STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1486, affiliated with MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Complainant, vs. JOINT UNION HIGH SCHOOL DISTRICT #1 OPERATING NICOLET HIGH SCHOOL LOCATED IN THE CITY OF GLENDALE, WISCONSIN AND VILLAGES OF BAYSIDE, RIVER HILLS, FOX POINT, MILWAUKEE COUNTY, AND A PORTION OF BAYSIDE LOCATED IN OZAUKEE COUNTY, 1/ Respondent.	Case VII No. 17886 MP-354 Decision No. 12672-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of Complainant.
Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., by Mr. John G. Vergeront, appearing for Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 1486, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Joint Union High School District #1 operating Nicolet High School located in the City of Glendale, Wisconsin and Villages of Bayside, River Hills, Fox Point, Milwaukee County, and a portion of Bayside located in Ozaukee County, has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Wisconsin Statutes; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin, on June 18, 1974, before the Examiner; and the parties having thereafter filed briefs which were received by September 6, 1974; and the Examiner, having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 1486, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, herein Complainant, is a labor organization and at all times material herein was the exclusive bargaining representative of custodial and maintenance employes employed by Joint Union High School District #1 operating Nicolet High School located in the City of Glendale, Wisconsin and Villages of Bayside, River Hills, Fox Point, Milwaukee County, and a portion of Bayside located in Ozaukee County.

2. That Joint Union High School District #1 operating Nicolet High School located in the City of Glendale, Wisconsin and Villages of

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1/ Respondent's name was amended at the hearing.

Bayside, River Hills, Fox Point, Milwaukee County, and a portion of Bayside located in Ozaukee County, herein Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of the Wisconsin Statutes, and that Respondent is engaged in the provision of public education in its district, with its principal office at Menomonie, Wisconsin.

3. That Complainant and Respondent were signators to a collective bargaining agreement for the 1973-1975 school year which covered the wages, hours and working conditions of custodial and maintenance employes employed by Respondent; that said agreement contained a recognition clause which provides in part:

"ARTICLE I - RECOGNITION

Section 1 - Recognition

The Board hereby recognizes the Union as the exclusive collective bargaining agent for all regular full-time and regular part-time custodian and maintenance employees, excluding supervisors and confidential employees.

Section 2 - Representation

The Union shall represent all employees in the bargaining unit at all negotiations.

Section 3 - Notification

The Union shall be notified immediately by the Board, in writing, of all hirings, dismissals, effective dates and types of changes in classification, resignations, retirements, discharges, number of weeks of severance and final pay thereon, if any, and any unpaid leaves and their duration.

. . ."

4. That said agreement in Article 4, Section 6, also contains a job posting provision which states:

"Section 6 - Job Posting - Full-Time Employees

If there is a vacancy in a job held by a full-time employee, before filling the vacancy the Board will post on the Union bulletin board notice of the vacancy for a period of five (5) working days before filling such vacancy. During such period full-time employees may make application for the vacancy. If a full-time employee makes application for such vacancy and is qualified to do the job, he shall be assigned to the job. If more than one full-time employee makes application and is qualified, the Board shall determine who is the most qualified and the job shall be assigned to him."

5. That said agreement contains a management rights clause embodied in Article 18, entitled "Management Functions and Rights", which states:

"Except as expressly limited by this Agreement, all management functions and rights are exclusively reserved to the Board."

6. That said agreement did not contain any provision providing for final and binding arbitration.

7. That prior to the opening of the 1973-1974 school year, a bargaining unit employe, Mrs. Walton, worked as a regular part-time custodial employe from 5:30 p.m. to 1:00 a.m. at Respondent's Elm Street and F-Wing facilities, where she performed cleaning duties; that in the Fall of 1973, Mrs. Walton transferred out of that job and became a full-time cleaning woman, a separate job classification; and that Mrs. Walton's transfer left a vacancy in her prior position.

8. That in an attempt to fill that vacant position, Respondent's Assistant Business Manager, William Stuckey, met with Union Representative Erv Horak in late November or early December, 1973, and discussed this matter, at which time Horak offered a number of alternative means for filling that vacancy; that Horak there specifically suggested that Respondent contact the Milwaukee County Job Program to inquire whether that program knew of any individuals who would be interested in working as a part-time custodian; and that Stuckey did not there indicate to Horak that Respondent might subcontract the work in question.

