STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 560, AFSCME, AFL-CIO, Complainant, vs. AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT ONE, EAU CLAIRE, Respondent.	Case 156 No. 37305 MP-1869 Decision No. 23944-C

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Local Union No. 560, AFSCME, AFL-CIO.

Riley, Ward & Kaiser, S.C., Attorneys at Law, by Mr. James M. Ward, 306 Barstow Court, P.O. Box 358, Eau Claire, Wisconsin 54702-0358, appearing on behalf of Area Vocational, Technical and Adult Education District One, Eau Claire.

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

Examiner Richard B. McLaughlin having, on May 6, 1987, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he dismissed a complaint filed by Local Union No. 560, AFSCME, AFL-CIO which alleged that the Area Vocational, Technical and Adult Education District One, Eau Claire had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by subcontracting out its food services operations; and Local No. 560 having, on May 26, 1987, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and the parties having filed briefs, the last of which was received on July 10, 1987; and the Commission having reviewed the record, the Examiner's decision, the Petition for Review and the briefs filed in support and in opposition thereof, and 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 Examiner's Findings of Fact, Conclusions of Law and Order be, and hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote one continued on page 2)

1/ Continued

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

AREA VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT ONE

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

BACKGROUND

In its complaint, as amended at the hearing, the Union alleged that the District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by subcontracting out its food services operations during the collective bargaining process and after the Union had filed a Petition for Mediation-Arbitration. The District's answer denied that it committed any prohibited practices and admitted that although it subcontracted its food services operations while it was engaged in negotiations for a successor agreement, the decision to subcontract and the actual execution of the subcontract all occurred during the unexpired term of the parties' agreement after the District had reached impasse in negotiations with the Union over subcontracting.

THE EXAMINER'S DECISION

The Examiner found that the decision to subcontract the food services operations was a mandatory subject of bargaining. The Examiner held that the defense of impasse was available to the District under the facts presented because the subcontracting dispute arose during the term of the July 1, 1985 through June 30, 1986 collective bargaining agreement and thus was not subject to final and binding interest arbitration under Sec. 111.70(4)(cm)6, Stats. The Examiner concluded that the parties reached impasse in negotiations over the decision to subcontract on June 5, 1986, and therefore that the District's subsequent implementation of the subcontract did not violate Secs. 111.70(3)(a)4 or 1, Stats., because any obligation to bargain the decision had been satisfied. The Examiner accordingly dismissed the complaint.

POSITIONS OF THE PARTIES

The Union contends that interest arbitration under Sec. 111.70(4)(cm)6, Stats., was available to resolve this subcontracting dispute and the Examiner erred in concluding otherwise. It claims that the case may be viewed as a disagreement over the wages to be paid under a successor agreement. It argues that economics was the basis for the subcontract and a wage reduction sought by the District was at the core of the parties' dispute. The Union submits that when the parties were unable to agree on a wage reduction, the District then decided to subcontract. The Union alleges that the fact that the decision to subcontract was made during the term of the contract is not determinative of the availability of mediation-arbitration because the decision was the end product of a dispute as to wages for the successor agreement as to which mediation-arbitration was available. It concludes that the Examiner's decision that mediation-arbitration was not available was therefore incorrect and that, under City of Brookfield, Dec. No. 19802-C (WERC, 11/84), the "impasse" defense was not available and the District violated Secs. 111.70(3)(a)4 and 1, Stats., by implementing part of its final offer thereby destroying the status quo.

The District contends that the Examiner properly concluded that mediation-arbitration was not available to resolve the subcontracting dispute. It submits that the instant case is controlled by the Commission's decisions in Dane County, Dec. No. 17400 (WERC, 11/79) and City of Eau Claire, Dec. No. 22795-B (WERC, 3/86) which held that impasse is an available defense to bargaining disputes over a unilateral change in a mandatory subject of bargaining arising during the term of an existing collective bargaining agreement because interest arbitration is unavailable. It argues that Brookfield dealt with the hiatus period between contracts and only abrogated the impasse defense where a change in a mandatory subject of bargaining was subject to mediation-arbitration. The District asserts that the instant subcontracting was a matter which arose during the term of an existing agreement and thus was not subject to mediation-arbitration. It maintains that the Union's attempt to characterize the dispute as one over wages to be included in the successor agreement is not supported by the record. It takes the position that the subcontracting was not grounded in a wage dispute. It claims that when the subcontracting was first considered, no

bargaining demands on wages were on the table. The District also notes that while the subcontracting was rooted in economic considerations, no amount of wage concessions would necessarily have changed the results because of the savings in indirect costs and improved management of the food services operations which the subcontract provided. It submits that these factors could easily have caused the District to subcontract even if it had no quarrel with the wage level of employes. According to the District, the minimum wage laws could have prevented sufficient wage concessions by the Union to meet the subcontractor's proposal on cost. It concludes that the Union's argument that this dispute was over wages does not stand up to scrutiny.

The District submits that it worked within the confines of the collective bargaining agreement and bargained to the point of impasse with the Union and implemented and executed the subcontract within the term of that agreement, an agreement which did not prohibit subcontracting. It contends that although negotiations had commenced for a successor agreement, this was mere happenstance. The District concludes by arguing that the Examiner correctly applied the law to the facts of the case and that his decision must be affirmed.

In reply to the District, the Union reiterates that mediation-arbitration was available under Sec. 111.70(4)(cm)6, Stats., and the District committed a prohibited practice by unilaterally implementing the decision to subcontract. It submits that the parties were negotiating over the terms to be included in a successor agreement and, as is the usual practice, such negotiations were occurring during the term of the old collective bargaining agreement. It argues that mediation-arbitration is available to avoid prolonged and bitter disputes over the terms of a new agreement and an employer cannot go through the motions of bargaining, declare an impasse and then unilaterally implement its final offer. It asserts that the District is taking the position that it is appropriate to implement so long as the old agreement has not expired but not once the contract has expired. It insists this approach is nonsensical and contrary to case law and the purposes of mediation-arbitration. It claims that the District's position ignores Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977), which is premised on the decision to subcontract being a subject which the Union can seek to have an impact on through the bargaining process. It takes the position that the District's arguments herein make the outcome of subcontract bargaining predetermined in advance. It argues that the Dane County decision determining the availability of mediation-arbitration relates only to the type of negotiations that are underway, and not when they are underway. It submits that whenever the parties are negotiating over a successor agreement, a reopened agreement or an original agreement, mediation-arbitration is available. It claims that the District's argument that mediation-arbitration is available only after an agreement has expired is illogical and contrary to Dane County. Here, the Union asserts that the parties were negotiating over the terms of a successor agreement, that mediation-arbitration was available, and that the impasse defense was not available. The Union requests that the Examiner be reversed and appropriate remedial orders be entered by the Commission.

DISCUSSION

The critical issue presented on appeal of the Examiner's decision is whether interest arbitration was available under Sec. 111.70(4)(cm)6, Stats., to the Union to break the parties' impasse as to the decision to subcontract food services operations. We conclude that interest arbiatration was not available and have therefore affirmed the Examiner's dismissal of the Union's complaint.

A municipal employer, pursuant to Sec. 111.70, Stats., has an obligation to bargain in good faith with the collective bargaining representative of its employes with respect to matters primarily related to said employe's wages, hours and conditions of employment. This duty to bargain over mandatory subjects continues during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of the agreement, or as to which bargaining has been clearly and unmistakably waived. 2/ On balance, an

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2/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); Brown County, Dec. No. 20623 (WERC, 5/83); City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

economically motivated decision to subcontract out all or part of the work presently performed by bargaining unit employes has generally been held to be a mandatory subject of bargaining. 3/ Thus, absent language covering subcontracting or a clear and unmistakable waiver, an employer is typically obligated to bargain over an economically motivated subcontracting decision during the term of an existing agreement.

Here, it can well be argued that because of the language in Article II of the parties' agreement reserves to the District the right "to discontinue processes or operations or to discontinue their performance by employees of the Board," the District had no duty to bargain because the subject matter of subcontracting is embodied in the contract. Assuming arguendo that the subject matter is not embodied in the contract and that the District was obligated to bargain over the subcontracting decision, the Examiner correctly concluded that the parties herein did bargain and reach an impasse as to the subcontracting decision.

In Dane County, we defined the types of impasses as to which interest arbitration under Sec. 111.70(4)(cm)6, Stats., is available as being:

> (1) reopened negotiations under a binding collective bargaining agreement to amend or modify a (sic) agreement subject to a specific reopener provision; (2) negotiations with respect to the wages, hours and working conditions to be included in a successor collective bargaining agreement for a new term; or (3) negotiations for an initial collective bargaining agreement where no such agreement exists. Said provisions are therefore inapplicable to deadlocks which may arise in other negotiations which may occur during the term of a collective bargaining agreement. (emphasis added)

We are satisfied that the Examiner correctly applied Dane County when he concluded that the parties' subcontracting dispute is one which arose during the term of the contract and thus that interest arbitration is unavailable. If we were to accept the Union's argument that its efforts to obtain subcontracting protections in a successor agreement transformed the instant mid-term dispute into one which is subject to interest arbitration, the distinction we established in Dane County would be rendered a virtual nullity. Thus, the District's implementation of the subcontract upon its exhaustion of any mid-term duty to bargain did not breach Sec. 111.70(3)(a)4, Stats., and the Union's complaint was properly dismissed.

Dated at Madison, Wisconsin this 2nd day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

3/ Unified School District No. 1, Racine County v. WERC, 81 Wis.2d 89, (1977); Brown County v. WERC, 138 Wis.2d 254 (1987).