STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 67, AFSCME, AFL-CIO, Complainant, vs. CITY OF RACINE, Respondent.	Case 295 No. 39273 MP-2011 Decision No. 24949-A

Appearances:

Lawton and Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Mark L. Olson, 815 East Mason Street, Milwaukee, Wisconsin 53202-4080 and Mr. Guadalupe G. Villareal, Assistant City Attorney, City of Racine, City Hall, 703 Washington Avenue, Racine, Wisconsin 53403, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 67, AFSCME, AFL-CIO having, on August 19, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Racine had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3,4 and 5 of the Municipal Employment Relations Act by subcontracting seasonal work which had in the past been performed by Regular Long Seasonal employes; and the Commission having, on November 4, 1987, 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 Sec. 111.07(5), Stats.; and hearing on said complaint having been held on January 12, 1988 in Racine, Wisconsin; and the parties having filed briefs and reply briefs in the matter, the last of which were exchanged on April 25, 1988; and the Examiner having considered the evidence and the 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. That Local 67, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the recognized exclusive bargaining representative of all employes in certain classifications in the Department of Public Works, Parks, Recreation and Cultural Services, and other departments, including employes employed as Regular Long Seasonal employes; and that its offices are located at 30203 Poplar Drive, Burlington, Wisconsin.

2. That the City of Racine, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at City Hall, 730 Washington Avenue, Racine, Wisconsin; and that the City's Personnel Director is James C. Kozina and he has acted on its behalf.

3. That at all times material hereto, the Union and the City have been parties to a series of collective bargaining agreements, including an agreement for the 1984 and 1985 calendar years; and that said agreement contained the following pertinent provisions:

ARTICLE II

Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to the following:

1. To direct all operations of City government.

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees, for just cause.

3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the Agreement.

4. To maintain efficiency of City government operations entrusted to it.

5. To introduce new or improved methods or facilities.

6. To change existing methods or facilities.

7. To contract out for goods or services; however, there shall be no layoffs or reduction in hours due to any contracting out of work.

8. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

ARTICLE VII
TYPES OF EMPLOYEES:

. . .

C. Regular Long Seasonal. Any employee who has been hired on a full-time basis, usually for an (sic) definite period of time during a definite time of the year (normally 32 weeks from April through November). This type of employee is not entitled to the normal City benefits except where eligible under the Wisconsin Retirement and holiday pay.

4. That in October, 1985, the parties commenced negotiations for a successor agreement to the 1984-85 agreement which by its terms expired on December 31, 1985; that as part of its initial proposals, the Union sought to renew two side letters, which by their terms expired on December 31, 1985, one of which provided additional restrictions on layoffs and subcontracting to those expressed in Article II, Sec. E. (3) and (7), and the other extended recall rights of employes on layoff through 1985; that the City in its initial proposals sought to modify Article II, Sec. E. 7. to read as follows: "7. To contract out for goods or services."; and that during the course of negotiations, the Union dropped its proposal and the City dropped its proposal and Article II, Sec. E paragraphs 3 and 7 remained unchanged.

5. That the parties were unable to reach a voluntary agreement and after an investigation by the Commission submitted final offers; that Joseph Kerkman was appointed mediator/arbitrator and after meeting and mediating with the parties, a tentative agreement was reached; that this tentative agreement was ratified by the Union but was rejected by the City in July, 1986 on the basis that the pay rates for the Regular Long Seasonal employes were too high; that the agreed rates were:

	1986	1987
Laborer	$7.52	$8.85
Truck Driver	$7.77	$9.15;

that the parties again met with Mr. Kerkman and a second tentative agreement was reached; that this second tentative agreement was the same as the earlier one except it provided that long seasonals would receive a flat fee of $300.00 for 1986 in lieu of any increase in pay for 1986 and the 1987 rates would be:

Laborer	$8.19
Truck Driver	$8.44;

that in addition, Article VII, Sec. C. was changed to read as follows:

> C. Regular Long Seasonal. Any employee who has been hired on a full-time basis, usually for a definite period of time during a definite time of the year (limited to thirty-two (32) weeks from April through November). This type of employee is not entitled to the normal City benefits except where eligible under the Wisconsin Retirement and holiday pay.;

and that the City ratified the tentative agreement in November, 1986 and the Union ratified this tentative agreement in December, 1986.

6. That the City has employed Regular Long Seasonal employes for at least 18 years prior to 1987; that these employes work in the months of April through November generally when outside work in the parks, zoo and other departments has increased; the seasonals work the same number of hours and are under the same supervisor as regular employes; that usually all seasonals whose work has been acceptable in the past return to work for the City from year to year until they obtain regular employment with the City, find other employment or become too old to perform the work; and that under the terms of the parties' agreement, Regular Long Seasonals are entitled to post for regular full-time positions and have preference over new applicants, and for purposes of posting, have seniority for all complete consecutive seasons worked with the City.

7. That on March 17, 1987, the City determined that it would subcontract for all seasonal work in 1987; that on or about March 10, 1987, Kozina contacted Kelly Services and asked for a proposal to perform the City's seasonal work; that Kozina specified that laborers be paid $6.00 per hour and truck drivers be paid $7.00 per hour; that on March 19, 1987, Kozina sent the following letter to all seasonal employes;

> Dear Seasonal Employee:
>
> This letter is to inform you that the City of Racine will be contracting out its seasonal work in 1987 through a temporary help agency.
>
> If you wish to be considered for temporary, seasonal work with the City of Racine, I suggest you register for work with the Kelly Services Agency, 1303 Douglas Avenue, Racine, Wisconsin 53402, as soon as possible.
>
> As the need for seasonal workers arises, we will contact Kelly Services for referrals to the City.

Also, please contact the City of Racine Personnel Department regarding the necessary procedures to follow to receive your pension contributions which were made to the Wisconsin Retirement System on your behalf while you were employed by the City.

Any questions concerning this letter may be directed to Mr. Bill Dyess, Personnel Department, City Hall.;

that certain of the City's Regular Long Seasonals registered for work with Kelly Services and others who contacted the City or were contacted by City supervisors about their previous job, also registered with Kelly Services; that the City employed 38 seasonal employes from Kelly Services for 32 weeks in 1987 and 28 of the 38 had previously worked for the City; and that the City realized savings of about $3.00 per hour per employe by its use of Kelly Services for seasonal work in 1987 rather than Regular Long Seasonal employes.

8. That the parties' collective bargaining agreement for the 1986 and 1987 calendar years contains a grievance procedure which culminates in final and binding arbitration; that in addition to the Management Rights clause, said agreement contains the following provisions:

ARTICLE V
Seniority

A. Definition. The seniority of a regular employee is determined by the length of his service, computed in years, months and days from the first day of his last continuous employment. Temporary or regular seasonal employees shall not have seniority. However, if a temporary or seasonal employee becomes a regular employee, he shall have seniority equivalent to the length of his last continuous employment.

. . .

F. Layoffs by Seniority. Layoffs of regular full-time employees shall be by City-wide seniority and regular full-time employees laid off shall receive seven (7) calendar days' advance notice of the layoff. The bargaining committee of the Union shall be notified of all layoffs and all employees being recalled at the time such notice is given. If a more senior employee desires to accept a layoff, he may choose to take such layoff.

. . .

H. Seniority List. The Employer shall furnish an up-to-date master seniority list by May 1 of each year to the department stewards. A seniority list for regular seasonal employees shall also be furnished each year to the President of Local 67. Such lists shall also be posted in a place where they may be conveniently inspected by employees.

. . .

ARTICLE XII
Job Postings

accordance with Article V, Section D, except their seniority shall apply retroactively for vacation selection.;

and that the Union filed grievances on the City's subcontracting the seasonal work, which grievances by agreement of the parties are being held in abeyance pending a decision on the instant complaint.

9. That the City and the Union did not bargain over the decision to subcontract the seasonal work after March 17, 1987; that the Union by its agreement to the terms of the parties' collective bargaining agreement, particularly Article II, Sec. E. paragraph 7., has waived its right to bargain over the City's decision to subcontract seasonal work; and that the Union made no request to bargain over the impact of the City's decision to subcontract seasonal work.

10. That in 1986, the City laid off its regular long seasonal employes and these employes were laid off when it subcontracted the seasonal work in 1987; and that the City's arrangement with Kelly Services was not a subcontract but was a joint employer relationship in that the City referred its seasonal employes to Kelly Services and gave them preference, it determined their rate of pay, assigned them duties and supervised them while Kelly Services simply referred employes to the City and issued their paychecks and was responsible for any statutory payments required such as social security, workers compensation, and unemployment compensation.

11. That the City's decision to enter into this arrangement with Kelly Services was solely for the economic savings derived from such an arrangement and it has not been established by a clear and satisfactory preponderance of the evidence to be motivated in whole or in part, by hostility on the part of the City toward the Union or long seasonal employes or to interfere with, restrain or coerce seasonal employes in the exercise of their protected concerted activities.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the City's arrangement with Kelly Services to perform seasonal work in 1987 did not interfere with, restrain or coerce long seasonal employes in the exercise of rights guaranteed in Sec. 111.70(2) of MERA, and therefore, the City did not violate Sec. 111.70(3)(a)1, Stats.

2. That the City's arrangement with Kelly Services was not based, in whole or in part, on the Regular Long Seasonal employes' protected concerted activity on behalf of the Union, and therefore, the City did not violate Sec. 111.70(3)(a)3, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

3. That the City had no duty to bargain with the Union within the meaning of Sec. 111.70(1)(a), Stats., with respect to its decision to subcontract seasonal work because provisions relating to the decision to subcontract are included in the collective bargaining agreement between the parties which constitutes a waiver of bargaining, and therefore, the City did not violate Sec. 111.70(3)(a)4, Stats., by its refusal to bargain with the Union over the decision to subcontract seasonal work.

4. That inasmuch as the Union never requested to bargain the impact of the decision to subcontract seasonal work, the City did not refuse to bargain the impact of its decision and did not violate Sec. 111.70(3)(a)4, Stats.

5. That the parties' collective bargaining agreement contains a contractual grievance procedure which provides for the final and binding arbitration of disputes arising thereunder, however, because the parties agreed to hold arbitration of the grievances filed on the subcontracting in abeyance and presented evidence and fully briefed the issues before the Examiner, the Examiner finds that the parties have waived any objection to the Commission's exercise of jurisdiction over the allegation of the Sec. 111.70(3)(a)5, Stats., violation.

6. That the City's arrangement with Kelly Services violated the parties' collective bargaining agreement, in particular Article II, Sec. E. 7. because the Regular Long Seasonal employes were laid off and remained so due to the

"subcontracting" of seasonal work, and in addition, the arrangement was not a true subcontract but a joint employer relationship requiring application of the contractual provisions including the wage rates provided therein, and therefore, the City violated the provisions of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the City of Racine, its officers and agents shall immediately:

1. Cease and desist from violating the terms of the parties' collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act by its arrangement with Kelly Services whereby regular long seasonal employes are laid off due to said arrangement and seasonal work performed is not paid at the contractually required rates of pay.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   a. The City shall immediately make whole the 38 most senior regular long seasonal employes on the 1986 seniority list by paying them the contractual rate less interim earnings for the 32 weeks of seasonal work together with interest at the rate of 12% per annum. 2/ Any of the 38 employes who were promoted or otherwise unable to complete the work would be prorated and the balance of the 32 weeks would be paid to the 39th, etc. on the seniority list.

1/ 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.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on August 19, 1987 when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. ann. (1986) See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

b. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of service of this Order as to what steps have been taken to comply with this Order.

3. IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 20th day of June, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

CITY OF RACINE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Union alleged that the City committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by the City's arrangement with Kelly Services to perform seasonal work in 1987 which had previously been performed by Regular Long Seasonal employes who were members of the bargaining unit represented by the Union. The City denied that it had committed any prohibited practices and asserted that it had the contractual right to subcontract provided there would be no layoffs due to such subcontracting and there were none because the Regular Long Seasonals were not laid off at the end of the 1986 season.

UNION'S POSITION

The Union contends that the City interfered with, restrained and coerced its employes when it took steps to enter into the agreement with Kelly Services. It points out that after a year of negotiations, and one tentative agreement that was rejected because the wage increases negotiated for the seasonals were "too high," the Union was finally able to reach an agreement which provided the seasonals with a meaningful increase of about $3.00/hr. which the Union had made important concessions to obtain, and then the City, almost immediately and before the increases went into effect, took action which saved the City about $3.00/hr., roughly the same amount of the negotiated increase. It submits that the City's actions nullified the Union's bargaining effort which adversely affected the employes' confidence in the Union's ability to bargain effectively on their behalf and thereby chilled the employes' assertion of bargaining rights in the future, thereby violating Sec. 111.70(3)(a)1, Stats. The Union contends that the City by its conduct in this matter discriminated against the affected employes and discouraged membership in the Union in violation of Sec. 111.70(3)(a)3, Stats.

The Union argues that the City refused to bargain its decision to subcontract the seasonal work. It notes that subcontracting is a mandatory subject of bargaining and the City unilaterally subcontracted the work without negotiating this decision with the Union, thereby violating Sec. 111.70(3)(a)4, Stats.

