STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 634, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO, Complainant, vs. CITY OF MENOMONIE (DEPARTMENT OF PUBLIC WORKS), Respondent.	Case XXVI No. 21188 MP-695 Decision No. 15180-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Union.
Solberg & Steans, Attorneys at Law, by Mr. Phillip M. Steans, and Mr. Kenneth E. Schofield, appearing on behalf of the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Dennis P. McGilligan to act as Examiner in the matter; and hearing having been held at Menomonie, Wisconsin, on March 15, 1977 before said Examiner; and the Examiner having considered the evidence, arguments and, briefs, and the Examiner being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 634, Wisconsin Council of County and Municipal Employees, affiliated with AFSCME, AFL-CIO, hereinafter referred to as Complainant, is a labor organization within the meaning of the Municipal Employment Relations Act, and at all times pertinent hereto has been the collective bargaining representative of all employes in the Streets Department of Respondent.

2. That the City of Menomonie, hereinafter referred to as Respondent City, is a Municipal Employer within the meaning of the Municipal Employment Relations Act, having its principal offices at the City Hall, Menomonie, Wisconsin, 54751.

3. That Complainant and Respondent City are parties to two collective bargaining agreements for the years 1976 and 1977 covering the aforesaid unit of employes at all times pertinent hereto.

4. That the 1976 contract contained the following pertinent provisions:

"ARTICLE 1 - RECOGNITION

SECTION 1. The City hereby recognizes the Union as the exclusive bargaining agent for all regular full time and seasonal employees employed in the Department of Public Works consisting of the Park Department, Street Department, Water Department and Sewage Disposal Department, but excluding the Superintendent, Supervisors and Confidential

Clerical personnel for the purposes of bargaining collectively, in good faith, on all matters pertaining to wages, hours and working conditions of employment.

. . .

ARTICLE 4 - HOURS

. . .

SECTION 6. There shall be no extra or part-time employees hired to perform the duties of regular full-time employees to avoid the payment of overtime rates of pay. Burden of proof shall be on the employees."

. . .

ARTICLE 8 - SENIORITY

. . .

SECTION 5. Whenever it becomes necessary to employ additional workers, either in vacancies or new positions therein, former qualified employees who have been laid off within one (1) year prior thereto shall be entitled to be re-employed in such vacancy or new position for which he may qualify in preference to all other persons.

. . .

SECTION 8. When an employee is laid off due to a shortage or [sic] work, lack of funds, or the discontinuance of a position, such employee may take any other position for which he may qualify and that his seniority will permit him to hold.

. . .

ARTICLE 10 - GENERAL PROVISIONS

. . .

SECTION 2. No new employees shall be hired while there are seniority employees on the laid off list who are able to perform the work available.

. . .

SECTION 9. If needed, there shall be eleven (11) seasonal positions. Four (4) in Park Department, three (3) in the Sewer Department, one (1) in the Water Department, and three (3) in the Street Department. In addition, the City may employ casual laborers to fill temporary positions, with no expectancy to recur. However, such casual employees shall not be hired until all eleven (11) seasonal positions have been filled. Said seasonal and casual employees will not be eligible to accrue or receive any fringe benefits except for protection of the grievance procedure or as otherwise provided for in this agreement.

. . ."

5. That the 1977 agreement contained the following pertinent provisions:

"ARTICLE 1 - RECOGNITION

1.01 Bargaining Unit. The City hereby recognizes the Union as the exclusive bargaining agent for all regular and seasonal

employees employed in the Park Department, Street Department, Landfill Department, Water Department and Sewage Disposal Department, but excluding Supervisors and Confidential Clerical personnel for the purposes of bargaining collectively in good faith on all matters pertaining to wages, hours and working conditions of employment. The City shall not initiate, create, dominate, aid or support any other employee group for any bargaining or other purposes which Local 734 fulfills.

. . .

ARTICLE 5 - SENIORITY

. . .

5.02 Layoff/Recall. In the event it becomes necessary to lay off employees for sufficient reason, they shall be laid off in the inverse order of seniority and shall be recalled from lay-off according to their seniority. No new employees shall be hired until all employees on lay-off status desiring to return to work have been recalled.

5.03 Bumping. When an employee is laid off due to a shortage of work, lack of funds or the discontinuance of a position, such employee may take any other position for which he/she may qualify and that his/her seniority will permit him/her to hold.

. . .

ARTICLE 7 - HOURS

. . .

7.06 Part-time Employees. There shall be no extra or part-time employees hired to perform the duties of regular full-time employees to avoid the payment of overtime rates of pay. Burden of proof shall be on the employees.

Seasonal and part-time employees shall not be utilized to displace regular full-time employees.

. . .

ARTICLE 11 - GENERAL PROVISIONS

. . .

11.03 Seasonal and Casual Positions. If needed, there shall be twelve (12) seasonal positions. Five (5) in the Park Department, three (3) in the Sewer Department, one (1) in the Water Department, and three (3) in the Street Department. In addition, the City may employ casual laborers to fill temporary positions with no expectancy to recur. However, such casual employees shall not be hired until all eleven (11) seasonal positions have been filled. Said seasonal and casual employees will not be eligible to accrue or receive any fringe benefits except for protection of the grievance procedure or as otherwise provided for in this agreement."

6. That on or about July 21, 1976 Respondent City laid off six regular full time employes in the Streets Department due to a projected decrease in the non-general revenue fund in the amount of $16,000; that Respondent City was operating at its levy limits at all times pertinent hereto.

7. That these six employes remained on lay off status and were not recalled by Respondent City at all times pertinent hereto.

8. That these employes performed tasks which included snow removal from the City streets and were members of the bargaining unit represented by Complainant.

9. That on or about October 29, 1976 Respondent City solicited bids from private contractors for snow removal.

10. That sometime subsequent thereto the Respondent City entered into a contract with H. F. Radandt Company to perform snow removal work for the City; that H. F. Radandt Company personnel performed snow removal work for Respondent on December 7, 1976 and March 4, 1977; that this snow removal was the sort of work normally performed by bargaining unit employes.

11. That Respondent City continued snow removal utilizing some of its unit employes in addition to the snow removal being performed by H. F. Radandt Company personnel.

12. That on or about December 17, 1976 the City Manager sent to the City Council the following memorandum:

"To: City Council
From: City Manager
Subject: Snow Removal by Contract

The Street Department and the Snow and Ice Control budget can provide sufficient City employee manpower to perform the snow plowing of all streets outside the central business district. To remove snow from this district involves additional expense. The estimates used before deciding whether City forces or contractors would clear this snow were as follows:

> Snowfalls of four inches or less could probably be cleared by the existing City crews. That amount of snow can remain on the downtown streets until the rest of the City is plowed without serious disruption of traffic.
>
> Using the past five years' experience, we estimated ten snowfalls over four inches could occur. The average removal time is ten hours per snowfall (please note this is average). This yields 100 hours of snow removal time.
>
> The City would use ten pieces of equipment. The direct operating cost of each averages $5.00 per hour. This excludes depreciation, insurance and garaging overhead. We, therefore, estimated $5,000 for our machine use.
>
> Wage costs were estimated at an additional $3,000 overtime for existing City crew members. The critical factor, however, is that to handle the snowfalls in this estimate we would be required to employ or re-employ six workers for a minimum of four months. This would cost $26,208 (4160 hours at $6.30 per hour). This does not include the increased unemployment compensation liability for part or all of the eight months these six workers would not be employed. The $6.30 hourly cost is not just wage and benefits, but also employer cost tied to every wage dollar.

This shows the City would have to add $34,208 to meet the estimated 100 hours of snow removal, or $342 per hour. The two quotations we received ranked from $212 to $277 per hour if used for the same 100 hours. For calendar year 1977 we estimated $25,000 maximum contractual cost.

Regardless of actual snowfall experience, not less than $26,208 would be added to our cost by preparing to use all City forces. We pay the contractor only when it snows so there is no minimum cost to that method."

13. That Respondent City made no estimation of the cost of hiring the six laid off employes to perform snow removal work in March 1977 instead of sub-contracting the work out.

14. That the cost of the snow removal services rendered by H. F. Radandt Company to Respondent City was $1,390.50 for work performed in December 1976 and $1,295.50 for work performed in March 1977.

15. That the decision to sub-contract snow removal work was done without notice to Complainant; that Respondent City never bargained nor sought to bargain with Complainant over its decision to sub-contract snow removal work; that Respondent City unilaterally made the decision to sub-contract snow removal work.

16. That Respondent City's decision to sub-contract snow removal work was made on economic considerations and was based primarily on relative labor costs.

17. That the 1976 and 1977 labor agreements contained no requirement that laid off employes who are recalled must be re-employed for a minimum period of four months.

18. That the Complainant filed a grievance regarding the aforementioned action of Respondent City sometime toward the end of December, 1976 which the City refused to answer or process through the grievance procedure because the Complainant was commencing two other legal actions relating to the same matter at the same time (the grievance pertained to the sub-contracting of snow removal by the City with Radandt Company).

In view of the foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent City has a duty to bargain collectively with Complainant concerning its decision to enter the above-described arrangement with H. F. Radandt Company regarding snow removal prior to entering said arrangement, as well as a duty to bargain collectively with Complainant concerning the effects of said determination upon the wages, hours and conditions of employment of the employes in the bargaining unit; that by failing and refusing to engage in such collective bargaining, Respondent City has committed and is committing, prohibited practices in violation of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

2. That there is no evidence that the decision of Respondent City to enter the aforesaid arrangement with H. F. Radandt Company was in any part motivated by a desire to evade said Respondent City's duty to engage in collective bargaining, or by hostility

toward any activities of any of its employes that are protected by the Municipal Employment Relations Act, and that Respondent City has not and is not, committing any prohibited practices within the meaning of Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

3. That the Respondent City refused to process the Complainant's grievance regarding Respondent City's decision to sub-contract snow removal work through the grievance procedure contained in the parties' collective bargaining agreement; that consequently the Examiner will decide the merits of the grievance with respect to whether the Respondent City violated the collective bargaining agreement regarding same; that Respondent City's decision to sub-contract snow removal work does not violate either the 1976 or 1977 collective bargaining agreement; therefore Respondent City has not and is not committing any prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that Respondent, City of Menomonie, its officers and agents, shall immediately:

1. Cease and desist from:

   (a) Refusing to bargain collectively with Complainant Local 634, WCCME regarding its decision to sub-contract with H. F. Radandt Company, or any other enterprise, for the performance of snow removal work which has been traditionally performed by bargaining unit employes, or regarding the effects upon the wages, hours and conditions of employment of the employes represented by Complainant of any such decision; or making any unilateral change in wages, hours and conditions of employment without first meeting its obligation to bargain collectively.

   (b) Maintaining its snow removal operation, which was formerly staffed by the employes represented by the Complainant, pursuant to any arrangement or contract entered with H. F. Radandt Company, or any other enterprise.

2. Take the following affirmative action to effectuate the policies of the Municipal Employment Relations Act;

   (a) Reinstate the snow removal program to be operated by the Respondent, in which the employes employed by Respondent in its snow removal work prior to the aforesaid contract with H. F. Radandt Company may be re-employed in identical or substantially identical positions to those in which they were employed previous to such contract with H. F. Radandt Company.

   (b) Make whole all laid off employes for any loss of wages which they have suffered due to Respondent's decision to sub-contract snow removal work to H. F. Radandt Company.

   (c) Upon request, bargain collectively with Complainant with respect to the contracting out of its snow removal program.

(d) Notify all Streets Department employes by posting, in conspicuous places on its premises, where notices to all such employes are usually posted, copies of the notice attached hereto and marked Appendix A. Appendix A shall be signed by the Mayor of the City of Menomonie.

(e) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin 13th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

APPENDIX A

NOTICE TO ALL STREETS DEPARTMENT EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL institute a snow removal operation to be operated by the City of Menomonie, and make the six laid off employes whole by payment to each of them of the respective sum of money equivalent to that which they would normally have earned as an employe of the Respondent City for any loss of pay they may have suffered by reason of Respondent City's violations of the Municipal Employment Relations Act.

