STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF KENOSHA

Involving Certain Employees of

CITY OF KENOSHA

Case 9
No. 60698
ME(u/c)-1038

Decision No. 7529-E

In the Matter of the Petition of

CITY OF KENOSHA

Involving Certain Employees of

CITY OF KENOSHA

Case 15
No. 60699
ME(u/c)-1039

Decision No. 8659-B

In the Matter of the Petition of

TEAMSTERS LOCAL UNION NO. 43

Involving Certain Employees of

CITY OF KENOSHA

Case 198
No. 60568
ME-3849

Decision No. 30262-A

Dec. No. 7529-E
Dec. No. 8659-B
Dec. No. 30262-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan M. Conti**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of Teamsters Local Union No. 43.

Davis & Kuelthau, S.C., by **Attorney Joel S. Aziere** and **Attorney Daniel G. Vliet**, 111 East Kilbourn, Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the City of Kenosha.

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of Local 71, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DIRECTION OF ELECTION AND ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

On November 14, 2001, Teamsters Local Union No. 43 filed with the Wisconsin Employment Relations Commission a petition seeking to represent all long-term seasonal employees of the Waste Collection Department, Water Department, Street Department and Parks Department in the City of Kenosha. On December 20, 2001, the City of Kenosha filed a petition to clarify a bargaining unit by including the same long-term seasonal employees in the bargaining unit represented by Local 71, AFSCME, AFL-CIO. On February 4, 2002, the Commission ordered the petitions consolidated for hearing and decision.

Examiner Karen J. Mawhinney, a member of the Commission's staff, held a hearing in Kenosha, Wisconsin, on February 5, 2002. Local 71, AFSCME, AFL-CIO, appeared at the hearing in support of the City's petition for unit clarification. The parties submitted post-hearing briefs and reply briefs, the last of which was received on April 22, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Kenosha, herein the City, is a municipal employer with its offices at 625 – 52nd Street, Kenosha, WI 53140.

2. Teamsters Local Union No. 43, herein Teamsters, is a labor organization with its offices at 1624 Yout Street, Racine, WI 53404-2160.

3. Local 71, AFSCME, AFL-CIO, herein AFSCME, is a labor organization with its offices at P.O. Box 624, Racine, WI 53401-0624.

4. There are currently six bargaining units of City employees – a police unit of 140 employees, a firefighter unit of 125 employees, a transportation unit of 45 employees, a crossing guard unit of 45 employees, a building inspector unit of 11 employees, and the AFSCME unit of 221 employees in 18 departments into which AFSCME and the City ask the long-term seasonal employees be placed. In addition to the 65 long-term seasonal employees at issue in this dispute, there are 120 unrepresented City employees.

5. The City and AFSCME are parties to a 1998-2000 collective bargaining agreement that includes the following recognition clause:

> 1.01 The Employer recognizes and acknowledges that the American Federation of State, County, and Municipal employees, AFL-CIO, Local #71, is the authorized representative for the express purpose of having conferences and negotiations with the Employer on behalf of the employees of the City of Kenosha employed in the Central Service, Waste, and Street Divisions of the Department of Public Works, in the Department of Parks, in the Construction, Filtration, Pumping and Meter Divisions of the Water Department, in the Sewage Treatment plant, and in the Parking Commission, excluding supervisory and confidential employees, craft and professional employees, seasonal and temporary employees, as certified by the Wisconsin Employment Relations Board on August 24, 1966 and October 6, 1968.
>
> 1.02 The Employer recognizes and acknowledges that the American Federation of State, County, and Municipal Employees, AFL-CIO, Local #71, is the authorized representative for the express purpose of having conferences and negotiations with the Employer on behalf of the employees of the City of Kenosha employed in the Department of Finance, Purchasing Department, Department of Development, Police Department, Department of Inspection, Administration and Engineering Divisions of the Department of Public Works, Department of Health, the Office Division of the Water Department, and the Public Museum (excluding part-time Guard and Director of Museum), excluding supervisory and confidential employees, craft and professional employees, seasonal and temporary employees, as certified by the Wisconsin Employment Relations Board on October 24, 1966.

Prior bargaining agreements contained the same recognition clause.

6. For at least the last 18 years, the City has hired long-term seasonal employees to work approximately seven months of each year. They work in the Department of Parks and the Department of Public Works-Divisions of Streets and Waste. They are generally classified as laborers, as well as waste collectors and construction maintenance workers, and they perform the same type of work as full-time employees represented by AFSCME. The job duty descriptions for the seasonal positions originated from job descriptions for full-time employees.

The Waste Division uses long-term seasonal employees to supplement the full-time work force. They perform the same work as full-time employees driving a garbage truck and picking up solid waste. The long-term seasonal employees fill in for full-time employees who are injured or on vacation or gone for any reason. They may be called into work outside of the normal seven-month season to work for absent employees. Both full-time employees and seasonal employees have identical qualifications for the job and are required to have Class B Commercial Drivers' Licenses (CDL's). A seasonal employee may be assigned to work a two-person truck along with a full-time employee, or two seasonal employees could make up a two-person crew.

The seasonal employees work in the same locations and report to the same site as full-time employees where they all punch their time cards. Both groups work the same hours, wear the same clothing, report to the same supervisors and use the same equipment. Both groups may take part in an incentive plan whereby they may leave early if their work is completed.

The Superintendent of the Waste Division, Joe Badura, gives preference to seasonal employees when hiring for full-time postion because the long-term seasonal employees have proven their abilities. The Waste Division maintains procedures and policies for seasonal employees, which are the same policies and procedures that full-time employees follow, although long-term seasonal employees are given a different set of work rules and safety rules in a shorter form than the regular employees receive.

The Parks Department has general classifications of Maintenance Worker I and II, Equipment Operators, Athletic Fields Coordinator and Beach and Pool supervisors. Long-term seasonal employees start in the Parks Department in the first week in April to supplement the work force. They work on the same projects as full-time employees, performing the same duties. They have the same qualifications as full-time employees. Only seasonal employees work at the marina as launch ramp attendants and at the golf course. Seasonal employees also fill in for full-time employees on worker's compensation or sick leave or vacation, but unlike the Waste Division, they are not brought in outside of the seven-month standard work period in the Parks Department.

Seasonal Parks Department employees have the same job sites and supervisors as full-time employees. Both seasonal employees and full-time employees must be qualified to operate all the equipment. Both groups have CDL's to operate equipment. Most of the seasonal employees work the same hours as full-time employees, with some exceptions for a second shift crew and some

seasonals who are on a rotating shift.

Todd Ingrouille, a supervisor at the Parks Department, gives preference to hiring seasonal employees when filling full-time jobs, but most positions in the Parks Department are filled by transfers from the AFSCME bargaining unit. The Parks Department maintains seasonal procedures and policies that also apply to all full-time employees, with the exception of the inclement weather policy. If the weather is so bad that employees cannot work, the Department gives seasonal employees two hours pay and sends them home for the day.

The Streets Division uses long-term seasonals to supplement the regular work force and take up the increased workload during the summer months of construction. There are concrete crews, asphalt crews, storm sewer cleaning crews, and maintenance crews that do most of their work in the summer months. Long-term seasonal employees perform all of those duties, except electrical work and operating heavy equipment. They perform all of the duties of a Construction and Maintenance Worker I or a Construction and Maintenance Worker II. They work side by side with all classifications of full-time employees and fill in for absent employees.

The seasonal employees are required to have CDL's, Class A with the tanker endorsement and no air brake restriction, which is necessary to operate the majority of equipment in the Streets Division.

The long-term seasonal employees in the Streets Division work the same hours in the same locations and job sites, on the same projects, on the same equipment, under the same supervisors as full-time employees represented by AFSCME.

John Prijic is the Superintendent of Streets. When filling full-time positions, he gives preference to seasonal employees if they are on the eligibility list for full-time positions. About half of the full-time Streets Division employees once worked as seasonal employees. The Streets Division gives seasonal employees policies and procedures that also apply to full-time employees.

7. Long-term seasonal employees' wages are less than regular employees. The Common Council establishes the wage rate and fringe benefits for seasonal employees when it establishes the wages and fringe benefits for other unrepresented City employees. The starting hourly wage for a long-term seasonal was $8.01 (at the time of the hearing in this matter), which is $5.00 to $6.00 per hour less than a full-time employee in a comparable position. Seasonal employees are entitled to retirement benefits under the Wisconsin Retirement System after they have worked one calendar year and up to 600 hours and also receive a basic life insurance benefit. Unlike the long-term seasonal employees, full-time AFSCME represented employees receive a wide range of fringe benefits, such as paid holidays and vacations, tuition aid, paid sick leave, and health insurance.

8. Long-term seasonal employees have the opportunity to return to work for the City each year unless they have received an unfavorable review by a supervisor. A large number of

seasonal employees work in the same position year after year, and some of them ultimately become regular full-time employees with the City.

The City trains seasonal employees and allows a reasonable amount of time for them to get CDL's.

When the City has vacancies for full-time AFSCME unit positions, it has the contractual obligation to allow regular full-time AFSCME employees to fill the position by transfer. If the position is not filled by transfer, then seasonal employees as well as other outside applicants may apply for those positions. In a seniority list for the AFSCME unit dated January 9, 2002, there were 63 out of 221 full-time employees who had previously been seasonal employees.

The City also creates a special seasonal laborer program where it nominates nine seasonal employees who have shown a strong work ethic, good attendance and productivity, to be automatically certified to any vacancy in an AFSCME unit laborer's position. Supervisors often hire people on that list for full-time positions. The seasonal employees on that list are given a preference for positions and are exempt from testing given to outside applicants.

All City employees, including long-term seasonal employees, are subject to the same safety and work rules and may be disciplined for violating those rules. Seasonal employees could protest discipline through the City Civil Service Commission while AFSCME unit employees grieve discipline through provisions of the collective bargaining agreement with the City.

9. AFSCME, has not previously sought to represent long-term seasonal employees for the purposes of collective bargaining.

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

CONCLUSIONS OF LAW

1. A collective bargaining unit consisting of all long-term seasonal employees of the City of Kenosha Department of Parks and Department of Public Works excluding supervisors and confidential, managerial and executive employees is an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

2. A question concerning representation within the meaning of Sec. 111.70(4)(d)3., Stats., exists within the bargaining unit described in Conclusion of Law 1.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DIRECTION OF ELECTION AND ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

1. An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within 45 days from the date of this Direction in a collective bargaining unit consisting of all long-term seasonal employees of the City of Kenosha Department of Parks and Department of Public Works excluding supervisors and confidential, managerial and executive employees, who were employed on _____ (date), except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees voting desire to be represented for the purposes of collective bargaining by Teamsters Local Union No. 43 or by Wisconsin Council 40, AFSCME, AFL-CIO or desire to be unrepresented.

2. The City of Kenosha's petition for unit clarification is dismissed.

Given under our hands and seal, in the City of Madison, Wisconsin, this 19th day of June, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I dissent.

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

CITY OF KENOSHA

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, DIRECTION OF ELECTION AND ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

The Teamsters seek to represent long-term seasonal employees in the City of Kenosha in a separate bargaining unit. The City and AFSCME do not dispute that these employees are entitled to representation but believe that these employees should be accreted into the unit represented by AFSCME if the employees so vote. Both AFSCME and the City argue that a separate unit of the long-term seasonal employees is not appropriate.

THE POSITIONS OF THE PARTIES

Teamsters

While acknowledging that there is some community of interest between the full-time employees and the long-term seasonals, the Teamsters argue that the unit comprised solely of long-term seasonal employees is appropriate based upon the difference in wages, benefits, hours and working conditions, as well as the absence of undue fragmentation and most significantly, the parties' bargaining history. The Municipal Employment Relations Act (MERA) does not require the establishment of the most appropriate unit - all that is required is "an" appropriate unit. A unit of long-term seasonal employees is "an" appropriate unit.

The difference in wages is significant. Seasonal employees do not have fringe benefits, such as holiday pay, vacation pay, tuition aid, sick leave or health insurance. A big difference in working conditions is the fact that the seasonals only work seven months a year. They are subject to yearly evaluations, unlike full-time employees, and there is no guarantee of return employment.

The Teamsters assert that the City's claim that seasonals are given preference for full-time AFSCME unit jobs is exaggerated. The City must post the vacancy to be bid on by other full-time employees, and if no AFSCME bargaining unit employees want the job, the job is then publicly posted to be bid on by outside applicants as well as seasonal employees. The Parks Department has no full-time employees who were once seasonals. While supervisors claim to give a seasonal employee preference in hiring based on knowledge of the employee's work and ability, Teamsters argue such knowledge might also prevent the seasonal employees from being awarded the full-time job.

The AFSCME unit was certified in 1966 and specifically excluded seasonal employees. Since that time, the City and AFSCME have negotiated a recognition clause which continues to

exclude seasonal employees. AFSCME has never filed a unit clarification or representation petition, and it has not bargained to include seasonals in its unit. It was only when the Teamsters petitioned for a separate unit of long-term seasonals that AFSCME showed any interest. The seasonal employees who approached AFSCME were not contacted further.

Based on the City and AFSCME's historical exclusion of seasonals from the bargaining unit, as well as AFSCME's lack of interest in representing them, a separate unit is appropriate. To deny these employees the opportunity to select the representative of their choosing would deny them their basic rights under MERA. As the Commission stated in ADAMS COUNTY, DEC. NO. 27094 (WERC, 11/91), restricting the right of employees to select or reject union representation of their own choosing is a basis to reject the accretion of employees to existing units. An accretion election would restrict the long-term seasonal employees' choice of representation by eliminating Teamsters as an option. Thus, the only viable solution is to hold an election whereby the long-term seasonal employees are given the opportunity to select Teamsters or AFSCME as their collective bargaining representative.

The Teamsters argue that a separate unit of long-term seasonal employees would not result in undue fragmentation. Fragmentation is only one of the factors to be considered, and it is not a sufficient reason to find a unit of long-term seasonal employees to be inappropriate.

AFSCME

AFSCME states that is has a long history of representing a wall-to-wall bargaining unit of City employees in some 18 different departments, totaling over 221 employees in more than 100 different job classifications. The long-term seasonal employees work alongside regular full-time employees represented by AFSCME. They have the same hours as full-time employees, share a common job description, use the same equipment, have common supervision and are governed by common work rules. In the event full-time employees are absent, long-term seasonal employees fill in for them. The City has hired many former long-term seasonal employees as full-time employees. Given the foregoing, AFSCME argues the long-term seasonal employees should not be placed in a separate bargaining unit, as they share a community of interest with regular full-time employees. Further, in keeping with the anti-fragmentation policy of MERA, a separate bargaining unit is inappropriate.

AFSCME asks for an accretion election among long-term seasonal employees in order to determine whether they wish to be represented by AFSCME, in accordance with WAUKESHA COUNTY TECHNICAL COLLEGE, DEC. NOS. 11076-C AND 29564 (WERC, 2/99). If the Commission rejects the argument for an accretion election and honors the request of the Teamsters for a separate bargaining unit of long-term seasonal employees, AFSCME requests to be placed on the ballot to determine representation in a separate bargaining unit.

The City

The City asserts that the long-term seasonals share a community of interest with full-time employees represented by AFSCME. The seasonals are primarily laborers and waste collectors. They perform the same type of work and hold the same classification titles as regular employees in the Parks Department and the Waste and Streets Divisions. They are required to have the same certifications and qualifications and skills. They perform the same duties, work in the same locations, work on the same projects, work the same hours, use the same facilities, report to the same supervisors, follow the same rules and regulations and are subject to the same disciplinary procedures as full-time employees.

The City maintains sets of safety rules and work rules. All employees – both seasonal and regular – are required to read them and are equally disciplined for violating them. Each Division maintains its own policies and procedures, covering issues such as breaks, tardiness, accidents, etc. The policies and procedures are in either employee handbooks or seasonal handouts, which are shorter versions of the handbooks. The policies and procedures apply to all employees.

The City states that the intrinsic relationship between the seasonals and full-time employees is illustrated by fact that the seasonals form a significant applicant pool from which many regular employees are hired. Because they work in the same positions occupied by full-time employees, they have already received the training necessary to fill the full-time positions. There are 63 former seasonal employees among the 221 AFSCME bargaining unit members, almost 30 percent of the unit. Seasonal employees are given preferential treatment in hiring through the "seasonal laborer program." Additionally, each Division head gives preference to seasonals who apply for regular jobs.

The City points out the duty descriptions in the seasonal job postings originate from job postings for regular full-time employees. The seasonals fill in when regular employees are absent, even outside of the seven-month period for seasonals. Consequently, the seasonals belong in the same unit as their regular employee brethren. In the Waste Division, seasonals work the same routes with no restrictions. They must hold a Class B CDL just like regular employees. They operate the same equipment. The same thing holds true for the Parks Department and Streets Division, where long-term seasonal employees work the same duties and assignments as full-time employees and hold the same certifications and CDL's. The City believes that it would be unreasonable and unworkable to create separate bargaining units with employees performing the same duties.

The City further notes that the seasonal employees work the same hours as full-time employees, receive the same break periods, and use the same time clocks. While they are paid less than full-time employees, that distinction alone is not determinative of the appropriate unit to which they belong. The seasonal employees also have the same supervisors as full-time employees

and work in the same location or use the same facilities as full-time employees.

The City argues that allowing seasonal long-term employees to organize into a separate unit would result in undue fragmentation of bargaining units by placing similar jobs in different units. In this case, the seasonals do not perform similar jobs – they perform the same jobs as regular employees. This case is similar to MANITOWOC COUNTY (SHERIFF'S DEPT.), DEC. NO. 25851-A (WERC, 3/91), where reserve deputies supplemented the regular workforce and were accreted into the existing unit. The same situation is presented in the instant case. The Teamsters have offered no justification for the departure from the anti-fragmentation mandate. The City does not challenge the seasonals right to representation. The issue is to which unit they rightly belong.

In Reply – Teamsters

The Teamsters respond to the briefs filed by the City and AFSCME by pointing out that the Commission's role is to determine whether the unit sought is "an" appropriate unit, not the most appropriate unit. There are significant differences in wages, benefits and hours of long-term seasonals compared to full-time employees. They receive considerably lesser wages and benefits and work fewer hours and are subject to yearly evaluations in order to maintain their jobs for the following season. There is no guarantee that seasonal employees will get full-time positions as vacancies arise – they must compete with outside applicants for jobs after AFSCME members have the first chance to post for jobs. Thus, there is not such a strong community of interest between long-term seasonals and full-time employees as to make a separate unit of seasonal employees inappropriate.

The Teamsters believe that the City misconstrues its position and ignores case law recognizing bargaining history as an important factor in determining whether a petitioned-for unit is an appropriate one. The City and AFSMCE have specifically excluded seasonal employees from the bargaining unit since 1966. The City and AFSCME only sought to accrete seasonals into the existing bargaining unit after the Teamsters filed the representation petition, after AFSCME had rejected the seasonals' requests for represention, and after excluding them for the previous 36 years.

Under the City's position, long-term seasonal employees would only have the option of selecting a bargaining representative that has historically refused to represent them and consistently excluded them from the unit, or no union at all. This substantially restricts the seasonals' choice as to representation.

The Teamsters also object to accreting seasonals into an existing unit during the term of the collective bargaining agreement which was executed by a union in which the seasonals played no part in selecting. There is a legitimate concern as to whether they can receive full and fair representation in a unit made up of 220 full-time employees as opposed to 65 seasonal employees.

AFSCME's President admitted that he had reservations about seasonal employees having the same voice as the full-time employees for bargaining purposes.

Thus, only an election with Teamsters on the ballot would provide the seasonal employees the full choice of representatives to which they are entitled.

In Reply – The City

The City takes issue with the Teamsters' reliance on the ADAMS COUNTY case cited in its brief. The WERC found that the community of interest for solid waste employees was distinct from that of other blue collar employees, the duties and skills were different between solid waste and highway employees, and solid waste employees had separate supervision and a separate work site. Because the solid waste employees shared no common interests with highway department employees, the WERC concluded that accretion into the highway unit without an alternate choice of representative was inappropriate. The facts in ADAMS COUNTY are completely distinct from and in opposition to those contained in the instant case.

Further, the City objects to the Teamsters' reliance on CITY OF CLINTONVILLE, DEC. NO. 19858 (WERC, 8/82), where the Teamsters look only to the holding and remain blind toward the facts that led to that decision. The utility employees in that case had interests distinct from other city employees, with different duties and skills, separate supervisors and work site, and they already comprised an appropriate unit for collective bargaining and had elected a representative. In this case, the long-term seasonals have not yet organized nor elected a representative for collective bargaining.

The City disputes the Teamsters' claim that there are significant differences in wages, hours, and working conditions which justify a separate bargaining unit. The hours and working conditions of seasonal employees and full-time employees are identical. The fact that the seasonal employees are paid at a different wage rate is not determinative of the appropriate unit to which they belong. While the Teamsters try to downplay the role seasonals play in the hiring process, about 30 percent of regular full-time employees in the AFSCME unit came from the seasonal group.

DISCUSSION

Section 111.70(4)(d)2.a., Stats. provides in pertinent part:

> The commission shall determine the appropriate bargaining unit for the purposes of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may

decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groups constitute a collective bargaining unit.

When making the determination of whether a unit is "appropriate," we measure the facts presented by the parties against the statutory language of Sec. 111.70(4)(d)2.a., Stats. We use the following factors as interpretive guides to the statute:

1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.

2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.

3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to wages, hours and working conditions of other employees.

4. Whether the employees in the unit sought share separate or common supervision with all other employees.

5. Whether the employees in the unit sought have a common workplace with the employees in said desired unit or whether they share a workplace with other employees.

6. Whether the unit sought will result in undue fragmentation of bargaining units.

7. Bargaining history. ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS. 2D 580 (1984).

We have used the phrase "community of interest" as it appears in Factor 1 above as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase "community of interest" as a means of determining whether employees share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. This definitional duality is long standing and has received the approval of the Wisconsin Supreme Court. ARROWHEAD UNITED TEACHERS V. WERC, SUPRA.

Factor 6 reflects our statutory obligation under Sec. 111.70(d)(d)2.a., Stats., to "avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force."

Factor 7 involves an analysis of the way in which the workforce has bargained with the employer, or if the employees have been unrepresented, an analysis of the development and

operation of the employee/employer relationship. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91)

Based upon long-standing Commission precedent, it is well established that within the unique factual context of each case, not all criteria deserve the same weight 1/ and thus a single criterion or a combination of criteria listed above may be determinative. 2/ Consequently, the Commission gives effect to the aforesaid statutory provision by employing a case-by-case analysis 3/ "to avoid the creation of more bargaining units than is necessary to properly reflect the employees' community of interest." 4/

1/ SHAWANO-GRESHAM SCHOOL DISTRICT, DEC. NO. 21265 (WERC, 12/83); GREEN COUNTY, DEC. NO. 21453 (WERC, 2/84); MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90).

2/ Common purpose, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC 11/83); similar interests, MARINETTE SCHOOL DISTRICT, SUPRA; fragmentation, COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79); bargaining history, LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78).

3/ APPLETON AREA SCHOOL DISTRICT, DEC. NO. 18203 (WERC, 11/80).

4/ AREA BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT NO. 1, DEC. NO. 11901 (WERC, 5/73).

Most importantly, our consideration is not based on whether the unit sought is the most appropriate unit, but rather whether it is "an" appropriate unit. 5/

5/ OCONTO SCHOOL DISTRICT, DEC. NOS. 29295 AND 29296 (WERC, 1/98); MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

When determining whether the separate long-term seasonal employee unit sought by Teamsters is "an" appropriate unit, it is apparent that the long-term seasonal employees share a very strong community of interest as measured by Factors 1-5 above. Their work has a common purpose and they share common duties, skills, wages, hours, working conditions, supervision and work sites. As our dissenting colleague points out, aside from differing wages, fringe benefits and length of work year, the long-term seasonal employees also share these commonalities with employees in the existing AFSCME unit.

As to Factor 6, given the large size of the City's overall workforce, the number of current bargaining units and the number of long-term seasonal employees in the proposed

bargaining unit, we conclude that creation of an additional unit will not result in undue fragmentation. We note that this unit would be larger than three of the six existing bargaining units.

Turning to Factor 7, the wages, hours and working conditions of the long term seasonal employees have been unilaterally established by the City along with those of the other unrepresented City employees. The long term seasonal employees have existed for at least the last 18 years outside the confines of the AFSCME unit which includes the full-time employees with whom they work.

Given all of the foregoing, we conclude that a long-term seasonal employee unit is "an" appropriate unit. These employees share a strong community of interest and creation of an additional unit will not unduly fragment the City's workforce. Although the City has not historically treated these employees as a separate group when establishing their wages, hours and conditions of employment, the long-term seasonal employees have remained separate from the full-time AFSCME employees for at least the last 18 years. Thus, Factors 1-7 establish the "appropriate" status of a long-term seasonal employee unit.

When reaching this conclusion, we of necessity reject the contentions of AFSCME and the City that we should accrete the long-term seasonal employees into the AFSCME unit. Such action would deny the employees the right to determine whether they wish to be represented by Teamsters. As we have long held, a denial of the employees' statutory right to select or reject union representation of their own choosing is looked on with disfavor and has been the basis for prior Commission rejection of accretion of unrepresented employees into existing bargaining units. ADAMS COUNTY, DEC. NO. 27093 (WERC, 11/91); WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89); CITY OF WATERTOWN, DEC. NO. 24798 (WERC, 8/87); CITY OF CLINTONVILLE. DEC. NO. 19858 (WERC, 8/82). Further, as was true in ADAMS COUNTY, such a denial is particularly inappropriate where, as here, the union seeking accretion has not sought to represent the employees in question for many years.

In summary, we have found the long-term seasonal employee unit to be "an" appropriate one and have directed an election in which both AFSCME and Teamsters will be on the ballot. We do so because these employees have a sufficient community of interest to support their status as a separate bargaining unit if they choose union representation. Given the overall size of the City's workforce and the existing number of units, we find that a long term seasonal unit will not unduly fragment the City's workforce. Despite the fact that employees have for years worked side by side with AFSCME represented employees, the City has treated them as separate from the AFSCME represented employees for the purposes of wages and fringe benefits. Particularly under these circumstances, it is appropriate to give these employees the choice of selecting the union representation they believe will best meet their needs (AFSCME or Teamsters) or electing to retain their current unrepresented status.

Given our direction of an election, the City's petition for unit clarification has been dismissed.

Dated at Madison, Wisconsin this 19th day of June, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

Stimulated by its apparent desire to give a group of employees a wider range of candidates for their bargaining representative, the majority endorses the creation of a bargaining unit that violates the state statutory prohibition against fragmentation. Clearly, municipal employees are entitled " . . . to bargain collectively through representatives of their own choosing." /6 That right, however, is neither unqualified nor unfettered. Under Wisconsin law the selection of a bargaining representative of the employees' choice can be made only after certain legal threshold conditions have been met.

6/ Section 111.70(2).

In my view, application of these conditions to the circumstances of the case herein indicate not only that the bargaining unit the majority endorses is not required by existing law, but that its creation *is contrary to existing statutory law and Commission precedent*. A bargaining unit consisting solely of the City of Kenosha long-term seasonals is simply *not* an appropriate bargaining unit.

We begin with the mandate contained in Section 111.70(4)(d)2.a., Stats.

> The commission shall determine the appropriate bargaining unit for the purposes of collective bargaining and *shall whenever possible*, unless otherwise required under this subchapter, *avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force*. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groups constitute a collective bargaining unit. (Emphasis supplied.)

As the majority notes, in making a determination of whether a proposed bargaining unit is "appropriate" the Commission measures the facts presented by the parties against the statutory standard recited above. For almost 20 years the Commission has been aided in making this "measurement" by using seven guidelines.

1. Whether the employees in the unit sought share a "community of interest" distinct from other employees.
2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.

3. The similarity of wages, hours and working conditions of employees in the unit as compared to the wages, hours and working conditions of other employees.
4. Whether the employees in the unit sought share separate or common supervision with other employees.
5. Whether the employees in the unit sought have a common workplace with the employees in said desired unit or whether they share a workplace with other employees.
6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history. ARROWHEAD UNITED TEACHERS V. WERC, 116 WIS.2D 580 (1984).

The majority's decision begins with an abbreviated analysis of Factors 1–5. The majority correctly notes that the long-term seasonals share a community of interest *among themselves*. That is not at issue. More to the point is the majority's subsequent, though scant, acknowledgment that the seasonals also share what it describes as "commonalities" with their full-time counterparts. More accurately stated, the internal community of interests of the long-term seasonals virtually merges with that of their regular full-time counterparts.

For just as the long-term seasonals have a common purpose and share common duties, skills, working conditions, supervision, work sites and work places among themselves, they have the same common purpose and *share identical duties, skills, hours of work, working conditions, supervision, and work sites with their regular, full-time counterparts employed by the City of Kenosha and presently represented by Local 71, AFSCME, AFL-CIO*.

Though ignored by the majority, long-standing City hiring practices give even greater sinew and muscle to the already stout "community of interests" bond that exists between the long-term seasonals and their full-time counterparts. It is undisputed that the long-term seasonals receive hiring preference from the City when permanent vacancies open up for positions in the bargaining unit occupied by their full-time counterparts. According to City witnesses, this practice represents enlightened self-interest because it allows the City to augment the ranks of its full-time employees with proven workers, who have already demonstrated their ability to perform successfully the work for which they are now being hired on a full-time basis. The City notes that about 30% of the regular full-time employees now represented by Local 71 emerged from the ranks of the long-term seasonals.

There are only two apparent differences between the City's long-term seasonal employees and its full-time employees with whom the seasonals work side-by side. The first is obvious: seasonal employees are employed by the City only up to seven months a year; full-time employees work the entire year. The second is wages and benefits: seasonal employees do not receive wages and benefits quite equal to those earned by the full-time employees.

But the fact that the seasonal employees are paid at a different rate is neither remarkable nor determinative of the appropriate unit to which they belong. Certainly, it does not reflect a community of interests unique to the seasonals. Very likely, the wage and benefit differentials between the long-term seasonals and the full-time employees were a primary stimulus for the seasonals to seek some sort of bargaining recognition. A desire for improved wages and benefits may well constitute a powerful motivation to seek bargaining recognition, but it is hardly unique to the seasonals.

Given the identical nature of the duties, skills, hours of work, working conditions, supervision and work sites of each group whose members work side by side, the majority's failure to give appropriate credence to the anti-fragmentation "guideline" is little short of egregious. In my view, its apparent indifference to the plain words of the statute, betrays respected Commission precedent of long-standing:

> In view of the statutory direction to avoid fragmentation, it is the policy of the Commission to avoid the creation of more bargaining units than is necessary to properly reflect the employes' community of interests. 7/

7/ AREA BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT 1, DEC. NO. 11901 (WERC, 5/73).

As the majority asserts, accretion of the seasonals to the AFSCME-represented (Local 71) bargaining unit would deny them the opportunity of determining whether they wish to be represented by the Teamsters. 8/ But contrary to the view of the majority, that opportunity is not an unqualified right. It is a right that is subject to the balance of the Sec. 111.70(4)(d)2.a., Stats., duly imposed by a democratic, legislative process. By according it to a group with community of interests that are virtually identical to those of the larger Local 71-represented group, in effect the majority is countenancing what might very well turn out to be a "minority union." That, very clearly, is not consistent with the balance achieved under existing statute. 9/

8/ Neither the City nor Local 71 maintained that accretion should be automatic. Each asserted that any proposed accretion be subject to a vote of the long-term seasonals as to whether or not they wished to be represented for collective bargaining purposes by Local 71. Only if a majority voted "yes," would the seasonals then be accreted to the bargaining unit represented by Local 71.

9/ Section 111.70(4)(d)1., provides, in part: "1. A representative chosen for the purpose of collective bargaining by a majority of the municipal employees voting in a collective bargaining unit, shall be the exclusive representative of all employees in the unit for the purposes of collective bargaining . . ."

In this instance, the words of the statutory mandate are clear: fragmentation of bargaining units is to be avoided by maintaining as few collective bargaining units as practicable. Based on the exceptionally strong community of interests that bind the long-term seasonals with their counterparts represented by Local 71, 10/ it cannot be plausibly maintained that accretion is not practicable in this case. The test to be applied by the Commission is not to determine whether the proposed unit will be larger or smaller than existing bargaining units, as the majority would have it. Neither is the test to divide the number of current bargaining units into the size of the City's overall workforce, which the majority also suggests. This Commission has not yet adopted any rule of thumb as to what number is acceptable. The test is simply " . . . maintaining as few collective bargaining units as practicable."

10/ Even the long-term seasonal employees recognize this. The record indicates the seasonals first contacted Local 71 and requested bargaining representation.

But whether or not the result reached by the majority is a more desirable outcome than that permitted by statutory law is not an issue that can be determined by this agency. Commission members may feel entitled but are not authorized to resolve that issue. If the statutory "anti-fragmentation" stricture is to be repealed or weakened, it must be accomplished by legislative action. As long as the stricture remains a part of the state statutory structure, however, the proper role of the Commission is to give it the effect intended by the Legislature.

Based on its result herein, it seems clear that the majority does not share this view.

Thus I dissent.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

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