STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Shneidman, Myers, Dowling, & Blumenfield, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, P.O. Box 2155, Madison, Wisconsin 53701, 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.

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

On October 31, 1994, Commission Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the Village of Saukville had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by subcontracting certain work during a contract hiatus. He therefore ordered the Village to take certain affirmative action to remedy the statutory violations. The Examiner dismissed allegations by Village of Saukville Employees Local 108, AFSCME, AFL-CIO,that the Village of Saukville had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate a grievance over the subcontract.

On November 21, 1994, the Village of Saukville filed a petition for review with the Wisconsin Employment Relations Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received February 14, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

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.

(footnote 1 continued on page 3)

(footnote 1 contiuned from page 2)

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the

signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

VILLAGE OF SAUKVILLE

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

The Pleadings

In its complaint initiating these proceedings, the Complainant Union alleged that the Respondent 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 and by refusing to arbitrate a grievance regarding said subcontracting. The Respondent Village answered the complaint by denying that it had committed any of the alleged violations and asserting that it had not breached the status quo as to subcontracting and had no obligation to arbitrate a grievance during a contract hiatus.

The Examiner's Decision

The Examiner analyzed the issues before him as follows:

> Discussion
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> 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

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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).

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 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

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

> 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.

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

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

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/

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.

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/

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).

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/

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.

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 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

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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).

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 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.

Positions of the Parties

The Petition for Review

In its petition for review, Respondent Village asserts that the Examiner's application of the facts in the record was clearly erroneous in two separate areas. First, the Village contends the Examiner erred by concluding that the Village had not established a business necessity defense based upon its contract for services with RUST E & I. Second, the Village asserts that the Examiner erroneously found that the transfer of employes from the Village to RUST E & I constituted a "displacement" within the meaning of the parties' subcontracting language.

As to the business necessity defense, Respondent Village argues that the Commission has recognized this defense when a unilateral change occurs during the hiatus between the expiration of one contract and the creation of a successor. The Village asserts the Examiner failed to acknowledge that part of the savings generated by the subcontract was produced by a vacant bargaining unit position. The Village further argues that the Examiner failed to adequately consider the timing of the one unit and two supervisory vacancies in relation to the collective bargaining process and the ultimate contract for services with RUST E & I. In this regard, the Village argues that the vacancies which in turn prompted a consideration of subcontracting did not occur until the parties were in the middle of submitting final offers and stipulated items to the Commission for interest arbitration.

As to the issue of whether employes were "displaced", the Village argues that no displacement occurred because the Village employes became the employes of RUST E & I and thereafter reported to work in the same location, performed the same work, and received substantially similar wages and benefits. Thus, the Respondent Village argues that it did not violate the status quo in existence during the contract hiatus as to subcontracting.

The Village further argues that the Examiner's decision raises substantial questions of law and administrative policy. To the extent the Examiner concluded that Respondent needed the Complainant Union's consent for any change in the collective bargaining agreement which would allow subcontracting, the Respondent Village asserts that the Examiner's conclusion is contrary to the intent of the Municipal Employment Relations Act to encourage collective bargaining. Respondent contends that such a view of the law ties the hands of a municipality which might wish to negotiate to alter the terms of an expired collective bargaining agreement. If the Commission's decision in St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93) stands for the proposition that a municipal employer cannot respond to changing circumstances during a contract hiatus, the Village contends that St. Croix was erroneously decided and asks the Commission to reverse same in the context of this case. The Village argues that its understanding of St. Croix would prohibit it from being able to alter contract language concerning subcontracting until it bargained a successor to a 1993-1994 contract. Respondent Village asserts that such result is contrary to a governmental policy favoring collective bargaining.

Respondent Village further argues that if St. Croix is the law, employers will need to unnecessarily anticipate future needs and be obligated to make proposals which are extraneous or unnecessary. Such a view of the law imposes undue hardship on employers and destroys the flexibility necessary for efficient and economical operation of the municipal enterprise. The Village contends that according to the decision of the Examiner and the prior decisions of the Commission, Respondent Village was "locked into the expired agreement" during the entire contract hiatus. Respondent Village argues that not only do such holdings make it impossible to respond to changing circumstances, they also do not encourage a union to enter into meaningful bargaining. Under the Examiner's decision, Complainant Union could rely on the status quo and was not required to even consider how it might be possible to bargain the savings necessary to deter Respondent from entering into the subcontract.

