STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY EMPLOYEES LOCAL 1672B, AFSCME, AFL-CIO, JEROME ZEY, ELROY DIX, FELIX HOLEWINSKI, MICHAEL McCARTNEY, ALBERT BOUTTOT, LESTER KOLLMAN, GRANT CURRAN and MELVIN DELARELLE, Complainants, vs. CITY OF GREEN BAY, JOINT SCHOOL DISTRICT NO. 1, EUGENE SLADKY, DONALD TILKENS, THOMAS BENO, ROBERT STUART, MRS. D. C. ANGUS, HARRY BINS, MRS. JOHN ZEIBELL, and GLENN E. EVJUE, as members of the Board of Education of Joint School District No. 1, Respondents.	Case XIV No. 15224 MP-110 Decision No. 10722-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson, appearing on behalf of the Complainant.

Mr. Ervin L. Doepke, City Attorney, Green Bay, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainants having on January 11, 1972, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the above named Respondents had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted on February 25, 1972, and March 13, 1972, at Green Bay, Wisconsin by the Wisconsin Employment Relations Commission, the full Commission being present; and the Commission, having reviewed the evidence and briefs of Counsel, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Green Bay Employees Local 1672B, AFSCME, AFL-CIO, hereinafter referred to as AFSCME, is a labor organization representing employes for the purposes of collective bargaining and has its offices at Green Bay, Wisconsin; that AFSCME is affiliated with Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO; and that James W. Miller, a resident of Green Bay, Wisconsin, and at all times material herein has been a representative of said Council and an agent of AFSCME.

2. That individual Complainants Jerome Zey, Elroy Dix, Felix Holewinski, Michael McCartney, Albert Bouttot, Lester Kollman, Grant Curran and Melvin Delarelle, were, and are, at all times material herein residents of Green Bay, Wisconsin.

3. That the Respondent Board of Education, Joint School District No. 1, City of Green Bay, et al, hereinafter referred to as the School Board, has its offices at 100 North Jefferson Street, Green Bay, Wisconsin, and that it operates, controls and maintains elementary and secondary schools in the City of Green Bay and the Towns of Allouez, Bellevue, DePere, Eaton, Green Bay, Humboldt and Scott; that Respondent Eugene Sladky, at all times material herein, has been, and is, the President of the School Board.

4. That since October 10, 1968, AFSCME has been, and is, the certified collective bargaining representative of all custodial and maintenance employes in the employ of the School Board; and in said relationship, at all times material herein, the School Board and AFSCME were parties to a collective bargaining agreement, effective from January 1, 1971 to December 31, 1971 covering the wages, hours and conditions of employment of said employes, which agreement contained, among its provisions the following material herein:

"ARTICLE I
RECOGNITION AND UNIT OF REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer, or its lawfully authorized representative, on questions of wages, hours, and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:

1. All maintenance employees of the Board of Education, Joint School District No. 1, City of Green Bay, ET.AL., excluding professional teachers, supervisors, department heads, craft employees, elected or appointed officials, cooks, clerical and confidential employees.

2. . . .

3. . . .

. . .

The employer agrees not to discharge nor to discriminate against any employee for membership in the Union or because of Union activities.

ARTICLE II
MANAGEMENT RIGHTS

The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the

Constitution of the State of Wisconsin, and of the United States, including, but without limiting and generality of the foregoing, the right:

(1) To the executive management and administration control of the school system and its properties and facilities;
(2) To hire all new employees and subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such employees;
(3) To determine hours of duty and assignment of work;
(4) To establish new jobs and abolish or change existing jobs;
(5) To manage the working force and determine the number of employees required.

The exercise of management rights in the above shall be done in accordance with the specific terms of this agreement and shall not be interpreted so as to deny the employee's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

. . .

ARTICLE VII
SENIORITY

The Employer agrees to the seniority principle.

Seniority shall be established for each employee and shall consist of the total calendar time elapsed since the date of his employment. Seniority rights terminate upon discharge or quitting.

Seniority shall be established separately in craft union.

In the event of lack of work or lack of funds, employees shall be laid off in inverse order to the length of service and the last employee laid off shall be the first to be called back from such layoff provided the employee's qualifications meet the needs of the school system.

Permanent employees shall not be subject to layoff until all temporary and probationary employees in the system involved are first laid off.

If a lay-off under consideration is to be a reduction-in-force lay-off, the Employer shall give the Union ten (10) days notice on permanent full-time positions.

If any employee fails to return to his job upon being recalled within 72 hours his employment shall be terminated. Notice of such permanent recall and/or terms of employment shall be furnished to the Union.

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ARTICLE XVI
GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

Step 1. The aggrieved employee shall present the grievance orally to his steward. The steward and/or the aggrieved shall attempt to resolve the grievance with the immediate supervisor, who may call higher level supervisors into the discussion. If it is not resolved at this level, the grievance shall be processed as outlined in Step 2.

Step 2. The grievance shall be presented in writing to the department head and if not resolved within five (5) working days at this level, the Director of Building and Grounds shall note his statement on the grievance form and it shall be processed as outlined in Step 3.

Step 3. The grievance shall be presented in writing to the Superintendent of Schools, and if not resolved within five (5) working days at this level the Superintendent shall note his statement on the grievance form and it shall be processed as outlined in Step 4.

Step 4. The grievance shall be presented by letter to the Board of Education Negotiations Committee. If it is not resolved at this level within ten (10) days, it shall be presented to an Arbitration Board as in Step 5.

Step 5. Within five (5) days of completion of Step 4, the grievance shall be submitted to arbitration. An Arbitration Board shall be composed of three disinterested members. The employer and the union involved shall each select one member of the Arbitration Board and the two members so selected shall then select a third member, who shall act as chairman. Should the two members selected be unable to agree on the selection of the third member, then the selection of the third member shall be left to the Wisconsin Employment Relations Commission. The Board of Arbitration, after hearing both sides of the controversy, shall

hand down their decision in writing within ten (10) days of their last meeting to both parties to this Agreement, and if approved by not less than two (2) members thereof, such decision shall be final and binding on both parties to this agreement.

The Board of Arbitration shall have no power to add to or subtract from or modify any terms of this Agreement.

The employer shall bear the expense of its members on the Board of Arbitration and the aggrieved employee or the aggrieved employee's union shall bear the expense of his member on the Board of Arbitration. The costs, if any, of a third member on such Board, shall be divided equally between the employer and the other party to the dispute.

GENERAL: Any employee may process his grievance as above outlined, but the Union shall have the right to be present and act in support of its position in the matter of the grievance.

Any employee shall have the right of the presence of a steward when his work performance or conduct or other matter affecting his status as an employee are subject of discussion for the record.

The Union shall determine the composition of the Grievance Committee of the Union. Such committee shall not exceed four (4) employees.

. . .

ARTICLE XX
NEGOTIATIONS

Negotiations on all matters covered by this Agreement or on other proposals with respect to wages, hours and/or conditions of employment shall be conducted annually and any agreement reached in negotiations shall become effective on the following January 1st.

Negotiations shall proceed in the following manner; the party requesting negotiations shall notify the other party in writing of its request not earlier than the 1st day of June. An initial meeting of the parties shall be called within thirty (30) days of the notice of such request, but not earlier than the first day of July. The party upon whom such request is made shall have the opportunity to study such request and make an offer or counter-offer to the other party within fifteen (15) days thereafter. Negotiations shall continue until resolved or until it is clear that no agreement can be reached.

The Employer agrees that time spent in the conduct of negotiations shall not be deducted from the pay of the four delegated employee representatives of the Union.

. . ."

5. That in the fall of 1970 the Green Bay City Council reduced the School District's budget request for the year 1971 by some $850,000; that, as a result of such budget cut, the School District sought means by which to reduce their 1971 expenditures, and in that regard, on January 25, 1971 the School Board voted to eliminate student driver education classes for the 1971-1972 school year, which would result in anticipated reduction in the sum of approximately $97,000 for said school year, a portion of such sum would result in a deduction of the 1971 year budget; and that, further in said regard, the School Board on February 22, 1971 voted to eliminate 21 teaching posts for the school year 1971-1972, which number of positions included three and one-quarter driver instructors.

6. That, following a hearing on a complaint of prohibited practices filed by AFSCME, Robert M. McCormick, an Examiner on the staff of the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, on February 25, 1971, issued Findings of Fact, Conclusions of Law and Order, wherein said Examiner concluded that the School District and its agents had committed certain prohibited practices within the meaning of Section 111.70(3)(a) of the Wisconsin Statutes; that the prohibited practices found to have been committed included the discharges of four custodial employes, who were officers of AFSCME, which discharges had occurred on May 12, 1969; that in his decision the Examiner ordered the School District and its agents, to, among other things, immediately offer reinstatement to said discharged employes and to make them whole, by the payment to each of said employes a sum of money equal to that which they would have earned as wages, from the date of their discharge to the date of an unconditional offer of reinstatement by the School District, together with other benefits due each of said employes during said period, less a set-off for any earnings earned elsewhere during said period; and that had the School District complied with the Order of the Examiner, with regard to the reinstatement of said four employes, upon receipt of the Examiner's decision, the back pay due and owing said employes was estimated to amount to approximately $50,000.

7. That the School District did not comply with the Order of the Examiner, but rather on March 18, 1971 filed a Petition for Review of the Examiner's decision with the Commission, wherein, in effect, it requested the Commission to reverse the Examiner and dismiss the complaint filed in that matter. 1/

8. That on March 16, 1971 the Property Committee of the School Board conducted a meeting wherein said Committee considered, among other matters, "the question of performance of custodial and maintenance work by contracting as compared to the present board employed staff", and in that regard said Committee "directed that a study be made to determine cost, etc. of contract maintenance program"; that following the conduct of said meeting and prior to March 22, 1971, the School Board issued a notice of a School Board meeting for the latter date,

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1/ The Commission on March 17, 1971, on its own motion, issued a "Notice of Review" of the Examiner's decision. Apparently said "Notice of Review" and the School District's Petition for Review crossed in the mails.

in which notice the above action of the Property Committee was included on the agenda for such School Board meeting; and that on the latter date and at such Board meeting, which was attended by Miller, the School Board considered the report of the Property Committee, which among other matters, approved a study "of maintenance contracting services".

9. That on April 13, 1971, after a member of the School Board had made recommendations with regard to the matter, the Finance Committee of the Green Bay City Council approved the use of architectural plans for a new school to be the same plans which had been utilized for another new school which was in the progress of construction, resulting in a saving of approximately $18,000 in architectural fees.

10. That on June 1, 1971 Miller, on behalf of AFSCME, sent the following letter to the School Board:

> "This letter is to advise you that Local 1672B, Green Bay Municipal Employees Union, (School Board) AFSCME, AFL-CIO, desires to open the present Labor Agreement for negotiations for the year 1972 in accordance with Article XXVII of the Agreement."

11. That on June 22, 1971 the Property Committee of the School Board, in a meeting held on said date, took the following action with respect to the study of contracting out its custodial work:

> "Mr. John Razzano and Dominic Del Signore representatives of Columbus Services International, a national firm specializing in building cleaning, from New Castle, Pennsylvania appeared before the committee and made a presentation of the type of services offered by their firm.
>
> They gave a brief history of their firm and answered questions in regard to the procedure they use in determining the feasibility of engaging their services, as well as, method of transition from independent to contract cleaning of buildings. They offered their services, at no cost to the Board of Education, to make a study to determine whether the Board should consider contract cleaning of the school buildings.
>
> The Property Committee authorized the firm to proceed with the study with the understanding that it would be done at no cost to the Board of Education."

12. That on September 16, 1971 the Commission, following a review of the Examiner's decision referred hereto in para. 6 supra, and following the consideration of the entire record and the briefs filed by the parties following the filing of the Petition for Review by the School District, issued an Order Amending Examiner's Findings of Fact, Conclusions of Law and Order, wherein among other things, the Commission sustained the conclusion of the Examiner that the School District had committed prohibited practices with respect to the discharge of the four AFSCME officers, and in that respect the Commission also affirmed the Examiner's Order that said employes be offered reinstatement with back pay from May 12, 1969 to the date of an unconditional offer of reinstatement, together

with other benefits each may have earned during said period, less any earnings which each of them may have received during said period, and therein the Commission ordered the School District to notify the Commission, within ten days of the date of the receipt of said Order as to what steps it had taken to comply therewith; that on October 13, 1971 the School District filed a Petition for Review of the aforementioned decision of the Commission with the Circuit Court of Brown County; that said proceeding, at least up to the date of the hearing in the instant matter, is and has been pending in said Court; and that the School District has not, at any time material herein, complied with the order of the Commission set forth in the aforementioned decision rendered by it on September 16, 1971.

13. That on October 4, 1971 Miller and the AFSCME Bargaining Committee met with the School Board Negotiation Committee to discuss for the first time the negotiations for the 1972 collective bargaining agreement covering custodial and maintenance employes; that at said meeting Miller submitted a list of written demands which AFSCME desired to be included in the 1972 agreement; and that at said meeting neither Miller and the AFSCME Bargaining Committee, nor the members of the School Board Negotiating Committee, made any reference or proposal relating to contracting out of school custodial work.

14. That at a meeting of the School Board's Negotiations Committee, held in the afternoon of October 14, 1971, the following action occurred with regard to the study of contracting out custodial work, as reflected in the minutes of said meeting:

> "Mr. St. George, President of St. George Sales and Service Inc., appeared before the Committee and discussed progress on his proposal to provide janitorial services in the Green Bay Schools on a contract basis. He stated that a survey is being made in three schools, that is, an elementary, a junior high, and a senior high school, for the purpose of offering the services in these schools on a trial basis. He also stated that they could be ready to take over the janitor services in these three schools on a trial basis beginning November 1, and would be in a position to provide the services on a contract basis in all the schools by the end of December, at a savings in total cost to the school district. He was informed that the matter would be brought before the Property Committee at its monthly meeting, Tuesday, October 19, and action could be taken by the Board on October 25, 1971. Mr. St. George stated he would have a proposal ready for the Property Committee Meeting." 2/

2/ No evidence was adduced during the hearing as to the manner in which St. George became involved in the study.

15. That at a meeting of the School Board's Property Committee held on October 19, 1971 the following action occurred with respect to the matter of the proposed contracting out of custodial work:

"The property committee received a proposal from Crest Building Maintenance Service Company of Milwaukee to perform the custodial work required at West High School, Danz Elementary School, and Edison Junior High School. These schools to be cleaned for a trial period to observe the quality of the work and determine the feasability of contracting the custodial work for all of the schools. Mr. Allen St. George, a representative of the firm, was present and answered questions regarding the history and background of his firm and the type of services his firm will provide if their proposal is accepted.

This firm proposes to furnish all labor, materials and equipment necessary to clean the building at the costs listed as follows:

Edison Junior High School	
Monthly cost	$ 5,100.00
Annual cost	56,100.00
West High School	
Monthly cost	$ 4,830.00
Annual cost	53,130.00
Danz Elementary School	
Monthly cost	$ 1,090.00
Annual cost	11,990.00

Under this proposal the Board of Education would realize a savings well in excess of $ 47,000.00 over the present method of cleaning the buildings. (See Custodial Cost Summary Sheet Attached)

It was noted that the cost summary of the present method covers only the personnel cost and does not include the material and equipment necessary to perform the work.

Mr. St. George assured the committee that his firm would keep the buildings in as good or better condition as under the present method and would be able to start the work in the above buildings on November 15, 1971 and could take over the rest of the schools in about six weeks.

A considerable number of questions were raised regarding the transition to contract cleaning, the type of personnel employed by the firm, status of the present personnel, etc.

The property committee directed that the opinions of the labor negotiator and legal council be obtained prior to any action which may be taken to initiate the contracting of custodial services in the schools."

16. That on October 25, 1971, at the request of the School Board, the Green Bay City Attorney furnished the following opinion to the School Board with respect to the proposal to contract out the custodial work:

> "With regard to the proposed contract between Crest Building Maintenance Co. and the Green Bay Board of Education to provide a pilot study in certain Green Bay schools, it is within the authority of the Board of Education to enter into such a contract subject only to the provisions of the current agreement with Local 1672B. The reduction in work force which would result if the Board of Education entered into the contract would require the ten days' notice to the union and a settlement in full with those employes laid off as a result of the contract.
>
> It is suggested that the proposed contract be modified so that the Board of Education may reemploy former employees of the school district that may be hired by the contractor, notwithstanding the present termination clause in the proposed contract."

17. That at a regular meeting of the School Board, held in the evening of October 25, 1971, the School Board considered the report of the Property Committee with respect to the matter, which recommended the approval of the proposal of the Crest Building Maintenance Company "for trial runs involving three schools custodial services and that the letters of opinion of the Negotiator and City Attorney be made part of the contract with Crest Building Maintenance Company"; and that in said consideration the School Board approved the proposal of the Property Committee.

18. That on October 29, 1971 the School Board's Director of Personnel sent the following letter to Miller:

> "This is to advise you that the Green Bay Board of Education at their October 25, 1971 meeting approved the Property Committee recommendation for the performance of the custodial work at Edison Junior High School, Danz Elementary School, and West High School by contract to a building maintenance firm.
>
> This firm is scheduled to begin operation under the contract on Monday, November 15, 1971.
>
> The initiation of the contract for custodial services in the above schools will result in the reduction of the present work force. The following positions will be eliminated on the present table of organization: four (4) Custodian I, eleven (11) Custodian II, two (2) Custodian III, and one (1) Custodian-Fireman.
>
> The reduction of the work force will be made in accordance with Article VII of the agreement with the Municipal Employees Union Local 1672B and notices of termination of employment effective at the completion of the work shift on Friday, November 12, 1971 will be issued to the employes laid off."

19. That also on October 29, 1971 the following employes were sent lay-off notices:

Albert Boutott(*)	Lester Kollman(*)
Grant Curran(*)	Ken Kowaleski
Elroy Dix(*)	Robert Landwehr
Melvin Delaruelle(*)	Michael McCartney(*)
Felix Holewinski(*)	Penvie Monique
John Jacobs	Bernard Wigman
James Johnson	Jerome Zey(*)
Willis Jacobs	

(*) Indicates that said individuals were co-complainants in the instant matter. In addition, the School Board also eliminated two vacant Custodian II positions, as well as a vacant Truck Driver position.

20. That said lay-off notices were in the following form:

"JOINT SCHOOL DISTRICT NO. 1
CITY OF GREEN BAY ET AL

EMPLOYMENT TERMINATION NOTICE

Employee (Indicated)

School (Indicated)

Dated October 29, 1971

The Green Bay Board of Education has recommended approval of a maintenance contract for the custodial work at Edison Junior High School, Danz Elementary School, and West High School. This is a study program, however, it will require a reduction of the present work force.

The reduction of the present custodial staff is being made in accordance with Article VII of the agreement with the Municipal Employees Union Local 1672B. This is to advise you that you will be laid off effective at the completion of your shift on Friday, November 12, 1971, and will be eligible for re-employment according to the terms of the present labor agreement with the Municipal Employees Union Local 1672B."

21. That on November 3, 1971, following the receipt of the letter from the School Board's Director of Personnel, Miller sent a letter to the School Board, with copies thereof being sent to the Mayor of Green Bay, its City Clerk, its Labor Consultant, and the President of the Green Bay City Council, which letter contained, in material part, the following:

"Please be advised that the position of Local 1672B is that the hiring of this firm to replace already employed employees would violate the current labor agreement between the Board of Education and the Union. The Union is the certified collective bargaining representative for these employees on all questions of wages, hours, and

conditions of employment of these employees, the whole matter is subject to negotiation. The Union requests that the Board of Education not sign a contract with the building maintenance firm but bring the issue to the bargaining table under the terms of the labor agreement. Please advise."

22. That on November 4, 1971 the School Board, by Respondent Sladky and its Secretary, formally approved and accepted a contract with Crest, Incorporated, of Green Bay, formerly known as Crest Maintenance Company, for the furnishing of janitorial services at Danz Elementary School, Edison Junior High School and West Senior High School; that said agreement was for a period of 12 months, commencing on November 15, 1971, and was subject to cancellation by either party during the period thereof, by a sixty day notice; and that said agreement set forth the cost of such services as follows:

School	Price Per Month	Yearly Price
Danz	$ 1,090.00	$ 11,990.00
Edison	5,100.00	56,100.00
West	4,830.00	53,130.00

23. That an analysis made by the School Board, in comparing the costs of contracting out the custodial services in the three aforementioned schools with the costs which would have been incurred had such services been performed by employes of the School Board, indicated that the School Board, over the 12 month period involved, would realize a saving of $61,616.81.

24. That in the morning of November 12, 1971 the AFSCME Bargaining Committee, including Miller and Robert Oberbeck, the Executive Secretary of AFSCME District Council 40, met with the School Board Negotiations Committee in negotiations covering the employes represented by AFSCME; that at the outset of the meeting Miller requested that the custodial employes who were notified of the lay offs, to be effectuated on that date, not be laid off, that the School Board abide with the terms of the existing collective bargaining agreement with respect to such lay offs, that the parties negotiate on changes in the existing agreement, which changes, if agreed upon, would become effective on January 1, 1972; that Miller further contended that the School Board had violated the existing agreement with respect to its determination to lay off the custodial employes, and requested that the School Board bargain with AFSCME on the decision to lay off the custodial employes; that during the meeting the School Board's Labor Negotiator indicated that the School Board Negotiations Committee would not bargain on the decision made by it with respect to the lay off, but would be willing to bargain with AFSCME on the effects thereof; and that thereupon the AFSCME Bargaining Committee refused to continue negotiations and the meeting was terminated.

25. That on November 12, 1971 the School Board terminated the active employment of the custodial employes noted in para. 19, supra; that on November 19, 1971 Miller filed a written grievance with respect to such lay offs with the School Board Negotiations Committee, wherein he alleged that the School Board, in contracting out the custodial work involved, violated Articles I, IV and VII of the collective bargaining agreement existing between the parties, and in said grievance Miller requested that the laid off employes be reinstated and be made whole as a result of their lay offs; and

that said grievance was attached to a letter sent by Miller to said Committee, wherein Miller stated as follows:

> "Enclosed is a grievance concerning the lay-off of thirteen employees by the Green Bay Board of Education. The Union is starting the grievance at your level, Step 4 of the Grievance Procedure, in an attempt to save time, however, if the Committee feels that the entire procedure should be followed I am sending copies of this communication and of the enclosed grievance to Mr. Olds and Mr. Dallich for their action. Please advise."

26. That on November 26, 1971 the Superintendent of Schools, in a letter to Miller, acknowledged receipt of the above noted grievance, and indicated that upon the advice of the City Attorney, it was recommended that AFSCME follow the "entire grievance procedure as set forth in the contract", that Miller was requested to contact either the Labor Negotiator or the Supertintendent "to establish our time schedule", and that as of the date of the filing of the complaint initiating the instant proceeding said grievance had not been resolved.

27. That at all times since November 12, 1971 the School Board's Negotiating Committee has refused, and continues to refuse, to bargain with AFSCME and its agents concerning the School Board's decision to contract out the aforementioned custodial work, which decision was motivated for economic reasons, rather than to interfere with, restrain or coerce, or to discriminate against employes because of their concerted activity in and on behalf of AFSCME.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That prior to November 11, 1971, Section 111.70, Wisconsin Statutes, relating to labor relations in municipal employment, contained no provision requiring a municipal employer to bargain at reasonable times, in good faith, with the representative of its employes, with respect to wages, hours, and conditions of employment; and that, however, on November 11, 1971, the Municipal Employment Relations Act, Chapter 124 of the Laws of 1971, became effective, and therein Section 111.70(2) grants to municipal employes the right "to bargain collectively through representatives of their own choosing...", and establishes a duty upon municipal employers to bargain in good faith with such representatives, with respect to wages, hours and conditions of employment.

2. That, while the decision of Respondent Board of Education, Joint School District No. 1, City of Green Bay, and its agents, including Respondent Eugene Sladky, to contract out custodial work previously performed by its employes affected the wages, hours and working conditions of employes represented by Complainant Green Bay Employees Local 1672B, AFSCME, AFL-CIO, the Respondent Board of Education, Joint School District No. 1, City of Green Bay, et al, and its agents, including Respondent Eugene Sladky, had no statutory duty to bargain with Complainant Green Bay Employees Local 1672B, AFSCME, AFL-CIO, with regard to said decision at the time said decision became binding, specifically on November 4, 1971, on the approval and acceptance of the offer of Crest, Incorporated to furnish the custodial services, which action resulted in the lay off of the employes involved,

even though the employes involved were not laid off until November 12, 1971; and that, therefore, the Respondent Board of Education, Joint School District No. 1, City of Green Bay, et al, and its agents, including Respondent Eugene Sladky, did not commit, and are not committing, any prohibited practices within the meaning of Section 111.70(3)(a)(4) and/or Section 111.70(3)(a)1 of the Municipal Employment Relations Act, with respect to the contracting out of custodial work and the resultant lay off of employes.

3. That, since the decision to contract out the custodial work was motivated by economic reasons, rather than to interfere with, restrain or coerce or to discriminate against employes because of their concerted activity in and on behalf of Complainant Green Bay Employees Local 1672B, AFSCME, AFL-CIO, the Respondent Board of Education, Joint School District No. 1, City of Green Bay, et al, and its agents, including Respondent Eugene Sladky, did not commit, and are not committing, any prohibited practices within the meaning of Section 111.70(3)(a)3 and/or Section 111.70(3)(a)1 of the Municipal Employment Relations Act with respect to the contracting out of custodial work and the resultant lay off of employes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that the complaint of prohibited practices filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of August, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

The instant proceeding was initiated by a complaint filed by AFSCME and eight 3/ of the custodial employes of the School District who were laid off on November 12, 1971, as a result of the School District contracting out of custodial work in three of the schools operated by the School District. The complaint named the School District, the members of the School Board, including the President of the School Board, as Respondents. In the complaint the Complainants specifically alleged that:

> "9. That lay-off of bargaining unit employees and assignment of their work to employees of a private contracting firm was a unilateral act by the Respondents without having submitted the subject to the Complainants Local 1672B for negotiations, even after a demand therefor, and constituted a violation of Wis. Stats., Sec. 111.70 (3)(a)4.
>
> 10. The lay-off of bargaining unit employees and assignment of their work to employees of a private contracting firm tends to discourage membership in the Complainant labor organization by discrimination in regard to tenure and other employment, and is, therefore, in violation of Wis. Stats., Sec. 111.70(3)(a)3.
>
> 11. The lay-off of bargaining unit employees and assignment of their work to employees in a private contracting firm tends to 'interfere with, restrain, and coerce' the exercise of protected rights by the complainants and other bargaining unit employees contrary to Wis. Stats., Sec. 111.70(3)(a)1."

In their answer the Respondents included a general denial, and moved that the complaint be dismissed. In the alternative, Respondents requested that all employes laid off on November 15, 1971, be made parties to the complaint. Also filed was a motion permitting Respondents to take a deposition of James W. Miller, agent for AFSCME. Prior to the hearing, the Commission denied the latter motion, and further denied the request to make all employes involved party complainants.

Hearing was held before the full Commission on February 25, 1972 and March 13, 1972. Complainants filed their brief on April 24, 1972 and the Respondents filed their brief on June 28, 1972.

3/ No facts were adduced during the hearing as to why the additional employes who were similarly laid off were not made individual complainants.

THE FACTS

The facts dispositive of the issues are detailed in the Commission's Findings of Fact.

PERTINENT STATUTORY PROVISIONS

The various events relied upon by the Complainants in support of their contention that the Respondents committed prohibited practices, occurred prior to and subsequent to November 11, 1971, the date on which substantial changes in the Municipal Employment Relations Act (Sec. 111.70, Wis. Stats.) became effective. Prior to the latter date, Sec. 111.70(2) set forth the "rights" of municipal employes as follows:

> "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

Also prior to November 11, 1971 municipal employers were only prohibited from "interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2)" 4/ and from "encouraging or discouraging membership in any labor organization .....by discrimination in regard to hiring, tenure or other terms or conditions of employment." 5/ Prior to November 11, 1971, Sec. 111.70 did not impose a duty upon a municipal employer to bargain in good faith with the representative of its employes, nor did the statute provide that it was a prohibited practice for an employer to refuse to bargain in good faith with such a representative on wages, hours and conditions of employment of such employes. 6/

However, on November 11, 1971 the Municipal Employment Relations Act became effective. Such Act repealed the former Sec. 111.70, and, as such, enacted material substantive changes in the rights, duties and obligations of municipal employers, municipal employes, and representatives of municipal employes.

MERA amended the "rights" section 7/ to read, in material part, as follows:

> "Municipal employes shall have the right of self-organization, and the right to form, join or assist

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4/ Sec. 111.70 (3)(a)1

5/ Sec. 111.70 (3)(a)2

6/ Madison School Board, 36 Wis. 2d 483, 12/67; La Crosse County, 52 Wis. 2d 295, 10/71

7/ Sec. 111.70 (2)

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection....."

MERA also enlarges the scope of municipal employer prohibited practices to include, not only the original Secs. 111.70 (3) (a) 1 and 2, but also the following provision, among others:

"Sec. 111.70(3)(a) 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit....."

While the original Sec. 111.70 did not define the term "collective bargaining", MERA defines said term as follows:

"Collective bargaining means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsiblities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter." 8/

POSITIONS OF THE PARTIES

The Complainants, in support of their allegations that the Respondents committed prohibited acts of interference and discrimination with regard to the subcontracting of the custodial work and the resultant layoff of the custodial employes, contended that the circumstantial evidence adduced herein established that the Respondents engaged in such activity in order to "pay the back pay awards of the four union officers" as required in the Commission's Order issued in the previous prohibited practice case, and, thus, that the Respondents are attempting to finance their own prohibited practices by reducing the size of the collective bargaining unit and replacing the laid off employes with "non-union workers." In support of its contention the Union argues that the timing of the Respondents' decisions with respect to the subcontracting and lay offs could not

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8/ Sec. 111.70(1)(d)

be explained, and that the money claimed to result in a saving to the Respondents by the subcontracting was equivalent to the amount of back pay due and owing the four union members had they been reinstated pursuant to the previous Commission Order.

The Union further argues, in support of its position, that the status of the four discharged Union officers was a motivating factor in Respondents decision to subcontract, which, the Complainants contend, was demonstrated by the fact that "virtually nothing was done about it until immediately after the Commission affirmed the Examiner's decision of reinstatement with back pay." The Union also argues that past history of the relationship between the Union and the Employer tends to establish an anti-union motivation on the part of the Respondents, and further that such motivation was manifested by the Employers' action with respect to its refusal to bargain on the decision to subcontract and with respect to the Respondents' attitude toward AFSCME's right to grieve the decision to subcontract under the existing collective bargaining agreement.

In support of its allegation that the Respondents refuse to bargain in good faith with respect to the subcontracting, the Complainants contend that, although the decision to subcontract and the execution of the agreement with the subcontractor occurred prior to the effective date of the Municipal Employment Relations Act, the effects of said subcontracting, namely, the lay off of employes, did not occur until after the effective date of the Municipal Employment Relations Act, and that, therefore, the Respondents had a statutory duty to bargain with AFSCME on not only the effects of the subcontracting but also the decision to subcontract.

The Respondents, in their brief, argue that they committed no prohibited practices with regard to the subcontracting and the resultant layoff of custodial employes, and specifically contend that, since the decision to subcontract was made prior to November 11, 1971, there was no duty upon the Respondents to bargain collectively with AFSCME on any matter. The Respondents further contend that by offering to bargain the effects of the layoffs, after the effective date of the Municipal Employment Relations Act, that it had complied with its duty to bargain as set forth in the statute.

DISCUSSION

The Commission concludes that the Complainants have not established, by a clear and satisfactory preponderance of the evidence, that the decision to subcontract the custodial work, and the resultant layoff of custodial employes, constituted prohibited practices within the meaning of Section 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act. The evidence established that the School Board had financial difficulties and in that regard took steps to relieve its budgetary problems. It eliminated a number of teaching positions as well as certain programs. The decision to subcontract the custodial work in the three schools, which was a pilot project, also would result in the substantial cut in the budget. The Union's argument that the decision to subcontract was motivated by the back pay order issued by the Commission in a previous case involving the parties is not convincing as evidencing an anti-union animus. 9/

9/ The School District had not complied with the Order of the Commission, but rather had appealed the Commission's Order to the Circuit Court.

While the timing of the study and the actual execution of the subcontracting is suspicious, in light of the events which had occurred, such suspicion is not sufficient to warrant a conclusion that the Respondents committed prohibited practices in this regard. Decisions made by municipal employers do not occur "over night". Studies and debates thereon with respect to budgets and other governmental functions are unfortunately time-consuming because of the very nature of government itself.

It is interesting to note that Miller, AFSCME's Representative, was present at the meeting of the School Board on March 22, 1971, which considered the report of the property committee approving that a study be made with respect to the contracting out of custodial work. Further, on June 1, 1971, Miller reopened the existing collective bargaining agreement for negotiations for the 1972 agreement, and that on October 4, 1971, Miller and the AFSCME bargaining committee met with the School Board negotiating committee in the initial negotiations for the 1972 agreement where Miller presented a list of written demands to be included in the 1972 agreement, and at said meeting no reference or proposal was made to the contracting out of custodial work, despite the fact that Miller was aware that the School Board was contemplating the possibility of contracting out AFSCME work. At no time prior to November 3, 1971, following the notification to the employes of their pending layoff, did Miller "protest" the decision of the School Board to subcontract the custodial work. It would seem to the Commission, under the circumstances, that Miller could have proceeded, or attempted to proceed, under the then existing collective bargaining agreement to grieve the contemplated action of the School Board relating to the subcontracting. Yet, for some reason not disclosed in the record, no such protest was made until after the School Board had made its decision and just one day prior to the actual execution of the subcontract. Further, the evidence did not establish that only AFSCME members were laid off. The layoffs were apparently in inverse order of seniority. The subcontracting of a limited portion of the custodial work does not eliminate the four positions previously occupied by the four Union officers who are awaiting their reinstatement and back pay pursuant to the Commission's decision.

The evidence adduced herein does not establish that the Respondents' decision to subcontract the custodial work and the resultant layoff of custodial employes either interfered with, restrained or coerced and/or discriminated against employes because of their concerted activity.

It is not denied that the Respondents refused to bargain with AFSCME on the Respondents' decision to subcontract custodial work. AFSCME argues that even though the decision to subcontract was made prior to the duty to bargain established by the Municipal Employment Relations Act, adoption on November 11, 1971, the employes were not laid off until November 12, 1971, and the subcontractors did not take over until November 15, 1971, and that, therefore, the decision to subcontract cannot be separated from the effects thereof. The Respondents, on the other hand, argue that, even assuming the applicability of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, the decision to subcontract is a function of management, which is not subject to the collective bargaining process. In support of said argument the Respondents cited the Wisconsin Supreme Court decision in Libby, McNeill & Libby (48 Wis. 2d 272, 10/70). In its

decision the Supreme Court stated that managerial decisions which lie at the core of entrepreneurial control are not subjects of collective bargaining, and most management decisions changing the direction of a corporate enterprise involving a change in capital investment are not bargainable. The Supreme Court further determined that while such a managerial judgment is not bargainable, the effects on the employes of such a decision is a matter of bargaining.

In our opinion, the decision of the Supreme Court in Libby, McNeill & Libby does not hold that all management decisions to subcontract work performed by bargaining unit employes are not mandatory subjects of bargaining. In its decision the Supreme Court cited the decision of the U. S. Supreme Court in Fibreboard Corp. v. Labor Board (379 U.S. 203, 1964) as follows:

> "In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not 'with respect to . . . conditions of employment.' Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of sec. 8 (d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area." (Emphasis supplied.)

Our Supreme Court stated "from Fibreboard, supra, we can conclude that most management decisions which change the direction of the corporate enterprise, involving a change in capital investment, are not bargainable." In our opinion the decision of the Respondents to subcontract a portion of the custodial work available in schools operated by the School District was not a change in the basic direction of the School District's activities, which involved a change in capital investment.

Had the decision to subcontract and the execution of the subcontracting agreement occurred after November 11, 1971, we would have concluded that the matter of such subcontracting was a mandatory subject of bargaining. However, the decision to subcontract and the execution of the subcontract occurred prior to the establishment of the statutory duty upon the School District to bargain on any matters affecting the wages, hours and working conditions of the employes involved, and, therefore, we cannot find that the Respondents committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act with respect to the decision to subcontract custodial work and the actual execution of said subcontract.

The effects of the decision to subcontract, and the resultant layoff of employes, did not occur until after the effective date of the Municipal Employment Relations Act, when the duty to bargain on wages, hours and working conditions was imposed on municipal employers in this State. The Respondents, on November 12, 1971, offered to bargain with AFSCME on the effects of the decision to subcontract and the agents of AFSCME refused to accept said offer to bargain as to the results of the decision to subcontract and the resultant effects on the employes involved. The Respondents, therefore, in said regard, cannot be found to have refused to bargain collectively in good faith in violation of the pertinent statutory provision.

Having concluded that the Respondents have not committed any prohibited practices either prior to November 11, 1971, or thereafter, we have dismissed the complaint.

Dated at Madison, Wisconsin, this 30th day of August, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Lel S. Rice II, Commissioner

_____
Mos. B. Kerkman, Commissioner