STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 67, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF RACINE, Respondent.

Case 749
No. 65912
MP-4264

Decision No. 32085-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 7, 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. At all times material hereto, the Complainant and the Respondent have been parties to a collective bargaining agreement that includes the following:

ARTICLE I
CONDITIONS AND DURATION OF AGREEMENT

A. Term: This Agreement shall become effective as of the first day of January, 2003 and shall remain in effect for a period of three years through December 31, 2005, and from year to year thereafter unless either party gives notice to the other by August 1, 2005, or August 1 of any year thereafter, to vacate or amend it.

. . .

ARTICLE II
MANAGEMENT AND UNION RECOGNITION

A. Recognition: The Employer does hereby recognize the Union, Local 67, AFSCME, AFL-CIO, as the sole collective bargaining agency for all City employees of the Public Works system in the job classifications listed on Exhibit 'A' composed of the following related departments: Department of Public Works and its related divisions thereof, namely . . .

. . .

E. Management Rights: The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work 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 and 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 all regular employees are working overtime and are unavailable. This shall not apply to full-time or part-time recreation supervision employees in the Recreation Division of the Park and Recreation Department.

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 inn this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

F. Settlement of Prohibited Practice Problems: 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 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.

. . .

ARTICLE VII
TYPES OF EMPLOYEES

A. Regular, Full-Time: Any employee who has been hired into a permanent, full-time position and who works a normal shift of usually 8 hours per day, 5 days per week. This type of employee is entitled to all the usual and normal City benefits.

B. Temporary: Any employee who has been hired on a limited full-time basis, usually for an indefinite period of time normally extending not more than 6 months at any one time.

Temporary employees can only work one six month period per year. This type of employee is not entitled to the normal City benefits except holiday pay.

C. Regular Long Seasonal: Any employee who has been hired on a full-time basis, usually for a definite period of time during a definite time of the year (limited to thirty-two (32) weeks from April through November). This type of employee is not entitled to the normal City benefits except where eligible under the Wisconsin Retirement and holiday pay. Seasonal employees are subject to discharge without recourse to the Grievance and Arbitration Procedure of this agreement during the first sixty-four (64) weeks of their employment.

D. Regular Part-Time: Any employee who has been hired for a limited, indefinite period of time (for 20 or more hours per week) on a less than full-time basis to work as needed. This type of employee normally does not meet the necessary requirements for normal City benefits.

E. Student: Any employee who has been hired on a limited full-time basis, usually for an indefinite period of time normally extending not more than 4 months at any one time. Student employees can only work one four month period per year. This type of employee is not entitled to the normal City benefits except holiday pay.

. . .

ARTICLE XIII
MISCELLANEOUS PROVISIONS

. . .

M. Entire Agreement: The foregoing constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any oral agreements, practices or statements not specifically set forth herein are hereby declared null and void and of no effect. None of the terms and conditions of this Agreement may be modified except by mutual agreement in writing.

. . .

Article III of the collective bargaining agreement provides for a grievance procedure that culminates in arbitration.

4. The September 7, 1976, Minutes of the City's Common Council Proceedings include the following:

66. Resolution No. 4294

WHEREAS, the City is desirous of establishing a uniform hiring policy for student summer help, which policy will come under the direct responsibility and authority of the Personnel Director; and

WHEREAS, the City is desirous of incorporating into said uniform policy the applicable recommendations made by the City Board of Ethics;

NOW, THEREFORE, BE IT RESOLVED, that the following guidelines be adopted for use in establishing and maintaining said uniform hiring policy, to wit:

1. That Summer student jobs must be advertised in the news media so that all students of Racine would have an equal opportunity to apply for these jobs and shall conform to the policies for hiring regular full time employees.

2. That a deadline for applications be set uniformly for all departments of the City and strictly adhered to.

3. That all applicants for vacancies be given a fair and equal opportunity, all student summer help openings will be filled by City of Racine residents who are pursuing the undergraduate studies wherever possible. No student shall be hired for more than four years.

4. That all hiring practices be consistent with the City Affirmative Action Program Ordinance. This ordinance should be a reality in practice, not merely verbal.

5. That the City Personnel Department, the Finance Committee of the Common Council, the City Attorney and the Commissions of the Water and Wastewater Department meet and agree on a uniform standard of hiring practices and an equalized wage structure for summer jobs wherever possible.

Ald. Turner moved to amend Item 5 of the Resolution by adding the following after City Personnel Department: "Affirmative Action Officer".

Ald. Turner's motion to amend adopted by the following vote:

Ayes – Mortenson, Otto, Peterson, Rowley, Turner, Barry, Constantine, Eastman, Knudsen, Mattes

Noes – Meier, Patton, Stockwell, Thomsen, Boehme, Davies, Heck

Ayes 10, Noes 7.

Ald. Eastman moved to adopt the Resolution as amended.

Adopted by the following vote:

Ayes-Mortensen, Otto, Patton, Peterson, Rowley, Stockwell, Thomsen, Turner, Barry, Boehme, Constantine, Davies, Eastman, Heck, Knudsen, Mattes,

Noes-Meier

Aye 16, Noes 1

. . .

On January 3, 2006, the City's Common Council adopted the following:

RESOLUTION NO. 6837

UNIFORM HIRING OF SUMMER HELP

WHEREAS, Resolution 4294 of September 7, 1976 established criteria for uniform hiring of summer student help; and

WHEREAS, it is essential and in the best interests of the City to expand the pool of potential workers for the summer help program to include efforts to provide summer employment for disadvantaged persons who participate in the Mayor's Summer Work for the Disadvantaged Program.

NOW, THEREFORE, BE IT RESOLVED, that the uniform hiring policy for summer student help established by Resolution 4294 of September 7, 1976 be modified by modifying the requirement that applicants be students by further providing that eligible applicants shall include those who are participants in the Mayor's Summer Work Program and who will be between 18 and 23 years of age at the time such work would commence for any summer work period.

5. Article VII(E) of the parties' collective bargaining agreement requires that individuals hired into the position of "Student" employee be a student, *i.e.*, an individual who is pursuing undergraduate studies at an educational institution such as a college or technical school. The parties' collective bargaining agreement does not require that individuals hired into the position of "Student" employee be between the ages of 17 and 24, or any other age.

Upon the basis of the aforementioned 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.

3. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that the parties 2003-2005 collective bargaining agreement has expired.

4. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has violated the parties' 2003-2005 collective bargaining agreement, as alleged in the complaint, as amended.

5. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has unilaterally implemented a change in violation of Respondent's statutory duty to bargain, as alleged in the complaint, as amended.

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., as alleged in the complaint, as amended.

Upon the basis of the aforementioned 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 18th day of May, 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.

DISCUSSION

Upon review of Complainant's complaint, as amended, the Examiner is satisfied that the Sec. 111.70(3)(a)4 and (5) claims for which Respondent has had "fair notice" are that Respondent violated its statutory duty to bargain and the parties' collective bargaining agreement when Respondent unilaterally adopted Resolution No. 6837 and changed the method of hiring student/seasonal employees by altering the definition of student/seasonal employees and failed to recall such employees. Accordingly, these are the claims that have been addressed by the Examiner.

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."

Alleged Violation of Sec. 111.70(3)(a)5, Stats.

While continuing to argue that Respondent has violated Sec. 111.70(3)(a)5, Stats., Complainant, in post-hearing brief, alleges that the parties' collective bargaining agreement expired on December 31, 2005. Respondent does not address this allegation and relies upon various provisions of the parties' collective bargaining agreement to argue that there has been no violation of the parties' collective bargaining agreement.

Article I(A) of the parties' 2003--2005 collective bargaining agreement provides that the agreement remains in effect unless "either party gives notice to the other party by August 1, 2005, or August 1 of any year thereafter, to vacate or amend it." This record does not establish that either party gave such notice. Nor does the record otherwise establish that the parties' collective bargaining agreement has expired. The Examiner concludes, therefore, that the parties' 2003-2005 collective bargaining agreement remains in effect.

One of the terms and conditions of the 2003-2005 collective bargaining agreement is a grievance procedure that culminates in final and binding arbitration. Respondent addresses Complainant's claimed contract violation and does not argue that the Commission should not assert its jurisdiction to hear and decide the alleged violation of the collective bargaining agreement. The Examiner concludes, therefore, that it is appropriate to assert the Commission's jurisdiction to determine whether or not Respondent violated the parties' collective bargaining agreement as alleged in the pleadings.

In the pleadings, as well as in post-hearing written argument, Complainant references "student" employees and "seasonal" employees. Among the "Types of Employees" recognized in Article VII of the collective bargaining agreement are "Student" employees and "Regular Long-Seasonal" employees. Upon consideration of the record as a whole, the undersigned is persuaded that this dispute does not involve "Regular Long-Seasonal employees," but rather, involves "Student" employees.

In the complaint, as amended, Complainant asserts that several sections of the parties' collective bargaining have been violated. Given the record presented at hearing, and the focus of Complainant's post-hearing written argument, the Examiner concludes that Complainant is asserting two claims. The first claim is that past practice and the collective bargaining agreement was violated when, following the unilateral implementation of Resolution No. 6837, Respondent failed to recall a "Student" employee in violation of the parties' collective bargaining agreement. (Complainant's initial brief, p. 11)

Union President Scott Sharp was the only witness to testify at hearing. According to Sharp, he "heard" that one "Student" employee was not called back. (T. at 18, 33) Assuming *arguendo*, that the collective bargaining agreement and past practice provide "recall rights" to "Student" employees, neither Sharp's hearsay testimony, nor any other record evidence, establishes that Respondent failed to recall any "Student" employee.

The second claim is that the unilateral implementation of Resolution No. 6837 violated past practice and the collective bargaining agreement because it changed the method of hiring "Student" employees. (Complainant's initial brief, p. 9) As testified by Sharp, the specific unilateral changes were a failure to limit hiring to individuals between the ages of 17 and 24 and a failure to limit hiring to individuals who are "students." (T. at 11-12)

In denying that the collective bargaining agreement requires Respondent to hire only "students" into the position of "Student" employee, Respondent relies upon the language of Article VII(E), as well as the management rights referenced in Article II(E) of the parties' collective bargaining agreement.

Article VII(E) states:

> Student: Any employee who has been hired on a limited full-time basis, usually for an indefinite period of time normally extending not more than 4 months at any one time. Student employees can only work one four month period per year. This type of employee is not entitled to the normal City benefits except holiday pay.

The term "Student" is commonly defined as "one who attends a school, college or university." *American Heritage College Dictionary, 3rd Ed*. (2000) Thus, by identifying an employee "type" as "Student," the parties have reasonably indicated that the employee must be attending a school, college or university. As Respondent argues, however, the first sentence of Article VII(E) identifies the "Student" employee in terms of length of employment, rather than status as a "student."

The language of Article VII(E) is ambiguous with respect to the issue of whether or not the position of "Student" employee is required to be a "student" as that term is commonly defined. It is appropriate, therefore, to seek clarification of the parties' intent by examining extrinsic evidence, such as bargaining history or the prior conduct of the parties.

Sharp has been employed by the Respondent in one capacity or another since he was first hired as a seasonal employee in 1976. According to Sharp, he had a hearsay understanding that Resolution No. 4294 was negotiated with the Union "before" action was taken. (T. at 28)

The plain language of Resolution No. 4294 indicates that it was unilaterally adopted by Respondent. Sharp's hearsay evidence is not sufficient to establish otherwise. Resolution No. 4294, in relevant part, states: ". . . all student summer help openings will be filled by City of Racine residents who are pursuing the undergraduate studies wherever possible."

Resolution No. 6837 was unilaterally adopted by the City on January 3, 2006. Resolution No. 6837, in relevant part, states: ". . . that the uniform hiring policy for summer student help established by Resolution 4294 of September 7, 1976 be modified by modifying

the requirement that applicants be students by further providing that eligible applicants shall include those who are participants in the Mayor's Summer Work Program and who will be between 18 and 23 years of age by the time such work would commence for any summer work period." (Emphasis supplied)

The most reasonable construction of the plain language of Resolution Nos. 4294 and 6837 is that the "summer help" program that existed from the adoption of Resolution No. 4294 until the adoption of Resolution No. 6837 was limited to individuals who were pursuing undergraduate studies. Such a construction is consistent with the following testimony of Sharp:

> Q: Now, let's talk about student employees. What's the difference between a seasonal and a student employee?
>
> A: A student employee, as dated back from 1976 when I started, was an employee that would be hired for sixteen weeks of an employment. That would be a college student/technical student from the age of 24 through . . . 23, 24, depending on when their birth date and employment date started, till they were 18 years of age or 17, depending on when they graduated.
>
> Q: So this was primarily targeting high-school age students?
>
> A: This was targeted for students, as it states in our contract, which is a student that would be going to furthering their education past high school; that would be enrolled in some type of schooling, be it college or technical school. (T. at 11-12)

In summary, as discussed above, by identifying an employee as a "Student," the parties have reasonably indicated that the employee must be attending a school, college or university. The evidence of the parties' prior conduct indicates that "Student" employee positions were intended to be filled and have been filled by individuals pursuing undergraduate studies at an educational institution such as a college or technical school.

The most reasonable construction of Article VII(E) is that a "Student" employee is not only defined by length of employment, but is also defined by student status. Specifically, a "Student" employee must be a "student," *i.e.*, pursuing undergraduate studies at an educational institution such as a college or technical school.

Sharp also indicates that, historically, a "Student" employee has been between the ages of 17 and 24. Sharp does not relate any bargaining discussions, or any other exchanges between the parties, in which a Respondent representative confirmed that a "Student" employee refers to individuals who are between 17 and 24 years of age.

The term "Student" does not normally refer only to individuals who are 17 through 24 years of age. Resolution No. 4294 is silent with respect to the age of "student summer help." While Resolution No. 6837 states that "eligible applicants" are those "between 18 and 23 years of age," this statement is made as a "modification" to Resolution No. 4294.

Neither the language of Resolution No. 4294, nor the language of Resolution No. 6837, reasonably indicates that Respondent previously intended that a "Student" employee be an individual between the ages of 18 and 23 years of age. Nor does the record otherwise establish that the parties mutually intended that the position of "Student" employee be occupied by an individual who is between 17 and 24 years of age, or any other age.

As the Respondent argues, Article II(E) of the parties' collective bargaining agreement identifies various management rights, including the right to hire employees. As Article II(E) recognizes, however, the referenced management rights "must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine." By agreeing to the language of Article VII(E), the Respondent has restricted its Article II(E) management rights by limiting eligibility for employment in the position of "Student" employee to those individuals who are pursuing undergraduate studies at an educational institution such as a college or technical school.

The evidence of the parties' prior conduct has not been considered for the purpose of establishing a right that exists outside of the collective bargaining agreement. Rather, such evidence has been considered for the purpose of clarifying ambiguous contract language. The consideration of "past practice" evidence for the purpose of clarifying ambiguous contract language is consistent with the provisions of Article II(E); does not violate the "zipper clause" of Article XIII(M); and need not meet the standards of a binding past practice as previously enunciated by Arbitrator Mittenthal.

In summary, Complainant has established by a clear and satisfactory preponderance of the evidence, that Article VII(E) of the parties' 2003-2005 collective bargaining agreement requires Respondent to hire "students," *i.e.*, individuals that are pursuing undergraduate studies at an educational institution such as a college or technical school, into the position of "Student" employee. Sharp's testimony that, in 2006, the Respondent hired individuals into the "Student" employee position that were not students is as follows:

> Q Based on the documentation that's been provided to Local 67, do we not know for certain how these employees are being designated? Are they students? Are they seasonal employees, since there is, in fact a difference?

A: Some were students (sic) that were from existing parts of the program before the change in Council action. Then they went and hired a new group of employees that didn't fill our past hiring practice of student employees, which upon our research, that were not in school. One was 45; another was 55 years of age. So they hired outside the age requirement and the student-part of being students.

Q Did you have the opportunity to work with any of these people?

A They worked in our department, yes. (T. at 26)

. . .

A: I can only talk - - I never worked with anyone after they hired – they had the change in the program.

Q: So you were talking about after the change in the program - -

A: Correct.

Q: - - you didn't work with any student?

A: Correct. (T. at 27)

The record does not reveal the nature of the "research" conducted by Complainant. Nor does the record otherwise establish that Sharp was in possession of sufficient facts to reliably conclude that, following the adoption of Resolution No. 6837, Respondent hired individuals into the "Student" employee position who were not "students." Neither Sharp's testimony, nor any other record evidence, establishes that Respondent has hired individuals into the "Student" employee position who are not "students."

In summary, Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the collective bargaining agreement requires the position of "Student" employee to be occupied by an individual who is between 17 and 24 years of age, or any other age. Thus, assuming *arguendo*, that Sharp is correct when he states that Respondent hired one individual who was 45 and another that was 55 as "Student" employees, such hiring would not violate the collective bargaining agreement.

The collective bargaining agreement does require that individuals hired as "Student" employees be "students," as defined above. Complainant, however, has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has hired any individual into the "Student" employee position that is not such a "student."

Alleged Violation of Sec. 111.70(3)(a)4

In its post-hearing written argument, Complainant appears to be claiming that Respondent violated its statutory duty to bargain by refusing Complainant requests to bargain. (Initial brief, p. 10) However, a fair reading of the complaint, as amended, indicates that Complainant's prohibited practices allegations involve only the claim of unilateral change.

Any Complainant claim that Respondent has violated its statutory duty to bargain by refusing Complainant requests to bargain is outside the scope of Complainant's pleadings and Respondent has not had fair notice that the Complainant is advancing such a duty to bargain charge in the present case. Accordingly, it would be inappropriate and inconsistent with principles of fair play for the Examiner to make findings of fact, conclusions of law and order regarding any Complainant claim that Respondent has violated its statutory duty to bargain by refusing Complainant requests to bargain. RACINE COUNTY, DEC. NO. 31377-B, 31378-B(Gratz, 1/06); AFF'D, IN RELEVANT PART, DEC. NO. 31377-C, 31378-C (WERC, 6/06).

As discussed above, Complainant has not established that the parties' 2003-2005 collective bargaining agreement has expired. In STATE OF WISCONSIN (DHFS), DEC. NO. 31207-C (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. . . ."
>
> CITY OF BELOIT, DEC. NO. 27990-C (WERC, 7/96) (footnote omitted). To the extent the contract does not "address" a mandatory subject of bargaining, the employer's duty to bargain would require the employer to provide the Union with notice and an opportunity to bargain before changing any existing practice ("status quo") regarding that subject. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), citing NLRB V. KATZ, 396 U.S. 736 (1962). Where a practice has developed that is in conflict with contract language, the employer may still have an obligation to bargain before renouncing the practice and reverting to the contract language, if the practice is

> sufficiently clear, mutual, and longstanding. CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85).
>
> . . .

The "unilateral change" that is the focus of the complaint, as amended, is the adoption of Resolution No. 6837; which Complainant claims resulted in the alteration of the definition of "Student" employees and the failure to recall employees into the "Student" employee position. As is evident from the above discussion, the definition of "Student" employee is addressed in the contract. Thus, it is the contract that determines the parties' respective rights with respect to this issue and the parties are entitled to rely on whatever bargain they have struck.

None of the contract language relied upon by Complainant expressly addresses "recall rights" of "Student" employees. According to Sharp, based upon a long-standing past practice, "Student" employees have recall rights for up to four years of student employment. (T. at 12-13)

Article II(E) addresses "past practices" in the departments covered by the parties' agreement. The Examiner is satisfied, therefore, that the contract determines the parties' respective rights with respect to the "recall rights" of "Student" employees.

Assuming *arguendo*, that Respondent has a statutory duty to bargain with Complainant over the definition of "Student" employee and the recall rights of "Student" employees, Respondent satisfied that duty to bargain when it negotiated the parties' 2003-2005 collective bargaining agreement. Accordingly, Complainant's claim that Respondent has committed a unilateral change in violation of Sec. 111.70(3)(a)4, Stats., has been dismissed.

Conclusion

For the reasons discussed above, 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., alleged in the complaint, as amended. Accordingly, the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 18th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CAB/gjc
32085-A