STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
SCHOOL DISTRICT OF MARINETTE	:	
Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and	:	Case XX No. 30705 DR(M)-272 Decision No. 20406
MARINETTE SCHOOL BOARD EMPLOYEES LOCAL 260A, COUNCIL 40, AFSCME, AFL-CIO	:	

Appearances:

Mr. Karl L. Monson, Consultant, Wisconsin Association of School Boards, filing briefs on behalf of the District.

Lawton and Cates, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703, by Mr. Bruce F. Ehlke, filing briefs on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

School District of Marinette having, on November 19, 1982, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b) Wis. Stats., seeking a declaratory ruling as to whether a proposal submitted to the District by the Marinette School Board Employees Local 260A, Council 40, AFSCME, AFL-CIO is a mandatory subject of bargaining; and the parties having thereafter waived hearing and filed written argument, the last of which was received on January 31, 1983; and the Commission having considered the record and the parties' arguments and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the School District of Marinette, herein the District, is a municipal employer and has its offices at 1010 Main Street, Marinette, Wisconsin 54143.

2. That Marinette School Board Employees Local 260A, Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization having offices at 2252 Imperial Lane, Green Bay, Wisconsin 54302.

3. That the Union is the collective bargaining representative of certain maintenance and custodial employes employed by the District; that the Union and the District were parties to a collective bargaining agreement having a term of July 1, 1980 through June 30, 1982, which set forth the wages, hours and conditions of employment of the employes represented by the Union.

4. That in October, 1981, the District informed the Union that it was considering the feasibility of subcontracting certain custodial work being performed by members of the bargaining unit represented by the Union, and that the District wished to bargain with the Union over the decision to subcontract as well as the impact, if any, upon wages, hours and conditions of employment of bargaining unit members; that on or about December 23, 1981, the District and the Union met and exchanged information about the potential subcontract.

5. That on or about January 16, 1982 the Union sent a letter to the District seeking to begin negotiations on a successor collective bargaining agreement; that on or about February 15, 1982, the parties met and exchanged initial proposals for a successor contract; that during this meeting the Union

indicated that it wished to prohibit subcontracting under the terms of the successor collective bargaining agreement; that the District informed the Union that it would be considering the subcontracting issue at a March 1, 1982 meeting of the school board; that on or about March 8, 1982 the District determined to subcontract certain work currently performed by the bargaining unit represented by the Union; and that layoffs required by this subcontract were to be implemented in accordance with the current contract on or about April 8, 1982.

6. That on March 22, 1982 the Union filed a complaint with the Wisconsin Employment Relations Commission alleging that the District had committed certain prohibited practices by deciding to subcontract.

7. That on or about April 5, 1982 the Union successfully sought a temporary injunction from the Circuit Court of Marinette County which, by its terms as formalized in a May 28, 1982 Order, enjoined the District from laying off or otherwise interrupting or terminating the employment of the employes represented by the Union in relation to any decision to contract out to an independent contractor work normally done by said employes pending the entry of a final decision and order by the Wisconsin Employment Relations Commission in the prohibited practice complaint filed by the Union.

8. That on or about June 22, 1982, the Union filed a petition for mediation-arbitration with the Wisconsin Employment Relations Commission regarding the terms of a successor agreement; that on November 4, 1982, pursuant to said petition the parties met with the Commission investigator for the purpose of attempting to resolve the alleged impasse in negotiations; that the parties exchanged initial final offers during that meeting and that the offer of the Union contained the following language:

SUBCONTRACTING

> The Union recognizes that except as hereinafter provided, the District has the right to subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employee shall be laid off or suffer a reduction of hours as a result of subcontracting.

9. That on or about October 18, 1982, the District requested that the Circuit Court of Marinette County modify the May 28, 1982 temporary injunction so as to prohibit the Union from including in a final offer any proposal which would limit the District's right to subcontract work; that on or about November 12, 1982, the Circuit Court of Marinette County denied the District's request and indicated that the Wisconsin Employment Relations Commission has primary jurisdiction to resolve such matters and that it did not seem appropriate for the Court to interject itself into the negotiations process; the Court further indicated that the request for relief sought by the District should be directed to the Wisconsin Employment Relations Commission.

10. That on November 10, 1982, the District timely filed a written objection to the Union's November 4, 1982 subcontracting proposal as being a non-mandatory subject of bargaining; and that on November 19, 1982, the District timely filed its petition for declaratory ruling herein.

11. That the Union's subcontracting proposal primarily relates to wages, hours and conditions of employment.

Based upon the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

1. That the subcontracting proposal submitted to the School District of Marinette by the Marinette School Board Employees Local 260A, Council 40, AFSCME, AFL-CIO, is a mandatory subject of 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 and Conclusion of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. That the School District of Marinette has a duty to bargain collectively within the meaning of Secs. 111.70(1)(d) and (3)(a)4 of the Municipal Employment Relations Act with the Marinette School Board Employees Local 260A, Council 40, AFSCME, AFL-CIO, with respect to the subcontracting proposal submitted by Local 260A during bargaining over a successor collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after

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the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

The District's contention that the Union's subcontracting proposal is a non-mandatory subject of bargaining is premised upon the District's belief that the mediation-arbitration process should be unavailable to the Union until the prohibited practice complaint pending before the Commission has been resolved and the temporary injunction lifted. The District argues that the prohibited practice complaint will resolve the question of whether it met its bargaining obligation with the Union over the decision to subcontract. Contending that the decision will find that it met its obligation, the District argues that it should then be given an opportunity to implement its decision before a new contract is established. The District contends that if the Commission allows the mediation-arbitration process to proceed, it will be precluding any meaningful determination by the Commission or the courts regarding the propriety of the District's actions under the 1980-1982 contract. The District argues that it should not be foreclosed from exercising a managerial right which it possessed under the 1980-1982 collective bargaining agreement. The District also contends that the temporary injunction was intended to maintain the status quo pending a determination of the prohibited practice and that this requirement should apply equally to both parties and should preclude the Union from seeking greater protection from subcontracting than it currently possesses. The District finally contends that the Union has waived or is estopped from utilizing a mediation-arbitration process until the temporary injunction is lifted upon resolution of the prohibited practice complaint. The District also argues that even if it is found to have breached its duty to bargain with the Union over the decision to subcontract, it should be given a chance to meet its bargaining obligation under the law and to either reach impasse or agreement with the Union on said decision. If the Commission does not agree, the District contends that it would be frustrating the public policy of the state by discouraging voluntary settlement through the procedures of collective bargaining and by denying the District effective access to a fair procedure for settlement. The District also asserts that if the Commission denied the District's request in this case, the Commission will have established that a sympathetic court may enjoin any employer's action until such time as a labor organization is able to acquire protection through a mediator-arbitrator.

As to the mediation-arbitration petition currently pending, the District contends that Sec. 111.70(4)(cm)6, Wis. Stats., only allows a petition to be filed after a "reasonable period of negotiations." It contends that the prohibited practice complaint will determine whether such a period of negotiation occurred and that it is entirely inappropriate that the labor organization be able to make that determination by fiat.

The Union contends that the subcontracting proposal in question has previously been found to be a mandatory subject of bargaining by the Commission in City of Oconomoc, (18724) 6/81. It asserts that the District's petition has been filed solely for the purpose of delaying implementation of the mediation-arbitration process provided for by Sec. 111.70(4)(cm)6, Wis. Stats. It contends that the various facts recited by the District are not material to the question of whether a contract provision is a mandatory or permissive subject of bargaining. The Union contends that what the District is seeking from the Commission is a declaration that a particular contract proposal is or is not a mandatory subject of bargaining based upon the parties' special bargaining history or the particular circumstances in which one or the other of the parties finds itself at the time the proposal is made. The Union contends that that is not and cannot be the test for determining mandatory subjects of bargaining and that a contrary finding would yield total chaos and uncertainty in the bargaining process. As the Commission has previously found that the subcontracting proposal in question primarily relates to wages, hours and conditions of employment, the Union asserts that the petition herein should be dismissed.

The Union correctly asserts that the Commission has previously found the subcontracting proposal at issue herein to be a mandatory subject of bargaining. City of Oconomowoc, supra. The District does not appear to contest the continuing validity of our conclusion in that regard, but rather seeks to focus the Commission's attention upon the circumstances existent between the parties

which are currently the subject of a pending prohibited practice proceeding. While there clearly is a relationship between the events which are subject to that proceeding and the Union's desire to submit a subcontracting proposal to a mediator-arbitrator if the parties are unable to reach a voluntary agreement, the legislature has clearly established through the content of Sec. 111.70(4)(cm)6e that the mediation-arbitration process shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time. Application of that statutory requirement to the District's theory mandates a conclusion that the District's arguments should be rejected. As to the District's contention regarding the Union's compliance with the statuory conditions precedent to mediation-arbitration, we would note that the complaint proceeding will not establish whether there has been a reasonable period of negotiations over a new contract but rather will focus on the existence of a bargaining dispute which arose during the term of an existing contract. Thus, we find no merit in this argument. We have therefore reaffirmed our conclusion in City of Oconomowoc, supra, that a proposal such as that submitted by the Union herein, is a mandatory subject of bargaining and have directed the Commission's investigator to contact the parties so that the mediation-arbitration process can continue.

Dated at Madison, Wisconsin this 10th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner