STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150, Complainant,

vs.

WASHINGTON COUNTY, Respondent.

Case 163
No. 67108
MP-4360

Decision No. 32185-B

Appearances:

Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of Service Employees International Union Local 150.

Nancy L. Pirkey, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, on behalf of Washington County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On March 18, 2008, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, concluding that the Respondent, Washington County (County), had not failed to bargain in good faith with the Complainant, Service Employees' International Union, Local 150 (Union) regarding the County's decision to subcontract or the impact of the decision to subcontract certain work previously performed by employees at the Samaritan Health Center, who are members of the bargaining unit represented by the Union. The Examiner also concluded that the County had not failed to bargain in good faith by the manner in which it responded to Union requests for information and otherwise processed the related grievance.

On April 8, 2008, the Union filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed briefs in support of their respective positions regarding the petition for review, the last of which was received by the Commission on June 3, 2008.

As explained in the Memorandum that accompanies this Order, the Commission concludes, contrary to the Examiner, that the County failed to bargain in good faith with the Union regarding the subcontracting decision and the impact of that decision on bargaining unit employees' wages, hours, and conditions of employment. The Commission further concludes that the Examiner correctly determined that the County had responded to Union information requests in a manner consistent with its duty to bargain. Consistent with those conclusions and as reflected below, the Commission affirms and modifies the Examiner's Findings of Fact and affirms in part and reverses in part the Examiner's Conclusions of Law and Order

ORDER

A. The Examiner's Findings of Fact 1 through 4 are affirmed.

B. The Examiner's Finding of Fact 5 is modified by adding the following, and, as modified, is affirmed:

> 5. … By the end of October 2006, Somers and other Samaritan officials were seriously considering the subcontracting of housekeeping and laundry services at the Samaritan Home as a way to effectuate substantial cost savings. Although the County and the Union were in the process of negotiating a successor collective bargaining agreement at the time, neither Somers nor any agent of the County informed the Union of the serious consideration of subcontracting.[1]

C. The Examiner's Finding of Fact 6 is modified to substitute the following for the sentence beginning, "At its April 4, 2007 meeting" and for the next sentence, and as modified is affirmed:

> 6. …At its April 4, 2007 meeting, the Samaritan Committee authorized Somers to release the Request for Proposals (RFP) that he, in conjunction with the County's Purchasing Department, had previously prepared for subcontracting Samaritan's Laundry and Housekeeping Services. [2]

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[1] In its petition for review in this matter, the Union requested that the Examiner's Finding of Fact 5 be supplemented to include the above-stated information, which we find to be relevant, material, and supported by the record.

[2] In its petition for review, the Union requested that the Examiner's Finding of Fact 6 be modified to clearly reflect that the Samaritan Committee authorized Somers to prepare the RFP at the Committee's January 4, 2007 meeting, that Somers in fact prepared the RFP prior to the Committee's April 4, 2007 meeting, and that the Committee authorized Somers to release the RFP at the April 4, 2007 meeting. The Examiner's Finding clearly included the January 4, 2007 instruction from the Committee to Somers, but suggested, inaccurately, that the RFP was not prepared until after the April 4, 2007 Committee meeting. The modification, above, is intended to reflect that Somers, in accordance with the Committee's January 2007 instruction, had prepared the RFP prior to April

D. The Examiner's Findings of Fact 7 and 8 are affirmed.

E. The Examiner's Finding of Fact 9 is modified by eliminating the last two sentences and substituting the following:

> 9. … The County dropped the proposed layoffs during the 2006 negotiations because the County had concluded that the layoffs would not save a sufficient amount of money to meet the County's budgetary needs, because the County planned instead to pursue the subcontracting option, and because the County did not want to have to "fight the battle" with the Union twice over cost saving measures.[3]

F. The Examiner's Findings of Fact 10 and 11 are affirmed.

G. The Examiner's Conclusions of Law 1 through 3 are affirmed.

H. The Examiner's Conclusion of Law 4 is set aside and the following Conclusions of Law 4 and 5 are made:

> 4. The County's decision to subcontract laundry and housekeeping services traditionally performed by bargaining unit members is a mandatory subject of bargaining.
>
> 5. During negotiations for a successor collective bargaining agreement, the County developed a plan to seriously consider subcontracting of laundry and housekeeping services, but the County did not inform the Union of same during negotiations for the successor agreement. By this conduct, the County failed to bargain in good faith with the Union, in violation of Sec. 111.70(3)(a)4, Stats.

I. The Examiner's Conclusion of Law 5 is renumbered Conclusion of Law 6 and is affirmed.

J. The Examiner's Order is affirmed insofar as it dismissed the allegations in the complaint regarding the County's processing of the May 18, 2007 grievance and related information requests.

4, 2007, on which date the Committee voted to have him release the RFP for bids.

[3] The modification, while consistent with the information contained in the deleted portion of the Examiner's Finding of Fact 9, is more complete by indicating, in conformance with the record, that the County's decision to drop the layoffs was accompanied by a contemporaneous decision to seriously pursue subcontracting, both occurring in or about October 2006, while successor negotiations were ongoing.

K. The Examiner's Order is set aside insofar as it dismissed the allegations in the complaint relating to the County's unilateral implementation of the decision to subcontract bargaining unit work and/or refusal to bargain regarding the effects of that decision.

L. The Examiner's Order is reversed to the extent it dismissed the allegation that the County refused to bargain in good faith with the Union during negotiations for the 2007-08 successor agreement by failing to disclose that it was seriously considering subcontracting during the term of that agreement, and the following Order is made:

IT IS ORDERED that Washington County, its officers and agents, shall:

1. Cease and desist from refusing to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., by failing to inform the Union in a timely fashion that the County was seriously considering subcontracting bargaining unit work during the term of the upcoming successor collective bargaining agreement.

2. Take the following affirmative action that the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Rescind the layoffs of all employees laid off as a result of the subcontracting of bargaining unit work that took place on or about August 1, 2007, and offer them reinstatement effective five days after issuance of this Order, with all appropriate wages and benefits.

   b. Give the Union notice and, upon request, bargain in good faith with the Union, before subcontracting bargaining unit work, including the work that had been performed by bargaining unit members prior to August 1, 2007, and over the impact of any such decision on the wages, hours, and conditions of employment of bargaining unit members.

   c. Bargaining that occurs in connection with paragraph (2)(b) of this Order is part and parcel of the negotiations for the parties' 2007-08 successor agreement and thus subject to the statutory dispute resolution procedures set forth in Sec. 111.70(4)(cm), Stats.

d. Notify all of the employees in the bargaining unit of County employees represented by the Union by signing and posting the Notice attached to this Order in conspicuous places where said employees are employed. The Notice shall remain posted for 30 days after the date on which it is posted, and reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

NOTICE TO WASHINGTON COUNTY EMPLOYEES
REPRESENTED BY SEIU, LOCAL 150

Pursuant to an Order of the Wisconsin Employment Relations Commission, Washington County hereby notifies employees represented by SEIU, Local 150, that:

WE WILL NOT refuse to bargain in good faith, in violation of Sec. 111.70(3)(a)4, Stats., by failing to inform Local 150 in a timely fashion that we are seriously considering subcontracting of bargaining unit work during the term of an upcoming successor collective bargaining agreement.

WE WILL rescind the layoffs of all employees who were laid off as a result of the subcontracting of bargaining unit work that took place on or about August 1, 2007, and offer those employees reinstatement effective five days after issuance of this Order, with all appropriate wages and benefits.

WE WILL give the Union prior notice and, upon request, bargain in good faith with the Union, before subcontracting bargaining unit work, including the work that had been performed by bargaining unit members prior to August 1, 2007, and over the impact of any such decision on the wages, hours, and conditions of employment of bargaining unit members.

WASHINGTON COUNTY

By _____
Edward Somers, Administrator
Samaritan Health Center

Date _____

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE IT IS SIGNED AND POSTED AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

WASHINGTON COUNTY

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

The Examiner's Findings of Fact have been largely affirmed except where modified in the Order, above. The facts most pertinent to the Commission's decision are summarized as follows.

The Union has long represented a bargaining unit of various service workers at the Samaritan Health Center nursing home and the Fields of Washington County assisted care center (collectively referred to hereafter as "Samaritan"). The County operates Samaritan as an enterprise fund, governed by a committee of five County Board members (hereafter "the Committee"). At all relevant times, Edward Somers has served as the Administrator of Samaritan.

At all relevant times, the collective bargaining agreement (CBA) between the County and the Union covering Samaritan's employees has contained a number of provisions that are set forth in full in the Examiner's Findings of Fact. The most pertinent portion of the Management Rights clause states:

> 2.01 … The County retains and reserves the sole right to manage its affairs in accordance with all applicable law, ordinances and regulations. Included in this responsibility, but not limited thereto, is … the right to lay off employees; the right to contract out for goods and services ….
>
> 2.03 … These rights are unqualified and shall not be abridged, delegated or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. These rights shall not be used for the purpose of discrediting or weakening the Union …."

The contract also contains Article 18-Layoff, which states in pertinent part:

> 18.04 Should the County deem it necessary to shut down or contract out the operation of the Samaritan Health Center during the lifetime of this Agreement, the County will provide the employees and the Union with a minimum of forty-five (45) calendar days of notice of the date of shutdown.

The facility has used an outside contractor to launder its linens for as long as any witness could recall, since at least the early 1970's. However, prior to the events giving rise

to this case, the County had not subcontracted any of the work historically performed by bargaining unit members over the past several decades.

In the summer and fall of 2006, Somers began to think seriously about the relatively high costs of Samaritan's housekeeping/laundry services and options for reducing those costs. In preparing Samaritan's budget for the upcoming 2007 fiscal year, Somers anticipated an operating deficit of several hundred thousand dollars. In August 2006, responding to a postcard solicitation, Somers authorized a private contractor, BSG Maintenance of Green Bay, Inc., to walk through the facility and submit an informal bid for undertaking Samaritan's housekeeping services. In October 2006, at the industry's annual conference, Somers attended a presentation by BDO Seidman that reported on the comparative costs among private and public sector nursing homes in Wisconsin. Somers concluded from that report that Samaritan's labor costs for housekeeping were substantially greater than those in comparable institutions.

During the fall of 2006, the County and the Union were engaged in negotiations for a successor to the CBA that was set to expire on December 31, 2006. At a bargaining session in October 2006, the County submitted a document entitled "Additional Bargaining Proposals," which contained two numbered paragraphs, one of which stated:

> The County proposes to make some changes in staffing that will result in the layoff of certain employees (to be discussed at the bargaining session). The layoffs will be effective January 1, 2007.

At the table, the County explained to the Union that it sought to reduce two full time custodians to part time and to lay off two Nursing Assistant Helpers and one laundry position. After caucusing, the Union rejected the proposal.

By letters dated October 17, 2006, the County provided notices of layoff, effective January 1, 2007, to each of the five employees holding the positions that were the subject of the above-described discussion at the bargaining table. The Union thereafter filed a grievance, supplemented by a letter from the Union's attorney, dated October 27, 2006, in which the Union contended that the layoffs violated various provisions of the CBA, including seniority.

At some point between October 17 and November 6, 2006, Samaritan officials consulted with each other and with counsel and decided that, instead of going forward with the layoffs, they would pursue the subcontracting of housekeeping services.[4] They reasoned that subcontracting could save far more money than the five layoffs and that they preferred not to battle with the Union twice over cost-saving methods. They believed they had an unfettered right to subcontract under the language in the existing CBA. Somers testified that, at the time he rescinded the layoffs, he believed subcontracting was "likely." Accordingly, by letter dated November 6, 2006, the County informed each of the five employees as follows:

[4] The record indicates that the Samaritan Committee was contemporaneously aware of this decision, at least generally, including the withdrawal of the layoff notices and the prospect of subcontracting.

> Upon further reflection we have determined that elimination of your position will not accomplish financial goals set for next year. Therefor[e], we are rescinding your layoff. We will be looking at other avenues to achieve operational savings in 2007. Rescinding your layoff is not a guarantee of future employment.

The Union was not copied on the letters to the individual employees. However, by memorandum sent on November 16, 2006, Somers responded to the Union's grievance regarding the layoffs. In the memorandum, Somers denied that the County had violated the contract, as the Union's grievance had alleged. He also stated:

> However, it has been decided to rescind the layoff of the Building Maintenance I employees and the Domestic Service Worker, letters were sent to the affected employees 11/6/06.
>
> Further, it has been decided not to eliminate the full position of the Nursing Assistant Helper, however to modify it to a first shift, 4-hour per day position. Letters will be sent to the affected employees.

Negotiations with the Union continued in November and December, 2006, culminating on December 18 with a tentative agreement for a successor contract for the period January 1, 2007 through December 31, 2008. During the negotiations, the County did not mention its plan to pursue subcontracting of housekeeping services. The Union was unaware of the impending subcontracting plan. The agreement included a wage increase for employees in housekeeping and domestic services.

At the Samaritan Committee meeting on January 4, 2007, the Committee reviewed the recently agreed-upon CBA and also directed Somers to prepare a Request for Proposals to subcontract the housekeeping/custodial work at the facility. The Committee voted to ratify the new CBA on January 9, 2007; the Union had ratified at some point prior to that date.

Between January 4 and April 4, 2007, Somers worked with financial officials at Samaritan to prepare a formal RFP in accordance with the Committee's January 4 directive. At the Committee's April 4 meeting, the Committee reviewed the prepared RFP and authorized Somers to release it, which he did on or about April 23, 2007.

At a Labor-Management meeting on April 16, 2007, Somers informed the Union that he had begun the RFP process for subcontracting housekeeping/custodial work, which was the first indication the Union had of the subcontracting plan. Between April 19 and the first week of May, the Union underwent some internal turbulence, leading to a temporary change of representatives assigned to the Samaritan bargaining unit. By letter dated May 9, 2007, the Union asked to be informed in writing "if the County has intentions to subcontract, what the County intends to subcontract, when the County intends to subcontract, and who the County intends to subcontract with." The Union's letter requested information about the

subcontracting and also demanded that "the County not proceed unless and until the Union has the opportunity to negotiate concerning the decision whether or not to subcontract, as well as the effect on the bargaining unit."

By e-mail dated May 9, 2007, Somers responded to the Union's letter, stating, *inter alia*, "At this point we are merely soliciting proposals to see if it will be financially advantageous for Samaritan to subcontract these services. … Please consider this letter written notice of Washington County's intent to subcontract housekeeping, custodial and laundry services at Samaritan Health Center." Somers attached a copy of the RFP.

The Union filed a grievance on May 18, 2007, contending that the proposed subcontracting would violate various provisions of the contract. The County responded by letter dated June 6, 2007, denying that subcontracting violated the contract, and quoting from the Management Rights clause that the County has "the right to lay off employees; the right to contract out for goods or services." In its response, the County also denied that it was subcontracting in order to discredit or weaken the Union, asserting that its action was prompted by financial reasons. By letter dated June 8, the Union asked to proceed to the next step of the grievance procedure, asked that the procedure be expedited with a deadline of June 30, asked that the County refrain from subcontracting until the process was completed, and asked that the County supply six discrete forms of documentary and financial information relating to the subcontracting on or before June 15. The County responded on June 19, 2007, denying the grievance, declining to expedite the process, providing certain information that had been requested, and indicating that certain information was not available. On July 2, 2007, the Union filed the instant prohibited practice complaint.[5]

After reviewing the four responses the County received to its RFP, Somers recommended and the Samaritan Committee voted on June 7, 2007 to select BSG's bid, which was projected to save Samaritan about $234,165 annually in labor costs. The contract into which Samaritan and BSG entered was self-renewing every year for seven years, without a price increase, and allowed Samaritan to terminate the contract for any reason "without cause" with 90 days written notice.

On June 8, 2007, the County conveyed layoff notices to 18 employees affected by the subcontracting, stating the layoffs would take effect on August 1, 2007. At Samaritan's request, BSG offered to interview any laid off bargaining unit members for positions with BSG for work at Samaritan. BSG's wage and benefit package, most notably its health insurance plan, were glaringly less generous to employees than Samaritan's. Only a handful of former Samaritan employees ultimately accepted employment with BSG. Since BSG continued to provide essentially the same scope of services, with the same methodology and using

[5] The Union's complaint included allegations that the County had failed to process the grievance properly and had failed to provide the Union with the requested information in a timely and complete manner, in both respects allegedly violating the County's duty to bargain in good faith. In the context of the parties' primary focus on the duty to bargain over the subcontracting itself, we will not summarize the facts applicable to this portion of the dispute.

equipment supplied by Samaritan, the cost savings that Samaritan realized from the BSG contract was due virtually entirely to the difference in employee wages and benefits.

The Union submitted its grievance to arbitration in a hearing was that was consolidated with the instant prohibited practice hearing. The arbitrator concluded that the contract permitted the County to contract out the bargaining unit work at issue, since the County's purpose here was to save money rather than to frustrate or modify the terms of the contract or to discredit or weaken the Union. Hence, the arbitrator denied the grievance. WASHINGTON COUNTY, MA-13748 (McLaughlin, 3/08).

The Examiner's Decision and the Positions of the Parties

The Examiner reached four principal conclusions, each of which the Union has challenged.

First, the Examiner concluded that, although the subcontracting in this case clearly was a mandatory subject of bargaining (which the County acknowledges), the CBA "addressed" the subject of subcontracting, by a combination of the language in the Management Rights Clause reserving the "right to contract out for goods and services" and the language in the Layoff Clause calling for 45 days' notice in the event the employer decides to "shut down or contract out the operation of the Samaritan Health Center." In the Examiner's view, these provisions show that "the labor agreement addresses the issue of subcontracting with sufficient clarity for each party to be 'entitled to rely on whatever bargain they have struck.'" Examiner's Decision at 25, quoting CITY OF MADISON (FIRE DEPARTMENT), DEC. NO. 27775-C (WERC, 7/96) at 12. Because he viewed the contract as addressing subcontracting, he concluded that the County had already discharged its duty to bargain over the subject.

Second, the Examiner declined to rule on the question of whether, even if the Union had contractually waived its right to bargain over the subcontracting decision, the County nonetheless had a duty to bargain over the "impacts" of that decision on employee wages, hours, and conditions of employment. In the Examiner's view, the Union had litigated the mid-term bargaining issue "as an all or nothing proposition," as reflected by its insistence upon a return to the status quo ante. Examiner's Decision at 26. Hence, he did not view the case as presenting a separate impact bargaining issue.

Third, the Examiner considered whether the County's "course of conduct" regarding the subcontracting decision – in particular its failure to inform the Union about the subcontracting possibility during negotiations for a successor agreement – violated the County's "duty to deal with the Union in good faith." Although the Examiner found it "most troubling … that the Samaritan Committee discussed the possibility of the RFP process prior to County ratification of the 2007-08 labor agreement, without contemporaneously notifying the Union," he concluded that this "single fact" fell short of bad faith bargaining.

Fourth, the Examiner rejected the Union's argument that the County's delay in responding to the Union's request for information about the subcontract constituted a refusal to bargain in good faith. Since the Examiner had earlier held that the contract language relieved the County of a duty to bargain before implementing the subcontracting, he reasoned that the information was relevant only to the processing of the grievance; hence, in the Examiner's view, the timing of providing the information "is less than critical, provided it reflects good faith." Examiner's Decision at 29. He concluded that the County "provided the Union with the requested information as soon as it had it" and therefore complied with the law. Id.

The parties and the Examiner focused most of their energy on the first of the foregoing issues: whether the County had already discharged its duty to bargain over subcontracting (and, concomitantly, whether the Union had waived its right to bargain on that subject) by virtue of the contract language in the Management Rights clause and in the Layoff clause. As to the Layoff clause language, neither party has argued that it applies directly to subcontracting, but rather to a shut down or other complete termination of operations. However, the Examiner and the County see that language as indicating, in combination with the Management Rights clause language, that the parties have negotiated over the general subject of contracting out and that they reached an agreement such that the only limit on management's free rein would be the 45-day notice requirement set forth in Section 18.04.

The Union, on the other hand, points to the long line of authority requiring a waiver of the right to bargain to be "clear and unmistakable," -- authority that the Examiner also cited and viewed himself as applying. Examiner's Decision at 24-25 and cases cited therein. The Union argues that the language in Section 18.04 expressly "addresses" only one specific topic (a total shut down of operations) within the broad range of possible topics that might arise under the rubric "contracting out" unit work. As to the Management Rights clause, the Union argues that the language simply states the employer's general authority to take actions; the language not only lacks any explicit waiver of prior bargaining (for example, by stating "without bargaining" or "unilaterally"), but in fact requires management to exercise its authority "in accordance with all applicable law …," one of which is the bargaining law. At worst, according to the Union, this language is ambiguous and susceptible to more than one interpretation. If ambiguous, it cannot meet the "clear and unambiguous" standard for accomplishing a waiver, at least without bargaining history or past practice to clarify its intent. In this case, there is no bargaining history whatsoever, much less any suggesting that the parties intended this language to permit subcontracting *carte blanche*. Moreover, the only practice over more than thirty years has been no subcontracting, with or without bargaining. Hence, the Union contends that the ambiguity must be resolved in its favor. The Union also argues that, even if the contract language covers the decision to subcontract, the County still had a duty to bargain the "impact" of the decision on bargaining unit members. The Union also contends that the Examiner erred in exonerating the County for its failure to disclose its subcontracting plans during successor negotiations.[6]

[6] The Union has also challenged the Examiner's holding that the County adequately responded to the Union's request for information regarding the subcontracting decision, bids, and effect on employees' wages, hours, and

DISCUSSION

As indicated in the Order, above, we have resolved this case by concluding that the County failed to negotiate in good faith with the Union during negotiations for the 2007-08 contract, and we have issued a remedy limited to that violation. However, because the Examiner and the parties have focused most of their attention on the question of whether the County "unilaterally changed" working conditions when it implemented the subcontracting decision in or about the summer of 2007, we will briefly discuss our perspective on the law relating to that important issue before addressing the "good faith bargaining" issue on which we ultimately resolve this case.

To briefly recap the law as it relates to bargaining over subcontracting, the Municipal Employment Relations Act (MERA) requires the County to negotiate with the union over both the decision and the impact of subcontracting bargaining unit work where, as here, the decision primarily affects working conditions because the County is continuing to have the same work performed but by less expensive, non-bargaining unit, employees. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (SUP. CT. 1977). An employer may not act unilaterally on such a mandatory subject of bargaining, because to do so undermines the Union's right to meaningful negotiations and defeats the basic purpose of MERA. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, and cases cited therein; NLRB V. KATZ, 396 U. S. 736 (1962). In general, an employer must notify a union representing its employees that it intends to take action on the particular subject of bargaining and offer the union an opportunity to negotiate beforehand. ID.

Here the County did not notify the Union and offer an opportunity to bargain before effectuating a subcontract that resulted in the layoff of 18 employees, and the Union therefore has established a *prima facie* case of unlawful unilateral change. The County, however, offers a well-recognized affirmative defense to such a unilateral change allegation: the County contends that it has already bargained for and acquired the right to subcontract in this manner, pointing to the Management Rights clause and Section 18.04 of the contract.

The affirmative defense on which the County primarily relies in this case is more easily stated than applied. The case law in this area is somewhat opaque. As we pointed out in STATE OF WISCONSIN, DEC. NO. 31207-C (WERC, 3/06) at 11, the result often turns upon how precisely the "subject" in question is described. Compare MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (1995) (despite comprehensive contract language on health insurance, which did not identify a carrier, the employer had a duty to bargain before changing the carrier), with CADOTT EDUCATION ASSOCIATION V. WERC, 197 WIS.2D 46 (Ct. App. 1995) (where the contract provided for holiday pay, but did not specifically address the conditions under which employees are eligible for holiday pay, the contract "covered" the subject and the employer had no duty to bargain before limiting eligibility to those who were in attendance on

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working conditions. As noted in our Order, above, we have affirmed the Examiner's conclusion on this issue and adopt his analysis without further discussion.

has not consistently distinguished between the question of whether certain contract language "waives" the right to bargain (thus implicating the "clear and unambiguous" standard) and the question of whether contract language sufficiently "addresses" a subject so as to show that the Union has already exercised its right to bargain on the topic. There is no shortage of decisions in which the two concepts have been used interchangeably, as the Examiner did in the instant case. Under any view of the prior case law, the instant case would present difficulties, because it involves language in a management rights clause that is not illuminated by bargaining history, that is by its terms subject to "applicable law" that arguably includes MERA's bargaining obligation, and that has not actually been exercised in anyone's memory. This language (with or without reference to the Layoff clause language) strikes us as a frail basis for concluding that the Union has agreed to allow the County to subcontract the work of 18 bargaining unit members without involving the Union in formulating the decision or the consequences.

A second issue related to the "unilateral change" theory is that pertaining to the County's obligation to engage in so-called "impact bargaining" even if the contract gave the County authority to subcontract unilaterally. This issue is also fraught with difficulty. Contrary to the Examiner, we think the Union has sufficiently posed the impact bargaining issue. The Union's May 9, 2006 bargaining demand specifically included the "effect" of any subcontracting decision on the bargaining unit, and the Union's brief to the Examiner clearly argued the point separately from the "decision bargaining" issue. However, the impact issue is intimately related to the contract waiver issue, since, as the County argues, the contract language could readily be interpreted to waive bargaining over both the decision and its impact. In addition, even if impact bargaining has not been waived, the Commission's case law is very fact dependent about whether the County would have been required to stay its hand on the subcontracting itself (i.e., maintain the status quo) until impact bargaining was exhausted. See CITY OF MILWAUKEE, DEC. NO. 32115 (WERC, 5/07). Accordingly, despite its pragmatic appeal, a holding that the contract language "addressed" the issue of the subcontracting decision, but not the impact of that decision, is an unsatisfying resolution to this case.

Although the Examiner and the parties view this case primarily through the lens of unilateral change theory, we have concluded that this case is more appropriately resolved by resort to the third issue summarized above, i.e., the County's duty to disclose that it was seriously considering subcontracting, as a function of its duty to bargain in good faith with the Union. As discussed more fully below, we conclude, in the totality of the specific circumstances present here, that the County violated its duty by failing to share with the Union – contemporaneously in the fall of 2006, while the parties were negotiating for the successor agreement – that the County was seriously considering subcontracting during the term of the successor agreement as a way to reduce operating costs. Had the County done so, the Union's response (or lack thereof) to the actuality facing its members, and any resulting negotiations or interest arbitration, may have affected either the language in the applicable contract language or its interpretation or both. The County's failure to provide the Union that opportunity makes

not negotiated in the requisite good faith. Accordingly, we have set aside the Examiner's conclusions regarding the waiver and impact bargaining implications of the language in the successor agreement and we do not decide those issues.

Turning to the County's obligation to inform the Union that it was seriously considering subcontracting, we begin with the language of the statute itself regarding the County's bargaining obligation:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, thorough its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, *in good faith,* with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours, and conditions of employment ….

Sec. 111.70(1)(a), Stats. (emphasis added). This statutory requirement of "good faith" in negotiating a labor contract, which mirrors language in the National Labor Relations Act, 29 U.S.C. Sec. 158(d), is an exception to the general law of contract formation, which requires "good faith" in the performance and enforcement of contracts but (absent duress or fraud) does not regulate the negotiation process. See RESTATEMENT (SECOND) CONTRACTS, SEC. 205, COMMENT "C"; CALAMARI & PERILLO, THE LAW OF CONTRACTS (4TH ED.) (West, 1998), at 458. Thus, for purposes of traditional business contracts, "the bargaining process [has been] treated as if it were a poker game," CALAMARI & PERILLO at 336, but collective bargaining negotiations are subject to a higher standard of conduct and scrutiny. This important difference – the requirement of good faith in negotiations – underscores other fundamental differences between a typical business contract and the collective bargaining process. Two striking differences are that, in collective bargaining, parties are required by law to negotiate a contract with each other (once a union has been selected by a majority of the bargaining unit) and the contract they are negotiating covers third parties, i.e., the employees in the bargaining unit. Thus the relationship between the union and the employer is an ongoing one, a "'partnership' in determining wages and working conditions," GORMAN & FINKIN, BASIC TEXT ON LABOR LAW (2D ED.) (West, 2004) at 532, that transcends the contents or the duration of any particular contract. The meaning of "good faith" must be viewed in terms of this unique statutorily-imposed relationship and responsibility.

As the Commission has long held, "good faith" in the conduct of negotiations is a "fact-intensive, highly circumstantial" inquiry, in which the Commission examines the "totality of the circumstances" in each case. EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) at 26; CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83) at 11. Here a number of circumstances converge to compel the conclusion that the County's conduct regarding its subcontracting plans during the negotiations for the 2007-2008 contract was not consistent with good faith. First, the action the County contemplated, i.e., subcontracting the entire housekeeping and custodial operation, was one that would have a major impact on the

language as authorizing or at least permitting this action, the language was not crystal clear, but rather subject to other plausible (if ultimately unsuccessful) interpretations, as noted by the arbitrator in the companion arbitration award. WASHINGTON COUNTY, MA-13748 (McLaughlin, 3/08). Third, the language on which the County relied had been in the contract for so long that neither party could supply any bargaining history that would shed light on what the parties intended when it was first negotiated. Fourth, not only did the County not in anyone's memory subcontract unit work prior the instant situation,[7] but the record contains no evidence that subcontracting was ever discussed over decades of successive contract negotiations. Fifth, the County's sole purpose in subcontracting was to lower its labor costs – a purpose particularly well-suited for exploration and perhaps compromise during the bargaining process. Sixth, while the County had not made a final decision to subcontract, the County had formulated a clear intention of "pursuing" subcontracting by seeking bids and investigating costs; in fact, the County authorized its director to prepare an RFP on the same date that it considered and shortly before it ratified the 2007-08 successor agreement. The subcontracting alternative thus was sufficiently "real" in the fall of 2006, while the County was in active negotiations with the Union, that the County decided to abdicate its earlier efforts to implement more limited layoffs. While the County points out that, in withdrawing its layoff notices, it informed the affected employees (though not the Union) that the County would "be looking at other avenues to achieve operational savings in 2007," this cryptic reference to its plans only begs the question why the County did not share its intentions both more forthrightly and more directly with the Union itself.

The pivotal implication from the foregoing combination of circumstances is that the Union, while negotiating the successor agreement, neither actually nor with reasonable imputation could have expected the County to implement a subcontracting decision on such a major scale during the term of the successor agreement. Although the County did not actively mislead the Union, the County did intentionally withhold information about an actively formulated plan to investigate subcontracting that clearly would have been of major interest to the Union and the bargaining unit. Collective bargaining, unlike general business transactions, is governed by a "good faith" requirement: it is not a "poker game." In this situation, the County's "partnership" with the Union, its shared responsibility for the working conditions of the employees, required the County to disclose to the Union that the County was seriously considering subcontracting during the course of the successor agreement then under negotiation.[8]

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[7] As long as anyone could remember, the County has used an outside vendor for certain laundry services. The record does not indicate that this work had ever been performed by bargaining unit employees.

[8] Although this case and its outcome are unusual, they are not unprecedented. See ELLINGTON BOARD OF EDUCATION, DEC. NO. 3 100 (CONN. STATE BOARD OF LABOR RELATIONS, 4/93) (holding that, "[t]he Board of Education committed a prohibited practice during negotiations by failing to disclose to the Union the serious possibility that the nurses would be replaced.")

We emphasize that the holding in this case is intensively fact-based. We are not establishing a per se rule regarding a duty to disclose any and all actions that either party is seriously considering taking during the term of a contract then under negotiation. While we tend to think disclosure generally enhances the collective bargaining process, the extent to which "good faith" will require such disclosure will be a function of circumstances, such as the significance of the impact on the bargaining unit, how fully formulated the plan is, the clarity vs. ambiguity of any contract language that arguably authorizes the action, and the extent to which the complaining party reasonably should have anticipated the impending action based on bargaining history or past practice.[9]

REMEDY

The Commission has a great deal of latitude in devising its remedies and may tailor them to the facts of a specific case." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), citing EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). Generally speaking, the Commission's remedial goals are to restore the parties as much as possible to the situation they would have been in had the prohibited practice not occurred, and sometimes this requires the Commission to deviate from its traditional remedies. See discussion in RACINE COUNTY, DEC. NO. 31377-C, 31378-C (WERC, 6/06) at 6-8.

This is an unusual case that calls for an unusual remedy. Returning the parties to the position they would have been in absent the prohibited practice is not realistic because, as noted above, the breach that occurred here may or may not have affected the content of the successor (2007-08) contract and may or may not have altered the outcome of the County's subcontracting plans. Instead, as the Union suggests, we take guidance from a remedy the National Labor Relations Board (NLRB) has devised for cases where an employer had no duty to bargain about a particular decision (usually to close a plant), but did have a duty to bargain about the "impacts" of that decision and failed to do so. Rather than reinstate employees retroactively with back pay in those situations, the NLRB may impose a more limited remedy, the so-called "Transmarine" remedy named after the case in which the remedy was first implemented, TRANSMARINE NAVIGATION CORP., 170 NLRB 389 (1968). Most pertinent here, that remedy requires the employer to begin paying "back pay" to the laid off bargaining unit employees only prospectively, beginning shortly after the Board issues its bargaining order, and continuing until good faith bargaining has been completed. The underlying rationale is to restore the *status quo* (i.e., the reinstatement of the laid off employees) so that meaningful

[9] For example, an employer would not have an obligation to disclose that it was seriously considering terminating an employee and thus invoking a "just cause" provision in the successor contract, even if the employer had never previously terminated any employees. We also emphasize that the decision in this case is not premised upon a "unilateral change" theory; we have expressly withheld deciding the unilateral change allegations here, for reasons explained in the discussion above. A "unilateral change" case requires the complaining party to establish that the respondent failed to provide advance notice before changing the status quo on a mandatory subject of bargaining. We acknowledge the many cases discussing how "final" an employer's intention or decision must be before it is subject to the notice requirement, but, since this decision is not premised upon a unilateral change theory, those cases are not apposite here.

bargaining can occur *prospectively*.

Like the NLRB, the Commission has also traditionally adhered to the view that, in order for a bargaining order to be meaningful, it is necessary to recapture as much as possible the parties' relative leverage as it existed in the *status quo ante*. See, e.g., GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). While the instant violation does not relate to "impact bargaining," but rather to a failure to engage in good faith bargaining during successor negotiations, the Transmarine remedy nonetheless suggests a solution here. A prospective reinstatement and bargaining order allows the parties to negotiate over the subcontracting issue from approximately the same positions they were in when the County formulated its plan in the fall of 2006. In addition to negotiating the subcontracting issue prospectively, the parties can also determine bilaterally or through interest arbitration what retroactive employment rights and/or back pay should apply to the affected employees between the time the subcontracting decision was implemented and the date the County complies with the prospective bargaining order.[10]

We have therefore ordered the County to reinstate the laid off employees prospectively, beginning five days after issuance of this Order, and to negotiate with the Union in good faith about the decision to subcontract housekeeping/laundry services and the impact of that decision on the bargaining unit employees' wages, hours and conditions of employment. In order to further restore both parties to the situation they would have been in had the County disclosed its plans during bargaining, the bargaining that we order is subject to the successor agreement dispute resolution procedures contained in Sec. 111.70(4)(cm), Stats., up to and including interest arbitration.

Dated at Madison, Wisconsin, this 20th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[10] While the Order requires negotiation and, if necessary, interest arbitration only over the subcontracting decision and its impacts on the bargaining unit, the parties are free to include other issues in both their negotiations and interest arbitration, provided those issues are included by mutual agreement.

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