STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHLAND CENTER DEPARTMENT OF PUBLIC WORKS, LOCAL 2387-A AFSCME, AFL-CIO, Complainant, vs. CITY OF RICHLAND CENTER, Respondent.	Case 28 No. 35324 MP-1737 Decision No. 22912-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.

Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Paul A. Hahn, P.O. Box 927, One South Pinckney Street, Madison, Wisconsin 53701-0927, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Mary Jo Schiavoni having, on January 30, 1986, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein she concluded that Respondent had not committed any prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., in connection with subcontracting of its garbage collection operation; and the Complainant having, on February 19, 1986 timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on June 2, 1986; and the Commission having reviewed the record including the Examiner's decision, the petition for review and the briefs filed in support of and in opposition thereto; and the Commission being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed,

NOW, THEREFORE, it is

ORDERED 1/

That the Commission affirms and adopts as its own the Examiner's Findings of Fact, Conclusions of Law and Order issued in this matter on January 30, 1986.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of August, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

1/ See Footnote 1 on Page Two.

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 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF RICHLAND CENTER (DEPARTMENT OF PUBLIC WORKS)

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Union, alleged that the City committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 and 4, Stats., by refusing to bargain collectively over the City's decision, and the impact of its decision, to subcontract its garbage collection operation which has been performed by members of the bargaining unit represented exclusively by the Union. The Union further alleged that it asked/demanded that the City reinstate the status quo and bargain with the Union on the decision as well as the impact of the decision but that the City refused to reinstate the status quo. The City denied that it had committed any prohibited practice and denied that it refused to bargain the decision or its impact and alleged that the parties' agreement permitted the City to subcontract provided no layoffs or reduction in hours of employes resulted therefrom and affirmatively asserted that the Union refused the City's offer to bargain on the decision as well as the impact of the decision to subcontract.

THE EXAMINER'S DECISION

The Examiner found, on the basis of Sec. 17.09 of the parties' collective bargaining agreement, which states: "If bargaining work is subcontracted, it shall not result in the layoff or reduction of hours of regular employees", along with relevant bargaining history, that the Union had waived its right to bargain with the City over the decision to subcontract its garbage collection as well as any impact of this decision. The Examiner found that no employes had been laid off or reduced in hours and dismissed the complaint in its entirety.

THE PETITION FOR REVIEW and POSITIONS OF THE PARTIES

The Union

The Union in its petition for review contends that the Examiner erred in finding that the Union contractually waived its right to bargain the decision to subcontract as well as the impact of such decision by its agreement to Sec. 17.09. The Union contends that the Examiner's Conclusions of Law and Order are also in error because they are based on the erroneous finding of waiver by contract language and bargaining history.

In support of its petition, the Union argues that absent a waiver, a municipal employer has a duty to bargain both the decision to subcontract as well as its impact. It asserts that any waiver must be clear, unequivocal and with full and complete knowledge. It claims that no waiver occurred and takes issue with the Examiner's Finding of Fact No. 20 wherein the inclusion of Sec. 17.09 in the parties' agreement through mediation-arbitration was found to be a waiver of the Union's right to bargain on subcontracting. The Union points out that Arbitrator Rice selected the Union's final offer, which included the language of Sec. 17.09. It submits that the Union explained the language to Arbitrator Rice in its post-hearing brief, which specifically stated that the Union was not waiving any statutory right for negotiations over a decision to subcontract. Furthermore, it notes that the City had proposed that it be given the absolute right to subcontract and the Union refused and objected to this proposal which was then withdrawn. The Union also points out that the word "if" in Sec. 17.09 indicates a pre-existing condition must occur first, namely, the bargaining of the decision as well as its impact. The Union maintains that placing the provision in the miscellaneous section rather than in the Management Rights section supports a finding that there was no waiver of the Union's right to bargain the decision to contract out. It concludes that the bargaining history as well as the language and its placement in the agreement support a finding that the Union did not waive its right to bargain a subcontracting decision.

The Union, in responding to the City's arguments, further contends that it did not waive by conduct its right to bargain on the decision to subcontract. It maintains that upon notice that the City was seriously contemplating subcontracting, it timely requested bargaining on both the decision and impact.

It further argues that its failure to negotiate until the status quo was restored did not constitute a waiver but was an attempt to establish good faith bargaining. The Union submits that reversible error was committed and appropriate remedial orders should be entered forthwith.

The City

The City contends that the Examiner's Findings of Fact, Conclusions of Law and Order are correct and should be affirmed. It claims that the Union waived its right to bargain the decision to subcontract by the contractual language which the Union proposed and which was included in the agreement. It claims that under the language of the collective bargaining agreement, the Union has clearly waived its right to bargain. It insists that bargaining history does not support the Union because the record establishes that the Union did not want mid-term bargaining and felt such bargaining would be a sham. It asserts that the Union wanted to forget its statutory right to bargain and sought to protect its members by Sec. 17.09. The City agrees that the word "if" in Sec. 17.09 recognizes a pre-existing condition but it maintains that that refers to the decision by the City to subcontract. It posits that if the language of Sec. 17.09 is not a waiver, the language would be meaningless. It states that the Union cannot escape from its negotiated provision, and if it had intended that subcontracting should be negotiated, it should have clearly so stated.

The City submits that the Union also waived its bargaining rights by failing to request bargaining when it had notice that the City was contemplating subcontracting and then by refusing the opportunity to bargain by insisting on a return to the status quo as a pre-condition for bargaining. The City asserts that while it was down the road toward subcontracting, no contract had been awarded and there was no binding commitment to the subcontractor.

Finally, the City submits in the alternative that the subcontracting of the garbage pickup was not a mandatory subject of bargaining. It claims that the decision primarily related to social and political objectives rather than purely monetary objectives and, based on the special circumstances in this case, the decision was not a mandatory subject of bargaining. The City concludes that the Examiner's Order is correct and should be affirmed.

DISCUSSION

The Examiner correctly stated the law applicable to the instant case. The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters on which the Union has otherwise clearly and unmistakably waived its right to bargain. 2/ The parties' collective bargaining agreement contains the following provision:

> 17.09 If bargaining unit work is subcontracted, it shall not result in the layoff or reduction of hours of regular employees.

Additionally, the agreement contains a management rights clause which reserves to the City "the sole and exclusive right to determine the Table of Organization, the number of employees to be employed and assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction. . . ." Also, the clause states: "To the extent that the rights and prerogatives of the Employer are not explicitly granted to the Union or employees such rights are retained by the Employer."

When read together, we conclude that the management rights clause and Sec. 17.09 provide the City with the unilateral right to subcontract as long as the specific requirements of Sec. 17.09 are met.

The Union's argument that the word "if" at the beginning of Sec. 17.09 infers a pre-existing condition, namely bargaining to impasse, is a strained and unpersuasive interpretation. Rather the condition precedent is that bargaining

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2/ Brown County, Dec. Nos. 20620, 20623 (WERC, 5/83); Racine Unified School District, Dec. No. 18848 (WERC, 6/82).

unit work is in fact subcontracted by the City. Certainly in negotiating on subcontracting, the parties could have put in additional language such as a prior notice requirement or a requirement that bargaining must first occur. Where none of these restraints are included in an express provision which includes restraints on the City's right to subcontract, it can reasonably be inferred that the parties did not intend any others to apply.

The Union's reference to a single phrase in the Union's brief to the Mediator-Arbitrator as evidence that it did not waive its right to bargain by including Sec. 17.09 in the agreement is counterweighed by other evidence in the record. When read in its entirety the Union's brief indicates that the issue of subcontracting should be addressed in the language of the agreement. The proposal was addressed to the rights to be accorded to employes should the City subcontract bargaining unit work. The Union argued that mid-term negotiations were not subject to mediation-arbitration and would be unproductive. It noted that the City had agreed to almost identical language in a contract with IBEW, which stated, in part, that: "the Employer may subcontract any of the work. . ." It seems incongruous to assert that bargaining will be unproductive so provisions must be included in the agreement, and then once the provisions are in the agreement, to insist that bargaining is still required.

Furthermore, while the Mediator-Arbitrator had the Union's brief, it appears that his decision was based on the evidence presented to him. A review of the Mediator-Arbitrator's decision 3/ reveals that the City has had the right to subcontract since the parties' initial agreement and had in the past subcontracted work. The Mediator-Arbitrator stated the following:

> ". . . The Union does not seek to contractually bar the subcontracting of work. It simply proposes that if bargaining unit work is subcontracted, regular employees will not be given lay offs or have their hours cut. The position of the Employer is not to address the matter in the collective bargaining agreement at all. This would permit the Employer to continue to subcontract and it would also permit the Employer to lay off or reduce the hours of employees in the bargaining unit. That is the status of the issue in the current agreement with the Union. . . .
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> Currently the Employer has the right to subcontract bargaining unit work even if it would result in the lay off of employees. It has had this right since the initial collective bargaining agreement between it and the Union. The Employer has subcontracted curb and gutter construction and major street resurfacing for a number of years but it has never resulted in the lay off of any employees. The Employer subcontracted the resurfacing of its streets and it resulted in a reduction of the need for patching crews but the Employer did not lay off any bargaining unit employees and waited for attrition to reduce the work force.
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> . . . The Union proposal would contractually adopt the practice that the Employer has followed in the past and from which it asserts it has made no decision to depart.
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> . . . Here the Union seeks a substantially less restrictive provision. It would permit the Employer to subcontract whenever it chose to do so but it would preserve the jobs of those employees who were then employed."

There was no mention of any reservation of the right to bargain in the Mediator-Arbitrator's decision. It appears that in the past, the City subcontracted bargaining unit work and there was no mention of any bargaining over these decisions. The Mediator-Arbitrator indicated that since the initial contract, the City had the right to subcontract even if it would result in the layoff of employes.

3/ City of Richland Center, Dec. No. 21648-A (Rice, 10/84).

Given the express language of the agreement on subcontracting, the Union's expressed disdain for mid-term bargaining, the Union's comparison of its language to a similar provision in the IBEW - City agreement, and the Mediator-Arbitrator's decision, we conclude that a Union waiver of further bargaining about subcontracting and its impact during the term of the instant agreement has been satisfactorily proven under the applicable caselaw standards noted above. Accordingly, we have affirmed the Examiner's Findings of Fact, Conclusions of Law and Order in their entirety.

Our foregoing conclusions make it unnecessary for us to reach or address the City's contentions that the subcontracting decision at issue herein was a nonmandatory subject of bargaining or that the Union's conduct after it learned of the City's intention to subcontract constituted a waiver of bargaining about the particular decision to subcontract and its impact involved herein.

Dated at Madison, Wisconsin this 5th day of August, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner