STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHLAND CENTER DEPARTMENT OF PUBLIC WORKS, LOCAL 2387-A AFSCME, AFL-CIO, Complainant, vs. CITY OF RICHLAND CENTER, Respondent.	Case 28 No. 35324 MP-1737 Decision No. 22912-A

Appearances:
Lawton & Cates by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Boardman, Suhr, Curry & Field by Mr. Paul A. Hahn, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Richland Center Department of Public Works, Local 2387-A, AFSCME, AFL-CIO, having on July 11, 1985, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Richland Center has committed and continues to commit prohibited practices in violation of Sections 111.70(3)(a)1, 2, 3 and 4, Stats.; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; and the parties having jointly requested that said hearing be held outside of the time limits set forth in Sec. 111.07(2)(a), Stats., due to settlement discussions and their own scheduling difficulties; and a hearing on said complaint having been held on November 12, 1985, at Richland Center, Wisconsin; and the parties having completed their briefing schedule on December 12, 1985; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Richland Center Department of Public Works, Local 2387-A, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its offices located c/o Bernie Kern, Route 1, Box 119, Muscoda, Wisconsin 53573; and that at all times material hereto, Bernie Kern has been the Union's president and Jack Bernfeld has been its designated representative; and that Kern and Bernfeld have functioned as agents for the Union at all times material herein.

2. That the City of Richland Center, hereinafter referred to as the City, is a municipal employer which among other functions operates a public works department in Richland Center, Wisconsin; that its principal offices are located in City Hall, Richland Center, Wisconsin; and that at all times material hereto the following individuals occupied the following offices or positions with the City and were its agents authorized to act on its behalf:

La Verne Hardy	-	Mayor
Raymond Lawton	-	City Clerk
Paul Hahn	-	Attorney and Designated Representative
Dan Parkinson, Calvin Hall, Dale Pauls, and Darlo Wentz	-	Aldermen and Members of the Public Works Committee
Richard Wilson	-	Street Superintendent

3. That at all times material hereto, the Union has been the exclusive collective bargaining representative for certain of the City's employes in a unit consisting of all full-time and part-time employes in the street department, parks department, cemetery department, water department and waste water treatment plant but excluding managerial, supervisory, confidential, clerical, casual and seasonal recreational employes.

4. That prior to April 15, 1985, three employes of the City, members of the bargaining unit set forth in Finding of Fact No. 3, performed garbage pick-up with a City garbage truck five days a week.

5. That the City and the Union have been parties to a series of one year collective bargaining agreements covering the unit set forth in Finding of Fact No. 3, the most recent agreement commencing on January 1, 1985 and running through December 31, 1986; and that said agreement contains the following provisions with respect to the issue of subcontracting:

ARTICLE II
MANAGEMENT RIGHTS

> 2.01 The Employer shall have the sole and exclusive right to determine the Table of Organization, the number of employees to be employed and assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction, the duties of each of these employees, the nature, hours and place of their work, and all other matters pertaining to the management and operation of the City of Richland Center Department of Public Works, including the hiring, promotion, transfer of any employee. The Employer shall have the right to demote, suspend, discharge or otherwise discipline any employee for cause. The Employer may establish and enforce reasonable work rules and regulations. To the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or employees such rights are retained by the Employer. It is agreed that the Employer shall not use these rights and powers in conflict with any provisions of this Agreement or for the use of undermining the Union or discriminating against its member.
>
> The Union and the employees assent and agree not to interfere with, abridge, nor attempt to interfere with, any of the prerogatives of the Employer with respect to the operation, management and direction of the Department of Public Works.

ARTICLE XVII
MISCELLANEOUS

. . .

> 17.09 If bargaining work is subcontracted, it shall not result in the layoff or reduction of hours of regular employees.

6. That the bargining history with respect to the inclusion of Article XVII, Section 17.09 reveals that this section was incorporated into the parties' collective bargaining agreement in 1984 as a result of an arbitration award in which the arbitrator adopted the Union's final offer which contained this language proposal; that the language reflected in Section 17.09 was carried over without change into the parties' most recent agreement covering 1985 and 1986; and that said agreement was ratified by the Union on January 14, 1985, and executed by agents of the City and the Union on February 25, 1985.

7. That during the course of the 1984 mediation-arbitration proceeding, the Union sent its brief to the mediator-arbitrator with an accompanying copy to be sent to Hahn, which brief states in pertinent part, as follows:

> The second issue relates to the rights accorded to employees should the City subcontract bargaining unit work. Our proposal is simple and straightforward:

> If bargaining unit work is subcontracted, it shall not result in the layoff or reduction of hours of regular employees.

The City's proposal of no language would effectively exclude this vital issue from the parameters of the collective bargaining agreement.