9. That following an unsuccessful attempt to obtain a replacement through the Milwaukee County Job Program, Respondent on December 21, 1973, posted a job vacancy position which stated:

"NOTICE:

There is a vacancy for the full-time part-time position for a cleaning person on the night shift. The position to be filled is for cleaning the house located at 6789 North Elm Tree Road and classrooms in upper F-Wing.

Written applications will be received in the Business Office until 4:00 p.m. on January 2, 1974, for appointment to this position."

10. That despite this posting, no bargaining unit personnel applied for this position.

11. That, thereafter, Respondent on January 9, 1974, subcontracted out the custodial work formerly performed by Mrs. Walton to Gibb Building Maintenance Company, Inc., herein Gibb, and that a Gibb employe subsequently spent approximately thirty (30) hours a week performing the work formerly done by Mrs. Walton.

12. That Respondent officially advised Complainant of this subcontracting in a January 14, 1974 letter to Horak; and, that, although Horak had previously heard informal rumors to the effect that Respondent intended to subcontract out this work, the January 14, 1974 letter was the first official word that Horak had received from Respondent to that effect.

13. That Respondent in the past has subcontracted out unit work on a temporary basis and that non-unit personnel have regularly performed unit work.

14. That Complainant attempted to secure a contractual provision which prohibited subcontracting out in the negotiations which preceded the present agreement; that Respondent then insisted that it would continue to subcontract out work as it had in the past, and that, therefore, it would not agree to such a clause; and that, in accordance with Respondent's position, no specific subcontracting clause was included in the ultimate agreement reached.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Joint Union High School District #1 operating Nicolet High School located in the City of Glendale, Wisconsin and Villages of Bayside, River Hills, Fox Point, Milwaukee County, and a portion of Bayside located in Ozaukee County, did not breach its collective bargaining agreement with Complainant when it subcontracted out unit work which had previously been performed by Mrs. Walton to Gibb and that, therefore, Joint Union High School District #1 operating Nicolet High School located in the City of Glendale, Wisconsin and Villages of Bayside, River Hills, Fox Point, Milwaukee County, and a portion of Bayside located in Ozaukee County, has not committed any prohibited practices within the meaning of Section 111.70(3)(a)5, or any other provision, of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin, this 23rd day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted above, the primary issue herein is whether Respondent committed a prohibited practice by allegedly breaching its collective bargaining agreement with Complainant, when it subcontracted out to Gibb the custodial work formerly performed by Mrs. Walton.

Alleging that such a breach occurred, Complainant principally argues that this subcontracting constitutes "an erosion of the bargaining unit, is inconsistent with the recognition and seniority clauses, and violates the collective bargaining agreement considered as a whole."

Respondent, on the other hand, denies that its subcontract to Gibb violated the contract, and affirmatively asserts that such assignment was proper for a variety of reasons: the absence of any contractual subcontracting prohibition, Complainant's unsuccessful attempt to obtain such a prohibition in the negotiations which preceded the instant contract, the existence of a management's rights clause, pertinent past practice under which non-unit personnel have performed unit work, and the reasonable manner in which it assigned the work in issue.

Before discussing the merits of the specific issue raised, it is necessary at this point to touch on a few preliminary matters. First, since Complainant makes no claim that the subcontracting violated any independent statutorily imposed duty to bargain, and as Complainant rests its entire case on the theory that Respondent has violated the contract, the undersigned needs to decide only whether such subcontracting violated the terms of this collective bargaining agreement. Accordingly, it is not necessary to pass upon whether, in the absence of a contract, such subcontracting contravenes the statutory duty to bargain elsewhere provided for in Section 111.70(3)(a)4. 2/ Secondly, since Complainant does not assert that Respondent's failure to give it advance notice of its subcontracting decision constituted a separate contract violation, and as this issue was not litigated, the undersigned does not pass on this point. Thirdly, it should be noted that the agreement does not provide for final and binding arbitration. As a result, and because neither party asserts that the matter should be deferred, this issue cannot be deferred to arbitration, but rather, must be decided in the instant forum. Lastly, since the parties themselves have failed to cite any Commission cases directly on point, and inasmuch as the undersigned has been unable to find any prior Commission cases which have squarely ruled on whether contractual recognitional and seniority clauses, standing alone, preclude the subcontracting out of unit work in circumstances similar to those herein, the undersigned has turned to the field of arbitrable law for guidance in resolving this issue.

As could be expected, there is no lack of arbitrable law in this area. For, as noted by Mr. Justice Douglas in Warrior and Gulf, 3/ disputes concerning subcontracting are "grist in the mills of the arbitrators". The fact that such cases are common, however, does not mean that arbitrators universally agree as to what are the respective rights and obligations flowing from a recognition clause in the face of an employer's decision to subcontract out unit work. Thus, both parties have cited in their briefs conflicting arbitrable authority in support of their respective, varying positions.

2/ See Fennimore Joint School District No. 5, Case II, Decision No. 11865-B (1974).

3/ Steelworkers v. Warrior and Gulf Navigation Co. 34 LA 561, 565.

With respect to Complainant's position, there is indeed a body of arbitrable thought which holds that managerial decisions such as subcontracting out are subject to "an implied limitation" under some general provision of the agreement such as the recognition clause. 4/ This opinion, however, generally recognizes that the recognition clause, standing alone, is insufficient to prevent subcontracting in all circumstances. Rather, the arbitrators subscribing to this view also consider other factors in assessing whether the particular conduct in issue violated the agreement, one of which is whether the Employer has acted reasonably. 5/

Even if one were to assume arguendo that this body of arbitrable opinion was the correct one and that it should be followed by the Commission, 6/ the undersigned nonetheless finds, upon the basis of the facts presented herein, that the Employer had not acted unreasonable, and that, therefore, there is no contract violation even under this view. Thus, as noted above, it is undisputed that: (1) the Employer attempted to fill Mrs. Walton's vacancy with bargaining unit personnel when it posted its December 21 notice to that effect; (2) despite this posting, no bargaining unit personnel were interested in that vacancy, as evidenced by the fact that not one single such employe bid for that position; (3) Respondent met with Union representative Horak and there discussed with him ways of filling that position; and (4) Respondent thereafter attempted, albeit unsuccessfully, to fill that position pursuant to one of Horak's suggestions. Taken together, these facts establish that Respondent's actions were not based on any intent to dissipate the bargaining unit, but rather, reflected a good faith desire on Respondent's part to keep that work within the unit, if at all possible, and that Respondent took reasonable steps in an attempt to achieve that aim.

In addition to acting in the foregoing reasonable manner, the record further shows that Respondent's subcontract comported with a well-established past practice, another factor considered by some arbitrators in situations such as those herein. 7/ Under that practice, Respondent frequently hired non-unit personnel to perform unit work, primarily during vacations and holidays. Similarly, Respondent also subcontracted out unit work such as painting when the need arose. Seeking to distinguish those past practices from the situation herein, Complainant argues in its brief that "this represents the first time an entire bargaining unit position, and not merely a specific job has been subcontracted".

Be that as it may, however, the fact nonetheless remains that no unit employe bid for the work in issue when given the opportunity to do so. As a result, it would appear that the subsequent elimination of the unit position was directly tied into the fact that no unit employe wanted to work in that position. Accordingly, and since no unit employe was displaced as a result of Respondent's decision to subcontract, the undersigned finds that the Complainant's proferred distinction is not meaningful and that the subcontracting herein was in accord with past practice.

This past practice takes on an added significance when it is remembered that Complainant tried, and failed, to insert a subcontracting prohibition into the contract during the negotiations which culminated in the instant agreement. Inasmuch as Complainant failed to secure such

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4/ Elkouri and Elkouri, How Arbitration Works, 427 (3rd Ed. 1973).

5/ E.g., Upson Co. (Shister), 68-1 ARB paragraph 8009.

6/ In light of the ultimate disposition herein, the undersigned finds it unnecessary to decide whether this view should be followed.

7/ Elkouri and Elkouri, supra, 427.

a prohibition, it is reasonable to assume that the ultimate agreement reached did not in any way alter the aforementioned established practice under which non-unit personnel performed unit work.

Since, then, the foregoing shows that there is no express contractual prohibition on the subcontracting out of unit work, and inasmuch as Respondent acted in a reasonable manner throughout this matter, and as the subcontract did not cause the displacement of any unit employes, and because the subcontract was in accord with past practice, the undersigned finds that the subcontract to Gibb was not violative of the collective bargaining agreement and that, therefore, the complaint should be dismissed in its entirety.

Dated at Madison, Wisconsin, this 23rd day of September, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner