STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS AND DAIRY EMPLOYEES UNION LOCAL 563, Complainant, vs. CITY OF APPLETON, Respondent.	Case CXXII No. 25603 MP-1069 Decision No. 18171-A

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Stephan Pieroni, having on October 22, 1980, issued Findings of Fact, Conclusions of Law and Order, together with a Memorandum Accompanying same, in the above entitled matter, wherein the Examiner concluded that the City of Appleton did not commit any prohibited practices within the meaning of the Municipal Employment Relations Act regarding its duty to bargain in good faith with General Drivers and Dairy Employees Union Local 563 relating to the decision of the City, and the impact thereof, to subcontract janitorial services in the City Hall, and with respect to whether, by such subcontracting, the City violated the terms of the collective bargaining agreement existing between the parties; and the Union having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and the Commission, having reviewed the entire record, the briefs filed with the Examiner, the Examiner's decision, and memorandum accompanying same, the petition for review, the briefs filed in support thereof and in opposition thereto, being satisfied that the Findings of Fact, Conclusions of Law, and Order should be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating this proceeding the Union, as the collective bargaining representative of regular City Hall employes in the employ of the City, including janitors, alleged that the City had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act (MERA), by refusing to bargain collectively with regard to its decision to subcontract janitorial work previously performed by janitors in the employ of the City, whose wages, hours and working conditions were covered in a collective bargaining agreement existing between the Union and the City. Prior to the hearing conducted by the Examiner, the Union filed an amended complaint alleging that the City also violated Sec. 111.70(3)(a)5 of MERA, by refusing to proceed to arbitration, as required in said agreement, to determine whether the City, by such subcontracting, violated the provisions of said collective bargaining agreement. In its answer the City alleged that it had collectively bargained with the Union and had reached an impasse therein prior to such subcontracting, and further denied that it had violated the agreement by refusing to proceed to arbitration on the basis of its claim that the Union's grievance with respect to the subcontracting was not a grievance arising out of the collective bargaining agreement between the parties. Thus the issues in this proceeding involve a claim of a strict statutory violation (the refusal to bargain), and a claim that the collective bargaining agreement had been violated, and under the agreement involved, said issue could normally be heard by a grievance arbitrator. However, prior to the close of the hearing before the Examiner, the parties stipulated as follows with respect to the latter allegation:

> The parties are in agreement that should the Commission find that the grievance is arbitrable, the Employer has refused to arbitrate the matter and the Commission could exercise its jurisdiction to decide the merits of the grievance in addition to the statutory allegations.

The Decision of the Examiner

It is undisputed, and the Examiner so found in his Findings of Fact, that prior to the subcontracting involved herein, the City maintained three janitorial positions in the City Hall unit. In August 1979 a janitorial position (one of the three in the unit) became vacant in the Police Department. One of the two janitors then employed at the City Hall location transferred to the position at the Police Department location, thus creating a vacant position at the City Hall, which was not filled by a City employe at any time material herein. During the fall of 1979 arrangements were being made to allow for the retirement of the remaining City Hall janitor, who actually retired in January, 1980 or thereabouts. After said retirement the City did not fill the latter vacancy with a City employe.

The Examiner set forth in his Findings of Fact all the facts material to the disposition of the issues involved in this proceeding. In his Conclusions of Law, the Examiner concluded that the City did not commit either of the two prohibited practices alleged, on the basis that (1) representatives of the parties had reached an impasse in bargaining with respect to the City's decision to subcontract such work, and (2) the grievance with regard to the subcontracting was "arbitrable as a substantive matter:, and therefore, pursuant to the stipulation of the parties, the Examiner exercised the Commission's jurisdiction to determine whether said subcontracting was violative of the collective bargaining agreement. In that regard the Examiner concluded that such conduct was not in violation of said agreement.

The Petition For Review

The Union, in its petition for review, urges the Commission to (1) modify the Findings of Fact "to clearly reflect that there is a large wage differential between the subcontractor and bargaining unit employes, that the City was aware of this differential and it insisted to impasse on the Union surrendering its negotiated economic package for janitors"; (2) modify the Conclusions of Law and find a violation of the collective bargaining agreement by "subcontracting janitorial work at a lower wage rate than that negotiated by the Union", and (3)

thus modify the Order and require the City to cease and desist from such violation and reestablish the janitorial work within the bargaining unit at the contractual wage rate.

Position of the Parties

The Union argues that the City's decision to subcontract the janitorial work was nothing more or less than an attempt to either avoid or subvert the wage and fringe benefit package for the janitorial work, which had been negotiated by the Union, and as set forth in the collective bargaining agreement, thus violating the "recognition clause" in the agreement, contending that such provision, as well as the provisions relating to the wage rates to be paid to janitors, "place limits on the ability of the employer to subcontract work which has normally been performed by bargaining unit personnel", and in that regard, Counsel for the Union cites a number of arbitration awards supporting such a conclusion. The Union argues that here the subcontrcting subverted and undercut the wage rates negotiated by the Union, and thereby said subcontracting violated the agreement.

Further, the Union takes exception to the Examiner's interpretation of the contractual recognition clause, especially the following language set forth in the Memorandum Accompanying the Examiner's decision:

> Looking to the parties' Recognition clause, nothing contained therein guarantees the right to perform janitorial work to members of the bargaining unit. This is so because the clause refers to 'employees' rather than jobs or functions. The most that can be said about this particular provision is that it recognizes the Union for purposes of collective bargaining and thereby establishes that the employer must bargain with the Union concerning every employe in the bargaining unit. . . . Further, employes of Service-Master are not employes of the City and therefore they are not members of the bargaining unit.

In said regard the Union takes issue with the conclusion that the recognition clause does not guarantee bargaining unit members the right to the janitorial work "because the clause refers to 'employes' rather than job functions", and further that "employes of Service-Master (the sub-contracting firm) are not employes" of the City. The Union also contends that the Examiner erred in his reliance on the provision in Article 5 of the collective bargaining agreement, which permits the City to "determine the number of employes to be assigned to any job classification and the job classifications needed to operate the Employer's facilities". With respect to its latter contention, the Union argues that Examiner's conclusion was contrary to an arbitration award issued by another staff member of the Commission involving an interpretation of Article 5. The Union also contends that neither party has ever contended that Article 5 is in any way material to the issues involved herein, and as a result have not been given the opportunity to offer evidence or arguments relating thereto. The Union argues that the Examiner has given abstract construction to the contractual provisions considered by him. The Union concludes its argument by contending that the Examiner's decision is contrary to the overwhelming body of "arbitral precedent" and "can only encourage forum shopping and decrease the Commission's credibility in the area of contract interpretation."

The City did not file a petition for review, nor a formal brief following the issuance of the Examiner's decision. However, by letter, it supported the Examiner's decision with respect to the issue involving the alleged refusal to bargain in good faith on its decision to subcontract the janitorial work. In the same document the City argued that since, during the course of the hearing, the parties agreed that the issue with respect to such subcontracting should be determined by the Examiner as an arbitrator, and therefore the Commission has no authority to review his "award", and that therefore, the "award disposes of the unfair labor practice charge."

Discussion

The ultimate issue in this proceeding before the Commission is whether the Examiner erred in concluding that the collective bargaining agreement between the parties was not violated by the City in subcontracting janitorial work normally performed by employes occupying positions included in the collective bargaining unit represented by the Union. However, we must first dispose of the City's contention that the Examiner's decision should be considered as an award issued by him as an arbitrator, as allegedly agreed to by the parties during the course of

the hearing. We must reject such claim. An examination of the stipulation involved, set forth verbatim previously in this memorandum, indicates that the "Commission could exercise its jurisdiction to decide the merits of the grievance in addition to the statutory allegations". The Examiner, pursuant to said stipulation, could not have determined the "statutory allegations" as an arbitrator, but only as an Examiner, and, further, if the Examiner were the arbitrator the "Commission" could not determine the merits of the alleged contractual violation.

We agree with the Union that Article 5 of the collective bargaining agreement is not material in determining whether the agreement has been violated as a result of the subcontracting. Said provision, in material part, merely reflects the City's right to determine the number of positions required to perform the janitorial work normally performed by janitors in the employ of the City. The provision does not recognize any claimed right of the City to subcontract janitorial work.

While we are aware that students of the arbitrable process have found that many arbitrators have determined, even in the absence of a provision either permitting or prohibiting subcontracting of unit work, that recognition, seniority, wage and other such clauses of the agreement limit management's right to subcontract, and certain standards of reasonableness and good faith are applied in determining these clauses have been violated, we are not willing to accept such awards as creating such precedent to be binding on this Commission, or, for that matter, to be binding on arbitrators. In addition, even the arbitrators who look to other contractual provisions don't have a uniform standard, as indicated by Arbitrator Nolan, in one of the awards 1/ submitted by the Union in support of its position, said arbitrator included an excerpt from How Arbitration Works 2/ as follows:

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that managment has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.

Said arbitrator further goes on to state as follows:

> Those then are the general rules. Now as to the guidelines. There are almost as many of these as there are arbitrators. Two cases cited by the Union (both of which, incidentally, upheld the challenged subcontracting) boil the relevant factors down to five, but they are not the same five. Schluderberg and Kurdle Co., Inc., 53 LA 819 (J. Seldenberg 1969); American Air Filter Co., 54 LA 1251 (D. Dolnick. 1970). Clarence Updegraff uses six "guidance factors," Arbitration and Labor Relations 329-30 (BNA. Third Edition. 1970), the Elkouris use eleven op. cit. at 504-07, and Sincicropi needs twleve. op. cit. at 140-41.

We are setting forth the above not to establish a basis for not considering awards as having any precedential effect, but rather to indicate that arbitrable authorities differ in their consideration of other contractual provisions and the effects thereof.

While it is true that the Commission, in determining whether a collective bargaining agreement has been violated by subcontracting, considers all provisions of the agreement, together with the material facts and circumstances, there exists no arbitrable precedent which is binding on the Commission.

We conclude that the recognition provision contained in the instant proceeding does not, standing alone, prohibit the City from subcontracting bargaining unit work. There is no other contractual provision which can be considered as pertaining to such subcontracting. The sub-contracting of unit work, when motivated by an intent to discourage concerted activity, or in

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1/ Uniroyal, Inc., 76 LA 1049, Arbitrator Dennis R. Nolan, 5/81.

2/ Elkouri & Elkouri, Third Ed., 1953.

retaliation for the exercise of such activity, in the absence of contractual language setting forth such prohibitions, constitutes a statutory rather than a contractual violation, as would a refusal to bargain such decision or the impact thereof. The petition for review filed herein took exception to only that portion of the Examiner's decision relating to the alleged contractual violation. While our rationale differs from that of the Examiner, we agree with the Examiner that the City did not violate the collective bargaining agreement by subcontracting the janitorial work involved.

Dated at Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney
Morris Slavney, Commissioner

CONCURRING OPINION

I concur with my colleagues in affirming the Examiner's decision, but cannot accept their rationale in so doing.

I agree with their statement, and discussion thereon, that prior arbitration awards need not be given precedential effect. This is not to say, however, that the awards and thinking of other experienced arbitrators are of no value and should not be considered in deciding cases. Thus a review of numerous arbitration awards and articles 3/ on the subject of sub-contracting reveals that decisions in this area of dispute lack uniformity and consequently awards can be found to support both sides of the issue. There is however a common theme that almost all authorities agree upon and that is that even a contract silent on sub-contracting imposes some limitations, through the recognition clause, on management's right to unilaterally sub-contract.

While I agree with my colleagues that a recognition clause does not guarantee the right to perform certain kinds of work to members of the bargaining unit I disagree that the employer has, under the agreement, an unfettered right to subcontract where the agreement only contains a recognition, wage, and classification provision. Thus, in those cases, as here, where there is no contractual language addressing the subject of subcontracting, the underlying factual situation of each case should be considered in deciding whether the subcontracting in question is proper. In so doing, considerations most frequently considered by arbitrators, in varying degrees, are the following

1) The discussion or treatment, if any, of the subject of subcontracting during contract negotiations.

2) The "good faith" of the employer in subcontracting the work. (Was the decision to subcontract motivated by anti-union bias? Was it designed to discriminate against the union?)

3) Any layoffs resulting from subcontracting. (Were regular employees deprived of work?)

4) The effect or impact that subcontracting will have on the union and/or bargaining unit. (Was the required work part of the main operation of the plant?)

5) Possession by the company of the proper equipment, tools, or facilities to perform the required work.

6) Was the required work an experiment into a specialty line?

7) Any compelling business reasons, economic considerations, or unusual circumstances justifying the subcontracting. (Was the work subcontracted out performed at a substantially lower cost?)

8) Any special skills, experience, or techniques required to perform the requir

work.

9) The similarity of the required work to the work regularly performed by bargaining-unit employees.

10) Past practice in the plant with respect to subcontracting this type of work.

11) The existence of any emergency conditions. (Were properly qualified bargaining-unit employees available to complete the work within the required time limits?)

3/ See Anthony V. Sinicropi, Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the Thirty-Second Annual Meeting National Academy of Arbitrators, Chapter 6, Revisiting an Old Battle Ground: The Subcontracting Dispute, pp. 125-166. Donald Crawford, The Arbitration of Disputes Over Subcontracting, in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, pp. 51-72. See also Elkouri & Elkouri, Third Edition, pp. 501-508.

12) Was the required work included within the duties specified for a particular job classification? 4/

In reviewing this case in light of the above, the undersigned notes the following facts surrounding the disputed subcontracting: (1) the Employer, in fact, bargained to impasse over its decision and that its decision was not motivated by anti-union animus; (2) there is no evidence that the City negotiated the governing agreement in bad faith; (3) there is no evidence that the City agreed to wage rates for City Hall janitors, while secretly intending to circumvent those rates by subcontracting; (4) that the appearance of good faith bargaining is strengthened by the fact that the City subcontracted nearly a year after the effective date of the agreement and in conjunction with a move to a new City Hall with cleaning needs different from those of the old City Hall; (5) that although two bargaining units positions were eliminated, no employes were laid off or deprived of work; (6) the work subcontracted was not part of the main operation of the City; and (7) there was a compelling reason for subcontracting the work in that the City could have the work in question performed at a substantially lower cost.

Based on said facts I concur with the decision of my colleagues that the City did not violate the collective bargaining agreement by subcontracting the janitorial service which was previously performed by bargaining-unit employees.

Dated at Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY _____
Herman Torosian, Commissioner

4/ Ibid, pp 140, 141.