STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF OCONOMOWOC Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LOCAL 1747, AFSCME, AFL-CIO affiliated with District Council No. 40	Case XXIV No. 26554 DR(M)-152 Decision No. 18724

Appearances:

Mr. Roger E. Walsh, Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys at Law, 700 North Water Street, Milwaukee, WI 53202, appearing on behalf of the Employer.

Mr. Richard W. Abelson, Local 1747, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, WI 53186, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

The City of Oconomowoc having on July 23, 1980 filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling as to whether a provision conditionally included in an existing collective bargaining agreement between it and Local 1747, AFSCME, AFL-CIO relates to a mandatory subject of bargaining; and the parties having waived hearing in the matter, and in lieu thereof, having, on December 3, 1980, filed a stipulation setting forth the facts material to the matter; and the City having filed a brief in the matter, and the Union having chosen not to file a brief; and the Commission, having reviewed the stipulation of facts and the brief of the City, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Oconomowoc, hereinafter referred to as the City, is a municipal employer having its offices at 174 East Wisconsin Avenue, Oconomowoc, Wisconsin, 53066.

2. That Local 1747, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization maintaining its offices in care of its representative, Richard W. Abelson, at 2216 Allen Lane, Waukesha, Wisconsin, 53186.

3. That at all times material herein the Union is, and has been, the exclusive collective bargaining representative of all regular full-time employes employed in the City's Department of Public Works, Parks and Forestry Department and Waste Water Treatment Plant; and that the nature of the work performed by said employes involves street and sidewalk repair, snow removal, planting and maintaining trees, shrubs and grass, the collection and treatment of residential, commercial and industrial waste water, and other work typically performed by employes employed in public works, parks and forestry departments and in waste water treatment plant; that the City and Union are parties to a collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Union, which agreement is for the term commencing January 1, 1980, and extending to at least through December 31, 1981; and that said agreement contains among its provisions the following material herein:

ARTICLE II - MANAGEMENT RIGHTS

2.01 - Rights. The Union recognizes that except as hereinafter provided, the City has the right to manage and direct the workforce. Such rights include, but are not limited to, the following:

. . .

h. To subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employees shall be laid off or suffer a reduction of hours as a result of subcontracting.

4. That as part of the settlement of said 1980-1981 collective bargaining agreement the parties, on March 21, 1980, entered into the following

MEMORANDUM OF UNDERSTANDING

It is hereby agreed between the parties that the following provision in Section 2.01(h):

'jobs historically performed by members of the bargaining unit shall not be subcontracted, and further,'

will be the subject of a petition for declaratory ruling filed by the City. Such provision shall remain in full force and effect until such decision is issued and its continuation in the 1980-81 contract or any successor contract will depend on whether the WERC rules that such provision is a permissive or mandatory subject of bargaining. If determined to be permissive it will be deleted from the agreement effective as of the date of the WERC decision or date of final appeal, if the WERC decision is appealed.

5. That the instant proceeding was initiated before the Commission in accordance with the above noted Memorandum of Understanding.

6. That the disputed language, prohibiting the subcontracting of jobs historically performed by members of the bargaining unit during the term of the collective bargaining agreement, relates primarily to wages, hours and working conditions of employes represented by the Union.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. That, inasmuch as the subcontracting provision in issue herein primarily relates to wages, hours and conditions of employment of the employes represented in the collective bargaining unit by Local 1747, AFSCME, AFL-CIO, said provision relates to a mandatory subject of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact, Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING

1. That para. 2.01(h) of Article II of the collective bargaining agreement presently in existence between the City of Oconomowoc

and Local 1747, AFSCME, AFL-CIO covering wages, hours and working conditions of all regular full-time employes employed in the City's Department of Public Works, Parks and Forestry Department and Waste Water Treatment Plant, shall, in its entirety, continue to be included in said collective bargaining agreement, and therefore shall be in full force and effect.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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

Background:

During the course of bargaining the Union proposed that the 1980-81 collective bargaining agreement between the parties include in the "management rights" article of said agreement the identical provision relating to "sub-contracting" which had been included in the agreement which was to expire on December 31, 1979. The City took the position that a portion of said provision related to a non-mandatory subject of bargaining, and therefore proposed that it be deleted from the 1980-81 agreement. The Union took an opposing view, contending that the entire provision related to a mandatory subject of bargaining. In order to conclude their negotiations the parties agreed that the City would initiate a declaratory ruling proceeding before the Commission to resolve the issue, however that the dispute provision would be included in the 1980-81 agreement, and if the Commission determined that it related to a non-mandatory subject of bargaining it would then be deleted from the agreement. The parties waived hearing in the matter, and instead executed and filed a stipulation of the facts material to the issue involved.

The Position of the City: 1/

The City contends that the following language in the provision in issue - - "jobs historically performed by members of the bargaining unit shall not be sub-contracted" - relates to a non-mandatory subject of bargaining, since it restricts the City in its formulation and implementation of public policy. In support of its claim the City relies extensively on the decisions of our Supreme Court in Unified School District No. 1 of Racine County, 2/ hereinafter referred to as Racine Schools, and City of Brookfield. 3/ It contends that said decisions require proposals, which primarily relate to the formulation of public policy for the purpose of the management and control of municipal affairs, be left to elected public officials, and therefore are not mandatorily bargainable. The basic argument of the City is set forth in its brief as follows:

> The Petitioner (City) maintains that the disputed language in this proceeding creates an undue and impermissable restriction on "the public employer's duty to act for the government, good order and commercial benefit of the municipality". The precise reason for this is that the disputed language restricts acts which may not affect any current members of the bargaining unit. The language allows for restriction of municipal action and policy which would not have a primary relation to the wages, hours or conditions of employment of any current employes whatsoever. Therefore, the decisions made in this situation clearly go to the level and quality of service a municipal employer chooses to offer, and per Racine and Brookfield, these decisions are clearly permissive subjects of bargaining.

1/ The Union chose not to file a brief.

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

3/ 87 Wis. 2d 819 (1979).

Discussion:

On September 11, 1974 the Commission issued a declaratory ruling involving the Beloit city school system wherein it determined that only subject matters that were primarily related to wages, hours or working conditions were mandatorily bargainable under the provisions of the Municipal Employment Relations Act (MERA). Said construction was sustained on appeal by our Supreme Court in Beloit Education Assoc. v. WERC. 4/ Said policy was reaffirmed as follows in the Racine Schools case previously referred to herein as follows:

> The question is whether a particular decision is primarily related to the wages, hours and conditions of 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 representative of the people. This test can be applied on a case-by-case basis, and is not susceptible to "broad and sweeping" rules that are to apply across the board to all situations.

In that case the issue involved concerned whether the school district had a duty to bargain a decision to subcontract its food service operation to a private employer, which decision resulted in the termination of district employes who were in a bargaining unit represented by a labor organization. In that decision the Court stated, in part, as follows:

> . . . The decision to subcontract the district's food service program did not represent a choice among alternative social or political goals or values.
>
> The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. The decision would presumably be felt in only two ways; it is argued that it would result in a financial saving to the district, and the district's food service personnel will have to bargain with ARA for benefits which they enjoyed before the decision, including the loss of some 2,304 accumulated sick-leave days and participation in the Wisconsin Retirement Fund.
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> The primary impact of this decision is on the "condition of employment"; the decision is essentially concerned with wages and benefits, and this aspect dominates any element of policy formulation.

Here the City premises its position on the basis that the language in issue does not primarily relate to a mandatory subject of bargaining since the remainder of the provision precludes any subcontracting which would cause any present employes to be laid-off, or would cause a reduction of hours of present employes. The City states its argument thusly: "The language allows for restriction of municipal action and policy which would not have a primary relation to the wages, hours, or conditions of employment of any current employes." The language in issue encompasses "jobs historically performed by members of the bargaining unit". The unit involved herein, apparently, includes "blue collar" positions in the employ of the Public Works Department, the

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4/ 73 Wis. 2d 43 (June, 1976).

Parks and Forestry Department, as well as the Waste Water Treatment Plant, and it is intended to exclude from subcontracting the work "historically" performed by said "blue collar" employes employed in said departments and plant. If we were to determine that the City has no duty to bargain on the disputed provision, the City could unilaterally subcontract work in said departments and plant to individuals after every occasion on which an employe chooses, for one reason or other, to quit employment, simply on the basis that "no present employe would be affected".

Further, the language in issue prevents the substitution of private employes for employes of the City. It prevents the performance of the same work by private employes, in the same place - the City of Oconomowoc. There is no evidence herein that the quality or level of services of the City will be affected by the provision in issue.

The Union herein has the duty to represent all employes in the bargaining unit involved herein, whether they were employed at the time of the selection of the Union as the bargaining representative, or whether they are presently employed, and when new employes are hired into the bargaining unit, the latter are also entitled to such representation. Further the fact that the language in issue would not cause a reduction in hours or a lay-off of present employes is not determinative as to whether said language does not primarily affect wages, hours or conditions of employment. If there is additional work to be performed, which had been historically performed by bargaining unit personnel, the utilization of subcontractors could very well deprive present employes of overtime earnings and benefits, choice of better positions, etc.

We must reject the City's position, and we conclude that the language in issue does primarily relate to the wages, hours and working conditions of the employes employed, in the collective bargaining unit involved herein, and that therefore it relates to a mandatory subject of collective bargaining within the pertinent provisions of MERA, and as provided in the Memorandum of Understanding between the parties, the disputed language remains in the collective bargaining agreement existing between the Union and the City.

Dated at Madison, Wisconsin this 10th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner