STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Goldberg, Previant, Uelman, Gratz, Miller, Levy & Brueggeman, S.C., by Ms. Marianne Goldstein Robbins, Attorney at Law, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Union.

Mr. David Geenen, City Attorney, City Hall, Appleton, Wisconsin 54911, appearing on behalf of the Employer.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Stephen Pieroni to act as Examiner in the matter; and hearing having been held in Appleton, Wisconsin, on March 10, 1980 before said Examiner; and the Examiner having considered the evidence, arguments and briefs, and the Examiner being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That General Drivers and Dairy Employees Union, Local 563, hereinafter referred to as the Complainant or Union, is a labor organization within the meaning of the Municipal Employment Relations Act, having its principal offices at 1366 Appleton Road, Menasha, Wisconsin and at all times pertinent hereto has been the collective bargaining representative of all janitors employed by the Employer in the City Hall and the Police Department, and that the business agent for said Local 563 at all times material herein was Mr. Merlin Gorzlancyk.

2. That the City of Appleton, hereinafter referred to as the Respondent-Employer or City, is a Municipal Employer within the meaning of the Municipal Employment Relations Act, having its principal offices at City Hall, Appleton, Wisconsin; and that the Personnel Director for the Respondent-City at all times material herein was Mr. David Bill.

3. That at-all times pertinent hereto Complainant and Respondent were parties to a collective bargaining agreement which was in full force and effect from January 1, 1979 to and including December 31, 1980 covering, among others, the aforementioned janitor employes in a

bargaining unit composed of "all regular City Hall employees and employees in conjunction thereto."

4. That said 1979-1980 collective bargaining agreement contained the following pertinent provisions:

> This Agreement made and entered into by and between the City of Appleton, With the Director of Personnel acting as its agent hereinafter referred to as the "Employer" and General Drivers and Dairy Employees Union Local #563, hereinafter referred to as the "union" for the purpose of establishing sound labor relations and to establish minimum wages, hours and working conditions for the employees by the City of Appleton in the Divisions covered hereby.
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> ARTICLE 1 - RECOGNITION
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> The Employer shall recognize General Drivers and Dairy Employees Local Union #563 as the authorized representative and exclusive bargaining agent for all regular City Hall employees and employees in conjunction thereto, employed by the City of Appleton, Wisconsin, excluding craft or professional employees, confidential employees, supervisors and executives, and also excluding employees of the Parking Commission, Engineering Division - Department of Public Works and Office of Assessor.
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> . . .
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> ARTICLE 5 - COMPENSATION
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> . . .
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> E. Job Classifications and Compensation are set forth in Exhibit A attached hereto and made a part of the Agreement.
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> F. The Employer shall determine the number of employees to be assigned to any job classification, and the job classifications needed to operate the Employer's facilities. Any new jobs or new operations not classified or described in this agreement shall be subject to immediate negotiations between the parties to this agreement. The Employer may establish a temporary rate for such new jobs or operations prior to the start of any such negotiations. The negotiated rate shall be retroactive to the date the position was filled.
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> . . .
>
> ARTICLE 15 - ARBITRATION
>
> Section A.
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> Any grievance relative to the interpretation or application of this Agreement, which cannot be adjusted by conciliation between the parties, may be referred by either party hereto, within five (5) days to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.
>
> . . .

Section D.

It is understood that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

. . .

EXHIBIT "A"

JOB CLASSIFICATIONS AND HOURLY RATES OF PAY

CITY HALL UNIT

	RATES EFFECTIVE	
CLASSIFICATION	12-31-78	12-30-79
. . .		
Janitor I	5.02	5.47
. . .		
Janitor II	5.97	6.42
. . .		

5. That on or about October 3, 1979 Respondent-City moved its City Hall offices from an older building to a new building; at said time Respondent-City employed one full time janitor (Klein) at City Hall and one full time janitor (Byrne) at the Police Department which is located in a separate building.

6. That prior to August 20, 1979 Janitor Byrne worked as a janitor in City Hall but on or about August 20, 1979 Byrne transferred into a vacancy at the Police Department location; that Respondent-City for many years prior to August 20, 1979 employed two (2) full time janitors in City Hall; that after Bryne transferred to the Police Department, Respondent-City elected to not fill the City Hall janitor vacancy.

7. That sometime in September, 1979, Mr. Bill orally informed Mr. Gorzlancyk that the City was considering the subcontracting of janitorial service in the new City Hall building; that Mr. Gorzlancyk responded that said decision would be a negotiable item; that thereafter on October 8, 1979 Mr. Bill informed Mr. Gorzlancyk that without admitting that said decision to subcontract janitorial services was a negotiable item, the City was interested in discussing the matter with the Union representative.

8. That representatives of the City and the Union met on the following dates to discuss the subcontracting issue: October 23, 1979, November 20, 1979 and December 12, 1979; in addition Mr. Bill and Mr. Gorzlancyk discussed matters relating thereto by telephone on December 6, 1979.

9. That throughout said discussions the City took the position that the cost of subcontracting janitorial services was more favorable than using bargaining unit personnel. Specifically, on October 23, 1979, the City proposed that it would subcontract janitorial services for the new City Hall; that if the City ever went back to hiring its own janitors, said employes would be in the bargaining unit represented

by Local 563; and that the City would assist Mr. Klein in his application for early retirement and in any event Mr. Klein would not be laid off as a result of the decision to subcontract janitorial services in the City Hall building; that in the alternative, the City would consider hiring its own employes if the Union would reduce its contractual wages and benefits to the same level as that of the subcontractor.

10. That throughout said discussions the Union took the position that it would not agree to erode the employes' contractual economic package. In response to the City's concern over the starting time and ending time of the employes' workday, the Union indicated that it was willing to agree to a change in the employes' work schedule if the City decided against using subcontracted labor.

11. That on or about November 29, 1979, Respondent-City entered into a contract with ServiceMaster of Northeast Wisconsin, Inc. to provide janitorial services in the City Hall building; and that said contract had a thirty (30) day cancellation clause in order to allow the Complainant more time to present alternative proposals to subcontracting janitorial services in City Hall; that Respondent continued to employ Mr. Klein as a janitor until sometime after January 1, 1980 when he retired.

12. That on December 12, 1979, Mr. Bill informed Mr. Gorzlancyk that if the Union did not change its position or otherwise offer a suitable alternative to subcontracting the janitorial service, then the City would consider their discussions at an impasse and would thereafter continue using the subcontractor's janitorial services. At no time prior to filing the instant complaint did the Union offer any other alternative than the one previously mentioned in paragraph 10 to induce the City to continue using bargaining unit employes as janitors in City Hall. That due to irreconcilable differences in the parties' positions an impasse existed on December 12, 1979 with respect to the issue of subcontracting janitorial services in City Hall.

13. That on December 14, 1979 Complainant-Union filed a grievance which alleged that the City's decision to subcontract janitorial work in City Hall violated the parties' collective bargaining agreement. That Respondent-City refused to process said grievance pursuant to the parties' grievance procedure contained in their collective bargaining agreement. That at the hearing on the instant matter the City and the Union stipulated that the Examiner would have jurisdiction to determine if the grievance was arbitrable and, if so, then determine the merits of said grievance.

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

CONCLUSIONS OF LAW

1. That the City neither refused nor failed to bargain collectively with Complainant with respect to the decision to subcontract janitorial services in the City Hall; nor did Respondent-City refuse or fail to bargain collectively with Complainant concerning the impact of said decision, and therefore Respondent-City did not violate Section 111.70(3)(a)1 or 4 of the Municipal Employment Relations Act.

2. That the grievance dated December 14, 1979 in which Complainant contested the City's decision to subcontract janitorial service in the City Hall is arbitrable as a substantive matter; that Respondent-City's decision to subcontract janitorial services in the City Hall does not violate the parties' 1979-1980 collective bargaining agreement;

therefore Respondent-City, by said decision, has not committed any prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 22nd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By /s/ Stephen Pieroni, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction:

In its original complaint, Complainant averred that Respondent subcontracted janitorial service for City Hall prior to reaching impasse with the affected employes' bargaining representative. In its amended complaint, Complainant realleged the above allegation and added the allegation that the Respondent refused to arbitrate a grievance which contested Respondent's decision to use a subcontractor to perform work previously performed by bargaining unit members. Complainant-Union alleged in said amended complaint a violation of Section 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act.

The facts giving rise to this case are not seriously in dispute. The focus of the dispute concerns the Respondent's decision to use subcontracted labor for janitorial services in the City Hall. It should be noted that Complainant-Union represents a bargaining unit which includes janitors at the City Hall and Police Department. The Police Department is located in a separate building. There is only one janitor assigned to the Police Department building and for many years two janitors had been assigned to the City Hall building.

Respondent City relocated its City Hall offices from a sixty year old building to a new building on October 3, 1979. At that time there was only one janitor employed to provide janitorial services at City Hall. This was so because the City had not filled one janitor vacancy in City Hall since it became vacant in late August, 1979. The remaining janitor, Mr. Klein, was physically disabled. These facts present the background which existed at the time the City entered into an agreement with a private firm to provide janitorial services in the City Hall on or about November 29, 1979. Additional facts relating to the discussions between the City and the Union on the issue of subcontracting will be set forth in detail below.

Position of the Union:

With respect to the Union's charge that the City refused to bargain to impasse over a mandatory subject of bargaining, the Union cites Unified School District No. 1 of Racine County vs. WERC 81 Wis 2d 89 (1977) and Local 634 AFSCME vs. City of Menomonie (No. 15180-A) as establishing the applicable legal standard. Applying the rationale of these cases to the instant dispute leads the Union to conclude that the decision to subcontract janitorial services in the City Hall was a mandatory subject of bargaining.

Next, the Union argues that on November 29, 1979 the parties had not reached impasse regarding the decision to subcontract. Yet on November 21, 1979 the City Council unilaterally decided to execute a contract with ServiceMaster and same was signed on November 29, 1979.

The Union further argues that although the contract with ServiceMaster contained a thirty (30) day cancellation clause, that provision simply did not give the Union a realistic opportunity to bargain effectively. The City's position that the Union would have to agree to cut wages and benefits to that of the minimum wage level of ServiceMaster belies any good faith intent to bargain after the contract between the City and ServiceMaster was executed. Lastly, it can hardly be said that the Union waived its right to bargain over the City's decision.

Looking at the alleged contract violation, the Union first avers that the grievance sets out a claim which on its face is covered by the collective bargaining agreement. Hence, the subject matter is arbitrable.

Second, the City's decision to subcontract janitorial work at wages far below those negotiated by the Union violated the Recognition clause and Wage Rate clause of the parties' collective bargaining agreement. To sustain the City's decision here would undermine the Union's role as bargaining representative. This is especially true since the City's decision to subcontract was primarily based on a comparison of the relative labor costs; and the City never contended that it was financially unable to pay the existing contractual wage rate.

Finally, the Union cites several arbitration awards which it contends are directly on point and which support its position.

Position of the City:

Initially the City contends that the decision to relocate the offices of City Hall was a permissive subject of bargaining. Subcontracting janitorial services was precipitated by the relocation of City Hall. Therefore the subcontracting of janitorial services was also a permissive subject of bargaining since it was directly related to the relocation of City Hall.

In any event, the City contends that it bargained with the Union to impasse over the decision to subcontract as well as its impact on the affected employe. Further, the Union initially failed to respond to the City's request to state its position and then later failed to propose a viable alternative to subcontracting janitorial services. Since the condition of the City Hall was rapidly detiorating, it was necessary to engage a temporary janitorial service to prevent further deterioration of the new building and its fixtures. However, the City purposely bargained the thirty (30) day cancellation clause into the contract with ServiceMaster so as to provide additional time for the Union to make a viable counter-proposal. Finally, the Union's failure to provide any alternative which the City could accept arguably constituted a waiver of the Union's right to bargain over the subcontracting issue at a later date.

Looking to the allegation of a contract violation, the City notes that there is no provision in the contract which specifically prohibits subcontracting. Further, no employes were adversely affected by said decision because the only remaining janitor in City Hall continued his employment until he took an early retirement in January, 1980. This arrangement was made pursuant to the agreement with the Union. Lastly, the Recognition clause does not support the Union's case cf. Local 634 AFSCME vs. City of Menomonie supra.

DISCUSSION:

Alleged Unilateral Change in a
Mandatory Subject of Bargaining Prior to Impasse

Initially, the Examiner finds no merit in Respondent's argument that the instant decision to subcontract janitorial services is a permissive subject of bargaining. Like the situations in City of Menomonie and Racine Unified School District No. 1 vs. WERC supra., here the Respondent's decision to subcontract janitorial work did not primarily relate to the formulation or management of public policy. The City continued providing maintenance of City Hall facilities by merely substituting subcontracted labor for two bargaining unit employes. The

undersigned concludes the reason for the decision involved primarily a comparison of relative labor costs. 1/ The City's decision to subcontract janitorial work had its primary impact on bargaining unit employes. This is so because the size of the bargaining unit was decreased by two employes. Further, the City's replacement of two of the three janitors in the bargaining unit arguably made the remaining janitors' bargaining position unstable. As such, said decision primarily related to the wages, hours and conditions of employment of the employes and was therefore a mandatory subject of bargaining.

Having so concluded, it is for the Examiner to determine the factual issue of whether a bona fide impasse had been reached when the City unilaterally declared that an impasse existed. For the reasons set forth below, the Examiner must conclude that an impasse did in fact exist.

It is a well acknowledged principle of labor law that where there are irreconcilable differences in the parties' positions after good faith negotiations, the Employer is free to make unilaterial changes in working conditions consistent with its rejected offers to the Union. However, the Employer is not free of its duty to bargain; said duty is only suspended. During this suspension the Employer may not repudiate the collective bargaining process or otherwise take action which amounts to a withdrawal of recognition of the Union's representative status. Indeed, a change in circumstances or a substantial change in the bargaining position of one party will terminate the suspension of the duty to bargain and collective bargaining must resume upon request. 2/

With these principles in mind, the undersigned turns to the facts surrounding the alleged impasse. Unlike the City of Menomonie case, the City here gave the Union advance notice of its intentions and met on several occasions with the Union representative to discuss the matter and consider possible alternatives. The record demonstrates that prior to the move to the new City Hall, Mr. Bill met with Mr.

1/ Employer Exhibit #7 compared the projected 1980 labor costs of using City employes and subcontracted labor as a difference of approximately $21,570. Other advantages included the following: the City would no longer have City professional personnel spending time supervising the janitors; the subcontracted janitors would start work after regular working hours instead of during the day when City business was being conducted; the City would have few, if any, capital expenditures for cleaning equipment; and the City would not be liable for workers compensation.

2/ The cases which establish these principles are legion in private sector labor law cf. NLRB vs. Tex-Tan, Inc. 53 LRRM 2298(CA 5, 1963); Philip Carey Mfg. Co. 52 LRRM 1184 (1963); Boeing Airplane Co. 25 LRRM 1107 (1948); Central Metallic Casket Co. 26 LRRM 1520 (1950); Almeida Bus Lines, Inc. 56 LRRM 2548 (CA 1, 1964); American Laundry Machinery Co. 33 LRRM 1457 (1954); NLRB vs. Sharon Hats, Inc. 48 LRRM 2098 (CA 5, 1951). The Examiner believes that these principles are likewise applicable in cases involving issues which arise during the term of the collective bargaining agreement between a Union and a Wisconsin municipal employer. This balance between an Employer's right to implement a decision upon reaching impasse and the Union's right to engage in collective bargaining as the exclusive representative of the bargaining unit is especially significant since, unlike the private sector cases, the Union here is statutorally prohibited from engaging in a strike and the statutory impasse procedures per Section 111.70(4)(cm)6 are unavailable. Dane County (17400, 11/79)

Gorzlancyk in order to advise Mr. Gorzlancyk that the City was considering subcontracting janitor work in the City Hall building. Mr. Gorzlancyk responded that it would be a negotiable item. Thereafter, on or about October 8, 1979 Mr. Bill telephoned Mr. Gorzlancyk and advised him that without admitting that it was a negotiable item, the City desired to meet with the Union to discuss subcontracting janitorial work in the City Hall. The meeting was scheduled for October 23, 1979.

Present at the October 23, 1979 meeting were the following individuals: Mr. Bill, Mr. Gorzlancyk, Mr. Behrent, Union Steward, and Mr. Klein, the janitor. Mr. Bill advised the Union that the City had reviewed various proposals for subcontracting janitorial work and found several advantages over using unit personnel. Among said advantages which the Union was informed about were the following: the subcontracting costs were much lower; subcontracting would avoid the expense of purchasing additional equipment to maintain the significant increase in the amount of carpeting; Mr. Klein's desire to retire in the near future made it an opportune time to subcontract since there would be no adverse impact on existing employes. (Tr. 59-60)

Consequently Mr. Bill proposed at the October 23, 1979 meeting that: 1) the City would subcontract janitorial service at City Hall; 2) that if the City later changed its mind, newly hired janitors would be in the bargaining unit; 3) the City would take whatever measures were necessary to assist Mr. Klein in obtaining a disability annuity so as to facilitate early retirement. The Union responded that it would take the matter under advisement and respond at a later date.

Shortly after the October 23, 1979 meeting, Mr. Bill was approached by Mr. Chemura, Administrative Assistant to the Mayor, who informed Mr. Bill that he had concluded that ServiceMaster should be recommended to the Common Council at the November 7 council meeting. Chemura advised Mr. Bill that the matter involved some urgency since Mr. Klein was unable to adequately maintain the building. Bill advised Chemura that he should delay his recommendation for a couple of weeks because he was still negotiating with the Union on that subject. (Tr. 41,62)

Thereupon Mr. Bill telephoned Mr. Gorzlancyk and asked him for the Union's position. Mr. Gorzlancyk advised that a letter was forthcoming on the matter. A letter from Mr. Gorzlancyk, dated November 5, 1979, advised Mr. Bill that the matter was still under advisement and requested five items of additional information relative to subcontracting janitorial service. (Union Exhibit #3) Mr. Bill was out of town the week that Mr. Gorzlancyk's letter arrived at his office. Mr. Bill attempted to schedule a meeting with Mr. Gorzlancyk the following week but Mr. Gorzlancyk was unavailable. Mr. Bill finally contacted Mr. Gorzlancyk the following Monday, November 19, and scheduled a meeting for the next day. At the meeting of November 20, 1979, Mr. Bill gave his written response to Mr. Gorzlancyk's letter dated November 5. (Employer Exhibit #4) In addition to answering Mr. Gorzlancyk's inquiries in this written response, Mr. Bill also wrote that he hoped "the matter would be resolved quickly."

Mr. Bill and Mr. Gorzlancyk were the only two participants at the November 20 meeting. Mr. Bill advised Mr. Gorzlancyk that Mr. Klein had requested that he be allowed to continue his employment through the end of the year before applying for his disability retirement. That and a retirement date in January, 1980 were agreed upon by Bill and Gorzlancyk. Then Mr. Bill asked Mr. Gorzlancyk for alternatives to subcontracting janitorial work. Bill also stated that there was some urgency in resolving the issue because the Board of Public Works and the City Council would be considering the question of subcontracting

that week. (Tr. 22,23,24,65,66) Bill further advised that a temporary arrangement for cleaning services would be made to improve the condition of the building. (Tr. 65) Mr. Gorzlancyk responded that the Union would agree to change the work schedule so employes would begin work after office hours, but the Union would not agree to decrease the contractually established wage and fringe benefit package. That proposal did not meet the satisfaction of the City. No other proposals were presented by either party so the meeting was terminated.

The record evidence shows that the City did enter into a contract with ServiceMaster for janitorial services on November 29, 1979. (Exhibit #6 and #6A) Further, the evidence reveals that the City persuaded ServiceMaster to agree to a thirty (30) day cancellation clause in the event that the Union presented a counterproposal which the City found acceptable. (Exhibit #7, p. 2; Tr. 43,44)

Next, Bill and Gorzlancyk spoke on the phone on December 6, 1979 concerning the contents of said contract with ServiceMaster and the action by the Common Council. Both men agreed to meet again on December 12. At the December 12 meeting Mr. Bill advised Mr. Gorzlancyk that the City would consider changing its position if the Union agreed to reduce the wages and fringe benefits of the City Hall janitors to the cost offered by ServiceMaster. Otherwise, if the Union maintained its previous position, Bill advised that the City would take the position that the parties had negotiated to impasse and the City would then be free to begin using the subcontracted labor. (Tr. 67) The meeting was concluded when Mr. Gorzlancyk declined to modify the Union's position. The Union filed a grievance over the issue two days later on December 14, 1979.

In addition to the above, the City elicited the following testimony from Mr. Gorzlancyk:

> Q Prior to the filing of the grievance, did the City at any time refuse to meet and negotiate with you about either the decision or the impact?
>
> A No.
>
> Q And did you meet and discuss periodically both questions?
>
> A Not only met. We talked on the phone on several instances also. (Tr. 24).

On the basis of the record, the Examiner observes that both parties took a rather rigid position and refused to modify same. However, it is clear to the undersigned that on December 12, 1979 there was no reason to believe that future sessions would be fruitful. Indeed, it could be argued that the parties reached an impasse at the November 20th meeting since neither party indicated any flexibility in their respective positions at that time.

Moreover, the Examiner finds nothing legally improper in the fact that the City engaged ServiceMaster on November 29 because that contract could be terminated upon thirty (30) days notice. The necessity of bringing someone in to clean City Hall was demonstrated by a separate initial clean-up bill of approximately $850. Hence, the Examiner concludes that the City and the Union bargained to impasse the decision to subcontract as well as the impact on the affected employe.

However, the Union did not waive its right to bargain over this issue. As stated, if one party substantially changes its position, the parties are required to bargain upon request.

Lastly, the Union suggests in its brief that the City may not have been serious about negotiating with the Union. An allegation of bad faith bargaining is not part of the pleadings and is therefore not an issue to be decided. However, the record clearly shows that the City did not act in bad faith or otherwise attempt to emasculate the bargaining unit in order to avoid its duty to bargain in good faith with the Union.

Alleged Violation of the Collective Bargaining Agreement

The grievance alleges that the City's action herein violated the Recognition clause and the Classification and Wage Rates contained in Exhibit "A" of the collective bargaining agreement.

Contrary to the City's argument, the Examiner concludes that, on its face, the grievance is arbitrable as a substantive matter. This is so because the parties have agreed to submit to binding arbitration those grievances which concern the "interpretation or application of this Agreement." The instant grievance raises a question concerning the interpretation or application of two clauses in the Agreement. Further, there is nothing in the contract which specifically excludes issues concerning subcontracting of work from the scope of the arbitration clause. Therefore, the grievance is arbitrable.

Turning to the merits of the case, the undersigned is aware of the equities involved and takes note that meritorious arguments exist for both parties.

A review of the arbitration awards on subcontracting discloses that subcontracting of janitorial work provides frequent grist for disputes. In the absence of contractual language explicitly prohibiting subcontracting of bargaining unit work, arbitrators have utilized many different approaches in resolving this difficult issue. 3/

In cases such as the instant matter, the undersigned is mindful of the United States Supreme Court's admonishment to arbitrators in United Steelworkers vs. Enterprise Wheel and Car Corp. 363 U.S. 593, 597 (1960) where it said "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of justice . . ." Thus, the arbitrator must attempt to determine the rights and obligations of the parties as evidenced by the terms of their agreement. The undersigned believes that the contract language is susceptible to resolving this matter.

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

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3/ See discussion in How Arbitration Works, Elkouri and Elkouri (3rd Ed. 1977) Ch. 13, Management Rights, Right to Subcontract, pp. 501-510; employers decision tested against "Relevant Criteria" Trane Co. 49 LA 586 (G. Sommers 1967); "Balancing Test" Shenango Valley Water Co. 53 LA 744 (McDermott 1969); "Implied Obligations" Hess Oil and Chemical Co. 51 LA 757 (Gould 1968).

bargaining unit. Note, however, that Article 5, paragraph F explicitly recognizes the Employer's authority to determine the number of employes to be assigned to any job classification. Further, employes of ServiceMaster are not employes of the City and therefore they are not members of the bargaining unit.

Likewise, the wage schedule contained in Appendix A does not prohibit the reduction of the number of jobs referred to therein, and Article 5, paragraph F explicitly recognizes the Employer's authority to do so. The undersigned concludes that the wage rates are only applicable to employes in the bargaining unit. Since it cannot be said that the ServiceMaster janitors are in the bargaining unit, no violation of this provision is found. Accordingly, the Examiner dismisses the Complaint as to the alleged contract violation.

Date at Madison, Wisconsin this 22nd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner