STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VILLAGE OF SAUKVILLE EMPLOYEES LOCAL 108, AFSCME, AFL-CIO,	
Complainant,	Case 10 No. 50750 MP-2875
vs.	Decision No. 28032-A
VILLAGE OF SAUKVILLE,	
Respondent.	

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainant.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. James S. Clay, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Village of Saukville Employees Local 108, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission on March 24, 1994, alleging that the Village of Saukville had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act by subcontracting work performed by bargaining unit members and refusing to arbitrate a grievance filed over said subcontracting. 1/ On May 5, 1994, the Commission 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. Hearing on the complaint was held on June 22, 1994, in Saukville, Wisconsin. The parties filed briefs and reply briefs in the matter, the last of which were exchanged on August 31, 1994. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Village of Saukville Employees Local 108, 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 certified exclusive collective bargaining representative of all regular full-time and part-time employes of the Village of Saukville, excluding supervisory, managerial, confidential employes and those employes with the power of arrest. Its offices are located at 583 D'Onofrio Drive, Madison, Wisconsin 53719.

2. The Village of Saukville, hereinafter referred to as the Village, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and

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1/ In his opening statement at the hearing, Counsel for the Union stated ". . ., it appears that there will be evidence presented that would suggest there was an anti-union animus that motivated at least in part the employer's actions." No motion was made during or after the hearing to include a charge of discrimination in violation of Sec. 111.70(3)(a)3, Stats., nor did the Union made any arguments in its brief relating to such a charge. Consequently, the Examiner has made no findings with respect to such a charge.

its offices are located at 639 East Green Bay Avenue, Saukville, Wisconsin 53080.

3. The parties entered into an initial collective bargaining agreement covering the period of January 1, 1990 through December 31, 1992. Article III - Management Rights, Section 3.01 provided the Village with the management right as follows:

> K. To contract or subcontract out all work except that said right shall not be used to displace full-time bargaining unit employees.

The bargaining history which resulted in this language is the Village initially proposed language that it had the right to contract and subcontract work. The Union told the Village this proposal was unacceptable and it would never agree to such language. The Village modified its proposal adding the exception that full-time bargaining unit employes would not be displaced by exercise of this right and agreement was reached on that provision.

4. The parties' collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration. The contract also contained the following provision:

ARTICLE XXVIII - DURATION

> 28.01 - This Agreement shall be effective as of January 1, 1990, and shall remain in full force and effect through December 31, 1992, and shall automatically renew itself from year to year unless either party gives notice in writing to the other party not later than September 1, 1992, or September 1 of any year this Agreement is in force.

The Union apparently gave notice that it wished to bargain a successor to the 1990-92 contract. The parties entered into negotiations and neither side proposed any changes to Sec. 301, K. The parties were unable to reach an agreement, and after mediation, submitted final offers as well as tentative agreements and the following stipulation:

> All items not changed by the above and not currently subject to dispute between the Village and the Union will be incorporated into the new Agreement for the years January 1, 1993 to December 31, 1994.

An arbitrator was selected to hear the parties' interest arbitration dispute and after hearing and briefs, the arbitrator issued a decision on February 26, 1994.

5. On June 15, 1993, the Village's Wastewater Superintendent submitted his resignation effective August 1, 1993. One June 25, 1993, the Village's Public Works Superintendent resigned effective July 16, 1993. On July 6, 1993, a Water Operator in the bargaining unit requested a transfer to the Police Department and began work as a police officer on November 2, 1993. On September 23, 1993, Christopher Lear, the Village Administrator, sent Helen Isferding, the Union's representative the following letter:

> The Village of Saukville Finance Committee has directed

> me to research the benefits of contract services for three department (sic) in the Village of Saukville. The Water, Wastewater and Public Works Departments are being considered for contract services. They have employees which are represented by the AFSCME Union, so we felt it important to notify you first, of our intention to investigate this new service delivery method. No decisions have been made at this point regarding contract services. We are simply in a research and discussion phase.
>
> Please be assured that the Village of Saukville will fulfill its obligations based on the outcome of this investigation.
>
> Regardless of the outcome, as always, the Village will be looking out for the best interest of its employees.

