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-B

Appearances:

Lawton & 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.

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

Examiner Lionel L. Crowley having on June 20, 1988 issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded that the City of Racine had violated its contract with Local 67 AFSCME, AFL-CIO and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., and wherein the Examiner further concluded that the City had not violated Secs. 111.70(3)(a)1, 3 or 4, Stats.; and the City having on July 6, 1988 timely filed a petition with the Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. seeking review of the Examiner's conclusion as to Sec. 111.70(3)(a)5, Stats. violation; and Local 67 having on July 13, 1988 untimely filed a petition with the Commission seeking review of the Examiner's conclusion that no Sec. 111.70(3)(a)1, Stats. violation had occurred; and the parties having filed briefs, the last of which was received on October 26, 1988; and the Commission, having reviewed the record and being fully advised in the premises, makes and issues the following

ORDER 1/

A. That Examiner's Findings of Fact 1-8 are affirmed.

B. That Examiner's Findings of Fact 9 -11 are set aside and the following Findings are made:

> 9. That as reflected by Article II, Section E, 7 of the parties' 1986-1987 contract, the parties have bargained and reached an agreement on a contract provision which sets forth the City's rights as to contracting out unit work; that as the subject of contracting out unit work is covered by the parties' 1986-1987 contract, the City had no duty to bargain with the Union over the decision to contract with Kelly Services; that the City did not bargain with the Union over said decision; and that the Union did not demand to bargain with the City over the impact of the decision to contract with Kelly Services.

(Footnote one found on page two)

10. That as the City's decision to contract with Kelly Services was motivated solely by the economic savings to be derived from the contract, the City was not motivated in whole or in part by animus toward the Union or the Sec. 111.70(2) activity of the employes; that said decision did not have a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2), Stats. rights; and that the contract with Kelly Services caused the layoff of unit employes represented by the Union.

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.

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.

(Footnote one continued on page three)

C. That Examiner's Conclusions of Law 1-3 are modified as follows:

1. That as the City's decision to contract with Kelly Services did not have a reasonable tendency to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2), Stats. rights, the City did not violate Sec. 111.70(3)(a)1, Stats.

2. That as the City's decision to contract with Kelly Services was not based in whole or in part on animus toward the Union or the Sec. 111.70(2), Stat. activity of employes, the City did not violate Sec. 111.70(3)(a)3, Stats.

3. That as the parties' 1986-1987 contract covers the subject of subcontracting, the City had no duty to bargain with the Union as to any subcontracting during the term of the 1986-1987 contract and therefore did not violate Sec. 111.70(3)(a)4, Stats. by unilaterally entering into the Kelly Services contract.

D. That Examiner's Conclusions of Law 4 and 5 are affirmed.

E. That Examiner's Conclusion of Law 6 is modified as follows:

6. That the City violated Article II, Section E, 7 of the parties' 1986-1987 contract due to the loss of unit work caused by the contract with Kelly Services and therefore violated Sec. 111.70(3)(a)5, Stats.

F. That the following Conclusion of Law is adopted:

7. That the City did not bargain in bad faith with the Union during negotiations over the parties' 1986-1987 contract and therefore did not violate Sec. 111.70(3)(a)4, Stats.

G. That Sections 1 and 2 of the Examiner's Order are modified as follows:

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

1. Cease and desist from violating Article II, Section E, 7 of the parties' 1986-1987 contract.

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

(Footnote one continued from page two)

. . .

(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.

a. Immediately make whole with interest at a rate of 12% per annum 2/ those regular long seasonal employes who, but for the Kelly Services contract, the City would have employed to perform regular long seasonal work during 1987.

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 herewith.

H. That Section 3 of the Examiner's Order is affirmed.

I. That the Complainant's petition for review is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

A. Henry Hempe, Commissioner

Commissioner Torosian did not participate in this decision.

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).

CITY OF RACINE

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

BACKGROUND

The Examiner's Decision

Initially, the Examiner rejected the Union allegation that the agreement between Kelly Services and the City violated Sec. 111.70(3)(a)1, Stats. because said agreement had a reasonable tendency to chill employe exercise of Sec. 111.70 rights. He conceded that the timing of the agreement was evidence of the agreement being a reprisal by the City against the Union for its successful efforts to significantly raise the wage rates of long seasonal employes. However, the Examiner concluded that such evidence was outweighed by the evidence that the City was pursuing a legitimate business objective (i.e. saving money through subcontracting) which the City believed was consistent with its rights under the bargaining agreement. In the Examiner's view, the record also would not support a conclusion that the City violated Sec. 111.70(3)(a)3, Stats. given the absence of sufficient evidence that the City was motivated by hostility toward the Union's successful bargaining efforts on behalf of the long seasonal employes.

Turning to the Union's allegation that the City had bargained in bad faith and thus violated Sec. 111.70(3)(a)4, Stats. during the 1986-87 contract negotiations by agreeing to large wage increases for seasonal employe and then nullifying said increases through the agreement with Kelly Services, the Examiner rejected same. The Examiner concluded that the City's exercise of the rights it believed it possessed under the contract did not establish bad faith bargaining during the prior negotiations. The Examiner also rejected the Union claim that the City was obligated to bargain over the decision to enter into a contract with Kelly Services. He found that the City had no obligation to bargain over said decision because the bargain struck by the parties in their 1986-87 contract already embodied the subject of subcontracting. As he found the Union never demanded to bargain the impact of the decision to enter into an agreement with Kelly Services, the Examiner also dismissed the Union allegation of a refusal to bargain by the City as to impact.

As to the allegation that the City's agreement with Kelly Services and the City's failure to compensate long seasonal employes in accordance with the bargaining agreement violated Sec. 111.70(3)(a)5, Stats., the Examiner initially concluded that as the parties had fully litigated this issue and had agreed to hold grievances in abeyance, it was appropriate to exercise jurisdiction over this allegation despite the presence of a binding arbitration clause. He then found that the City had violated the 1986-87 contract and thus Sec. 111.70(3)(a)5, Stats. as alleged by the Union. The Examiner reasoned that the long seasonal employes were "laid off" in the fall of 1986 because they had a reasonable expectation of being recalled in the spring of 1987 based upon past practice. He further concluded that the fall layoff due to the contractually mandated end of the 32 week period of long seasonal employment was converted to a layoff due to subcontracting when the City entered into the agreement with Kelly Services. In reaching the foregoing conclusions, the Examiner rejected City claims that the long seasonal employes were "terminated" in the fall of 1986 and that the contractual prohibition against any subcontracting which causes layoffs thus was not violated. He also found unpersuasive the City argument that the Union's failure to grieve similar City subcontracting in the past should bar the Union from pursuing the instant claim. Lastly, the Examiner concluded that under the agreement with Kelly Services, the City retained substantial control of the seasonal workers and thus was a "joint employer" with Kelly Services. As such, the City was obligated to continue to honor its contract with the Union and violated said agreement by failing to do so.

To remedy the violation, the Examiner ordered the City to make whole with interest the long seasonal employes it would have hired but for the Kelly Services agreement.

The Petitions for Review

The City timely filed a petition for review on July 6, 1988 with the Commission seeking review of the Examiner's conclusion that the City had violated Sec. 111.70(3)(a)5, Stats. On July 13, 1988, a date 23 days after the June 20, 1988 mailing of the Examiner's decision to the parties, the Union filed a "Cross-Petition for Review" as to the Examiner's conclusion that the City did not violate Sec. 111.70(3)(a)1, Stats.

As the Union's petition was not filed within the 20 day period mandated by Secs. 111.70(4)(a) and 111.07(5), Stats., the Union cannot receive Commission review of any portion of the Examiner's decision as a matter of right. However, where, as here, a timely petition has been filed by a party as to a portion of a decision, we can, as a matter of discretion, review the entirety of the case to resolve substantial questions of law and fact with potential statewide significance. Milwaukee Board of School Directors, Dec. No. 21893-B (WERC, 10/86). We will not exercise that discretionary review herein as the issue raised by the Union's petition lacks potential statewide significance. Thus, we have dismissed the Union's petition and will limit our consideration of the Examiner's decision on review to the violation of contract issue raised by the City.

POSITIONS OF THE PARTIES

The City's Initial Brief

The City first argues that the Examiner erred when concluding that the City "laid off" the long seasonal employes upon conclusion of the contractually established 32 week season in the fall of 1986. It asserts that the Examiner premised this conclusion upon: (1) the expectation of long seasonal employe that they would be recalled in the spring of 1987 and (2) the assumption that the Commission would not have included long seasonal employes in the unit without such an expectation being present. The City contends that the Examiner's reasoning was flawed because the Commission does not predicate unit inclusion of a position upon reasonable expectation of employment and because the long seasonal employes had no contractual right to employment in the spring of 1987. The City notes that long seasonals can only work for a specified period of time each year, are not covered by the layoff clause and do not have seniority rights except for the purpose of bidding on regular full time positions. The City cites Fayette Tubular Products, Inc. 83 LA 938 (1984), California Brewers Association, 57 LA 742 (1971) and Mode O'Day Company, 85 LA 297 (1985) as supportive of its position that the long seasonals were terminated in the fall of 1986 and that the subcontracting language of Article II is therefore not violated.

The City also contends that the Union must have shared the City's view of the "terminated" status of the long seasonals because the Union did not grieve past subcontracting of long seasonal work or the absence of the contractually mandated notice which the City is required to provide to the Union of any "layoff" or "recall". Nor, the City argues, has there been any attempt by the long seasonals to seek the required "leave of absence" which is a contractual prerequisite for an employe on "layoff" status to work for another employer. The City asserts that the foregoing is not only supportive of its position as to the manner in which the contract should be interpreted but also warrants a conclusion that the Union has waived any right to contest the propriety of the City's actions.

The City lastly urges Commission rejection of the Examiner's conclusion that Kelly Services and the City were "joint employers". The City asserts that: (1) there was no agreement between Kelly and the City to give preference to individuals previously hired by the City as long seasonals; (2) only 28 of 38 employes hired by Kelly Services were former City employes; (3) the City did not request that Kelly hire any specific former City employes; (4) the wage rate paid Kelly employes was not established by the City; (5) Kelly Services retained the ability to transfer or fire employes; and (6) Kelly Services issues the paychecks and pays Social Security, unemployment compensation etc. on behalf of the employes. The City argues that if the Commission were to apply a Sheboygan County, Dec. No. 23031-A (WERC, 4/86) analysis to the record, the Commission would find Kelly Services to be the sole employer. The City contends that the Examiner's reliance upon NLRB v. Western Temporary Services, 125 LRRM 2787 (CA 7 1987) for his "joint employer" conclusion is not persuasive.

Given the foregoing, the City asks that the Commision reverse the Examiner.

The Union's Responsive Brief

The Union urges the Commission to affirm the Examiner's conclusion that the City's actions violated Sec. 111.70(3)(a)5, Stats. The Union argues that the City's own records establish that long seasonal employes are "laid off" each year and are then recalled. It contends that in the spring of 1987 the City, through Kelly Services, recalled the long seasonal employes to do the same work they had previously done but failed to compensate said employes pursuant to the 1986-87 contract. Assuming arguendo that the City is correct that it was not the employer of long seasonals in 1987, the Union asserts that the City violated the contractual prohibition against subcontracting which results in "layoff". The Union notes that where the contract does not apply to long seasonals, the parties have specifically stated same. In the Union's view, the absence of any such exclusion in the subcontracting language establishes its applicability to all unit employes, including long seasonals. To the extent that the City argues that the subcontracting did not cause a layoff because the layoff occurred in the fall and the subcontracting occurred in the following spring, the Union cites arbitration awards in Central Telephone (Stern, unpublished, 1982) and Central Natural Gas, 74-2 ARB 4943 (Sinicropi, 1974) as properly rejecting this argument. The Union contends that the facts herein establish that the long seasonals were "laid off" in the fall due to "lack of work" and that in the spring the "cause" of the layoff became "subcontracting".

The Union argues that 32 week limit on seasonal employment merely defines the duration of the work season and has no bearing on their "laid off" status or the reasonableness of the expectation of recall. Similarly, the Union contends that the City's reliance upon the absence of any "guaranteed" recall rights is "neither here, nor there" given the established recall practice. The Union also contends that the arbitration awards cited by the City are all factually distinguishable.

As to the City claim that the Union has acquiesed to the City's interpretation of the subcontracting language and waived the right to challenge the City's action, the Union asserts said argument is without merit. The Union argues that when past subcontracting resulted in layoffs or reduction in hours, the Union did grieve when aware of such a result. The Union contends that any failure to challenge subcontracting was likely the result of the small number of employes involved and the Union's assumption that the individuals affected continued to be City employes. At best, the Union argues that the City "snuck" a couple of contract violations past the Union in 1983 and 1986. The Union contends that such evidence falls far short of establishing a "clear and unmistakable waiver" of any breach of Article II, Section E, 7.

In the alternative, the Union argues that because Kelly Services was merely an agent of the City and not a separate employer, the City violated the 1986-87 contract by failing to compensate the long seasonals in accordance with the contract. Unlike companies with which the City has subcontracted in the past, the Union contends Kelly Services did not provide any "goods and services" within the meaning of Article II, Section E, 7. Kelly Services is not in the business of providing services such as the work done by the long seasonal employes. Kelly Services involvement in providing such service was to serve as the City's agent when employing long seasonals and serving as a conduit through which those employes were paid. In this regard, the Union alleges: (1) the City set the wage rate to be paid to Kelly seasonals, (2) the City did all the supervision and assignment of work; (3) the City advised Kelly of those past employes who would be acceptable; (4) Kelly Services was in no position to play any meaningful role in the firing of any unacceptable employes; and (5) seasonal employes did the same work they had performed in the past. Citing Milwaukee Auditorium Board, Dec. No. 6543 (WERC, 11/63) and Deaton Truck Lines, Inc. v. NLRB, 337 F.2d 697 (CA 5 1964), the Union contends that as the City retained "dominant control" over both identifying the work performed and controlling the means by which the work was performed, the City remained the long seasonals "employer" within the meaning of Sec. 111.70(1)(j), Stats. The Union argues that Kelly Services had virtually no control over "wages, hours and conditions of employment". Kelly Services only real function was to issue pay checks, the Union asserts. "At best and this would be stretching the concept", the Union contends Kelly Services was a "joint employer" with the City.

The Union alleges that the Sheboygan County case cited by the City is, in fact, supportive of the Union's position herein. It argues that in Sheboygan, the Commission had a difficult time finding the County not to be the employer despite the control which an independent contractor had over the means by which the service was to be provided. The Union contends that Kelly Services has none of the attributes possessed by the independent contractor "employer" in Sheboygan.

Given the foregoing, the Union asks that the Commission affirm the Examiner's decision. However, the Union requests that the Examiner's remedial Order be modified to provide make whole relief for all long seasonals employed in 1986 by the City so as to better reflect the City's practice of recalling the same individuals each work season.

The City's Reply Brief

In its reply, the City again urges the Commission to reject the Examiner's conclusion that the long seasonals were "laid off". In the City's view, the Examiner essentially premised his conclusion solely upon the mere inclusion of seasonal employes in the unit. The City contends that the Examiner ignored the specific contract language mandating termination of the employes at the end of 32 weeks, the exclusion of long seasonals from coverage under the layoff clause, and the absence of any contractual guarantee that long seasonals will be rehired.

The City asserts that the arbitration awards cited by the Union in its responsive brief are "unpersuasive at best". The City argues that neither award involved facts akin to those herein, i.e. failure to rehire employe who the contract mandates be terminated after 32 weeks. The City contends that the Union's effort to distinguish the arbitration awards relied upon by the City was unsuccessful and that these awards provide a meaningful basis for overturning the Examiner's decision.

The City alleges that the Union claims of lack of knowledge of past subcontracting should be rejected as being "incredible". The City argues that the Union must be presumed to have known of past subcontracting which led to loss of long seasonal work and that the Union's failure to contest same creates a presumption of waiver.

As to the Union's contention that the City continued to be the employer, the City asserts that it is common practice for a subcontracted employe to be supervised by employes of the contracting company. Indeed, the City alleges that City employes supervise a number of different types of non-City employes. Thus, Union assertions as to the significance of this factor should be disregarded. The City contends that Kelly Services retained the absolute authority to hire and fire and that the very nature of a temporary help agency rendered it impossible for Kelly exercise a dominant role in the scheduling and supervising of employes.

Turning to the Examiner's finding of a "joint employer" relationship, the City asserts that there are critical factual distinctions between the Western Temporary Services case relied upon by the Examiner and the instant matter. Here, unlike Western, there was no agreement transferring employes' from one entity to another. Indeed, the City asserts it had no role in determining who Kelly hired other than advising former City employes that they were free to apply at Kelly Services. As to the Union's reliance on Deaton Truck Lines and Milwaukee Auditorium Board, the City asserts that the issues involved in those cases differ from those before the Commission herein and thus that said cases are inapplicable.

Contrary to the Union's contention, the City reiterates that Sheboygan County is quite supportive of the City assertion that Kelly Services was the employer of the long seasonals in 1987. It argues that in Sheboygan the Commission found that the County was not the employer despite the fact that the County was far more involved with employment decisions than the City is herein. The City also urges the Commission to consider City of Superior, Dec. No. 23318-A (WERC, 2/86) where, despite the absence of a supervisory role, the City was found to be the employer because, like Kelly Services, it controlled wage

and benefit decisions and made unemployment compensation, workers compensation and Social Sercurity payments. Given the foregoing, the City respectfully requests that the Examiner's "joint employer" conclusion be overturned.

DISCUSSION

The Union's primary violation of contract theory is that the City breached Article II, Section E, 7 when it entered into the disputed agreement with Kelly Services. Article II, Section E, 7 provides:

> 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 rule 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:
>
> . . .
>
> 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.
>
> . . .

There is no exclusion stated in the contract to the effect that this provision is inapplicable to regular long seasonal employes who all concede are in the bargaining unit. Thus, it is clear that regular long seasonals, like other unit employes, are entitled to whatever contractual protection is afforded by this limitation upon the right to subcontract.

As a general matter, it is clear that Article II, Section E, 7 is intended to protect against the loss of existing unit work. Thus, for instance, had the City entered into a contract with Kelly Services that produced a layoff or reduction in hours of any regular full time employe, we think it clear that Union could successfully challenge such an action as a breach of Article II, Section E, 7. We believe a similar result would be produced if the City entered into an agreement with Kelly Services that caused regular long seasonal employes who were working to be laid off or have their hours reduced. The question before us is whether the protection of Article II, Section E, 7 for regular long seasonal work is extinguished during the period of time when no long seasonals are actually working. We think not. We see no expression of intent in the existing language which would allow the contractual propriety of the loss of approximately 40 unit positions to turn on the timing of the subcontract vis-a-vis the timing of the regular long seasonal work season. In the face of the general language of Article II, Section E, 7, should the legitimacy of an April 1 subcontract turn upon whether long seasonals are employed on March 31 or April 1? The record is devoid of any evidence of such intent.

The City argues that because the long seasonals are not laid off in the fall each year, Article II, Section E, 7 is inapplicable. 3/ Initially, we would note that as the City's own records often describe a regular long seasonal employe as

---

3/ To the extent the City is also arguing that even if regular long seasonals were "laid off", Article II, Section E, 7 is inapplicable because the layoffs predated the subcontract, we find that argument totally unpersuasive. Such an interpretation has the potential to render Section E, 7 meaningless because it would, for instance, allow the City to layoff all unit employe and then immediately subcontract their work.

having been "laid-off" each fall, as the City has a practice 4/ of employing many of the same regular long seasonal employes year after year, and as even the City's Personnel Director referred in his testimony to the return of the regular long seasonals as a "recall," we find the label of "layoff" to fit the facts reasonably well. Indeed, in the context of this record we find persuasive the Union's argument that the employes were laid off in the fall due to lack of work and that in the spring the cause of the layoff became the Kelly Services contract. Further, while we acknowledge that no specific regular long seasonal employe have a right to be employed each year, the work in question clearly continued to exist in 1987. Thus, while the question of whether a specific employe had any reasonable expectation of working the spring of 1987, may be a close one in this factual context, it is clear the long seasonal unit work would be and was present. As it is the work which is ultimately protected by Section E, 7, and as that work was lost to unit employes because of the Kelly Services contract, we conclude that Article II, Section E, 7, was violated. 5/ Thus we affirm the Examiner's conclusion in that regard although our rationale differs from his. 6/

Having reached this result, we need not evaluate the Union's alternative theories to the effect that the City remained the "employer" of the long seasonals or was, at a minimum, a "joint employer" with Kelly Services. Thus, we have set aside the Examiner's Finding of Fact 10 and modified his Conclusion of Law 6. 7/

We have also modified the Examiner's remedial Order to more accurately reflect the appropriate intent expressed is his Memorandum (i.e. make whole those the City would have hired but for the subcontract). The Examiner's Order reflects an obligation to make whole "the 38 most senior" regular long seasonals. However, as the City has no practice or obligation to hire by seniority, it may be that the City would have employed some individuals who would not fall within the "38 most senior" category. Our modified Order reflects that possibility.

Dated at Madison, Wisconsin this 4th day of January, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

A. Henry Hempe, Commissioner

Commissioner Torosian did not participate in this decision.

4/ Past practice acquires some formal contractual stature under the introductory language of Article II, Section E.

5/ It could also well be argued that the loss of unit work constituted a "reduction in hours" under Section E, 7.

6/ In reaching this conclusion, we are cognizant that the Union did not grieve the apparent loss of regular long seasonal work due to subcontracting in 1983