Respondent Village further argues that it is in effect being punished for having bargained over the issue of subcontracting. It contends that if the contract had been silent on the issue of subcontracting, Complainant Union would have been obligated to bargain over the issue during the contract hiatus or run the risk of having waived its right to so bargain. Respondent Village asserts that there is no legitimate legal reason for treating parties who have chosen to negotiate and include an item in their collective bargaining agreement in a manner which is different than those who have chosen to allow their agreement to remain silent in a specific area. Respondent Village contends that the collective bargaining process should treat all parties in a similar manner whether or not the existing contract addresses an issue. If such a fair approach had been present here, the Village asserts its offer on the subcontracting issue would have been timely and appropriate and the Union's refusal to bargain would have constituted a waiver of the right to bargain.

Given all the foregoing, the Village asks the Commission to reverse the Examiner's Conclusion of Law that it committed violations of Secs. 111.70(3)(a)4 and 1, Stats.

Respondent's Brief in Support of Petition for Review

Supplementing its petition for review, Respondent asserts that the Examiner erroneously concluded that the savings achieved through subcontracting could have been generated had Respondent Village simply failed to fill two supervisory non-bargaining unit vacant positions. Respondent Village contends that the Examiner's Finding overlooks the operational efficiencies which the contract with RUST E & I produced.

Respondent further contends that it was prejudiced by the failure of the Commission to publish and disseminate the St. Croix decision in a timely manner. Because it should have been but was not aware of the St. Croix decision when it embarked on the course of conduct herein, Respondent Village asserts that the Commission should be estopped from utilizing that decision as the basis for any decision adverse to the Village.

Complainant Union's Responsive Brief

Complainant Union asserts that the Examiner erred by concluding that Respondent Village's refusal to arbitrate a grievance regarding the subcontracting did not violate Sec. 111.70(3)(a)5, Stats. Citing Nolde Brothers, Inc. v. Bakery and Confectionery Worker's Local 358, 430 U.S. 243 (1977), the Union contends that the subcontracting grievance is arbitrable because it arose out of the terms of the expired agreement. Complainant Union acknowledges that the Commission has not adopted Nolde but contends there is no reason why the Commission should not in this case utilize the Nolde rationale.

In addition, Complainant Union argues that because neither party gave any notice to the other that it did not intend the grievance arbitration provision to continue in full force in effect after December 31, 1992, the duration clause of the parties' 1990-92 contract provides that grievance arbitration provisions continued to be enforceable during the contract hiatus. Further, the Complainant Union cites the interest arbitrator's Award which provides that the grievance arbitration provision shall be effective as of January 1, 1993. Lastly, Complainant Union cites the parties' stipulation in interest arbitration that all items not in dispute will be incorporated into the new agreement. Complainant Union argues that this stipulation constitutes an independent collectively bargained agreement which creates a contractual obligation to honor all such matters covered by the stipulation, including grievance arbitration. In the alternative, Complainant Union argues that such a stipulation, when viewed in conjunction with the parties' duration clause, is persuasive evidence of the parties' intent that there should be no lapse in the application of the grievance arbitration provisions.

Complainant Union asserts that the Examiner correctly concluded that Respondent Village's subcontract violated the Village's obligation to maintain the status quo during a contract hiatus and thus Secs. 111.70(3)(a)4 and 1, Stats. Complainant contends that the Examiner properly rejected the Village's "business necessity" argument as a justification for the unilateral change. Complainant asserts that the opportunity to save money, standing along, cannot justify an employer's failure to bargain. Were it otherwise, Complainant Union asserts there would almost never be an obligation to bargain regarding wages, hours, and other conditions of employment. Complainant Union further asserts that while the opportunity to save the cost for replacing two supervisors might have justified contracting out their supervisory responsibilities, said cost savings do not in any rational way support the contracting out of the bargaining unit work in question. Complainant Union urges the Commission to reject the Village's claim that the savings from subcontracting were generated in part from operational efficiencies and that the contract with RUST E & I is an "integrated document" from which savings cannot be neatly identified. Complainant Union points out that it was the Village that negotiated the contract with RUST E & I and there is no evidence that the Village could not have negotiated terms which would have resulted in supervisory cost savings without destroying the bargaining unit.

Complainant Union also urges the Commission to affirm the Examiner's rejection of the Village's waiver argument. Complainant contends that both the status quo and the parties' stipulation for interest arbitration required that the Village maintain and honor the subcontracting prohibition contained in the 1990-1992 contract. The Complainant Union argues that the subcontract with RUST E & I represented a bungled attempt to modify the Village's final offer and also constituted an independent breach of the continuing 1990-1992 collective bargaining agreement. Complainant Union reminds the Commission that the Respondent Village's argument justifying of its unilateral implementation of a subcontract boils down to an assertion that an employer can stipulate to continuation of existing contract language; submit a final offer to an interest arbitrator that proposes no change in the language, and then, after the disputed items have been submitted to the arbitrator for resolution, demand to reopen bargaining regarding an item that is not in dispute; and if the union fails to agree to the employer's bargaining demand, the employer is free to unilaterally implement its new proposal. Complainant Union contends that a recitation of the Village's legal position in this case is "its own refutation."

Complainant contends that the time for the Village to have proposed a change in the existing subcontracting provision was before it submitted its final offer to interest arbitration, not seven months later after the parties' positions were before the interest arbitrator. Complainant asserts that it was not obligated to reopen the bargaining process regarding a subject as to which the parties had already agreed in their stipulation. Thus, Complainant Union argues that it did not waive any right to bargain herein. Having stipulated to the previously bargained and agreed upon subcontracting provision, Complainant Union argues the Village's unilateral implementation of a subcontract was in reckless disregard of its obligation to bargain.

As to the Village's argument that the Commission's failure to publish St. Croix estopped the Commission from relying thereon herein, the Union asserts that the Commission should reject this novel argument because ignorance of the law never has been an excuse for unlawful conduct.

Complainant Union also urges the Commission to affirm the Examiner's conclusion that the Village's subcontract "displaced" Village employes. Complainant contends that the use of the word "displace" in the subcontracting provision was clearly intended to refer to the termination of the employment of bargaining unit employes. Complainant asserts that it is not material whether the same individuals were hired by the private contractor to do the same work. The critical question is whether Village bargaining unit employes were displaced, and were replaced by individuals who were not Village employes. Clearly that was the case here.

Given all the foregoing, the Complainant Union urges the Commission to modify the Examiner's decision to find that the Village committed a violation of Sec. 111.70(3)(a)5, Stats., by failing to arbitrate the subcontracting grievance and to affirm the Examiner's decision that the Village's conduct violated Secs. 111.70(3)(a)4 and 1, Stats.

Respondent Village's Reply Brief

As to the Complainant Union's claim that the Examiner improperly concluded Respondent had not violated Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the subcontracting grievance, Respondent Village contends that because Complainant Union never filed a petition for review, the Commission lacks jurisdiction to review the Examiner's Findings and Conclusions as to that alleged statutory violation. Should the Commission conclude otherwise, Respondent Village asserts that the Examiner correctly analyzed this issue.

Citing Greenfield Schools, Dec. No. 14026-A (WERC, 10/76), Respondent Village argues the Examiner correctly concluded that the expiration of a collective bargaining agreement generally extinguishes the obligation to arbitrate. Respondent notes that in Racine Unified School District, Dec. No. 24272-A (WERC, 10/87) the Commission held that it would not necessarily follow Nolde Brothers. Further, even if Nolde were applicable herein, Respondent Village asserts that the facts do not establish that arbitration survived the expiration of the contract. The Respondent Village urges the Commission to reject Complainant's argument that the duration clause of the expired agreement establishes a basis for concluding that arbitration continues. Respondent argues there is no support for the Complainant's view that there is any obligation under that duration clause to specifically identify the provisions which a party will seek to modify during contract negotiations, nor for the proposition that if a party fails to specifically identify a provision, that said provision continues on in full force and effect. Equally unpersuasive in the Village's view is Complainant's argument that the stipulation before the interest arbitrator somehow establishes an independent collective bargaining agreement. Respondent Village contends the Examiner correctly rejected this argument. Given all of the foregoing, Respondent Village asserts that it did not violate Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the subcontracting grievance.

As to the refusal to bargain allegation, Respondent Village notes that the status quo is a dynamic concept which can allow a change. Respondent Village asserts that it should be able to seek to bargain changes in the status quo itself and contends that the execution of a stipulation for the purposes of interest arbitration should not deprive it of this right. Here, Respondent Village asserts that it exercised that right and that the Union's failure to respond constituted a waiver. In any event, Respondent Village argues that it did not "displace" employes and thus acted in a manner consistent with the status quo. It notes that RUST's contract with the Village obligates RUST to recognize the Complainant Union as the bargaining representative for the transferred employes and that the bargaining unit thus continues to exist.

Given all of the foregoing, the Respondent Village asks the Commission to dismiss the Complainant Union's complaint in its entirety.

DISCUSSION

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 2/ In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 3/

Here, the parties disagree about what the Respondent Village's status quo rights as to subcontracting were when the Village subcontracted certain work to RUST during the contract hiatus between the expiration of the 1990-1992 contract and interest arbitration Award which established the terms of the 1993-1994 contract. The Village claims that the subcontract did not "displace" any full-time unit employes and thus that it acted within its status quo rights. The Complainant Union asserts that the subcontract did "displace" full-time unit employes and thus that the Village exceeded its rights under the status quo.

When determining what the status quo is in the context of a contract hiatus, we consider relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. 4/

The expired agreement states that the Village has the right:

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

The instant dispute is the first "application" of this language.

2/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12; Green County, Dec. No. 20308-B (WERC, 11/84) at 18-19; and School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85) at 14.

3/ School District of Wisconsin Rapids, supra, at 14.

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

Evidence of bargaining history establishes that during negotiations over the 1990-1992 contract (which was the first bargaining agreement between these parties), the Respondent Village proposed that it have the right "To contract or subcontract out all work." The Complainant Union advised the Village that this proposal was unacceptable because "... we didn't want the bargaining unit work contracted out. We wanted them to be Village employees" and "We talked about a lot of those folks having seniority and were members of the bargaining unit and they had long seniority, and they wanted to continue to be Village employees. They wanted security in their jobs." The Village then modified its initial position by proposing what became the subcontracting language in the 1990-1992 agreement.

The Village argues that the full-time employes were not "displaced" because the employes in question became RUST employes performing the same work in the same location for substantially similar wages and benefits. The Union cites the dictionary definitions of "displace" and contends that to "displace" an employe is simply to end the individual's employment as a Village employe without regard to whether the employe is subsequently employed by a subcontractor. The Union asks: "If those employees were not displaced, why are there now five fewer Village of Saukville bargaining unit employees than was the case before the work in question was bargained out?"

Viewing the language of the expired agreement in the context of the bargaining history, we find the Union's position as to the status quo more persuasive. The word "displace" can reasonably be interpreted as either the Union or the Village suggest. However, in our view, the potential for ambiguity is resolved in the Union's favor by the undisputed bargaining history of the Union seeking to preserve employes' Village employment and by the canon of contractual interpretation which suggests that ambiguity should be resolved against the party drafting the language. 5/

We also think it important to note that if the Respondent Village's view of the status quo were correct, the Village would not have had any obligation to bargain further with the Complainant Union because they would have already acquired the right to subcontract in the circumstances present here. The fact that the Village offered to bargain suggests that the Village itself had some significant doubts about the meaning of the existing subcontracting language.

Having concluded that the status quo as to subcontracting did not allow the Village to enter into the subcontract with RUST, we turn to the Village's argument that the Union was not entitled to rely on the protection of the status quo during the contract hiatus and was obligated to bargain with the Village over the subcontracting.

5/ How Arbitration Works, Elkouri and Elkouri, Fourth Edition, 1989, pages 362-363.

First, it is important to acknowledge that in the context of their bargaining over their 1993-1994 contract, the Village had the right to compel the Union to bargain about any mandatory subject of bargaining, including subcontracting. In that context, the Village had the right to seek modifications of the 1990-1992 contract's subcontracting language. The record establishes that during bargaining over the 1993-1994 contract, the Village did not seek to change the existing subcontracting language and indeed entered into an interest arbitration stipulation with the Union that the 1993-1994 contract would contain the same subcontracting language as was included in the 1990-1992 agreement.

Here, the Village argues that in addition to the right it had (but failed to exercise) to seek change in its subcontracting rights when bargaining a 1993-1994 contract, it also had the right to compel the Union to bargain over subcontracting during the hiatus between the expiration of the 1990-1992 contract and receipt of the 1993-1994 contract interest arbitration Award. The Village does not cite any case from any jurisdiction in support of this "second bite at the apple" theory. We think this is because there are no cases which support such a radical departure from the fundamental duty to bargain principle that an employer must maintain the status quo during a contract hiatus.

Instead, as evidenced by our holding in St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93), aff'd 180 Wis. 2d 671 (1994), we think it well understood that the status quo doctrine generally 6/ entitles the parties to retain those rights and privileges in existence when the old contract expired which are primarily related to wages, hours and conditions of employment **while** they bargain over what rights they will have under the next contract. Rather than establishing some new principle of labor law (as the Village argues), St. Croix is no more than the application of well-established principles 7/ to a fact situation somewhat similar to that herein. As we pointed out in St. Croix and reaffirm here, the employer **is** entitled to force the union to bargain over new provisions in a successor agreement which retroactively change the employer's rights and obligations as to mandatory subjects of bargaining. But **during** any such employer effort, the union **is not** obligated to bargain over loss of existing status quo protections during the contract hiatus. There is only one bite at the apple.

6/ "Necessity" is a valid defense to the otherwise per se duty to bargain violation created by a modification of the status quo during a contract hiatus. City of Brookfield, Dec. No. 19822-

C (WERC, 11/84) at 8. We discuss that Village defense later in this decision.

7/ See footnotes 2-3 herein.

The Village complains that such a result is unfair because it deprives the Village of the savings which the subcontract produced. The Village further argues that because of the timing of events, the opportunity for such savings did not present themselves until well into the parties' contract hiatus. The Village additionally complains that our result places it in a worse position than would have been present if it had not bargained the subcontract language in the initial agreement with the Union.

In our view, the Village's complaints are again totally at odds with fundamental principles of collective bargaining. When parties bargain a contract, they agree that for the duration of that contract their rights and privileges are established by the terms of that agreement. Thus, it is well settled that during the term of a contract, neither party has the obligation to bargain with the other over matters addressed by that contract. 8/ Inevitably, opportunities or circumstances may arise during the term of a contract which can cause either party to regret the terms of the agreement into which they have entered. However, that regret does not provide a valid basis for compelling the other party to reopen the terms of a contract. Instead, it is commonly understood by all parties that when bargaining a contract, they must try to anticipate potential opportunities and changed circumstances which arise during the term of their contract and then to seek contract provisions which may allow them to take advantage of these opportunities or changed circumstances.

Here, the Respondent Village in effect complains that it bargained a 1990-1992 contract which was more restrictive as to subcontracting than it wishes were the case. On the other hand, the Complainant Union had the foresight to bargain protections as to subcontracting which have proven valuable to its interests. The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the expired contract while the parties bargain a successor agreement. If the Village had bargained a subcontracting provision which allowed it to enter into the subcontract with RUST, it would have been able to take advantage of that right during the contract hiatus. The dynamic status quo allows parties to exercise rights which they have acquired through the collective bargaining process. 9/ However, where no such rights have been acquired, the status quo protects the existing allocation of subcontracting rights and opportunities until the parties reach a new agreement as to such an issue. Thus, rather than being unfair and at odds with collective bargaining, our result recognizes the fundamental fairness of giving both parties an opportunity to bargain a contract which allocates rights and privileges and then requiring them to live by that allocation until a subsequent contract is reached. Put another way, the duty to bargain presents parties with opportunities to establish the terms of their relationship and then provides them with a period of stability during which they live with the bargain they have struck.

8/ Cadott Education Ass'n. v. WERC, 197 Wis. 2d 46 (1995).

9/ Mayville School District, Dec. No. 25144-D (WERC, 5/92) aff'd 189 Wis. 2d 406 (1994).

The Village has also argued that even if the status quo does not give it the right to subcontract with RUST, the doctrine of "business necessity" justified the departure from the subcontracting status quo. The Commission has acknowledged the existence of a necessity defense under the Municipal Employment Relations Act. 10/ Thus, in City of Brookfield, Dec. No. 19822-C (WERC, 11/84), we stated:

> ...Instead, we interpret MERA to mean that where, as here, there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. 6/

6/ As noted in the text following Note 10, infra, a possible exception to this general rule might be made in an extreme case of unlawful abusive delay of the statutory dispute resolution process. For a discussion of the waiver defense see, e.g., City of Brookfield, Dec. No. 11406-A, -B, (WERC, 9/73) aff'd, (CirCt Waukesha, 6/74) (sic) The Examiner aptly discussed the necessity defense at Note 28 of her decision. The possible availability of such a defense under MERA was noted in Racine Schools, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 56. In the private sector, see, e.g., Standard Candy Co., 147 NLRB 1070 (1964) (change justified as good faith response to need to conform with minimum wage provisions of the Fair Labor Standards Act); and AAA Motor Lines, 215 NLRB 793, 88 LRRM 1253 (1974) (change justified by union's dilatory and unlawful bargaining tactics combined with need to change in order to avoid employe losses of certain fringe benefits after contract expiration).

10/ In Wausau Theaters Company, Dec. No. 16488-C (WERC, 8/79), the Commission acknowledged the possible availability of a necessity defense under the Wisconsin Employment Peace Act.

Footnote 28 in the City of Brookfield Examiner decision stated:

> 28/ In Board of School Directors of Milwaukee Dec. No. 15829-D,E (1980), it was noted that some form of a proposed student evaluation program had to be implemented because of the imminent beginning of the school session. Similarly, some proposal covering school calendar has to be implemented if a school session is commencing prior to agreement on a successor contract.

In Racine Unified School District, Dec. No. 23904-B (WERC, 9/87), the Commission ruled that the necessity defense did not allow an employer to implement a wage increase to avoid a delay in receiving state aids.

The record here falls far short of establishing a persuasive necessity defense. The Village was simply seeking to save money by having certain services provided by a subcontractor rather than by Village employes. The Examiner questioned whether the Village's savings could even be attributed to the subcontracting of the unit jobs, citing evidence that the subcontractor would maintain existing wages and fringe benefits for the subcontracted workers. However, even assuming the Village's view of the savings is correct, the opportunity to obtain some operational savings cannot be equated with "necessity." Therefore, we reject the Village's argument in this regard.

Given all of the foregoing, we have affirmed the Examiner's Conclusion of Law that the Village violated Secs. 111.70(3)(a)4 and 1, Stats., when it entered into a subcontract with RUST. We further affirm his remedial Order which directs the Village to immediately reinstate those bargaining unit employes who became employes of RUST on or about February 18, 1994 and to make said employes whole.

As noted earlier herein, the Examiner dismissed the Union's allegation that the Village's refusal to arbitrate a subcontracting grievance during a contract hiatus violated Sec. 111.70(3)(a)5, Stats. The Village correctly points out that the Union did not file a petition for review as to that issue. However, pursuant to the provisions of Sec. 111.07(5), Stats., once any party files a petition for review, the entire Examiner decision is before us for affirmance, modification or reversal. Green County, Dec. No. 26798-B (WERC, 7/92). We thus proceed to consider the Examiner's

disposition of the refusal to arbitrate issue.

In our view, the Examiner persuasively and appropriately rejected Union arguments that the duration clause of the 1990-1992 agreement and/or the stipulation before the interest arbitrator created an obligation to arbitrate a subcontracting grievance. Thus, as to these Union theories, we have no further comment.

However, the Union also argued to the Examiner that the subcontracting grievance was subject to arbitration under a Nolde theory. Some additional comment is warranted as to the potential applicability of Nolde herein. To date, the Commission has not found it necessary to determine whether the Nolde-type presumption of continuing arbitrability of grievances should be adopted under the Municipal Employment Relations Act. We need not decide that matter herein either. Section 111.70(3)(a)4, Stats., requires that "The term of any collective bargaining agreement shall not exceed 3 years." As we held in Racine Unified School District, Dec. No. 24272-B (WERC, 3/88), to find that a three-year contract required arbitration of grievances concerning events occurring after its expiration would, in effect, extend the agreement beyond the statutory three-year limitation. Here, the Union's Nolde theory would similarly require that we find the parties' three-year 1990-1992 agreement could extend beyond the statutory limitation established by Sec. 111.70(3)(a)4, Stats. Thus, as we held in Racine, the three-year limitation on the term of an agreement established by Sec. 111.70(3)(a)4, Stats., precludes a determination that post-expiration events remain arbitrable under the terms of an expired three-year agreement.

Given the foregoing, we affirm the Examiner's dismissal of the Union's refusal to arbitrate allegation.

Dated at Madison, Wisconsin, this 22nd day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

A. Henry Hempe /s/
A. Henry Hempe, Commissioner