STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 579, Complainant, vs. CITY OF EVANSVILLE, Respondent.	Case 15 No. 37904 MP-1903 Decision No. 24246-B

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.
Wesner, Moore & Kraujalis, Attorneys at Law, by Mr. Anthony C. Kraujalis, One Parker Place, Suite 300, Janesville, Wisconsin 53547-1240, appearing on behalf of the Respondent.

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

Examiner Raleigh Jones having, on March 25, 1988, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he found that Respondent had discriminated against Jim Smith by laying him off on November 21, 1986 based, in part, on his having engaged in protected concerted activity and thereby violated Secs. 111.70(3)(a)3 and 1, Stats.; and Complainant having on April 14, 1988, filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties having filed written arguments in support of and in opposition to the petition, the last of which was received on August 23, 1988; and the Commission having reviewed the record in this matter and having considered all of the parties' written arguments and being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, 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 1/ continued on page 2)

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 therefore 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.

CITY OF EVANSVILLE

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

BACKGROUND

In its complaint initiating this proceeding, the Union alleged that the City had violated Sec. 111.70(3)(a)3, Stats., by laying off Jim Smith because he joined the Union. The City denied that it had committed any prohibited practices and alleged that Jim Smith was a seasonal employe and had to comply with City ordinances in order to become a regular employe.

Examiner's Decision

The Examiner found that the City hired Jim Smith as a seasonal employe on or about July 25, 1986. Seasonal employes are excluded from the bargaining unit represented by the Union. On November 20, 1986, Smith signed a union authorization card which was given to the City's Clerk/Treasurer on that same day. The City laid off Smith the next morning and the Examiner determined that the layoff was based, in part, on Smith's signing the union authorization card, a protected concerted activity. The Examiner thus concluded that the City had discriminated against Smith for signing the card and ordered the City to cease and desist from such activity and to pay Smith for 76 hours which the Examiner calculated Smith would have worked before being laid off for the season.

Petition for Review

The Complainant in its petition concurs with all of the Examiner's Findings of Fact and Conclusion of Law and only seeks review of the Examiner's Order asserting that the Order does not fully remedy the Respondent's layoff of Smith. It asserts the Examiner's remedy was inadequate and failed to recognize that Smith would have been retained in a full-time position; or alternatively, that the 76 hours as calculated by the Examiner was erroneous because it did not include snow removal work and was based on the time an outside contractor with sophisticated equipment took to do the job. The Complainant asks that the record be reopened to determine whether seasonal work in 1987 and 1988 was denied Smith on the basis of the discriminatory conduct by the City. It claims that a make whole remedy and an affirmative order requiring reinstatement of Smith would be an appropriate order to remedy the City's prohibited practice.

Complainant's Position

The Complainant contends that the Examiner's remedial order is inadequate because it does not provide for reinstatement or a full make whole remedy. It submits that the Commission has in the past ordered reinstatement and general make whole relief whether the position is full-time, part-time or seasonal. It claims that such an order serves a number of functions including placing the discriminatee in the same position he would have been had there been no discrimination, insuring that the discriminatee will be made whole for damages which continue to accumulate following the hearing, and allowing any issue of mitigation of damages to be considered in a compliance hearing. It submits that the remedy in this case did not provide an adequate remedy as there was no reinstatement or make whole order.

The Complainant submits that Smith worked past the normal time for seasonal employes and beyond the contractual ninety day probationary period and, as such, was considered a member of the bargaining unit with seniority rights. It insists that the proper remedy is reinstatement within the bargaining unit with pay at the contractual rate less interim earnings.

Alternatively, the Complainant argues that if Smith was a seasonal employe, there was additional work following his layoff including brush cutting and snow removal. The Complainant asserts that the appropriate remedy is to reinstate Smith to the seasonal position and the parties could resolve any outstanding issues on back pay or the Commission should remand the matter to the Examiner for additional factual findings on the availability of seasonal work after his unlawful layoff and the appropriate remedy could be determined.

Respondent's Position

The Respondent opposes the Petition for Review and asserts that the Examiner's remedial order is appropriate. It contends that the Examiner correctly decided that Smith was a seasonal employe with no right to reinstatement to a full-time position. It points out that the parties' agreement clearly excludes seasonal employes and Smith was a seasonal employe whose status did not evolve into a full-time position by working more than 90 days. It notes that the City has used seasonals for many years, yet they are specifically excluded from the agreement and the agreement requires job posting for full-time positions. The City distinguishes the authorities cited by the Complainant and submits that there is no decision cited ruling that a seasonal employe must be reinstated as a full-time employe.

It submits that the Examiner's back pay award was proper in that it restored Smith to the status quo ante. It argues that the determination of the status quo is the Examiner's assignment. It maintains that the authorities cited by the Complainant for reinstatement to seasonal positions are inapplicable here because those cases involved situations where there was a reasonable expectation of future employment, and here, Smith had no such expectation beyond 1986, and thus any requirement for pay in 1987 and 1988 is without any basis.

The Respondent alleges that there are no material errors of fact or any claim of the discovery of new evidence to warrant a rehearing or further hearing on the appropriate remedial order. It claims that the only proof offered by Complainant is that a seasonal employe who was hired in 1987 obtained a full-time position in May, 1988. Respondent hired a seasonal employe in 1987 for that season and six months after completion of his seasonal work, that employes received a full-time position. It insists that this falls far short of the proof required for a rehearing and supports the Respondent's general practice concerning seasonal employes which was applied to Smith. The Respondent requests that the Commission uphold the Examiner's Decision and Order.