Employes were also informed that the Village was researching contract services. Ms. Isferding responded to Mr. Lear by letter of October 8, 1993, as follows:

> I appreciate your letter and our conversation on September 29, 1993 regarding the possible privitization (sic) of certain service functions of the Village of Saukville.
>
> As stated during that conversation, the Union believes that the contract language prohibits the

Employer from any such subcontracting of bargaining unit work. I specifically refer to the following contract language : (sic)

> To contract or subcontract out all work except that said right shall not be used to displace full-time bargaining unit employees.

The Union sees the above as it's (sic) first position. We do have a contract and will continue to represent these people. Contrary to the rumored belief of some board members, the contract and the Union will still have to be dealt with. Secondly, we are making a demand to negotiate both the decision and the impact of any subcontracting for any matters not covered by the above language.

Public officials all too often have used contracting out as a solution to cost control. They have sacrificed their control over in response to what sometimes is "low balling" to get a foot in the door to public services. I have seen and been impressed by how proud of their jobs your employees are, and under the impression you have been too. Why mess with something that doe (sic) not have to be fixed?

Please continue to keep me and the Local informed.

6. After investigating contract services, the Village requested bids from five firms. The Village informed the Union that it had made a request for bids but no decision on contracting had been made. Three companies submitted bids which were explained at an open meeting of the Village Finance Committee on November 2 or 3, 1993. The Village decided to enter into negotiations with one bidder, Rust Environmental and Infrastructure (RUST). On December 1, 1993, Mr. Lear sent the following letter to Chris Woda, Union Steward, and the same letter to Ms. Isferding on December 2, 1993.

> The negotiations for Contract Services between the Village of Saukville and Rust Environmental and Infrastructure have progressed to a point where we feel a meeting between affected Village employees and representatives of Rust Environmental is appropriate. We feel it is time to get the Union involved in discussions regarding the potential subcontracting of Public Works, Wastewater and Water operation.
>
> I would propose a meeting during working hours the week of December 6, 1993.
>
> Please respond to me at your earliest convenience for date, time and location.
>
> Thank you in advance for your help in this matter.

A meeting was held on December 14 or 15, 1994, with the Village, Union,

employes and RUST present. Another meeting was held on January 7, 1994, where Ms. Isferding presented the following to the Village:

> Today, on January 7, 1994, and in any future set up meetings it needs to be understood that we are present with the following intentions:
>
> 1. Our position is that the village can not (sic) subcontract bargaining unit positions and we intend to do what ever (sic) necessary to uphold that position. We do not intend to waive any rights we have.
> 2. Our intent is not to negotiate.
>
> If the Employer is not in agreement, or will use our presence in any other way, we wish to be so informed.
>
> What we intend to do is to listen to what you has (sic) to say, as the contents of this meeting are unknown. We wish to cooperate and offer support if this is the route that the village is taking for specific non-bargaing (sic) unit positions.

7. On February 2, 1994, Mr. Lear sent the following letter to Ms. Isferding:

> It is the intent of the Village of Saukville to fulfill any legal obligation to AFSCME Local 108 which may arise pursuant to 111.70 Wisconsin Statutes. The Village currently has under consideration the possibility of obtaining Village services such as public works, water treatment and wastewater treatment from an outside source. The Village, by this letter, is offering to immediately enter into negotiations with Local 108, AFSCME, AFL-CIO concerning the Village of Saukville's decision to contract for services from an outside source. Please contact me no later than Friday, February 11, 1994 to set a date to commence negotiations.
>
> In contemplation of negotiations concerning the decision to contract with an outside source for the Village's public works, water treatment and wastewater treatment services, enclosed you will find the initial proposal of the Village relating to contract services. Further, in the event it becomes relevant and/or necessary, I have also enclosed the initial proposal of the Village concerning the effects of providing Village services from an outside source.
>
> I look forward to hearing from you on or before February 11th.

By a letter dated February 10, 1994, the Union by its attorney pointed

out that Section 3.01, K gave the Village the right to subcontract as long as it did not result in any Village employe losing his or her employment with the Village. On February 15, 1994, the Village adopted a resolution to enter into a contract for services with RUST. On February 16, 1994, Mr. Lear sent the following notice to bargaining unit employes affected by this subcontract:

> As you know, the Saukville Village Board of Trustees voted at their February 15, 1994 meeting to adopt Resolution #682. This resolution puts into effect a five year contract with Rust Environment and Infrastructure to operate our Public Works, Wastewater and Water Operations.
>
> The new contract will ensure maintenance of your position, performing work as you have in the past, salary and comparable benefits. The effective date and time for your transfer to RUST Environment and Infrastructure will be Friday, February 18, 1994 at 11:59 p.m. Therefore, beginning Saturday morning, February 19, 1994 you will be supervised by RUST Environment and Infrastructure personnel.
>
> I personally look forward to a continuance of our excellent working relationship!!

Also on February 16, 1994, the Village's legal counsel responded to the Union's legal counsel's letter of February 10, 1994, asserting that no employes were "displaced" under Section 301, K as employes would keep their jobs and get paid the same from RUST. Additionally, the Village's attorney noted there was no contract as they were in hiatus and the Village had maintained the status quo. The Village's agreement with RUST provided in part as follows:

> RUST E&I recognizes the AFSCME Local 108 as the exclusive bargaining agent for all current OWNER employees in the bargaining unit.
> RUST E&I employees experienced in water/wastewater systems and public works shall staff the Facilities and shall have the operator certifications required by State regulations. The staffing plan shall be consistent with project requirements. Staffing for the project shall include eight (8) full-time employees.
> At the request of the OWNER, RUST E&I will offer employment to current OWNER employees at a combination of salary and benefits equal to or better than currently received by such employees. Assuming acceptance of employment, each former OWNER employee shall retain their fulltime (sic) position with RUST E&I for the initial and subsequent terms of this Agreement. RUST E&I does reserve the right as employer to discipline or discharge for cause in accordance with the terms and conditions of RUST E&I's contract with AFSCME Local 108. In the event this Agreement is terminated, the OWNER shall have the first opportunity to hire any or all of the RUST E&I employees assigned to the OWNER'S Facilities.

On February 18, 1994, five Village employes working in the Village's

Department of Public Works, Water and Wastewater Treatment operations became RUST employes but continued to perform the same job duties as prior to that date.

8. On February 18, 1994, the Union filed a grievance over the subcontracting of the five Union positions. The Village denied the grievance that same day. The grievance was appealed to arbitration and the Village refused to proceed to arbitration on the grounds that the events of the grievance occurred during the contract hiatus and the agreement to arbitrate did not survive the expiration of the agreement as part of the status quo. Thereafter, the instant complaint was filed by the Union.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The grievance arbitration provision of the parties' 1990-1992 collective bargaining agreement did not require the Village to submit the subcontracting grievance of February 18, 1994, to arbitration and neither did the parties' stipulation of July 16, 1993. Thus, the Village did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., when it refused to arbitrate the February 18, 1994 grievance on subcontracting.

2. The status quo which existed upon expiration of the 1990-1992 collective bargaining agreement between the parties included the Village's right to contract or subcontract all work except the right shall not be used to displace full-time bargaining unit employes.

3. The Village, by subcontracting with RUST, displaced full-time bargaining unit employes contrary to the status quo and has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

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

ORDER 2/

IT IS ORDERED that the Village of Saukville, its officers and agents shall immediately:

2/ 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

1. Cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by changing the status quo during the hiatus period between the expiration of a collective bargaining agreement and the date of an interest arbitration award for a successor agreement by subcontracting work which displaces full-time bargaining unit employes.

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

   a. Immediately restore the status quo ante by reinstating the five employes who were displaced by the Village's contract with RUST to Village employment and make them whole for all lost wages, if any, together with interest 3/ and benefits as if they had continued to be employed by the Village.

   b. Notify all of its employes by posting, in conspicuous places on its premises where employes are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by an official of the Village and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

   c. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 31st day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

3/ 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 March 24, 1994, 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).

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL immediately reinstate bargaining unit employes who became employes of RUST on or about February 18, 1994, as a result of our subcontract with RUST, to Village employment. We will make said employes whole for all losses in wages and benefits as if these employes had continued in Village employment.

2. WE WILL NOT commit unlawful changes in the status quo by subcontracting work which results in the displacement of full-time bargaining unit employes.

3. WE WILL NOT in any like or related manner interfere with, restrain or coerce employes in the exercise of their rights assured by the Municipal Employment Relations Act.

By _____ _____
Village of Saukville Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the Village violated Secs. 111.70(3)(a)1, 4 and 5, Stats., by subcontracting work performed by full-time bargaining unit members and terminating them from Village employment in violation of the status quo and by refusing to arbitrate a grievance over said subcontracting. The Village answered the complaint denying it had violated Secs. 111.70(3)(a)1, 4 or 5, Stats., and asserted that it complied with the status quo in that no employes were "displaced" and it had no obligation to arbitrate a grievance during the hiatus period.

Union's Position

The Union contends that the Village's refusal to arbitrate the grievance over the subcontracting of bargaining unit work constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats. It submits that the contractual definition of a grievance is very broad and the agreement makes no exception for grievances concerning events arising after the expiration of one contract and before adoption of its successor. The Union cites Nolde Brothers, Inc. v. Bakery and Confectionery Workers Local 358, 430 U.S. 243 (1977) for the proposition that a grievance that concerns contract rights that vested during the contract but ripened later can be arbitrated and here the termination of almost two thirds of the bargaining unit due to subcontracting during the hiatus period, strikes at the very heart of the collective bargaining process and the relationship between the bargaining unit and the employer. The Union notes that both the Village and Union agreed that the subcontracting provision would continue to be included in the contract and they so stipulated. It claims that the subcontracting clause continued in full force and effect by reason of the duration clause in the 1990-1992 contract as neither gave notice that the subcontracting clause would not continue. It submits that the parties' stipulation also indicates that there would be continuing application of the subcontracting provision. The Union insists that whether the subcontracting clause continued by operation of law during the hiatus or by the parties' own language and stipulation, the Village breached the agreement by its refusal to arbitrate which violates Sec. 111.70(3)(a)5, Stats.

The Union claims that the Village unilaterally implemented its proposed new subcontracting provision which violated Sec. 111.70(3)(a)4, Stats. It points out that the Village made a proposal on February 2, 1994, with respect to subcontracting, which was long after the 1993-94 collective bargaining dispute had been heard by the arbitrator and long after the parties' stipulation to continue the previously agreed subcontracting provision. It submits that when the Union rejected the proposal of February 2, 1994, the Village simply implemented it. The Union asserts that subcontracting is a mandatory subject of bargaining and an agreement on it must be maintained, even during a hiatus until an agreement to change it is bargained. It maintains that as interest arbitration is a continuation of the bargaining process, an employer cannot implement its "last offer," and even in the private sector, an employer cannot implement a last offer after it has agreed to language covering the same subject matter. The Union argues that it was not obligated to reopen bargaining with the Village over a subject that had been agreed to and by refusing to do so, it did not waive any of its rights to bargain. It concludes that the Village's unilateral implementation was a blatant disregard of its obligation to bargain and was a violation of Sec. 111.70(3)(a)4, Stats.

The Union contends that the Village's displacement of two thirds of the bargaining unit violated Sec. 111.70(3)(a)4 or 5 or both. It maintains that the dictionary definition of "displace" is "to remove from office, status or job, discharge, . . . take the place of; replace . . ." It claims that the Village, by subcontracting with RUST, terminated the employment of Village employes and replaced them with RUST employes, thereby displacing bargaining unit employes. It asserts that it is not material that the same individuals were hired by RUST as the ultimate fact is that Village employes were replaced by private employes of RUST. It maintains that whether this is a breach of contract or a failure to bargain, it constituted a prohibited practice. It asks that the Village be ordered to cease and desist from its unlawful contracting out bargaining unit work and the affected bargaining unit employes be reinstated and made whole with interest and for such other and further relief deemed appropriate.

Village's Position

The Village concedes that Article III, Section 3.01, K is part of the dynamic status quo which survived the expiration of the contract. Additionally it concedes that subcontracting bargaining unit work is a mandatory subject of bargaining.

The Village contends that it did not violate the collective bargaining agreement when it contracted for services with RUST. It points out that contracting and subcontracting is permitted as long as no full-time bargaining unit employe is "displaced." It notes that the individual Village employes became RUST employes and none of the individuals became unemployed. It alleges that these individuals reported to the same work station at the scheduled work shift and performed the same work they had been performing. The Village claims that there is no evidence that any employe lost even a single hour of regularly scheduled work in his assigned classification. The Village refers to the dictionary definition of "displace" as: "to remove from the usual or proper place." It argues that the employes performed the same work in the same location and in the same job classification which was their usual or proper place and they were not "displaced" within the plain meaning of the word. The Village submits that the Union's argument that "displace" means "laid off" or "terminated" misconstrues the intent of the parties. It notes that layoff means a temporary separation from employment without loss of seniority and termination is a permanent separation from employment. It asserts that the Union representative has sufficient labor experience to recognize the difference between layoff/termination and displacement. It suggests that the Union could have insisted on an interpretation more favorable to it but failed to do so. It argues that the Union wanted to protect the employment of members of the unit and that is what they did. The Village claims that the agreement with RUST protected the employes' employment as well as a guarantee of Village reemploy- ment if the contract with RUST was terminated. The Village notes that the employes received the same pay and essentially the same benefits. The Village contends it did not destroy the bargaining unit and it did not violate Section 3.01, K of the expired agreement.

The Village alleges that it did not commit any prohibited practice when it refused to arbitrate the Union's grievance. The Village points out the contract expired on December 31, 1992, and all the events giving rise to the grievance arose after that date, so the grievance arose during the hiatus and grievance arbitration is not a status quo obligation. The Village points out there was no express agreement to arbitrate grievances during the hiatus and it had no legal obligation to arbitrate. It refers to the Union's request to reopen negotiations which contained a proposal to continue in effect all

provisions of the contract, but the Village refused to agree to such proposal. It takes the position that although the interest arbitration award was retroactive to January 1, 1993, it did not create an obligation to arbitrate the grievance because retroactivity of the award does not create the fiction of an express agreement to arbitrate where none existed. It denies any violation of Secs. 111.70(3)(a)1 or 5, stats., by refusing to arbitrate the subcontracting grievance.

The Village contends that it did not unilaterally modify a term or condition of employment which was part of the status quo and did not violate Secs. 111.70(3)(a)1 or 4, Stats. The Village recognizes that absent a valid defense it may not alter the status quo between the expiration of the agreement and the issuance of an interest arbitration award. The Village asserts that the Union's claim that it could rely on the language of Section 3.01, K and had no obligation to bargain is incorrect. It submits that the status quo is dynamic and changes in status quo may occur by operation of law, past practice or the relationship and dealing between the parties. The Village submits that the status quo was modified by what transpired between the parties and the status quo did not restrict the future conduct of the parties concerning a mandatory subject. It notes that waiver and necessity are valid defenses. It argues that the Union must demand bargaining when they are put on notice that the employer is contemplating a change in a mandatory subject of bargaining and a failure to request bargaining constitutes a waiver. The Village argues that it notified the Union it was investigating subcontracting and kept the Union apprised of the investigation and gave the Union the opportunity to negotiate the decision and impact and the Union refused, and based on this, the Village asserts that it did not violate Sec. 111.70(3)(a)4, Stats. The Village fails to see any difference between a demand made in preparation for negotiations and a demand made during the hiatus. The Village argues that the obligation to bargain survives the petition for arbitration and the order appointing an arbitrator and when a demand was made by the Village, the Union had an obligation to bargain over a mandatory subject of bargaining and the Union's refusal constituted a waiver of its right to bargain the subcontracting. As to business necessity, the Village asserts that the three vacancies as well as an annual savings of $56,000 demonstrate a legitimate business necessity defense.

The Village further asserts that the subcontract was not a fait accompli relieving the Union from its obligation to bargain as there was nothing to give the Union the impression that bargaining would be futile.

The Village denies any violation of Sec. 111.70(3)(a)3, Stats., by its subcontract with RUST. The Village claims that to establish a violation the Union had to establish:

1. The employes were engaged in protected activities; and

2. The Village was aware of those activities; and

3. The Village was hostile to those activities; and

4. The Village's conduct was motivated, in whole or in part, by hostility toward the protected activities.

The Village maintains that nothing in the record establishes any of the criteria set out above. It submits the Village ensured recognition of the status of the Union by RUST and insured that employes would remain employed at equal or better compensation and benefits. The Village argues that there is nothing in the record to support a finding of a violation of Sec. 111.70(3)(a)3, Stats.

The Village submits that nothing in the record demonstrates that the Village committed any prohibited practices by its contracting with RUST and it asks that the complaint be dismissed in its entirety.

Union's Reply

The Union asserts that there are three issues presented: Whether the Village was obligated to arbitrate the grievance? Whether the Village was obligated to maintain the status quo? Whether the Village's subcontracting violated the subcontracting provision previously bargained by the parties?

The Union asserts the Village was obligated to arbitrate the grievance and although the Commission has not adopted the Nolde rationale, it submits that the duration clause of the 1990-92 contract continued the agreement in full force and effect after December 31, 1992. It also relies on the July 16, 1993 stipulation of the parties which, by its own terms, was effective immediately and continued the grievance arbitration provision in effect. It submits that whether the agreement continued in effect is for an arbitrator to decide and the Village violated Secs. 111.70(3)(a)5 and 1, Stats., by its refusal to process the grievance to arbitration.

The Union notes that the Village has conceded that the subcontracting provision is a mandatory subject of bargaining and an element of the dynamic status quo but has defended its unilateral change of that status quo on the basis of waiver or business necessity. The Union insists that neither argument makes the grade. According to the Union, the business necessity argument is based on saving $56,000 by not replacing two supervisors, but this cannot justify the Employer's refusal to bargain nor justify contracting out the bargaining unit work which would not result in the cost savings.

As to the waiver argument, the parties had signed a stipulation which incorporated the existing subcontracting provision in the successor contract

and the Village could not unilaterally implement a different subcontracting provision and pursuant to Sec. 111.70(4)(cm)5, Stats., a party can "modify" or "withdraw" its final offer only with consent of the other party. The Union asserts that it had no obligation to consent to the Village's proposed new subcontracting provision. The Union contends that the mere statement of the Village's legal position in this case is its own refutation. It asserts that the time to propose a change in subcontracting language was prior to final offers, and the Union was not obliged to reopen bargaining on a subject already agreed to and a refusal to reopen does not constitute a waiver of bargaining.

The Union asserts that the Village's displacement of bargaining unit employes constitutes a prohibited practice. It submits that the Village's argument that it did not "displace" bargaining unit employes is without merit and warrants no response. It asks why are there five fewer Village bargaining unit employes than was the case before the work in question was bargained out? The Union concludes that the Village, by its actions, committed prohibited practices in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., and asks that employes be restored to Village employment and be made whole.

Village's Reply

The Village insists that its refusal to arbitrate the subcontracting grievance was proper. The Village argues that the contractual definition of a grievance relied on by the Union when read in its entirety applies only to the terms of that agreement and as it expired, there is nothing to relate back to as far as this matter is concerned. The Village asserts that the accepted rule is that expiration of the agreement extinguishes the arbitration obligation. It claims that the ruling in Nolde is not applicable in all cases and the facts in this dispute giving rise to the grievance arose long after the contract expired and does not involve a vested benefit and/or an absolute right. The Village further points out that its refusal to arbitrate relates solely to the grievance which concerns events arising after contract expiration and prior to the creation of a successor so the rationale of Nolde, supra, is not applicable and its refusal to arbitrate was not a prohibited practice.

The Village insists that the Union and Village had an obligation to bargain over the subcontract with RUST and the Union waived its right to bargain. The Village submits that the stipulation of July 16, 1993, does not cause the subcontracting provision to survive the December 31, 1992 expiration date. It claims that no agreement is created until the issuance of the arbitrator's award. Additionally, it maintains the duration clause did not continue the existence of Article III, 3.01, K because either the whole agreement continued or none of it did, and by its terms none of it did. The Union overlooked the Village's proposal to seek a bargained change in the subcontracting clause and, according to the Village, this proposal was made in response to circumstances not contemplated when the parties began bargaining or when final offers were submitted. The Village asks how "a bargained agreement to change" can be accomplished if the Union is free to refuse to bargain? It claims that the practical result is not merely the maintenance of the status quo but the freezing of a term in perpetuity. According to the Village, the Union has mischaracterized the nature of the bargaining and/or interest arbitration process and the law concerning last offer amendments. It asserts that the subject matter of the final offer amendment is not restricted to the subject matter of the initial final offer. The Village insists that it committed no prohibited practice when it contracted with RUST.

The Village maintains that it did not commit any prohibited practice when it transferred employes to RUST for the reasons stated in its initial brief. It notes the parties are at odds over the meaning of what constitutes a

"displacement" but the City of Racine, Dec. No. 24949-B (WERC, 1/89) case relied on by the Union is misplaced as employes there were laid off, and in this case, employes were not laid off but reported to the same work stations at their regularly scheduled time and performed their normal work without loss in economic benefit. It submits that the Village has not committed any prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

Discussion

During a contract hiatus, a municipal employer's duty to bargain generally obligates it to maintain the status quo as to matters primarily related to wages, hours and conditions of employment. 4/ However, although grievance arbitration provisions are primarily related to wages, hours and conditions of employment, the municipal employer's status quo obligations do not include honoring any contractual grievance arbitration procedures. 5/ Here, the contract expired on December 31, 1992, and the subcontracting did not arise until the summer of 1993 and was not implemented until February, 1994, all during the contract hiatus, so the Village was under no obligation to honor the arbitration provisions of the expired contract. The Union's reliance on Nolde Brothers, supra, is misplaced because the facts here do not involve a contractual provision which involves facts and occurrences that can be said to infringe upon a right accrued or vested under the contract.

The Union's reliance on the Duration Clause of the 1990-92 contract is also misplaced. The evidence is clear that the parties had gone to interest arbitration for a successor to the 1990-92 contract. It follows that one party had to have given notice to reopen the contract, otherwise the contract would have been renewed for the next year and interest arbitration would not have been

4/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

5/ Racine Schools, Dec. No. 19983-C (WERC, 1/85); Greenfield Schools, Dec. No. 14026-B (WERC, 11/77).

available. As the contract was reopened, it expired by its own terms on December 31, 1992, and the general rule set out above with respect to arbitration is that it is not applicable during the hiatus.

With respect to the stipulation signed by the parties on July 16, 1993, it did not become effective until the interest arbitration award was issued 6/ and created no obligation on the part of the Village to arbitrate the subcontracting grievance.

Therefore, the Examiner concludes that the Village had no obligation to arbitrate the grievance filed on February 18, 1994, and its refusal did not constitute a violation of Sec. 111.70(3)(a)5, Stats.

Section 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

6/ Ozaukee County, Dec. No. 18384-A (Knudson, 7/81), aff'd by operation of law, Dec. No. 18384-B (WERC, 8/81).

A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employes in violation of Sec. 111.70(3)(a)1, Stats. 7/ As previously noted, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during the hiatus period between collective bargaining agreements is a per se violation of the Sec. 111.70(3)(a)4, Stats., duty to bargain. 8/ Waiver and necessity have been recognized to be valid defenses to a charge of unilateral implementation in violation of Sec. 111.70(3)(a)4, Stats. 9/

The employer's status quo obligation only applies to matters which primarily relate to employe wages, hours and conditions of employment. 10/ The Commission has found unilateral changes in the status quo wages, hours and conditions of employment to be tantamount to an outright refusal to bargain about a mandatory subject of bargaining because such a unilateral change undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 11/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 12/

Status quo is a dynamic concept which can allow or mandate change in employe wages, hours and conditions of employment. 13/ Thus, application of the dynamic status quo principle may dictate that additional compensation be paid to employes during a contract hiatus period upon attainment of additional experience or education, 14/ or may give the employer the discretion to change work schedules during a contract hiatus period. 15/ When determining the status quo within the context of a contract hiatus period, the Commission considers relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 16/

Article III, Section 3.01, K of the parties' 1990-92 agreement provides as follows:

> To contract or subcontract out all work except that said right shall not be used to displace full-time

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7/ Green County, Dec. No. 20308-B (WERC, 11/84).

8/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

9/ Racine Unified School District, Dec. No. 23904-B (WERC, 9/87); Green County, supra.

10/ Mayville School District, Dec. No. 25144-D (WERC, 5/92).

11/ City of Brookfield and Green County, supra.

12/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

13/ Mayville School District, supra.

14/ School District of Wisconsin Rapids, supra.

15/ Washington County, Dec. No. 23770-D (WERC, 10/87).

16/ School District of Wisconsin Rapids, supra, note 2.

bargaining unit employees.

The Village has conceded that this language is part of the dynamic status quo and must therefore be maintained during the hiatus absent a valid defense.

The Village has offered two defenses. The first is waiver based on the Village's offer to bargain over the subcontracting and the Union's refusal to do so. The Village's arguments are not persuasive. First, the Union had no obligation to bargain over a change in the status quo during the hiatus period. 17/ Secondly, during the term of an existing collective bargaining agreement, a municipal employer has a duty to bargain with the union over mandatory subjects of bargaining except to matters included in the agreement or where bargaining has been clearly and unmistakenly waived. 18/ Thus, if the contract was silent on subcontracting, the employer would be obligated to bargain both the decision and impact of said decision to subcontract. 19/ If the employer offers to bargain these matters and the Union does nothing, waiver is a defense to unilateral implementation. Where there is contract language covering the situation or negotiation history indicating a waiver, the Employer need not bargain over its subcontracting, but must follow the contract. 20/ Here, there was no contract in effect, and for a successor either side was free to propose changes in the contract to be included in the successor. Neither party did and the investigation was closed and interest arbitration directed. It was only after the arbitration decision was imminent that the Village indicated a desire to negotiate on the subcontracting decision. Here, the Village is seeking to use the waiver theory where an agreement is in effect and silent on the subject and apply it to negotiations for a successor agreement after all those negotiations were completed. The Village's argument, while interesting, is not persuasive. Thirdly, Sec. 111.70(4)(cm)6.b., Stats., provides that after final offers are certified and prior to the arbitration hearing, a party may modify its final offer with consent of the other party. Here the Village was too late and did not get the Union's consent. Under these circumstances, the Village was in the same position under the status quo as it was under the prior contract. Where the matter is included in the contract, the

17/ St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93).

18/ Racine County, Dec. No. 26288-A (Shaw, 1/92).

19/ Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977).

20/ City of Richland Center, Dec. No. 22192-A (Schiavoni, 1/86).

Village is bound by that language, and where negotiations were completed for a new agreement, the Village is bound by the status quo which in this case is the language of the contract. Thus, there was no waiver of bargaining by the Union by its refusal to reopen negotiations on status quo language.

As to business necessity, the record fails to show any. The Village could have contracted out the supervisory duties and saved money. How could the Village save money when the employes stayed in their jobs at the same rate of pay with similar benefits? This defense is not proven by the evidence. Inasmuch as there were no valid defenses, the Village was obligated to comply with Article III, Section 3.01, K as part of the dynamic status quo.

The Village breached the status quo when it subcontracted its Water, Wastewater and DPW operations to RUST because five bargaining unit employes of the Village were displaced contrary to the plain language of Article III, Section 3.01, K. The Village argued that employes were not displaced, i.e. removed because they did the same job at the same location at the scheduled hours and lost no pay or benefits. This argument is not persuasive. Section 3.01, K provides that the Village may subcontract except where subcontracting displaces full-time bargaining unit employes. Its subcontract with RUST removed five full-time bargaining unit employes from Village employment. The fact that they became employes of RUST or continued to perform the same work under the same circumstances as before is irrelevant. The Village removed five bargaining unit employes. They were "displaced." This action violates the status quo as embodied in the language of Section 3.01, K and the Village thereby committed a prohibited practice in violation of Sec. 111.70(3)(a)4, Stats., and derivatively of Sec. 111.70(3)(a)1, Stats. The Examiner has directed the Village to return the employes to Village employment, to make them whole, as well as the standard posting and notice requirements.

Dated at Madison, Wisconsin, this 31st day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner