, it argues that the needs of the County are so great that no quid pro quo is necessary. Second, it argues that the issue is such that no quid pro quo is available. Third, it argues it has offered a quid pro quo in terms of the side letter which guarantees that the Union will receive notice of any decision to subcontract and will have the right to bargain the impact of that decision.

In terms of the first argument, there are times, I believe, when a lesser quid pro quo or even no quid pro quo is needed for a change to be made. Such cases include situations in which a contract clause or benefit has caused or will cause a significant problem, unseen at the time of agreement, to one or both parties, or the clause or benefit is so significantly out of line with the comparables as to be an aberration, or the clause or benefit is of such a nature that there is a mutual interest and benefit to changing it because it no longer serves the parties well, but only one party has offered a reasonable resolution. I am not convinced that the Employer has proven that any of these criteria apply to this situation and to the change without a quid pro quo that it is proposing here.

The County would argue that this is an example in which a contract clause or benefit (or lack thereof) has caused a significant problem which was unforseen at the time the original contract with this unit was negotiated. There are two responses to that argument: first, the County did include subcontracting language in its original proposal to this unit and withdrew it, and second, the lack of subcontracting language is not the cause of the problem. It might be part of the remedy, but the lack of this language has not brought about the financial situation at the Center. It has been the reduction in state and federal aid that has caused the budget shortfall.

The County would also argue that the lack of subcontracting language in the contract is "so significantly out of line with the comparables as to be an aberration." Even if I accepted that argument, the County has offered in response a proposal that is also significantly out of line with the comparables as to be an aberration: completely unlimited ability to subcontract. One aberration does not fix another.

Nonetheless, the County quotes Arbitrator Hempe at length in its brief and adds emphasis as follows:

> Given the critical, mutual nature of the health insurance problem in Buffalo County that, if unresolved, portends dire future consequences for each party, **responsible, fair proposals for change that address the problem, offer a reasonable prospect of success, are compatible with conditions of employment in the external comparables as well as the mutual needs and interests of the parties do not necessarily require a quid pro quo.**
>
> As one venerable arbitrator has expressed it, "...where comparables indicate that a change may be in order, the concept of a quid pro quo does not prevail."
>
> Finally, this is not to suggest that the doctrine of quid pro quos is no longer useful. The doctrine has a continued, essential utility as an interest arbitral means of controlling unreasonable demands for take-backs of contractual benefits.
>
> However, with a health insurance history in Buffalo County that includes escalating single and family coverage premium increases in the past 11-years of 176% and 144%, respectively, and a shrinking health insurance reserve fund almost three-

> quarters of a million dollars less than the recommended level, it is not unreasonable **for the County to look to its comparable, neighboring counties for helpful examples in health insurance cost savings and to its employees for help.**
>
> Add to this picture the 2006 tax levy limit under which Buffalo County is laboring and the reductions that its County Board has already enacted (including a 64-hour work-year reductions), **the need to exchange quid pro quos for reasonable, responsible cost control modifications that address the problem, offer a reasonable prospect of success, and are compatible with trends in comparable counties is considerably reduced, if not eliminated. Thus, the absence of a quid pro quo in this instance is not detrimental to the County's health insurance proposals.**[19]

Arbitrator Hempe has stated well a growing arbitral policy, and I agree with his rational. The problem is that the facts of this case do not meet the criteria he establishes. His first criterion is that the proposal for change be responsible and fair. Many would argue that unfettered power, even if slowed by the requirement of impact bargaining, is anything but responsible and fair. Arbitrator Hempe also requires that the change offers a reasonable prospect of success. I take no position on that criterion in this case but do note that the County never states that its proposal will totally solve the Center's financial problems. The criterion that the proposal be compatible with the external comparables has been discussed above. In this case, of the five external comparables, only two subcontract laundry and none contract out housekeeping. As to whether the proposal is compatible with the mutual needs and interests of the parties, the Union would certainly assert that it does not meet the needs of its laundry and housekeeping members.

As the County notes, both the Union and the County have a mutual interest in the fiscal well being of Pine Valley. But Arbitrator Hempe was looking at the big issue of our day, the rising cost of health insurance coverage, where every employee has an interest in the controlling of sky rocketing increases. In that case, higher co-pay or deductibles affect all employees who share in the interest in having health insurance in a cost effective manner. Such is not our case where the Employer is saying it will terminate the positions of some of the units members, where the pain of the decision will not be spread among the unit but experienced by a segment.

As to the second argument, that the issue is such that no quid pro quo is available, the County asks how it can buy language when the Center is already losing money. There is no requirement that the quid pro quo has to have a monetary value. The idea of a quid pro quo is that it brings the arbitration process as close as it can to the actual give and take of bargaining. You get nothing for nothing, but you also get something for something. To award a party the clause or benefit they seek to include or exclude without a quid pro quo, absent the circumstances stated above, takes arbitration even farther away from collective bargaining realities. In any case, there may have been things to offer this unit, things for those who will be impacted, that might have encouraged the Union to take a closer

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[19] Buffalo County, Decision No. 31484-A (Hempe, 5/06).

look at the proposal, or at least a variation of it. So the argument that no quid pro quo is possible comes up short.

In terms of the third argument, that the quid pro quo is contained in the side letter which guarantees notice and impact bargaining, has a hallow ring. I am going to take something from you, but I will let you have some input in how that is done. Doesn't sound like much give and take there. It is well settled in Wisconsin that the decision to subcontract certain services constitutes a mandatory subject of bargaining, as does the impact of any such decision.[20] Offering the Union the exercise of a right it has does not qualify as a quid pro quo, even when the proposal is attempting to take away the right of bargaining the decision.

Other Factors

In terms of the lawful authority of the municipal employer, the stipulations of the parties, comparison of conditions of employment with employees in private employment, the consumer price index and the overall compensation of these employees, none of these were raised by either party and, therefore, are not considered in this decision.

But there is the one aspect of this case that sets it apart from most other arbitrations. A nursing home is a business. The County is right about that. Perhaps County nursing homes, along with faith and charitable based nursing homes, developed before the private sector had the resources to create and operate such facilities. In any case, the question of whether a county should continue to operate a nursing facility is answered by the politics of the local scene. If the public wants to keep its county nursing home open, politicians will more than likely keep it open. But when the tide changes and having a County nursing home, at least at the cost it entails, is no longer a priority for the electorate, then the possibility that the county sells or even closes the facility becomes closer to reality. And this Center appears to be at risk for such an event. In some ways, that would be unfortunate, not only to the employees but for the patients as well and for the county in general. And because of the somewhat unique nature of a nursing home, that it is business operated by the county at its option, the need for employer and union to confront and solve the financial problems facing a nursing home becomes even more apparent. That did not happen in this case; instead, the parties ended up in front of an arbitrator to decide an issue really best decided close.

But, ultimately, none of this drives this decision because the criteria used here is codified and does not differentiate between services the County is required to offer and those which is chooses to offer.

In any case, both parties but especially the County offered other arguments, all of which have been reviewed and found wanting.

For these reasons, based upon the foregoing discussion, the Arbitrator issues the following

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[20]Unified School District No. 1 of Racine County v. WERC, 81 Wis2d 89 (1977).

AWARD

That the final offer of the Union shall be incorporated into the collective bargaining agreement between the parties for the 2005-06 term.

Dated at Madison, Wisconsin, this 22nd day of September 2006.

By James W. Engmann
James W. Engmann, Arbitrator