Complainant's Reply

The Complainant contends that Respondent has a history of converting seasonal or short-term employes to full-time status, particularly where they are not students and work past Labor Day, e.g., Lee Maxwell and Gary Wiese, and recently, Robert Lawrence. It argues that the remedial order should require that Smith be reinstated to a regular full-time job, or alternatively, to a regular seasonal job with full back pay. It claims that an expectation of continued employment, either full or part-time, must be recognized in orders remedying prohibited practices. It maintains that an order returning a discriminatee to the status quo ante is necessary even when the employe's employment status may be uncertain. It insists that the remedial order in this case requires reinstatement to seasonal work as well as notice of and proper consideration for full-time positions that become available.

DISCUSSION

The sole issue presented by the Petition for Review is the Examiner's remedial Order. After consideration of the record and the parties' arguments on this issue, we affirm the Examiner's Order.

Contrary to the Union's contention, the record does not support a conclusion that Smith should be reinstated to a permanent full-time position. We concur with the Examiner's rationale for denying such a remedy. In the Examiner's Finding of Fact 3, he cited the Recognition clause of the parties' agreement, which specifically excludes seasonal employes from coverage under the contract. In Finding of Fact 4, the Examiner found that Smith was hired as a seasonal employe. The Union has not challenged these findings as erroneous. Thus, it is concluded that Smith was a seasonal employe and was not covered by the terms of the parties' agreement. The provisions of Article 3 of the agreement did not apply to Smith just as the other provisions did not apply to him. There is no contractual definition of a seasonal employe and the Examiner concluded that there were no set dates for the start and end of work by seasonal employes, so whether they worked more than 90 days did not change their status as seasonal employes. Thus, the mere fact that Smith worked more than 90 days or later into the season than normal or usual did not convert his status from seasonal to a regular full-time employe under the

agreement. 2/ The Examiner found in Finding of Fact 9 that there was no intent to convert Smith to full-time status. Again, there was no objection to Finding of Fact 9 and to order the City to reinstate Smith to a full-time position would place him in a better position than he would have been had the City's conduct been lawful. 3/ We find that the Examiner acted correctly by not ordering Smith reinstated to a regular full-time position.

The Union asserts that the remedy should have included reinstatement of Smith to the seasonal position. In Finding of Fact 9, the Examiner found that the City intended to lay off Smith when Grenawalt returned from vacation in November and in Finding of Fact 8, the Examiner found that Smith in September had been informed that he would work until mid-November. These findings were not contested. The record established that Smith would have been terminated in any event in November, 1986 but was terminated early because of his protected activity. The sole proven unlawful conduct establishes only that Smith was laid off earlier than he would normally have been. 4/ The appropriate remedy is to make him whole and not better off than before. Thus, the remedy was limited to calculating the proper layoff date and proper payment and not reinstatement because the season had already ended and there was no reasonable expectation of continued employment. The Examiner appropriately calculated the layoff date based on the amount of work performed by others and compensated Smith for the difference between his actual layoff date and the additional hours he reasonably would have worked. We have reviewed the evidence related to available work and we find no reason to alter the Examiner's conclusion. 5/

The Union has asked for reinstatement to the seasonal position for the 1987 season. The record failed to establish any pattern or practice of hiring the same seasonals year after year or that the same seasonals were ever hired as seasonal employes in a subsequent season. The record does not establish that Smith would have been hired over other seasonals from a prior year or that the City ever gave him or any other seasonal employe any promise of reemployment for the following season. We find the evidence fails to establish any status quo regarding rehiring of seasonal employes such that the failure to rehire Smith would be violative of the status quo or past practice. 6/

Additionally, the Union asserts that Smith was not given proper consideration for employment in a regular full-time position. Again, the Examiner found in Finding of Fact 4 that in the last six years no seasonal employe was converted to full-time status and that only in the mid-70's were CETA employes (Maxwell and Weise) hired into full-time positions. We concur with the Examiner that there is no past practice of selecting seasonal employes to full-time positions. There was no evidence presented that the City did not consider Smith for full-time positions. As noted in Finding of Fact 6, Smith had applied on two occasions for full-time positions but was not successful in obtaining a position.

Finally -- and this may be unnecessary to add -- it seems self evident to us that the Examiner's Order was intended to provide Smith with continuing relief from the illegal discrimination the City was found to have practiced against him and that such relief is enforceable through a compliance hearing, if necessary.

2/ Hayward Community School District, Dec. No. 24259-A (Crowley, 7/87) aff'd Dec. No. 24259-B (WERC, 3/88).

3/ Fennimore Community Schools, Dec. No. 18811-A (Malamud, 1/83), aff'd by operation of law, Dec. No. 18811-B (WERC, 10/83).

4/ Monona Grove School District, Dec. No. 20700-G (WERC, 10/86).

5/ Id.

6/ Prairie Home Cemetery, Dec. No. 22958-B (WERC, 11/86).

Thus, for instance, any subsequent hiring criteria applied to Smith for a seasonal or full-time position by the City must necessarily exclude any consideration of Smith's previous engagement in legally protected concerted activities if the City is to be in compliance with the Examiner's Order.

Dated at Madison, Wisconsin this 30th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ____________________
Stephen Schoenfeld, Chairman

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Herman Torosian, Commissioner

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A. Henry Hempe, Commissioner