2. WE WILL NOT refuse to bargain collectively with Local 634, WCCME, AFL-CIO regarding the decision to contract for the provision of the snow removal program, or regarding the effects upon the wages, hours and conditions of employment of the employes represented by Local 634, WCCME, of any such decision.

3. WE WILL, upon request, bargain collectively with Complainant with respect to any decision to contract out the City's snow removal program.

4. WE WILL NOT, in any manner, interfere with, restrain or coerce our employes in the exercise of the rights guaranteed by the Municipal Employment Relations Act.

Dated at_____, Wisconsin, this_____day of_____, 1978.

By_____
City of Menomonie
Mayor

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The City of Menomonie laid off six employes in the Streets Department on June 21, 1976 due to a decrease in its non-general revenue fund. Among the tasks that these employes normally performed was snow removal work. In the late fall of 1976, the City sub-contracted part of its snow removal work to a private contractor, H. F. Radandt Company. The City gave no notice to the Union nor did they bargain with the Union regarding the decision to sub-contract. Pursuant to its arrangement, Radandt performed snow removal work for the City on December 7, 1976 and March 4, 1977. Other City employes performed snow removal work on these same days. The Union filed the instant complaint alleging violations of 111.70 (3)(a)1, 3, 4, and 5.

The Union's position is that the decision to sub-contract bargaining unit work is primarily related to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining. It cites Libby, McNeil and Libby 1/ and Fibreboard Products Corporation v. NLRB 2/ to the effect that because the decision did not change the basic direction of the City's activities or effect its essential enterprise the decision merely substituted outsiders doing the same work in the same manner and is a mandatory subject of bargaining. Thus, the City's failure to notify the Union or to bargain with it regarding the decision to sub-contract constituted an unlawful refusal to bargain. The Union further contends that the sub-contracting of the unit work violated various provisions of the 1976 and 1977 labor agreements.

The City denies that the sub-contracting violated any provisions of the 1976 or 1977 labor agreements. Further, its position is that the decision to sub-contract bargaining unit work is not primarily related to wages, hours and conditions of employment and, thus, is not a mandatory subject of bargaining. In support of that proposition, it distinguishes Libby and Fibreboard on the grounds that private sector precedent is inapplicable to public sector bargaining. It argues that the decision to sub-contract is not mandatory in that it is an inherently managerial decision over which it had no duty to bargain. These contentions caused this case to closely parallel the Supreme Court's decision respecting the duty to bargain under the Municipal Employment Relations Act in Racine Unified School District No. 1 v. WERC. 3/

In Racine, the School Board decided to sub-contract out the operation of its food service program to a private contractor. The Union requested that the School Board bargain both its decision and its effects upon unit employes. The School Board refused claiming that its decision to sub-contract was not a mandatory subject of bargaining. The Wisconsin Supreme Court held that the decision to sub-contract was mandatory, however, it distinguished the private sector precedent relied upon by the Union in support

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1/ 48 Wis. 2d 272, 75 LRRM 2760 (1970).

2/ 379 U.S. 203, 57 LRRM 2609 (1964).

3/ 81 Wis. 2d 89 (1977).

of its position that the decision to sub-contract was mandatory. The Court formulated the following standard to be applied in determining which subjects are mandatory in the public sector:

> "The applicable standard is not that suggested by either party but rather the 'primary relationship' standard established in Beloit. The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employes, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. . . ."

Initially, the Examiner finds no merit in Respondent's argument that the decision to sub-contract is inherently managerial. 4/ Here the City's decision to sub-contract involved provision of the same municipal services although at an allegedly cheaper cost. 5/ The nature of the decision involved primarily a comparison of relative labor costs. The Respondent City felt that the snow removal work could be done more cheaply by Radandt Company employes than by City employes. The Respondent City did look at the total fiscal situation with respect to its decision but only in a superficial way. Thus, the Respondent City's decision to sub-contract snow removal had its primary impact on the wages and benefits of City employes. The situation is thus distinguishable from that in the City of Brookfield 6/ in which the City laid off five employes because it discontinued providing certain City services. The decision to determine the level of services which a municipal employer will provide is a policy decision and is not a mandatory subject of bargaining.

The Examiner has ordered the Respondent to cease and desist from sub-contracting any snow removal work, to bargain in good faith regarding the sub-contracting of any snow removal work and to make whole affected employes for wages lost as a result of the Respondent's unilateral action. 7/ The Commission in Racine has authorized such make-whole relief in refusal to bargain cases. Exhibits 6 and 7 provide the necessary data to fashion a make-whole remedy. Exhibit 6 shows that on December 7, 1976, six Radandt Company employes performed snow removal services for Respondent. All worked nine and one half hours on that day except for the

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4/ Respondent cites Pennsylvania case law construing the Pennsylvania public sector law regarding the duty to bargain in support of this proposition. The Wisconsin Supreme Court in Racine, supra, expressly disapproved the use of Pennsylvania law as precedent in construing the provisions of the Municipal Employment Relations Act. See Racine, 81 Wis. 2d 89 at 101-102, n. 7.

5/ Respondent produced no persuasive evidence to indicate what economic advantage it enjoyed by sub-contracting its snow removal work. Although the City Manager's memo to the City Council recites that in order to use unit personnel on lay off to perform snow removal work it would be necessary to re-hire those employes for a four month period, the record is devoid of any evidence to support that assertion.

6/ (11489-B, 11500-B) 3/76, 92 LRRM 3053.

7/ The Examiner has not reached the question of whether the Complainant should have made a demand to bargain in the instant case since the decision to sub-contract the snow removal was done unilaterally without notice to Complainant nor did the Respondent City ever attempt to bargain collectively with the Complainant over same.

individual operating the grader who worked nine hours. The City is ordered to pay all of the laid off employes for the nine and one half hours work except the individual with the lowest seniority who shall be given pay for nine hours work. Exhibit No. 7 shows that on March 4, 1977 Radandt employes worked a total of 52 hours on that day. Accordingly, the Examiner deems it proper to apportion that amount of hours among the six laid off employes equally. The City is ordered to pay each of the laid off employes for eight and two-thirds hours work. Payment for work in excess of eight hours shall be at the rate of one and one half times the individuals' normal hourly wage to be determined in accordance with the provisions of the pertinent collective bargaining agreement.

As there was no evidence adduced at hearing to support Complainant's allegation of discrimination pursuant to 111.70(3)(a)3, the Examiner dismisses the complaint as to that allegation.

Complainant next alleges that Respondent's sub-contracting of snow removal work violated various provisions of the pertinent collective bargaining agreements. Since the Complainant filed a grievance over the sub-contracting of the snow removal and the Respondent City refused to answer said grievance or to process said grievance through the grievance procedure and since the parties argued the merits of the instant dispute before the Examiner at the hearing and in their briefs the Examiner will make a decision with respect to the merits of this allegation.

First, Complainant argues that Respondent's decision to sub-contract violated the spirit of the recognition clause which was to keep jobs in the bargaining unit. However, it should be noted that the recognition clause merely delineates which employes are represented by Complainant. It does not guarantee a right to perform certain kinds of work to members of the bargaining unit. As the recognition clause provides no right to perform snow removal work, the sub-contracting does not violate the recognition clause. Second, Complainant argues that Respondent's actions violated the seniority, layoff, overtime and seasonal employes provisions of the labor agreement because it "hired" Radandt's employes thereby denying the laid off employes their rights to seniority, recall, overtime, and employment as seasonal employes. As noted, these arguments are predicated on the notion that the City "hired" Radandt's employes. However, the record is devoid of any evidence to support these contentions. As the laid off employes' contractual rights are conditioned upon the City's employment of additional employes, Complainant has failed to sustain its burden of proving that a contract violation occurred. Accordingly, the Examiner dismisses the complaint as to that allegation.

Dated at Madison, Wisconsin this 13th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner