STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 67, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF RACINE, Respondent.

Case 748
No. 65911
MP-4263

Decision No. 32084-A

Appearances:

Mr. Thomas G. Berger, Staff Representative, Council 40, AFSCME, AFL-CIO, P.O. Box 044635, Racine, Wisconsin 53401-0713, appearing on behalf of Complainant.

Mr. Scott R. Letteney, Deputy City Attorney, City Attorney's Office, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 22, 2006, Local 67, AFSCME, AFL-CIO, hereafter Complainant or Union, filed a prohibited practices complaint with the WERC (Commission), alleging that the City of Racine, hereafter Respondent or City, had committed prohibited practices in violation of Sec. 111.70(3)(a)4, Stats. On July 25, 2006, following receipt of Respondent's Motion to Make Complaint More Definite and Certain, Complainant filed an amended complaint alleging that Respondent had violated Sec. 111.70(3)(a)4 and 5, Stats. Hearing was held in Racine, Wisconsin on December 6, 2006. The parties filed post-hearing written argument by February 1, 2007. On April 27, 2007, the Commission appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sections 111.70(4)(a) and Section 111.07, Stats.

Having considered the arguments of the parties and the entire record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 67, AFSCME, AFL-CIO, hereafter Complainant or Union, is the exclusive collective bargaining representative of certain employees of the City of Racine and, at all times material hereto, has had an office with the mailing address of PO Box 044635, Racine, Wisconsin 53404-7013.

2. The City of Racine, hereafter Respondent or City, is a municipal employer with principal offices at 730 Washington Avenue, Racine, Wisconsin 53403.

3. On October 20, 2005, the City Hall and Police Department units were represented by Local 2239. At the time of hearing, these units were represented by Local 67. In October, 2005, Patricia McMillian, the current Chairman of the Local 67 City Hall and Police Department units, was the Treasurer of Local 2239, as well as its acting President. In November, 2005, Terry Parker, who currently works in the City's Human Resources Department, was Interim Human Resources Director. Local 2239 and the City are parties to a collective bargaining agreement that includes the following:

AGREEMENT

THIS AGREEMENT made and entered into by and between the City of Racine, Wisconsin, hereinafter called the "City" or "Employer" and the Wisconsin Council of County and Municipal Employees, and the American Federation of State, County and Municipal Employees, AFL-CIO and Local 2239, hereinafter called the "Union".

WITNESSETH

Both of the parties to this Agreement are desirous of reaching an amicable understanding with respect to the Employer-Employee relationship which exists between them and to enter into a labor agreement covering minimum rates of pay, hours of work, and other terms and conditions of employment with a view of securing harmonious cooperation between the City and its employees and averting disputes.

It is intended by the parties hereto that the Employer-Employee relationship which exists now, and has heretofore existed by and between the City and the employees covered by this Agreement, shall continue in the same amicable and peaceful manner as that which has existed in the past, and that agreements reached and set forth herein shall be binding upon the parties.

NOW THEREFORE, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto agree with each other as follows:

. . .

ARTICLE I
CONDITIONS AND DURATION OF AGREEMENT

A. Term: This Agreement shall become effective as of the first day of January, 2004 and shall remain in effect for a period of two (2) years through December 31, 2005, and from year to year thereafter unless either party gives notice by the other by September 1, 2005, or September 1 of any year thereafter, to vacate or amend it.

. . .

ARTICLE II
RECOGNITION

The Employer herewith recognizes the Union, Local 2239, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, as the sole collective bargaining representative of the employees included within a collective bargaining unit consisting of all regular full-time and regular part-time 'clerical and related' and 'technical' employees in the employ of the City of Racine, excluding managerial, supervisory, confidential, casual, professional, craft employees, law enforcement personnel with the power of arrest, firefighters, employees working within the Police Department, and employees of the Water and Wastewater Utility, with the sole exception of three engineering technicians transferred from the City Engineering Department on or about January 1, 1989.

The City recognizes the two collective bargaining units, City Hall and Police Department, as separate bargaining units. However, all collective bargaining, mediation, and interest arbitration proceedings will be conducted as one (1) unit, resulting in two (2) collective bargaining agreements.

Recognition embodies and embraces collective bargaining on questions of wages, hours and conditions of employment, and the adjustment and settlement of grievances with representatives of the Union.

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ARTICLE IV
MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently

with the other provisions of this contract and the past practices in the department covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.

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

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

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

5. To introduce new or improved methods or facilities.

6. To change existing methods or facilities.

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

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

9. To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.

10. To take whatever action is necessary to comply with State or Federal law.

11. Overtime: The City has the right to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal employment and the public interest. Part-time and seasonal employees shall not be assigned overtime unless regular employees are working overtime or are unavailable.

In addition to the management rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these management rights and the City agrees that it will not use these management rights to interfere with rights established under this Agreement or the existing past practices within the departments covered by this Agreement, unless such past practices are modified by this Agreement or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

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ARTICLE V
PROHIBITED PRACTICES

In the event either party desires to file a prohibited practice charge with the Wisconsin Employment Relations Commission against the other for any reason authorized by state law, it shall so notify the other party in writing by certified mail summarizing the specific details surrounding the potential charge. Such charge may not be filed for a period of thirty (30) days following delivery to the other party of the said written notice and upon receipt of this notice the parties agree to meet and confer in an attempt to resolve the dispute during the thirty (30) day period.

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ARTICLE IX
COMMUNICATION OF POLICY DECISIONS

In the event the Employer elects to make major operational or personnel changes within the bargaining unit which would have a substantial impact on the conditions of employment of bargaining unit members, the appropriate Administrative Manager (or his/her designee) agrees to meet with the President of Local 2239 and three (3) other representatives of the Union to completely explain the changes and to receive suggestions from the Union concerning them prior to implementation. Neither the City nor the Union waives any statutory rights that are available to them under Section 111.70, Wisconsin Statutes.

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ARTICLE XII
SENIORITY

A. Definition: The seniority of a regular employee is determined by the length of his/her service with the City, computed in years, months, and days from the first day of his/her last continuous employment. Temporary or regular seasonal employees shall not have seniority. However, if a temporary or seasonal employee becomes a regular employee, he/she shall have seniority equivalent to the length of his/her last continuous employment. Regular part-time employees accrue seniority on a pro-rata basis.

B. Recognition of Principle: The Employer recognizes the principle of seniority and the Union recognizes the need for maintaining an efficient work force. In all matters involving increase or decrease of forces, layoffs, or promotions, the length of continuous service with the Employer shall be given primary consideration. Skill, ability and efficiency shall be taken into consideration only where they substantially outweigh consideration of length of service, or where the most senior employee is unable to do the work. To prove qualified, the employee must demonstrate ability to do the job within thirty (30) calendar days. An employee shall not receive seniority benefits unless he/she becomes a regular full-time employee.

C. Notification: In the event the senior employee is not chosen, the Human Resources Director shall give an explanation in writing to such senior employee and the Union stating the reason for his/her not being chosen.

D. New Employees: New employees and those hired after a break in continuous service will be regarded as probationary employees in the first six (6) months and will not receive seniority during such period. Wage adjustments and fringe benefits, however, shall commence as provided in this Agreement irrespective of the probationary period. When a probationary employee becomes a regular employee, he/she shall receive credit for seniority purposes for the time worked during such probationary period. However, a probationary employee will not receive seniority for a probationary period unless he/she becomes a regular full-time employee. Probationary and student employees are subject to discharge without recourse to the grievance and arbitration procedures of this Agreement.

E. Loss of Seniority: An employee's seniority and the employment relationship shall be broken and terminated:

1. If he/she resigns.

2. If he/she has been discharged for just cause and such discharge has not been challenged in accordance with grievance procedures.

3. If without giving a reasonable excuse to his/her supervisor, he/she remains away from work for three or more consecutive working days.

4. If he/she fails to report to work within seven (7) working days after being recalled from layoff by the Employer, provided, however, that if he/she is out of town the period shall be fourteen (14) working days and further provided that if his/her failure to comply with this provision is caused by sickness, accident or other circumstances beyond his/her control, he/she shall not lose his/her seniority.

5. If he/she accepts gainful employment when on a granted leave of absence, unless such leave was granted to allow gainful employment.

6. If he/she retires.

F. Seniority Lists: The Employer may furnish an up-to-date master seniority list by May 1 of each year to the Union President who may post it on the bulletin board provided for Union use.

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ARTICLE XIII
JOB POSTINGS

A. Posting Procedure: Any job vacancy which occurs due to retirement, quit, death, new position, or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties and qualifications desired, rate of pay, work location or assignment, and shift. Sufficient space shall be provided for employees to sign (apply) for said job posting.

All job openings within the province of the bargaining unit shall be posted for five (5) working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) workdays after the close of the posting.

The City agrees to move the successful bidder into his/her new position as quickly as possible, but in no event later than thirty (30) calendar days after notification of his/her selection.

The job positing (sic) for any classification shall remain in effect for ninety (90) days following the award of the posted job and shall govern, without any reposting, any job openings occurring within said ninety (90) day period in that job classification.

B. In accordance with Article XII, Seniority, total bargaining unit seniority shall prevail in all job postings except for shift changes which will be based upon classification seniority. Shift changes shall not be subject to Section C and/or D below. If there is no successful bidder for a position, consideration will be given to bargaining unit members in the other Local 2239 unit before outside applicants.

C. Probationary Period: Employees working on a job obtained through job posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous job should his/her ability to handle the new work prove unsatisfactory within this probationary period. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

D. Return to Previous Job: If within thirty (30) calendar days the employee is dissatisfied with the posted job and wishes to return to his/her previous job the Employer shall have the right to request the employee remain on the job until such time as the job is again posted and filled. At no time shall this time exceed thirty (30) calendar days. In order for a Union employee to change jobs or classification while still in a probationary status, he/she must return to his/her must return to his/her previous job classification. This provision shall also apply to employees from the Police Department Union who post for and are awarded a job in this unit.

E. For the purpose of job posting only, the employee in the Cemetery Department will not be considered to be eligible to move to jobs within the collective bargaining unit until the employee has a minimum of three (3) years of service within the Cemetery Department.

F. Effective January 1, 2002, employees who post for an equal or lower paying position shall be required to remain in said position for a period of 18 months assuming the employee is awarded said position. This provision shall not apply to employees who post for and are awarded an

equal or lower paying position and are subject to Article XIII, Sections C and D of this Agreement. There shall be no restriction for employees who post for a higher rate of pay position.

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ARTICLE XIV
TESTING

The City reserves the right to establish reasonable testing procedures to be used to determine the ability of the employee to do the job on any promotion.

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ARTICLE XVI
LAYOFFS AND BUMPING

A. Employees shall be laid off in inverse order of their length of service and shall possess the right to be reemployed in order of their seniority in positions for which they can qualify for a period of three (3) years following layoff. The City agrees to give two (2) weeks advance notice to employees being laid off.

B. An employee selected to be laid off shall have the right to bump the least senior bargaining unit employee in an equal or lower paying job classification of such employee's choosing, providing such employee has more seniority than that person, unless the skill, ability and efficiency of the lesser senior person substantially outweigh consideration of length of service, and also provided such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal posting procedure. If there is a vacancy in the job classification the employee chooses to bump into, said vacancy shall be considered to be the least senior bargaining unit employee in that job classification.

C. An employee who is bumped in accordance with paragraph B above shall be afforded the same bumping rights provided in paragraph A above, but if such employee is unable to bump any other employee such employee shall be placed on layoff.

D. Where two (2) or more employees have the right to bump, the above bumping rights shall be exercised by such employee in the order of their seniority from most senior to least senior.

E. An employee bumping into a new position shall serve the normal probationary period for that position. An employee who does not satisfactorily complete the probationary period shall not be allowed to again exercise bumping rights, but shall be placed on layoff. During such probationary period an employee may voluntarily choose to be placed on layoff, but shall then not be allowed to again exercise bumping rights resulting from that layoff.

F. An employee who is bumped out of his/her position shall have the preferential right to return to such position if for any reason it should be come vacant within sixty (60) days from the time the employee is bumped from it.

. . .

ARTICLE XXXI
HOURS OF WORK

A. The standard work week shall be Monday through Friday. The standard workday for full-time employees shall be from 8:00 a.m. to 11:55 a.m. and from 1:00 p.m. to 4:55 p.m. Employees working the daily schedule set forth above shall be compensated on the basis of eight (8) hours per day.

B. Deviations from the standard starting and quitting times set forth above may be made by mutual agreement between the affected employee(s) and the immediate supervisor.

C. It is understood that in any department the City may require minor and temporary changes in the times certain employees take their one hour and five minute lunch break, this to accommodate special needs at certain times of the year to some departments.

D. There shall be no across-the-board reduction of hours among full-time employees to obviate layoffs or otherwise share available work.

Article X of the collective bargaining agreement provides for a grievance procedure that culminates in final and binding arbitration.

4. By letter dated June 25, 2004, the City's Human Resources Director requested the City's Mayor to refer certain recommendations resulting from a Clerk/Treasurer audit to the Finance/Personnel Committee. On March 7, 2006, the City's Common Council approved a motion to receive and file a "Communication from the Director of Human Resources wishing to discuss the review of the results of the Clerk/Treasurer audit." Prior to October 20, 2005,

the City decided upon a plan to consolidate the City's Treasurer and Clerk's offices. This plan included the elimination of five positions represented by Local 2239 and the creation of five new positions represented by Local 2239. The five positions to be eliminated were Clerk Typist III – Grade SU-7; Cashier/Clerk I-Grade SU-7; Licensing Clerk – Grade SU-9; Cashier Clerk II – Grade SU-9; and Registration Clerk-Grade SU-10. The five positions to be created were Customer Service Specialist - Grade SU-9. On October 20, 2005, and prior to the elimination or creation of any of these positions, representatives of the City explained the City's consolidation plan to Local 2239 and offered to "grandfather" employees by moving those employees who were currently working in the positions slated for elimination into the Customer Service Specialist position without the employees having to interview or test. Local 2239 requested that the City recall Bonita Moten; an individual who, in 2003, had been laid off from a Clerk I-Grade SU-7 bargaining unit position in the Treasurer's Office. Representatives of the City and Local 2239 held a second meeting on November 23, 2005. Among the matters discussed at this meeting was the City's consolidation plan. During these meetings, the City told Local 2239 that it would not recall Moten because it was not part of the plan; that Moten's position no longer existed; and that the City had concerns about Moten's job performance. Concluding that the Union would not agree to the City's "grandfathering" proposal unless the City recalled Moten, the City withdrew its "grandfathering" proposal and informed Local 2239 that it would eliminate the positions as they became vacant and then post a Customer Service Specialist position. The City told Local 2239 that the individuals hired into the Customer Service Specialist position would be cross-trained to perform the work of the City Clerk and Treasurer.

5. During the October and November, 2005 meetings, Local 2239 asked the City to "come back" at the time that the parties bargained their successor contract. At the time of hearing, the parties had ratified an agreement to succeed their 2004-2005 collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. Respondent, City of Racine, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

2. Complainant, Local 67, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and the successor to Local 2239, AFSCME, AFL-CIO.

3. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has violated the parties' collective bargaining agreement.

4. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has refused to bargain with Complainant on the impact of any Respondent decision for which Respondent has a statutory duty to bargain with Complainant.

5. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)4 or 5, Stats.

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

ORDER

Complainant's complaint, as amended, is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 14th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CITY OF RACINE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, as amended, Complainant asserts that Respondent has violated Sec. 111.70(3)(a)4 and 5, Stats. Respondent denies that it has committed the prohibited practices alleged by Complainant.

Applicable Statutes

Section 111.70(3)(a)4 ad 5, Stats., provide, in relevant part, that it is a prohibited practice for a municipal employer:

> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

To violate Sec. 111.70(3)(a)4 and 5, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats.; which provides that it is a prohibited practice for a municipal employer:

> . . . to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.70(3)(a)5 Allegations

The complaint, as amended, alleges numerous contract violations. Those allegations that have not been specifically addressed in Complainant's post-hearing written argument are deemed to have been abandoned by Complainant. Accordingly, the Examiner has addressed only those Complainant allegations that were raised in the complaint, as amended, and specifically addressed in Complainant's post-hearing written argument.

On October 20, 2005, City representatives met with representatives of Local 2239 to explain the City's plan to merge certain City departments, including the offices of the City Clerk and Treasurer. At the time of this meeting, Local 2239 was subject to a 2004-2005

collective bargaining agreement, which by its terms, was in effect until at least December 31, 2005.

On October 20, 2005, the City Hall and Police Department units were represented by Local 2239. At the time of hearing, these units were represented by Local 67. In October, 2005, Patricia McMillian, the current Chairman of the Local 67 City Hall and Police Department units, was the Treasurer of Local 2239, as well as its acting President.

The parties' 2004-2005 collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration. Respondent addresses Complainant's allegations of contract violation and does not argue that the Commission should not assert its jurisdiction to hear and decide Complainant's alleged violations of the collective bargaining agreement. The Examiner concludes, therefore, that it is appropriate to assert the Commission's jurisdiction to hear and decide the Sec. 111.70(3)(a)5 allegations that were raised in the complaint, as amended, and addressed in Complainant's post-hearing written argument.

At the October 20, 2005 meeting, the City informed Local 2239 that its plan included the elimination of five positions represented by Local 2239, *i.e.,* Clerk Typist III – Grade SU-7; Cashier/Clerk I-Grade SU-7; Licensing Clerk – Grade SU-9; Cashier Clerk II – Grade SU-9; and Registration Clerk-Grade SU-10 and the creation of five new positions represented by Local 2239, *i.e.*, Customer Service Specialist - Grade SU-9. Local 2239 was informed that the individuals filling the Customer Service Specialist positions would be cross-trained to perform the work of the Clerk and Treasurer's Office. At the time of this meeting, the City had not implemented any of the proposed position changes. (T. 20)

In the complaint, as amended, Complainant alleges a violation of the "Preamble on Page 1" of the parties' collective bargaining agreement. As Respondent argues, the labor contract does not contain a section entitled "Preamble." However, the "Witnesseth" section, which is cited in Complainant's post-hearing written argument, functions as a "Preamble" and contains language which, on its face, may be related to Complainant's argument that the City has violated that portion of the labor agreement that calls on the parties to continue in the same amicable and peaceful manner as that which has existed in the past. The Complainant alleges that the City violated this portion of the labor agreement by rejecting the Union's request to negotiate the terms of the restructuring.

As a review of the "Witnesseth" section reveals, this language expresses an intention of the parties, rather than a contractual obligation. Assuming that Complainant is correct when it argues that the complained of Respondent conduct was neither harmonious nor amicable, such conduct would not violate the "Witnesseth" portion of the parties' collective bargaining agreement.

In the complaint, as amended, and in Complainant's post-hearing written argument, Complainant asserts that the City has violated Article 4, Management Rights. Complainant

argues that, by implementing changes in classifications, wages, hours and working conditions while refusing to negotiate the effects, the City violated state statutes.

Article 4 recognizes that, among the management rights retained by the City, is the right to "To take whatever action is necessary to comply with State or Federal law." Article 4, however, does not impose upon Respondent a contractual obligation to comply with state statutes. Assuming *arguendo* that Respondent had implemented changes while refusing to negotiate in violation of state statutes, such conduct would not violate Article 4.

In the complaint, as amended, and in Complainant's post-hearing written argument, Complainant asserts that the City violated Article 12, Seniority. According to Complainant, Respondent violated this Article by employing temporary employees while regular full-time employees qualified to perform the work were on lay-off and by refusing to recall a qualified employee on lay-off.

It is undisputed that, when the parties discussed the City's restructuring plan on October 20, 2005 and at a subsequent November 23, 2005 meeting, the parties discussed Complainant's request to recall laid-off employee Bonita Moten. It is also undisputed that Respondent did not agree to this request.

McMillian recalls that, at the time of the Union's request to recall Moten, the City was using temporary employees in the Treasurer's Office and, possibly, the Clerk's Office. (T. 10) Neither McMillian's assertion that these temporaries were occupying Moten's position or performing work that had been performed by Moten (T. 36), nor any other record evidence, establishes that Respondent used temporary employees or failed to recall a laid-off employee in violation of Article 12, as alleged by Complainant.

In the complaint, as amended, and in Complainant's post-hearing written argument, Complainant asserts that the City violated Article 31, Hours of Work. Complainant asserts that deviations from the contractual 8:00 a.m. to 4:55 p.m. work day must be by mutual agreement and claims that the "restructuring" required employees to work between two departments with different schedules and that no provisions were made for vacation selection between employees in a "shared" department.

At hearing, McMillian was questioned as follows:

Q: Did this elimination of positions and the creation of a new position make any changes to hours of work or working conditions at all?

A; No, not really.

Q: So the hours remained the same –

A: Uh-huh.

Q: -- for the people who were now working crossing both departments?

A: Yes, the hours stayed the same.

Q: How was – did the City talk about how vacation selection was going to work out - -

A: No, they were going to –

Q: -- with these employees form two different departments?

A: No. Everyone knows that you just can't take vacation at the end of the year in both of the departments because it's too hectic of a time. And they're explained; that's explained to them when they – they're hired. (T. 16-17)

. . .

Q: Seniority didn't change because of any of the changes; is that correct?

A: Not to my knowledge, no.

Q: Ability to choose vacations didn't change because seniority was the same?

A: Right. (T. 19)

The record fails to establish that the "restructuring" required any employee to work schedules/hours or to select vacations in violation of Article 31 of the parties' collective bargaining agreement.

When the parties met to discuss the restructuring, the City offered to "grandfather" employees by moving those employees who were currently working in the positions slated for elimination into the Customer Service Specialist position without the employees having to interview or test (T. 38; 60-62). When the Union insisted that Moten be recalled to a position, the City considered this request to be a "deal breaker;" rescinded its offer and informed the Union that positions would be eliminated as they became vacant and that the new positions would be posted. (T. 14-15; 58-61) Complainant's argument that Respondent promised to grandfather into the new jobs the people whose jobs had been eliminated and then reneged on that promise is not supported by the record evidence.

Consistent with its complaint, as amended, Complainant argues that Respondent has violated Sec. 111.70(3)(a)5, Stats., by implementing a restructuring process in which the City eliminated jobs, established new jobs and set the pay for those jobs. Complainant, however,

has not established that Respondent has violated Sec. 111.70(3)(a)5, Stats., as alleged by Complainant.

Sec. 111.70(3)(a)4 Allegations

The Sec. 111.70(3)(a)4 allegations that were raised in the complaint, as amended, but not specifically addressed in Complainant's post-hearing written argument are deemed to have been abandoned by Complainant. Accordingly, the Examiner has addressed only those Complainant allegations that were raised in the complaint, as amended, and specifically addressed in Complainant's post-hearing written argument.

Complainant's Sec. 111.70(3)(a) 4 claim is based upon conduct that occurred during the meetings of October and November of 2005. In October and November of 2005, the parties' 2004-2005 collective bargaining agreement was in effect. In STATE OF WISCONSIN (DHFS), DEC. NO. 31207-C (WERC, 3/06), the Commission states:

. . .

> We begin by setting forth the Commission's longstanding principles regarding an employer's duty to bargain while a contract is in effect:
>
> > [The] employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. . . ."
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> . . .

Under MERA, the standard for determining mandatory or permissive status with respect to subjects of bargaining is whether the subject matter is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formulation and choice of public policy; the former subjects are mandatory and the latter permissive. CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS. 2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS. 2D 43 (1976). In addition to Respondent's duty to bargain over mandatory subjects of bargaining, Respondent has a statutory duty to bargain the impact of Respondent decisions that are permissive subjects of bargaining upon the wages, hours and working conditions of Complainant's bargaining unit employees. CITY OF BROOKFIELD, *supra*.

In the complaint, as amended, Complainant does not allege that Respondent has a duty to bargain over the restructuring decision, but rather, alleges that Respondent has a duty to bargain the effects of such change. At the start of hearing, Complainant did not assert that Respondent has a duty to bargain over the restructuring decision, but rather, asserted "We believe that the City was required to bargain the effects of this change. And when the City refused to actually bargain the effects of the change, the charge had to be filed." (T. 7) The Examiner is satisfied that the only Sec. 111.70(3)(a)4 claim that is appropriately before the Commission is Complainant's claim that Respondent has violated its statutory duty to bargain the impact of the City's decision to restructure the City Clerk and Treasurer's offices.

Apparently, the meetings of October and November, 2005 were called by the City for the purpose of complying with Article IX of the parties' collective bargaining agreement. (T. 67). As reflected in the language of this provision, the parties agreed to meet "In the event the Employer elects to make major operational or personnel changes within the bargaining unit which would have a substantial impact on the conditions of employment of bargaining unit members" in order "to completely explain the changes and to receive suggestions from the Union concerning them prior to implementation." The provision ends with the statement: "Neither the City nor the Union waives any statutory rights that are available to them under Section 111.70, Wisconsin Statutes." Compliance with the provisions of Article IX does not, in and of itself, relieve Respondent of any statutory duty to bargain with Complainant over the impact of Respondent's decision to restructure the Clerk and Treasurer's offices.

At hearing, McMillian was questioned as follows:

Q: Were you involved in the discussions on behalf of Local 2239 with the City of Racine during these merger changes?

A: Yes. I was involved in the meeting that took place around October, towards the end of 2005. I believe it was October of 2005 when we first met.

Q: Do you recall what happened, what was said?

A: Basically what was said, they presented to us what they wanted to do with merging the two departments. That would be - - well, actually it's – it would be City Clerk's and the Treasurer's Office, were the two departments that were involved, and those were the departments they wanted to merge. The only thing that we asked them to do was to bring back one of the laid-off individuals from the Treasurer's Office. And they informed us that it was not a part of the plan. That was just a rough summary of the meeting.

Q: Did the City make any offer to accommodate the Union's request in any way, shape or form during that meeting?

A: No.

Q: Did they make any counter-proposal—

A: No, they just - -

Q: -- to the Union's –

A: No, they told us what they wanted to do; and that was it. We did ask them to come back at negotiation times because that was one of our bargaining –it was our bargaining year. We asked them to come back at that time, but that wasn't done.

Q: Okay. So you –

A: Our main concern was to bring back the laid-off individual; and that was not a part of the plan. And they did inform us of that. (T. 8-10)

. . .

Q: So the Local Union met with the City and made proposals to the City; is that right?

A: We met with them, yes.

Q: And made proposals to try and come to some kind of an agreement?

A: To bring the laid-off person back before they did the merger.

Q: And the City's response to the Union's proposal was a counter-proposal or –

A: No. It was basically – no, they showed us what they wanted to do; and that's what they did. (T. 16)

McMillian identified the laid-off person as Bonita Moten. (T. 13)

McMillian's testimony reasonably indicates that after the City explained the restructuring plan, the Union made only two requests. The first request was that the City recall Moten and the second request was that the City "come back at our negotiation times."

Recall rights of laid-off employees primarily relate to wages, hours and conditions of employment and, thus, are a mandatory subject of bargaining. Article XVI, Layoffs and

Bumping, of the parties' agreement addresses the recall rights of laid off employees. Recall rights are also addressed in Article XII(E).

There is ambiguity with respect to the nature of the Union's request to recall Moten. If the request were made pursuant to the Union's belief that Moten was entitled to be recalled under the terms of the existing collective bargaining agreement (because temporary employees were performing her work or for any other reason) then Respondent did not have a further duty to bargain over the recall of Moten, but rather, could rely upon the language in the parties' 2004-2005 contract.

Human Resources Department employee Terry Parker concluded that the Union's request to recall Moten was made as a condition precedent to Complainant's acceptance of the City's "grandfathering" offer. (T. 59) Such a conclusion is consistent with the following testimony of McMillian:

> Q: Isn't it true that City officials at that time offered to grandfather people into these positions?
>
> A: Yes, they did.
>
> Q; And what was the Union's counter-proposal to that?
>
> A: We asked that – to return Ms. Moten to her position prior to you doing the merger. That is what I asked the City to do. And they indicated no, which – I'm sorry. They stated no, that there was no position to return her to. (T. 30)

McMillian's testimony, as a whole, reasonably indicates that, when the City told the Union that it would not recall Moten, the City did not summarily dismiss the Union's request. Rather, the City provided justification for its denial of this request, *e.g.*, Moten's position no longer existed (T. 10; 14) and the City had concerns about Moten's job performance (T. 37)

Sec. 111.70(1)(a) of MERA expressly states that the duty to bargain does not compel either party to agree to a proposal or require the making of a concession. Assuming *arguendo* that Respondent had a statutory duty to bargain with Complainant over the Union's request to recall Moten, this duty to bargain would not require that the City accede to the Union's request to recall Moten or to make any counter-proposal following the City's denial of this request.

The record establishes that the parties had discussions other than those of October 20 and November 23, 2005. (T. 64) The record also establishes that the parties have ratified a successor agreement. (T. 51-52) The record, however, is silent with respect to the nature of the parties' other discussions and the parties conduct during their contract negotiations.

As set forth above, McMillian recalls that, after the City had informed the Union that it would not recall Moten, the Union made the request that the City "come back at our negotiation times," but that wasn't done. The record does not establish why "that wasn't done." Neither McMillian's testimony, nor any other record evidence, establishes that the City's conduct during the subsequent contract negotiations violated Respondent's statutory duty to bargain.

When the parties met in October of 2005, the Union was advised that the "proposed pay" of the new Customer Service Specialist was SU-9. (City Ex. #1) At hearing, McMillian testified as follows:

> Q: Did the Union express any agreement whatsoever on this new job description or the wage rate?
>
> A: No, we didn't – we didn't agree. (T. 14)

McMillian does not state, however, that the Union contested either the wage rate or new job description, or made any proposal with respect to the wage rate or job description. [1]

Consistent with its complaint, as amended, Complainant argues that Respondent has violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain the effects of the "restructuring" upon the wages, hours and working conditions of its bargaining unit members. Complainant, however, has not established that Respondent has violated Sec. 111.70(3)(a)4, Stats., as alleged by Complainant.

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[1] To be sure, the Union's minutes of November 23, 2005, indicate that, at the meeting of November 23, 2005, the Union's Business Agent and Parker had discussions concerning the appropriateness of the new job description and SU-9 wage rate. However, in response to Respondent's objection to the admission of the Union's November 23, 2005 minutes, the Examiner stated that, given the witness testimony indicating the possibility of errors in these minutes, the Examiner was not accepting these minutes at face value and that the minutes would be considered to the extent that they are referred to by the witnesses and corroborated/denied by witness testimony. Given the absence of corroborating testimony, the Examiner does not consider the minutes of the discussions between the Union's Business Agent and Parker to be reliable evidence.

Conclusion

Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)4 and 5, Stats. Accordingly, the Examiner has dismissed Complainant's complaint, as amended, in its entirety.

Dated at Madison, Wisconsin, this 14th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

CAB/gjc
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