STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COUNCIL 40, AFSCME, AFL-CIO, Complainant, vs. MARINETTE SCHOOL DISTRICT, Respondent.	Case XVIII No. 29496 MP-1318 Decision No. 19542-B

Appearances:
Lawton and Cates, Attorneys at Law, 110 East Main Street, Madison, WI 53703, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainant.
Jabas and Morrison, S.C., Attorneys at Law, 903 Pierce Avenue, Marinette, WI 54143, by Mr. James A. Morrison, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Council 40, AFSCME, AFL-CIO having, on March 22, 1982, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Marinette School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on April 14, 1982, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held in Marinette, Wisconsin on August 5 and 6, and October 18, 1982; and the parties having filed briefs and reply briefs, the last of which were exchanged on March 1, 1983; and the Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT 1/

1. That Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization which functions as the exclusive bargaining representative for certain classifications of employes, including custodial and maintenance employes, employed by the Marinette School District; that its offices are located at 2252 Imperial Lane, Green Bay, Wisconsin 54302; and that James Miller and Cindy Fenton are the Union's Staff Representatives and have functioned as its agents.

2. That Marinette School District, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit and education of inhabitants of the District and its offices are located at 1010 Main Street, Marinette, Wisconsin 54143; that Thomas Maxwell is the President of the District's Board of Education, Dr. Robert Froehlich is the Superintendent, and Karl Monson is the District's professional labor negotiator; and that they have functioned as its agents.

3. That the Union and the District were parties to a collective bargaining agreement covering the period July 1, 1980 to June 30, 1982 which set forth the wages, hours and conditions of employment of employes in the bargaining unit represented by the Union; that said agreement contained a grievance procedure culminating in final and binding arbitration; and that said agreement did not contain a provision with respect to subcontracting bargaining unit work.

1/ Pursuant to the stipulation of the parties on the record, the Examiner has not made any findings in regard to the allegations set forth in paragraph 4 of the complaint relating to the method of payment of wages, and dismissal of this charge has been included in the Order set forth herein.

4. That on October 14, 1981, Monson telephonically informed Miller that the District was contemplating subcontracting all or a portion of the custodial and/or maintenance work then being performed by bargaining unit employes and the District recognized its duty to bargain the decision to subcontract as well as the impact of such a decision on wages, hours and conditions of employment; that Miller replied that the local Union had a meeting scheduled for October 31, 1981 during which this matter would be discussed; and that Monson expressed the desire to commence negotiations without unnecessary delay as soon as possible after said local Union meeting.

5. That on or about November 4, 1981, Miller informed Monson that the Union would bargain on subcontracting and indicated that he had only one day available before the first of the year to meet with the District representatives and that was December 21, 1981; that by a letter dated November 9, 1981, Monson indicated that the time frame indicated by Miller was unreasonable and indicated that the District was willing to meet during normal school hours from November 16, 1981 through November 27, 1981; and that by a letter dated November 19, 1981, Miller again reiterated that he was available only on December 21, 1981.

6. That on December 21, 1981, the District and the Union met on the issue of subcontracting the custodial and maintenance work and the District's spokesman, Monson, again indicated that the District was contemplating contracting out the custodial services; that Monson gave the Union a copy of a bid proposal from a subcontractor, and a cost analysis of savings the District believed it could achieve; that Monson further indicated that the District had advertised an invitation for bids with a return date of January 4, 1982 and copies of these bids would be provided to the Union; that the Union, with Miller as spokesman and Fenton as an observer, indicated that the Union was prepared to negotiate the decision to contract out and requested certain information, such as the square footage of the District's buildings and grounds, and who would perform certain duties, including supervision of the subcontracted work; that Monson's response was that the square footage information was available to the Union in the form of public documents and was not relevant and the District would be responsible for supervision; and that the parties agreed to meet again on January 18, 1982.

7. That on or about January 13, 1982, Monson sent Miller a summary of the bids submitted to the District and the District's cost analysis which projected a savings to the District on the basis of the low bid of about $130,000.00; that by a letter dated January 15, 1982 from Miller, addressed to the Members of the District's Board of Education, the Union gave notice that it desired to begin negotiations for a successor agreement and proposed that no work presently performed by bargaining unit employes be contracted out; that Miller also sent the Commission a Notice of Commencement of Contract Negotiations bearing the date of January 15, 1982; that on January 18, 1982, Miller informed the District that he had the flu and consequently he was unable to meet as scheduled on that day; that on January 19, 1982, Monson telephoned Miller to reschedule the meeting which had been cancelled; that Miller informed Monson that he would not establish a future meeting date until he was sure he was over the flu; and that Monson contacted Miller on January 29, 1982 and they agreed to meet on February 15, 1982.

8. That the parties met on February 15, 1982 and Miller, assisted by Fenton, submitted the Union's proposals for a successor agreement which were as follows:

1 - Increase longevity to 4%

2 - Employees to use sick leave for illness in the immediate family

3 - Increase wages by 75¢/hr

4 - No sub-contracting as proposed in letter of 1/15/82;

That the District submitted twelve proposals entitled, "Board of Education Proposal to A.F.S.M.E. (sic) to save Jobs in the School District of Marinette," which were as follows:

1. $1.50 per hour across the board salary decrease and wages remain frozen until June 30, 1983.

2. Eliminate the longevity program.

3. Vacations must be earned and limited to a maximum of two (2) weeks.

4. Paid sick leave beginning on the third consecutive day of illness.

5. Ability to reorganize at management's discretion.

6. Eliminate the job posting provision.

7. Eliminate the Maintenance Foreman and Mechanic-Welder classifications.

8. Custodians will do routine maintenance around their buildings.

9. Thirty-eight (38) hour work week with the weekend checks assigned at straight pay to complete the forty (40) hour week.

10. Eliminate two (2) holidays.

    Day after Thanksgiving
    .5 before Christmas
    .5 before New Year's

11. Evening shift will not receive one-half hour paid lunch hour.

12. Funeral leave will be deducted from accumulated sick leave;

that Monson indicated that the District wanted to negotiate the decision to subcontract and Miller responded by requesting information as to square footage, who would perform certain work, and who would supervise the work; that no agreement was reached on any issue and the District's representatives asked about the next available date to meet again; that the Union's representatives indicated the next available date was the third week in March; that the District's representatives informed the Union that the District felt the Union was stalling and that the District believed that the Union had waived its right to bargain on the subcontracting issue and therefore intended to consider the issue of subcontracting at a Board meeting scheduled for March 1, 1982; that the parties agreed to meet again on March 15, 1982; that by a letter dated February 18, 1982, the District provided members of the local Union with the square footage data requested on February 15, 1982; that on or about February 25, 1982, Miller sent a letter to the Members of the District's Board requesting them to defer consideration of the subcontracting issue until bargaining was completed.

9. That on March 1, 1982, the District's Board met with six of the nine members present and voted on the issue of contracting out custodial services; that the issue failed on a 3-3 tie vote, with President Maxwell voting against contracting out any services; that the District's Board was scheduled to meet again on March 8, 1982 and the issue of subcontracting was again placed on the agenda; that on March 4, 1982, Mr. Hinz, the local Union's treasurer, contacted Maxwell to set up a meeting with local officers to discuss the upcoming March 8, 1983 meeting; that Maxwell didn't think it was a good idea but indicated that he would come if asked by the local Union's President; that Maxwell contacted Superintendent Froelich to have Union President Plautz contact him; that Plautz was contacted and met with Maxwell after work on March 4, 1982; that Maxwell informed Plautz that it was likely that the full Board would vote for subcontracting unless the Union came up with some proposal for cost savings at the negotiating table; that the local Union representatives relayed this information to its representatives but no proposal was made; that on March 8, 1982 the Board, by a 6-3 vote, with Maxwell voting in the minority, passed a resolution to contract out the custodial work; that its decision was based solely on a projected cost savings of about $130,000.00; and that at this meeting it passed a second resolution to lay off 15 bargaining unit employes effective April 9, 1983.

10. That the parties met on March 15, 1982 with Fenton, as the spokesperson for the Union, and Monson for the District; that Fenton indicated that the Union wished to bargain over the decision to subcontract and Monson responded that the Board had already made their decision but could vote to rescind it if the Union could come up with sufficient cost savings; that Fenton then submitted a cost savings proposal as follows: 1) eliminate two positions; 2) delay longevity payment; 3) Modify funeral leave provision; and 4) eliminate one half hour paid lunch; that Fenton estimated these would result in a savings of about $50,000.00; that Monson indicated that these savings were not sufficient and the District needed savings very close to what the District believed it could save by subcontracting; that the District indicated that it was not in financial difficulty, there was no budget shortfall or crises, but that it desired the savings which were available by contracting out; that Fenton asked the District for the cost analysis of the District's twelve proposals and this was provided to the Union; that no agreement was reached on the decision to contract out and the parties agreed to meet on March 24, 1982 to discuss the impact of the decision.

11. That on March 24, 1982, the parties again met and the Union indicated that without waiving its right to bargain the decision to subcontract, it was submitting an impact proposal; that the District costed the Union's impact proposal and rejected it on the grounds that the proposal would negate the cost savings anticipated by contracting out; that this proposal was then modified by the Union and again rejected by the District; that no agreement on impact was reached; and that the Union modified its proposals for a successor agreement and the District indicated that it would make a counterproposal at its next meeting.

12. That on or about April 5, 1982 the Union obtained a preliminary injunction from the Circuit Court in Marinette County enjoining the District from laying off any bargaining unit employes due to its decision to contract out custodial services; that said injunction has continued in effect to the present time; and that no bargaining unit employes have been laid off due to the District's decision to subcontract custodial services.

13. That the parties again met in negotiations on April 12, May 15 and June 21, 1982 and no agreement was reached on the decision to subcontract, its impact, or the terms of a successor agreement; and that thereafter, on or about August 5, 1982, the Union filed a petition for mediation-arbitration pursuant to Section 111.70(4)(cm)6.

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

CONCLUSIONS OF LAW

1. That the District did not refuse or fail to bargain collectively with the Union with respect to its decision to subcontract the District's custodial work then being performed by bargaining unit employes represented by the Union as well as the impact of said decision, and therefore, the District did not violate Section 111.70(3)(a)4 of MERA.

2. That the District's decision to subcontract its custodial work was not motivated in any part by hostility or animus toward the Union or its members, and it did not interfere with, restrain or coerce any of its employes in the exercise of their rights set forth in Sec. 111.70(2) and therefore, the District did not commit a prohibited practice in violation of 111.70(3)(a)1, 2 or 3 of MERA.

3. That because the Union failed to prove that it has exhausted the contractual grievance procedure, the Examiner will not assert the Commission's jurisdiction to review the District's alleged breaches of said agreement with respect to bargaining procedure in violation of Sec. 111.70(e)(a)5 of MERA.

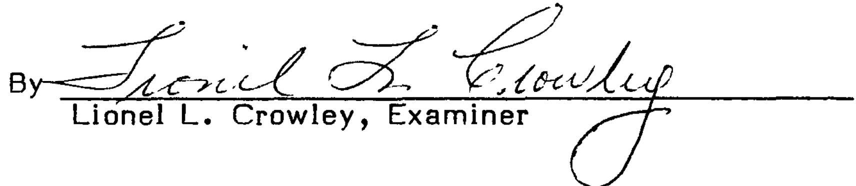
On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 2/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 3rd day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



By Lionel L. Crowley, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Union alleged that the District refused to bargain in good faith with the Union to the point of impasse over its decision to subcontract certain custodial work performed by bargaining unit employes and the District refused to bargain the impact of this decision on the wages, hours and working conditions of employes represented by the Union. It alleged that the District unilaterally adopted resolutions to contract out custodial work and to lay off employes represented by the Union contrary to the parties' collective bargaining agreement and in violation of Sections 111.70(3)a 1, 2, 3, 4 and 5 of MERA. The District denied the allegations and alleged that the Union waived its right to bargain the decision to subcontract.

UNION'S POSITION

The Union contends that the evidence fails to establish that it waived its right to bargain the decision to contract out custodial work and to bargain the impact of such decision. It points out that the District received a bid in the summer of 1981, made a cost comparison, and actively considered subcontracting for some time without mentioning this to the Union. It argues that the lack of agreement within four short months after the District gave the Union notice of its intent to contract out cannot constitute waiver, particularly in light of the following factors: 1) no deadline being set for action by the District; 2) Miller's tight schedule; 3) Fenton's inexperience; and 4) the District's refusal to provide the Union with information as to square footage and supervision of the subcontracted work. In particular, the Union asserts that this information was relevant and appropriate, and the District's foot-dragging in providing this information must be taken into account.

It contends that the Union did not waive its right to bargain but made a reasonable effort to bargain with the District on the decision to contract out. The Union asserts that District, by its unilateral decision on March 8, 1982 to subcontract the custodial work, without bargaining this decision to the point of impasse, violated the provisions of MERA. It further contends that the District did not bargain the impact, i.e. the layoff of bargaining unit employes, at all. It argues that the District planned its course of action from the very beginning, based on the conception that the Union would object and engage in dilatory tactics. It points to the District's attitude at the table in dismissing the Union's requests for information by inferring that the Union was stalling, by aggressively pushing regressive proposals, and by not submitting counterproposals, as evidence of such a preconceived plan to subcontract out. It contends that this pattern of conduct constitutes bad faith bargaining and requests that the District be ordered to rescind its actions and to bargain in good faith with the Union to the point of impasse or agreement regarding the decision to contract out and the impact thereof.

DISTRICT'S POSITION

The District contends that the Union waived its right to bargain the decision to subcontract by its failure to demand bargaining on the matter and by its conduct at the bargaining table. The District claims that the Union never demanded to bargain on the decision to subcontract. It points out that while the Union indicated it was willing to negotiate, it made no demands and did nothing affirmatively but merely relied on delaying tactics. It argues that the Union's inordinate delays, refusal to discuss relevant issues, and requests for irrelevant and non-exclusive information constitute a clear and unmistakable waiver of bargaining on the Union's part. The District asserts that Miller's unavailability cannot excuse the delays as the Union is obligated to meet and confer at reasonable times, and if its agent is not available, it must obtain one who is. It suggests that the Union's contention that no urgency or deadline was set for negotiations is ridiculous as the District indicated that it wished to bargain "as soon as possible," gave a target date of March 1, 1982, informed the Union on February 15, 1982 that the Board would take the matter upon March 1, 1982, and gave notice of its intended action on March 8, 1982. It maintains that in the face of this, the Union did nothing, thereby waiving its right to bargain by inaction.

The District also asserts that the parties had bargained to impasse as of the February 15, 1982 meeting because the District had offered to meet, provided details of the cost savings, and indicated a decision would be made on March 1, 1982, and the Union's failure to respond, established that future meetings would be fruitless and that the parties were at impasse permitting unilateral action by the District.

The District contends that when the Union did appear at the bargaining table, its conduct there evidenced a refusal to bargain, thereby waiving its right to bargain by conduct. It contends that the Union refused to address itself to the issue but rather asked for a stream of irrelevant information which was not in the exclusive control of the District. It argues that the Union cannot willfully avoid its duty to bargain and yet retain its right to bargain. The District further contends that the Union's predisposition not to agree to any loss of bargaining unit jobs coupled with its conduct at the table indicates that it had no intention of bargaining the issue of subcontracting. The District points out that after March 8, 1982, the Union was able to meet more frequently and, based on the same information it had before that date, was able to make proposals addressed to cost savings which indicates they had adopted a policy of delay and inaction, conduct which constituted a waiver of its right to bargain and/or creating an impasse, allowing unilateral action by the District.

Finally, the District contends that there was no wrongdoing on the part of Maxwell by his meeting with the Union President as the Union instigated this meeting and the Union's officials admitted that this conduct was appropriate.

DISCUSSION

A municipal employer has an obligation to bargain in good faith with the collective bargaining representative of its employes with respect to said employes' wages, hours and conditions of employment. This duty to bargain continues during the term of a collective bargaining agreement and requires that the municipal employer bargain with its employes' bargaining representative to the point of impasse before unilaterally changing employes' wages, hours and conditions of employment. 3/ A decision to subcontract out all or part of the work presently performed by bargaining unit employes and the impact thereof have been held to be mandatory subjects of bargaining. 4/ It is conceded in the instant case that the District's decision to subcontract its custodial work and the impact of this decision are mandatory subjects of bargaining.

REFUSAL TO BARGAIN

The record indicates that the District was willing to meet and confer with the Union at reasonable times. The District not only notified the Union that it was contemplating the subcontracting of custodial services, it informed the Union that it would negotiate the decision and its impact. The District's actions came early, after it had received and analyzed an unsolicited bid from a subcontractor. It offered to meet with the Union as soon as possible, even before additional bids were solicited or received. The record establishes that the District's reason for contemplating contracting out was solely economic in that it perceived a savings of roughly $100,000.00 based largely on a differential in wage rates. It met with the Union and explained the basis for its perceived savings. When the Union did not immediately make a proposal that offered an alternative to this perceived savings, the District at the February 15, 1982 negotiating session suggested twelve proposals as an alternative to subcontracting. The Union argues that these proposals were "regressive" and evidenced the District's bad faith. On

---

3/ City of Beloit, (11831) 9/74, aff'd in relevant part, nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/75, app'd to Wis. Sup. Ct., aff'd 74 Wis. 2d 43 (1976); Oak Creek-Franklin School District No. 1, (11827) 9/74, aff'd No. 144-473 (Dane Co. Cir. Ct. 11/75).

4/ Unified School District No. 1, Racine County, 81 Wis. 2d 89, (1977); City of Menomonie, (15180-A) 4/78; Walworth County, (15429-A, 15430-A) 12/78.

the contrary, the Examiner concludes that the District sincerely believed that it could effect a savings by subcontracting its custodial work, yet it indicated flexibility on a decision to subcontract if alternative savings could be found. The District's initial suggestions for cost savings indicated a willingness to consider other options to subcontracting and do not evidence bad faith.

The Union also pointed to the District's rejection of the Union's proposals as evidencing a refusal to bargain. Section 111.70(1)(d) provides that the duty to bargain does not compel a party to agree to a proposal or to make a concession. The only proposals made by the Union as to cost savings occurred on March 15, 1982 and amounted to a claimed savings of $50,000.00. 5/ The District indicated that this amount of savings was insufficient, but it would entertain alternative proposals provided the savings came close to $130,000.00. The differential between the parties' positions was $80,000.00 and neither party submitted proposals to narrow the difference. In view of the wide disparity in positions, it cannot be concluded that the District would have subcontracted the custodial work no matter what proposal was made by the Union. Had the Union made a proposal which produced a cost savings reasonably close to the District's estimated savings, and had the District maintained its position with respect to contracting out, then there would be a basis on which a charge of refusal to bargain might be found. However, these factors are not present in the instant case, and the District's rejection of the Union's proposal does not constitute a refusal to bargain.

The Union argues that the District had its mind made up to subcontract, so that nothing presented by the Union would change this. The evidence fails to establish that the District presented its plans as a fait accompli. An employer cannot give notice of its intention to subcontract that does not allow the Union sufficient time to bargain over the decision prior to its implementation 6/. Here, the District gave the Union early notice that it was contemplating subcontracting and kept the Union informed of its actions in regard to this matter. The Union could have presented alternate means for producing the cost savings sought by the District as an alternative to subcontracting, but it did not do so prior to March 15, 1982. Even after the District's Board's March 8, 1982 decision to subcontract, there was sufficient time for the Union to convince the District to change its plans. While Monson indicated that the Union might be too late with its proposals on March 15, 1982, the District indicated that the Board could change its mind and the District considered the Union's proposals and rejected them on the basis that they produced insufficient savings. The evidence does not establish that the District would have subcontracted had the Union proposed the savings the District sought to achieve. The District bargained with the Union at reasonable times for the purpose of reaching agreement; however, the parties failed to reach agreement and this, without more, does not establish a refusal to bargain in good faith.

REFUSAL TO SUPPLY INFORMATION

The Union contends that the District refused its request for information related to square footage and supervision as supporting a conclusion that the District refused to bargain in good faith. The duty to bargain in good faith on the part of an employer requires it to supply a labor organization representing its employes, upon request, information to enable the labor organization to understand and intelligently discuss issues raised in bargaining, provided the information is related and reasonably necessary to its dealings in its capacity as the employes' representative. 7/ The Union here sought the square footage of the District's buildings and grounds. The District initially indicated that the bid specifications along with the bids were the basis for its analysis and square footage was not relevant. Additionally, this was public information which the Union could gather.

5/ While the District disputed the amount of savings that would result from the Union's proposal, the Examiner has used the Union's estimate because even with a $50,000 savings, the District deemed the Union's proposal insufficient.

6/ Walworth County, (15299-A, 15430-A) 12/78.

7/ Sheboygan Schools, (11990-A, B) 1/76; State of Wisconsin (17115-C) 3/82; Board of School Directors of Milwaukee, (15825-B) 6/79.

The Examiner concludes that the Union has failed to demonstrate the relevance of this information. The Union's reason for requesting this information was that it provided a cost per square foot for subcontracting. There was no evidence that the District ever utilized a cost per square foot factor in its decision. Furthermore, square footage may be entirely misleading in that a large gymnasium may cost less to maintain than several small classrooms. Additionally, even after the Union had this information, there was no evidence that it was used in demonstrating the lack of cost effectiveness in subcontracting.

An employer is not obligated to provide information that is equally available to the Union. The square footage information was available to a reasonable diligent bargaining representative. The Union had the bid specifications and could have searched out the square footage information on its own.

Finally, the District did supply the Union with the square footage data by a letter dated February 18, 1982 which was three days after the February 15, 1982 negotiation session. Therefore, even if the District had a duty to supply this information, it fulfilled its obligation by supplying this information to the Union.

Concerning the supervision of the subcontractor, the District immediately responded that the supervision was the responsibility of the District's management and the evidence failed to demonstrate that the Union ever requested a clarification or additional information on this point. The Examiner concludes that the District complied with any duty it may have had to furnish information and, in this regard, has not refused to bargain in good faith.

INTERFERENCE

The evidence failed to demonstrate that the District's decision to subcontract was based, in part, on any anti-union animus or any other unlawful motivation and this charge is dismissed. Likewise, there was no evidence adduced at the hearing to support the Union's allegation of discrimination pursuant to Sec. 111.70(3)(a)3, and this charge too has been dismissed. Board President Maxwell's meeting with local Union President Plautz was initiated by the local Union, was not improper, and did not constitute interference with the Union.

The Union's contention that the District made a unilateral change prior to bargaining to the point of impasse will be discussed later in conjunction with the District's defenses.

WAIVER OF BARGAINING

Turning to the District's defenses to the complaint, the District contends that the Union waived its right to bargain the decision to subcontract. A bargaining representative's right to bargain on a mandatory subject of bargaining may be waived. 8/ Waiver must be proved by clear and unmistakable evidence. 9/ Waiver of the right to bargain the decision to subcontract by inaction has been recognized by the Commission. 10/ Hence, when an employer informs a bargaining representative that it intends to subcontract bargaining unit work, it is incumbent upon the representative to timely demand bargaining on the decision to subcontract and a failure to do so constitutes a clear and unmistakable waiver of the right to bargain over the decision. 11/ The District contends that the Union never made a demand to bargain the decision to subcontract and consequently waived it right to bargain. While the evidence established that the Union never made a formal demand to bargain the decision, in early November, 1981, Miller indicated that the Union would bargain the decision to subcontract, and at the December 21, 1981, negotiating session, Miller reiterated the Union's willingness to negotiate

---

8/ Racine Unified School District, (18848-A) 6/82.

9/ City of Milwaukee, (13495) 4/75; City of Menomonie, (12674-A, B) 10/74.

10/ City of Appleton, (18451-A) 9/81; Walworth County, (15429-A, 15430-A) 12/78; New Richmond Jt. School District, (15172-A) 5/77.

11/ Id.

the decision. Thus, no formal bargaining demand was necessary. The District offered to bargain the decision and its impact and the Union accepted the offer to bargain by its action of agreeing to meet on the issue, indicating that it was willing to negotiate the issue, requesting information and then submitting proposals. Had the District merely indicated that it was contemplating the subcontracting of bargaining unit work and kept the Union informed of its actions in that regard, then the Union would have had to formally demand bargaining. While the District here did more than simply indicate its intention to subcontract, which evidences its good faith, the technical failure by the Union to submit a formal demand for bargaining does not constitute a clear and unmistakable waiver by the Union under the unique facts of this case.

The District also contends that the Union waived its right to bargain the decision based on its conduct at the table. The District points to the Union's delay in coming to the table as evidence of such conduct. The District is correct in its position that a party has the responsibility to meet promptly and, if unable to do so due to the unavailability of its spokesman, to designate a different spokesman who can fulfill this obligation. While Miller had other commitments which limited his availability, a refusal to meet based solely on this reason does not constitute a refusal to bargain in this case. It must be noted that the District had not received the bids pursuant to its request for bids as of December 21, 1981 or costed them out. The District had notified the Union of its intentions and it was incumbent on the Union to make itself aware of the facts and to convince the District that its perceived savings were not there or to suggest other savings in lieu of subcontracting. As the bids did not come in until early 1982, it may have been difficult to determine what savings were contemplated. The District also points to the Union's failure to promptly reschedule the cancelled January 18, 1982 meeting and the Union's failure to submit any proposals related to cost savings. While this evidence tends to prove that the Union was stalling, it is insufficient in this case to constitute a waiver. Here, the parties were meeting, exchanging information, and agreeing to additional meeting dates. The Union may not have correctly perceived the District's firm desire to subcontract, perhaps viewing the District's action as a ploy to obtain concessions. The Board's initial failure to pass a resolution to subcontract also may have indicated to the Union that the District would decide not to contract out, hence, no action on the part of the Union was necessary. The parties both relied on the Board's resolution of March 8, 1982 as unilateral action on the District's part; however, the mere passage of a resolution by the Board was not the end of negotiations. Board resolutions are not irrevocable decisions. 12/ The resolution clearly indicated that the District was serious as to subcontracting and the perceived savings were then established. On March 15, 1982, the Union did submit proposals which it argued would save the District around $50,000.00. The evidence viewed in total fails to establish that the Union waived its right to bargain by its conduct in negotiations. When it became clear what the District intended and what savings were to be realized, the Union did bargain on this issue and did not waive its right to bargain.

IMPASSE

An employer may, after bargaining with the Union to an impasse, make unilateral changes that are in accordance with its last offer prior to impasse. 13/ It must be noted that the mediation-arbitration provisions of Sec. 111.70(4)(cm)6 are not applicable to bargaining impasses on matters that arise during the term of a collective bargaining agreement. 14/ In the present case, the District, contrary to the Union, argues that the parties had reached impasse on February 15, 1982 and it was free thereafter, to implement its decision to subcontract. Whether an impasse exists must be determined on a case by case basis upon an examination of the particular facts as they exist at a particular time. The factors considered include:

12/ Walworth County, (15429-A, 15430-A) 12/78.

13/ Jt. School District of Winter, et al., (14482-B) 3/77.

14/ Dane County, (17400) 11/79.

". . . The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations . . . " 15/

Contrary to the District's position, the Examiner does not conclude that an impasse was reached on February 15, 1982. The Examiner does find that the parties arguably reached an impasse on the decision to subcontract, at the March 15, 1982 meeting, based on the following reasons:

1) The District informed the Union well in advance that it was contemplating contracting out and offered to meet and negotiate on the issue.

2) The subcontracting was solely for economic reasons based on the District's estimate of a savings of $130,000.00.

3) The District supplied the Union with the bid information and cost analysis and other information requested by the Union prior to its decision and the Union had ample opportunity to use this information to formulate proposals.

4) The District allowed ample time between its decision and the implementation of the decision to permit the Union to formulate proposals.

5) The District suggested cost savings proposals, implicitly indicating an alternative to subcontracting.

6) The Union at the March 15, 1982 negotiation meeting submitted a cost savings proposal that it estimated would save $50,000.00 leaving the parties about $80,000.00 apart in their respective estimates.

7) The District indicated it needed further savings but the Union proposed none, and neither party indicated any further movement to close this differential.

8) Nothing in the record suggests that any further negotiating after this meeting would be fruitful or would narrow the parties' differences on this issue.

The above factors are comparable to the scenario in City of Appleton, (18171) 10/80, where on somewhat similar facts, the Examiner concluded that the parties had reached impasse on the decision to subcontract janitorial services. In the instant case, neither party, at the conclusion of the March 15, 1982 meeting, indicated any flexibility in their respective positions at that time and hence, they arguably were at impasse. Once the parties had reached impasse, the District was free to implement its decision to subcontract its custodial services.

The Union contends that the impact of the decision to subcontract was the layoff of fifteen bargaining unit employes and the District did not bargain this at all. The record clearly establishes that the District offered to bargain the impact along with the decision to subcontract. Miller indicated that he desired to bargain the decision and then the impact. The impact was discussed at the March 24 and April 12 sessions. The decision to subcontract and its impact are clearly intertwined. It is obvious from the evidence that the District based its savings on the layoff of employes and both sides were well aware that the bargaining unit jobs were at stake. The Union's contention that the District did not bargain at all on this issue is not supported. Additionally, the Union did not waive its right to bargain over the issue and, upon request, the District would be required to bargain on the impact.

The Examiner notes that since April 5, 1982 the District has been enjoined by the Circuit Court of Marinette County from laying off any employe due to its decision to subcontract custodial services. Consequently, the District has not implemented its decision to subcontract with its attendant impact, thereby

---

15/ Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967).

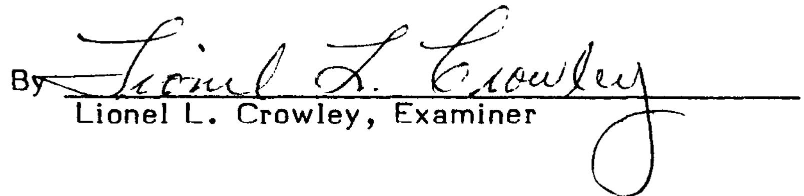
permitting the Union ample opportunity from that date to the present to propose alternatives to subcontracting by the District or to make demands with respect to the impact of any decision. Based on the record, a conclusion that the District failed to bargain the impact is not warranted. Therefore, the charge that the District refused to bargain in good faith with the Union on the issue of subcontracting is dismissed.

ALLEGED BREACH OF CONTRACT

While this allegation was made in the complaint, it was largely abandoned at the hearing and was not briefed, but it has been considered by the Examiner. The Commission's long-standing policy regarding breach of contract allegations has been not to assert its jurisdiction where the complainant has failed to exhaust the parties' contractual grievance and arbitration procedures. 16/ The exceptions to this policy are where the union has been frustrated in its efforts to utilize the grievance and arbitration procedures 17/ or where the parties have mutually waived the arbitration procedure. 18/ Since the evidence fails to demonstrate that the Union made any effort to exhaust the parties' contractual grievance and arbitration procedures, and as none of the foregoing exceptions to the Commission's policy are present in this case, the Examiner will not assert the Commission's jurisdiction to determine whether the District has breached the bargaining agreement, and has dismissed this allegation.

Dated at Madison, Wisconsin this 3rd day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

16/ Joint School District No. 1, City of Green Bay, et al., (16753-A, B) 12/79; Board of School Directors of Milwaukee, (15825-B, C) 6/79; Oostburg Joint School District, (11196-A, B) 12/72.

17/ Kenosha Unified School District, (13302-B) 1/76.

18/ City of South Milwaukee, (13175-B, 13176-B) 1/76.