The Union further claims that the City violated the collective bargaining agreement when it subcontracted the seasonal work. It refers to the employment records of the City for each seasonal which indicates that at the end of the 1986 season, the words, "laid off" are listed as the reason for leaving. It maintains that every spring, these employes are recalled pursuant to a well established practice. It takes the position that Article II, Sec. E, 7. prohibits the subcontracting of work which results in the layoff of employes and the contracting of work to Kelly Services resulted in the layoff of the regular long seasonals, an express violation of that section of the agreement. The Union alternatively asserts that the City violated the agreement when it failed to pay seasonal employes the contractually agreed rates for seasonal employes. The Union insists that Kelly Services is not a separate and independent employer but merely the City's agent for employing and paying seasonal employes. It claims that Kelly Services is merely an administrative conduit and that the actual scheduling, supervising, evaluating, and determining the rates of pay was done by the City which exercised dominant control over the seasonal employes. The Union suggests that even if Kelly Services is viewed as an independent employer, the City was a joint employer with it because of the significant and dominant controls the City exerted over the seasonal employes.

It concludes that the City continued to be the seasonals' employer and as such, had to apply the terms of the agreement including the wage rates agreed to be paid seasonal employes. It asserts that the failure to pay these rates violated the agreement. The Union submits that the violation of Article II and the wage rates provision is in violation of Sec. 111.70(3)(a)5, Stats. The Union seeks a cease and desist order as well as an order making the seasonal employes whole.

CITY'S POSITION

The City contends that the Union has failed to meet its burden of proving, by a clear and satisfactory preponderance of the evidence, that the City has committed any prohibited practice by its subcontracting of certain seasonal work in 1987. The City maintains that it had no obligation to bargain with the Union over its decision to subcontract the seasonal work because Article II, Sec. E. 7. reserves to it the right to subcontract and the Union has thereby waived its right to bargain on subcontracting during the term of the agreement. The City points out that the subcontracting language did not change but remained the same as the 1984-85 agreement and the Union sought no change in this language during negotiations for the 1986-87 agreement and the Union cannot claim that the legitimate exercise of this reserved right requires further negotiation on the decision to subcontract. The City also refers to the evidence of prior decisions to subcontract pursuant to this language and the failure of the Union to grieve or file a prohibited practice charge as establishing that the Union has waived any right to bargain the decision to subcontract. It further notes that the Union never requested the City to bargain the impact of this decision and the Union thereby waived bargaining on the impact of the City's decision to subcontract.

The City argues that it did not violate Article II, Sec. E., paragraph 7. in the manner of subcontracting the seasonal work in 1987 in that there were no "layoffs" or "reduction in hours" as a result of the subcontracting. It claims that seasonal work is limited by the specific terms of the agreement and there is no continuing employment right attached to the status of seasonal employes. It asserts that seasonal employes are not laid off but separated at the end of the 32 week season and there is no expectation of work beyond that. The City refers to Article V, Sec. F. which provides for layoff by seniority and which clearly exempts seasonal termination of long seasonal employes from "layoff." It submits that the agreement clearly distinguishes layoffs of regular full-time employes and the termination of long seasonal employes. It further alleges that there is no causal connection between the November 1986 termination and the March 1987 decision to subcontract such that a layoff of seasonal employes has occurred. It contends that the bargaining history supports its position by the change in the language in Article VII, Sec. C. from "normally thirty-two (32) weeks" to "limited to thirty-two weeks," which limited the right of the City to utilize seasonal employes because application of the limit differs from the normal reasons for a layoff and does not establish a "layoff" of these employes.

The City submits that the seasonal employes retain no seniority or recall rights under the agreement and reemployment is dependent on work record, thus as they retain no continuing right to seasonal jobs, they cannot be considered "laid off." The City claims that it has not violated any of the seasonals' rights to reemployment because none existed in the first place. The City insists that its interpretation that seasonals are not "laid off" is supported by the evidence of past practice where long seasonal employes were not rehired after subcontracting at the Golf Course, Parks and Recreation Department and Memorial Hall, none of which were contested by the Union. The City further points out that the same seasonal employes have not been reemployed from year to year as there is a 16-17% turnover and this lack of continuity establishes no expectation of reemployment. The City notes that of the 38 Kelly employes, 10 were not former employes which is consistent with the past turnover rate. It claims that this evidences that there was no continuous employment relationship for seasonal employes.

The City argues in the alternative that, even if seasonal employes were laid off in 1986, there was no causal relationship between these layoffs and the subcontract some five months later in 1987. It argues that layoff must be dependent on the subcontracting and the evidence here fails to prove any connection between the separation at the end of the season in 1986 and the subcontracting in 1987.

The City contends that there was no violation of Sec. 111.70(3)(a)3, Stats., as the elements necessary to show discrimination based on protected activity have not been proved as there was no proof of knowledge, and no proof of animus or action based on animus.

The City states that it bargained in good faith with the Union in negotiations which resulted in the 1986-87 collective bargaining agreement. It submits that the negotiations for the 1986-87 agreement involved no significant

discussion as to the status of long seasonal employes and the major issue was Temporary Assignments and not seasonal employment or seasonal rates. It argues that there was no evidence presented that the City agreed to any waiver of its right to subcontract work and there was no discussion when the two tentative agreements were discussed about the continued use of long seasonal employes and there is nothing to indicate that the settlement was premised on the continuing use of long seasonal employes.

The City maintains that there was no irregularity or illegality in the subcontract of seasonal work. It denies that the subcontract was a subterfuge or sham and the evidence established that there was nothing unusual or irregular about the supervision, determination of pay, and the method of payment, and additionally, the regularity of the subcontract is supported by the fact that ten seasonals from Kelly had not been City employes. It emphasizes that the City supervises different types of employes, not just City employes, that Kelly employes have been used in the past and those Kelly employes who work for other employers are supervised in a similar fashion as the City. The City claims that it has the right to subcontract and its agreement with Kelly Services is a regular, commonly accepted subcontracting arrangement and the Union's assertions to the contrary are without merit. The City concludes that the complaint has no merit and must therefore must be dismissed.

UNION'S REPLY

The Union contends that the City has made inconsistent arguments by asserting that the layoff language applies to only regular full-time employes and then contending that the Union has waived its right to bargain over layoff and subcontracting affecting the long seasonals. It insists that the City cannot have it both ways and either the City has failed in its duty to bargain or has violated the agreement. The Union argues that the City has violated the agreement because the agreement applies to long seasonals and the Layoff by Seniority provision only applies to regular full-time employes which simply means that seniority does not apply to the layoff of seasonals, but Article II, Sec. E., paragraphs 3. and 7. do not limit layoffs and subcontracting to just regular full-time employes and does apply to seasonals. The Union rejects the City's argument that the seasonals are not laid off pointing to the City's records which used the words "laid off" to describe why seasonals leave at the end of each season. It points out that this pattern is the traditional and well recognized employment cycle for seasonal employment. The Union contends the limitation of 32 weeks on seasonal employment is not material here and does not affect the reasonableness of their expectation of being recalled. The Union asks that the City's argument that there was no causal connection between the layoffs and the subcontracting be rejected because the cause of the initial layoff simply changes to a layoff due to subcontracting because the employe would be employed at the beginning of the season and the initial reason for layoff would no longer exist. It notes that while all prior seasonals might not be called back without subcontracting, some would and the failure to recall even a single seasonal must be attributed to the subcontracting.

The Union submits that it has not waived any prior breaches of the agreement because the evidence failed to show the Union was aware of such violations or these violations were of such a scale as to make it obvious to the Union that a violation occurred and thus the evidence is not sufficient to demonstrate any waiver.

The Union reiterates its argument that unlike past subcontracting, Kelly Services provides no goods or services but simply acts as the City's agent in hiring and paying employes and the City's arguments are bunkum. It insists that at best Kelly Services is a joint employer and the City must pay the contractual wage rates. It submits that the City has violated the agreement which violates Sec. 111.70(3)(a)5, Stats., and appropriate remedial relief should be ordered.

CITY'S REPLY

The City reiterates its argument, contrary to the Union's inference, that there was no connection between the decision to subcontract in 1987 and the negotiation of the 1986-87 agreement. It also repeats its assertion that the Union has waived bargaining on the subcontracting by clear contract language as well as by conduct in never requesting the City to bargain on it.

The City argues that its agreement with Kelly Services was not a sham and that Kelly is not an alter ego. It claims that it has not dictated the hourly rate charged by Kelly and Kelly has the right to hire, fire and control its employes and the City has not retained dominant control over the wages, hours and conditions of employment of Kelly's employes. It insists that the relationship was one of subcontracting and that the City never guaranteed that its former seasonals would be retained by Kelly Services. It asserts that the City's supervisors did not determine which seasonals would be utilized in 1987 because they could only use employes hired by Kelly Services and the supervisors did not directly contact former long seasonal employes as Kozina informed these employes that they had to register with Kelly if they wished to be considered for seasonal work. The City reiterates that the long seasonals were not "laid off" in 1986 but were terminated and have no recall or seniority rights under the agreement and its inadvertent use of the term "laid off" in its records cannot be viewed as dispositive as these were filled in by the departments and not the Personnel office which never considered seasonals as being laid off. It requests the complaint be dismissed on the merits.

DISCUSSION

The Union has asserted that the City has committed an independent violation of Sec. 111.70(3)(a)1, Stats., by the timing of and the entering into the agreement with Kelly Services because of the tendency to chill the Regular Long Seasonal employes' exercise of their rights under Sec. 111.70(2), Stats. Proof that the City intended to interfere with the protected rights of employes is not required to establish a violation of Sec. 111.70(3)(a)1, Stats., but all that is required is evidence that the City's actions had a reasonable tendency to interfere with the employes' protected rights. The undersigned is not persuaded by the Union's arguments. The evidence established that the basis for subcontracting was solely economic and was based on the City's interpretation of the parties' collective bargaining agreement under which it believed it was authorized to subcontract the work. The exercise of a contractual right for a legitimate business objective does not constitute a Sec. 111.70(3)(a)1, Stats. violation. 3/ The timing of the subcontracting shortly after agreement on the parties' contract is evidence of some possible reprisal; however, this alone is not sufficient to prove interference given the basis for the decision and reliance on contract language. Notwithstanding the timing of the subcontracting, the evidence fails to demonstrate that the subcontracting had a reasonable tendency to interfere with, restrain or coerce the employes in the exercise of their MERA rights. Consequently, it must be concluded that the evidence failed to prove an independent violation of Sec. 111.70(3)(a)1, Stats.

The Union in order to prove its claim of a Sec. 111.70(3)(a)3, Stats. violation that the subcontracting constituted encouragement or discouragement of membership in the Union by discrimination in regard to hiring, tenure, or other terms and conditions must show all of the following elements:

1. Employes were engaged in protected activities.

2. The City was aware of the activity.

3. The City was hostile to such activity

4. The City's subcontracting was motivated, in whole or in part, by its hostility toward the protected activity. 4/

Arguably, the employes were engaging in protected activity, i.e. collective bargaining, although it is not clear that the reason for a substantial wage increase for seasonals was as much the seasonals' endeavor as was the Union's desire to protect regular full-time positions. The City does not strongly dispute

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3/ Price County, Dec. No. 24504-A (Gratz, 4/88); City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

4/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

this element and it had knowledge of the protected activity. The record fails to prove the final two elements. The evidence failed to prove that the City was hostile to the protected activity. The City initially rejected a tentative agreement because the rates were too high and later agreed to reduced rates. This conduct merely establishes disagreement over an item in negotiations and is not sufficient to show hostility. Even when coupled with the subcontracting in the timeliness and the savings of about the wage increase, it does not establish that hostility was present, only that the City was taking advantage of a contractual right to effect a cost savings. The City believed it had the right to do what it did and the evidence fails to prove that this was based on hostility or motivated, even in part, by its hostility toward the Union. Thus, the elements necessary to demonstrate that the subcontracting was discriminatory or retaliatory based on protected activity has not been proven and no violation of Sec. 111.70(3)(a)3, Stats., has been found.

The Union has alleged a violation of Sec. 111.70(3)(a)4, Stats., asserting that the City has failed to bargain the decision to subcontract and bargained in bad faith. The City has a duty to bargain collectively with the Union with respect to mandatory subjects of bargaining during the term of an existing agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters have been clearly and unmistakenly waived. 5/ If subcontracting of the seasonal work was not covered by the agreement, then the City would be obligated to bargain over the decision as it is a mandatory subject of bargaining and the City would be obligated to bargain its decision. A review of the parties' collective bargaining agreement leads to the conclusion that the subcontracting of seasonal work is embodied in the provisions of the agreement, and therefore, the City was not obliged to bargain its decision to subcontract the seasonal work during the term of the agreement. Article II, Sec. E., paragraph 7. reserves to the City the right "to contract out for goods or services; however, there shall be no lay-offs or reduction in hours due to any contracting out of work." The agreement provides that the City may subcontract provided it complies with the restriction set forth therein. The language is very broad and is not limited to any class of employes and must be applied to all bargaining unit members including the seasonal employes. Thus, the language encompasses subcontracting seasonal work and the City had no obligation to bargain its decision to subcontract the seasonal work because this subject had been waived by clear contract language. The evidence established that the City had subcontracted in the past pursuant to this language so the Union was aware of the right reserved to the City by this language and the evidence established that no changes were made concerning this right or the exercise of it and it is concluded that the Union has waived its right to bargain the subcontracting decision and there was no refusal to bargain its decision in violation of Sec. 111.70(3)(a)4, Stats.

It was asserted that the City failed to bargain in good faith the 1986-87 agreement by agreeing to large increases for the seasonals and then nullifying this agreement by subcontracting their work for a savings of the amount agreed to. The evidence failed to prove that the City agreed to limit or restrict its right to subcontract beyond what the language of the agreement provides. The evidence also failed to demonstrate that the Union sought and received any commitment, promise or indication that the City would not exercise its right to subcontract. The Union was free to propose any limitations it desired on subcontracting and it did not in the 1986-87 negotiations. The Union must be charged with knowledge of the language it had agreed to and the consequences of the exercise of language by the City. The City had sought to increase its right to subcontract by removing all restrictions on this right. The City is under no obligation to indicate that it might exercise this right at some point in the future as the Union must know that such right can be exercised at any time during the contract. The proper exercise of this right does not establish bad faith bargaining. For example, the Union may request high rates for seasonals so that regular full-time employes are not displaced by seasonals. The City may then hire full-time employes and reschedule work such that no seasonal employes are needed. Although the seasonals had lost their employment, it could not be argued that the City bargained in bad

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5/ 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).

faith by doing what was permitted under the contract and desired by the Union. Here too, if subcontracting is permitted under the contract, the City could agree to an increase for seasonals and decide to exercise a contract right such that no seasonals are employed and similarly there would be no bad faith bargaining on the City's part. Based on the record, the undersigned cannot find that the City bargained in bad faith in violation of Sec. 111.70(3)(a)4, Stats. in the 1986-87 negotiations.

Generally, the Commission will not assert its statutory complaint jurisdiction over a breach of contract claim where there is available a contractual procedure which provides for the final impartial resolution of disputes over contractual compliance. 6/ The record indicates that the parties have a grievance procedure culminating in final and binding arbitration. 7/ Additionally, the Union has filed grievances on this matter which are before an arbitrator. However, there is an exception to the Commission's general policy and that is when the parties waive the arbitration provision. 8/ The parties fully litigated the merits of the contractual violation before the undersigned and fully argued the merits of the contractual breach in the briefs filed in this matter. The parties agreed to hold the arbitration in abeyance pending the result in this matter. Given the above factors, the undersigned finds that the parties implicitly waived the arbitration procedure and the undersigned will assert the Commission's jurisdiction over the Sec. 111.70(3)(a)5, Stats. allegations of the complaint. 9/

The agreement provides that the City has the right to contract out for goods or services but there can be no layoffs or reduction in hours due to the subcontract. The City denies any violation of this provision on the grounds that the long seasonal employes were not "laid off" and there was no causal connection between the 1987 subcontract and the 1986 termination of the long seasonal employes. A "layoff" is defined as a temporary or indefinite separation from employment. 10/ The laid off employe usually has a reasonable expectation of reemployment in the future, although in certain cases, a layoff may be permanent. A termination occurs where there is no reasonable expectation of employment in the future. Inherent in the term, "layoff," is the anticipation of recall. 11/ Whether an action is a layoff or a termination has been the subject of many arbitration decisions. 12/ A review of the record in this matter convinces the undersigned that long seasonal employes were laid-off and not terminated, in 1986. The evidence indicates that for many years seasonal employes were laid off at the end of the season and had a near certain expectation of being recalled to work at the start of the next season. The Commission does not include employes in a bargaining unit who lack a reasonable expectation of continued employment. 13/ It is noted that the regular long seasonal employes are included in the bargaining unit and here the evidence failed to show that there was no reasonable expectation of employment, but rather, while there was no guarantee, there was a reasonable belief based on many years practice that long seasonals would be reemployed.

6/ Waupun School District, Dec. No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

7/ Ex-1.

8/ City of Appleton, Dec. No. 14615-C (WERC, 1/78); Superior Joint School District No. 1, Dec. No. 12174-A (Greco, 5/74), aff'd Dec. No. 12174-B (WERC, 5/75).

9/ City of Evansville, Dec. No. 24246-A (Jones, 3/88).

10/ Roberts' Dictionary of Industrial Relations, 3rd Ed. (BNA, 1986); Elkouri and Elkouri, How Arbitration Works, (BNA 4th Ed. 1985) at 557-558.

11/ CBS, Inc. v. Photographers Local 664, 102 LRRM 2026 (2nd Cir., 1979).

12/ Elkouri and Elkouri, How Arbitration Works, (BNA 4th Ed. 1985) at 557-558.

13/ School District of Pittsville, Dec. No. 21806 (WERC, 6/84).

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9/ City of [illegible], Dec. No. 24246-A (Jones, 3/88).

The City contends that the employes were terminated because of the contractual 32 week limit on employment rather than for reasons typically related to layoff such as a lack of funds or work. The contractual 32 week merely defines the maximum season rather than permitting the City determining the maximum season. The actual starting and ending dates are left to the City's discretion. The contractual limitation is not a significant factor in deciding that the employes were laid off, it simply defines the yearly season and every year there is a season to which the regular long seasonals have returned. This expectation of continued employment is a more significant factor in determining that the regular long seasonals are laid off. The cases cited by the City are inapposite in that the contractual language of those cases provided that summer temporaries be terminated, that a temporary could not be laid off because laid off employes had bumping rights, or the agreement stated that the termination was not a layoff. These express provisions are absent from the parties' agreement and it is concluded that long seasonals are laid off at the end of the 32 week season.

The City's reliance on the seniority provisions of Article V are also not persuasive. Article V, Sec. F. expressly provides that layoffs of regular full-time employes are by seniority. This provision requires the application of seniority for regular full-time employes and its silence on long seasonals only means that the seniority restriction does not apply to seasonals and they can be laid off and recalled without regard to seniority. Article V is a seniority provision and its application to long seasonals is only when a seasonal posts for a regular position, otherwise seasonals have no seniority rights. The mere absence of seniority rights does not mean that they are not laid off. Given the nature of seasonal work, there may be different layoff dates and recall dates depending on when work is available. Additionally, there is no guarantee of recall or reemployment the next season, but the test of a layoff is whether there is a reasonable belief that the employe will come back and using that test, it is clear that those employes had a virtual right to come back. Some employes declined to return upon seasonal recall because of age given the nature of the work or because of other employment or promotion to regular City employment which would account for 16-17% turnover from year to year but 83 or 84% were recalled year after year. Merely because the employes were not the same year after year does not establish that the same employes were not recalled, just that some did not accept the recall. Obviously, the bulk of employes had a reasonable expectation of recall and this would indicate that they had been laid off. Thus, it is determined that the indicia of layoff is present and those of termination are not. The City offered evidence that in the past a few long seasonals were not recalled due to subcontracting. It is not clear from the record that any employes filed grievances on this or that the Union was aware that any employe was terminated as a result of such subcontracting. Some employes may have decided to work for the subcontractor or took other seasonal jobs with the City or chose not to return to work. Even if the Union was aware of the City's actions and did not grieve it, it would not be barred from grieving any future violation.

The City's second argument that there is no connection between the 1986 layoff and the 1987 subcontracting is also not persuasive. The employes were laid off in 1986 because the season ended and in 1987 when the season began they were still laid off but were expecting to be recalled as the City had seasonal work for them to do. By subcontracting this work, the prior seasonal layoff was converted to a layoff due to the subcontracting. But for the subcontract, the City would have employed 38 regular long seasonal employes. Inasmuch as the subcontract precluded their employment, the cause of the continued layoff was the subcontracting, and therefore the City has violated Article II, Sec. E. paragraph 7. because there were layoffs of Regular Long Seasonal employes due to the subcontract.

Turning to the subcontracting arrangement, it is undisputed that the City referred all of its long seasonals to Kelly Services, that the City set the hourly rate for the employes, that at least one employe was told to go to Kelly and she would start at her job as soon as she could, that all but 10 of the employes referred to the City by Kelly Services were former regular long seasonals. The agreement between the City and Kelly Services is rather sketchy but once the City set the hourly rate, Kelly set a rate by the hour which included the statutorily required amounts for social security, unemployment compensation, workers compensation and an administrative fee. The City provided insurance to cover loss or damage to its equipment and for liability for damage caused by negligence of

Kelly employes while working with equipment for the City. 14/ The City set the hours, selected the employes referred by Kelly, supervised them and did everything except pay them which was done by Kelly. The evidence supports the conclusion that the subcontract was a simple device to circumvent the contractual wage requirements, thereby resulting in an economic savings to the City. The undersigned finds that the Union's argument is persuasive that the City and Kelly are joint employers. Joint employers are two separate entities which exert control over the same employes and joint employer status exists if two employers "exert significant control over the same employes." 15/ The evidence establishes significant control by the City of the seasonal employes referred by Kelly to the City such that the City is a joint employer and obligated to apply the provisions of the agreement including the wage rates for seasonal employes. These wage rates were not paid by the City in violation of the agreement.

Having concluded that the City violated the parties' collective bargaining agreement, it follows that the City violated Sec. 111.70(3)(a)5, Stats.

REMEDY

The City has been ordered to cease and desist violating MERA and to comply with the terms of its collective bargaining agreement. The City is directed to make whole by paying the wages and fringes to the regular long seasonals it would have hired but for the subcontract, less interim earnings, along with the statutory amount of interest. The make whole order will require some employe contributions to WRS if those have been withdrawn and the parties may have to discuss the proper procedure for doing so.

Dated at Madison, Wisconsin this 20th day of June, 1988

By Lionel L. Crowley
Lionel L. Crowley, Examiner

14/ Ex-4.

15/ NLRB v. Western Temporary Services, 125 LRRM 2787 (7th Cir. 1987).