The Union offer is superior to the City's. The Union has demonstrated the need to address this issue in the labor agreement. The City is obviously contemplating subcontracting a variety of bargaining unit work. Unlike many of the comparable agreements, the Union does not seek to contractually bar the subcontracting of work. While not waiving any statutory right, if any, for negotiations over such a decision, the Union simply proposes that if work is subcontracted, regular employees will not be laid off or have their hours cut.

The City would leave the matter unspoken. This is too important an issue to be so excluded. By excluding this issue from the collective bargaining agreement, any negotiations regarding the subcontracting of work during the term of the contract would be excluded from the established dispute resolution procedure -- mediation/arbitration. (Dane County v. Dane County Special Education Association, WERC Dec. No. 17400, Union Exhibit 11). Thus, subcontracting would be as fait accompli and negotiations, in all likelihood, unproductive as the Union would have no recourse should an impasse be reached.

The language proposed by the Union is supported by the comparables. In fact, such language is not new to Richland Center. Article II of the 1984 agreement between Richland Center (Public Utility Commission) and IBEW, Local 965, provides almost identical language when it states in part:

> The Employer may subcontract any of the work as long as the subcontracting does not cause the layoff of any bargaining unit employees, or elimination of normal overtime.

. . .

and that Hahn, as an agent of the City, received said brief.

8. That since at least the 1984 mediation/arbitration proceedings, the Union was aware that the City was contemplating the subcontracting of some bargaining unit work; that on January 23, 1985, the Public Works Committee of the City voted to recommend to the City Council that a one year contract for garbage and trash pick-up be awarded to a private contractor; that said work was bargaining unit work then being performed by three bargaining unit employes in a City-owned garbage truck; that on January 28, 1985, the City Council voted to solicit bids from private contractors for the garbage and trash pick-up for a one year period; and thereafter on or about January 31, 1985, the City publicly solicited bids through local newspapers.

9. That on February 21, 1985, the Public Works Committee met to evaluate the bids received and to evaluate the economic feasibility of contracting the work to a private contractor versus continuing the garbage and trash pick-up by the City; and that the Public Works Committee voted to recommend that the City continue operation as in the past but let bids for a new garbage truck.

10. That on March 14, 1985, after discussion on the merits of subcontracting, the Public Works Committee recognized Ruef Sanitary Service, hereinafter referred to as Ruef, as the lowest bidder for garbage removal and voted to discuss the subcontracting issue with the City Council as a whole on March 19, 1985; and that on March 19, 1985, the City Council voted to approve a contract with Ruef the effective date to be April 15, 1985.

11. That on March 20, 1985, Bernfeld sent the following letter to Hahn:

> It has come to my attention that the City has recently decided to subcontract its trash collection operations to a private contractor. The Union has neither been notified of this possibility, nor have we been given an opportunity to bargain over the decision and its impact on our bargaining unit. Please consider this letter to be our formal demand for negotiations about this subcontracting. Before effective and meaningful negotiations can take place, the City must rescind its decision. Failure to do so, in our opinion would commit a prohibited practice pursuant to Section 111.70 Wisconsin Statute.
>
> The Union also hereby requests any and all information pertaining to this subcontracting including the agreed upon specifications, cost, data related to cost savings or cost increases caused by this action, the contract between the City and the contractor, and any other pertinent information.
>
> The Union takes this matter very seriously and your prompt attention therefore is appreciated.

12. That Hahn responded to Bernfeld by letter dated April 3, 1985, as follows:

> This letter will confirm my message with your office of this date that the meeting scheduled for today, April 3, 1985, relative to the subcontracting of garbage pickup by the City of Richland Center was cancelled by the mutual agreement of the parties. The parties have agreed to hold a meeting on Wednesday, April 10, 1985, at 10:00 a.m. in the City Council Chambers to discuss City consideration of subcontracting the land fill operation.
>
> By this letter, we wish to give the union notice that the City of Richland Center is contemplating another method of handling the land fill operation other than the use of its Department of Public Works. Without waiving its right to take the position that the City is not obligated to bargain over a decision to subcontract the land fill operation, the City of Richland Center is willing to meet on April 10 and discuss and bargain over this contemplated action. We wish to emphasize that the City of Richland Center has made no decision to subcontract the land fill operation at this time. The City is considering the possibility and has taken bids from prospective contractors but has not proceeded any further. Also, by being willing to bargain this possible change of policy, the City takes the position that this does not establish a precedent that the City must bargain over any other policy decision that may be made, now or in the future. The City stands ready to bargain over the effects on any employees of any decision to subcontract the land fill operation.
>
> It has also been agreed that at the April 10 meeting the City will respond to any questions the Union may raise as to the effects on employees of the bargaining unit due to the City's decision to subcontract the garbage pickup work. None of the employees currently performing garbage pickup work will be laid off, nor will their hours be reduced. It is our understanding the Union wishes to ask questions as to the job duties they will now be performing.
>
> If you have any questions regarding the City's position or the meeting itself, please do not hesitate to contact me.

13. That the City agreed to meet with the Union on April 10, 1985, and did, in fact, meet on that date to discuss the decision to subcontract; that the City informed the Union that Ruef had been awarded a contract for the work in question and informed the Union that Ruef would begin to perform the work within a matter

of days; that the City reiterated its position that it did not have to bargain with the Union over the issue of subcontracting; that the City informed the Union that it believed it had the right to subcontract pursuant to the parties' collective bargaining agreement as long as no employes were laid off; that Bernfeld renewed the Union's demand that it be able to bargain about the decision to subcontract and insisted that the City rescind its actions with respect to awarding the subcontract before effective bargaining could take place; that the City was unwilling to rescind its agreement with Ruef but indicated that, without waiving any rights, it would bargain the impact of its decision to subcontract the disputed work; and that it informed the Union that no employes would be laid off or reduced in hours.

14. That at the time of the April 10 meeting, Ruef had been awarded the contract for the garbage pick-up, but that neither Ruef nor the City had signed the contract although it was scheduled to take effect on April 15, 1985.

15. Thereafter, in a follow-up letter on April 12, 1985, the Union reiterated its position that the City return to the status quo of continuing to have bargaining unit employes perform the garbage pick-up; that the Union communicated its understanding that the three affected employes would be assigned other work with the street department; and that the Union requested a variety of information relating to the subcontracting of the garbage pick-up.

16. That on April 12, the City executed a one year contract with Ruef covering the garbage pick-up to commence on April 15, 1985; and that on April 15, 1985, the three affected bargaining unit employes were assigned to other duties in the street department with no reduction in hours.

17. That the major consideration for the City's decision to contract with Ruef was financial in that the cost of the one-year contract with Ruef was $79,902; a guarantee of $3,000 less than the actual cost of garbage pick-up in 1984.

18. That the other reasons advanced by the City with respect to its decision to subcontract the garbage pick-up were as follows: (1) the City was concerned about its antiquated garbage truck, the cost of buying a new truck estimated to be $66,000 to $64,147 over a ten year period, and maintaining the old vehicle until the new one was purchased; (2) a desire on the part of the City to cut back garbage pick-up from a schedule of five days per week to two days per week and to utilize the three affected employes to improve the condition of City streets and side-walks, which had greater priority than garbage pick-up, in the view of the City's Public Works Committee; (3) the City's attempt to confine actual expenditures for garbage pick-up to the proposed budget estimates, said actual expenditures dramatically exceeding amounts budgeted therefore in recent years; and (4) concern that the City might be stopped by the Department of Natural Resources from using the city-owned landfill, Ruef having its own landfill available for its customers.

19. That the City's decision to contract with Ruef resulted in the loss of bargaining unit work, i.e. the garbage pick-up, for three bargaining unit employes who were then reassigned to other tasks with the street department without a reduction in hours or opportunities for overtime.

20. That the Union, by successfully gaining the incorporation of Section 17.09 through negotiations and the mediation/arbitration procedure into its collective bargaining agreement, has contractually waived its right to bargain with the City over its decision to subcontract the garbage pick-up and the right to bargain over the impact of that decision as well.

21. That the Union failed to present any evidence to establish that the City by its actions as set forth in Findings 8-20 sought to initiate, create, dominate or interfere with the formation of the Union.

22. That the Union failed to present any evidence that the City by its actions as set forth in Findings 8-20 encouraged or discouraged membership by discriminating against any employe with respect to the terms and conditions of his employment.

23. That the instant complaint was filed on July 11, 1985, in response to the City's action of subcontracting the garbage pick-up to Ruef.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following:

CONCLUSIONS OF LAW

1. That the City of Richland Center has no duty to bargain collectively with Richland Center Department of Public Works, Local 2387-A, AFSCME, AFL-CIO, within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, with respect to the decision to subcontract its garbage pick-up and/or the impact of its decision on the wages, hours, and working conditions of bargaining unit employes represented by Richland Center Public Works, Local 2387-A, AFSCME, AFL-CIO, since provisions relating to the decision and the impact thereof are included in the current collective bargaining agreement existing between the parties; and accordingly, that the City of Richland Center did not violate Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by its refusal to bargain with Richland Center Public Works, Local 2387-A, AFSCME, AFL-CIO because said Union contractually waived its right to bargain with respect thereto.

2. That the City of Richland Center based upon the acts set forth in the Findings of Fact, did not violate Section 111.70(3)(a)2 of the Municipal Employment Relations Act.

3. That the City of Richland Center based upon the acts set forth in the Findings of Fact did not violate Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

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

Dated at Madison, Wisconsin this 30th day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

The complaint alleges that the City violated Section 111.70(3)(a)1, 2, 3 and 4, Stats., by unilaterally subcontracting the garbage pick-up service previously performed by bargaining unit employes without bargaining with the Union over the decision or the impact of the decision upon bargaining unit employes. 2/

The facts relating to this action on the City's part are essentially undisputed and are set forth in the Findings of Fact. They need not be reiterated here.

Position of the Parties:

The Union strenuously asserts that subcontracting is a mandatory subject of bargaining citing Fibreboard Paper Products Corp. vs. N.L.R.B., 379 U.S. 203 (1964) and Unified School District No. 1 of Racine County vs. WERC, 81 Wis.2d 89, 103 (1977). It likens the instant dispute to that set forth in City of Menomonie (D.P.W.), Dec. No. 15180-A (WERC, 4/78), stressing that both cities decided to contract services out without making any attempt to negotiate same. Moreover, when asked to do so both refused to bargain, and refused also to restore the status quo. According to the Union, the City in the instant dispute made its decision to subcontract based upon economic considerations similar to the reasons set forth by the respondent the Menomonie case. The Union requests restoration of the status quo ante and an order that the City bargain over the decision to subcontract as well as over the impact of the decision upon the employes.

The City, on the otherhand, maintains that it is not required to bargain with the Union over the decision to subcontract because, under the facts presented herein, the decision to subcontract the garbage pick-up was not a mandatory subject of bargaining. It points to the reasons for the decision to subcontract as being substantially wider than the desire to save money, and claims that the decision was one of public policy, with both social and political objectives.

The City also contends that it has fulfilled its legal obligation to bargain the impact of its decision upon bargaining unit employes with the Union. It asserts that, in fact, there has been no impact upon bargaining unit employes because the affected employes were retained and assigned to street maintenance.

Even assuming that the City had an obligation to bargain over its decision to subcontract, the City argues that the Union waived its right to bargain over that decision, not only by the course of the collective bargaining negotiations and the agreement itself, but also by failing to request bargaining when it had notice that the City was actively considering subcontracting. It points out that the Union refused to bargain when presented with the opportunity to discuss the matter with the City.

2/ By letter dated November 8, 1985, the Union informed the Examiner and the City of its intent to amend the complaint by adding allegations that the City has refused and continues to refuse to provide pertinent information with respect to the decision to subcontract. At the hearing, however, the Union did not amend its complaint to this effect nor have the parties addressed this issue in their respective briefs. The Examiner, accordingly, does not address this issue herein.

Discussion:

Generally speaking, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on such matters had been clearly and unmistakenly waived. 3/ Where a collective bargaining agreement exists which expressly addresses a subject, it determines the rights of the parties' and consequences of certain actions. 4/ Whether or not a waiver exists, however, must be determined on a case by case basis. 5/

The courts and Commission have held in previous cases that both the decision to subcontract as well as the impact of such a decision are mandatory subjects of bargaining. 6/ Assuming for the sake of argument that the facts in the instant case establish that both the decision itself and the impact on employes are mandatory subjects of bargaining, 7/ it is apparent that the Union has contractually waived its right to bargain with respect to both matters in the instant case.

Article II, the management rights clause, expressly grants to the City the exclusive right "to determine the Table of Organization, the number of employees to be employed and assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction . . ." It further reserves to the City the right to determine "the duties of each of these employees, the nature, hour and place of their work, and all other matters pertaining to the management and operation of the City of Richland Center Department of Public Works, including the hiring promotion, transfer of any employee . . ." Article XVII, Section 17.09 states that "If bargaining work is subcontracted, it shall not result in the layoff or reduction of hours of regular employee." These two clauses, when read in conjunction, permit the City to subcontract provided that said subcontract does not result in the lay-off or reduction in hours of regular bargaining unit employes. Union Representative Bernfeld essentially admitted as much at the hearing as his testimony regarding the bargaining history of Section 17.09 reveals:

> "Q Let me interrupt you. You said something about the proposal of the Union?
>
> A Initially our proposal was they could not subcontract at all. It was a blanket statement. There was discussion, or negotiations in mediation, and there was extensive mediation through the Wisconsin Employment Relations Commission, and the Union's position was, and it became -- ultimately became a final offer was that the Employer would retain the bargaining -- the right of -- of the decision over the right of subcontracting, but the impact of any subcontracting of -- it was decided if they could so subcontract, or that they could indeed subcontract that -- that there would be no -- indeed no layoffs, or reduction of hours as a result of that decision. Our rationale for that was very clear. We made

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3/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

4/ Racine Unified School District, supra; Janesville School District, Dec. No. 15590-A (Davis, 1/78).

5/ Racine Unified School District, Dec. No. 19357-D (WERC, 1/83).

6/ Unified School District of Racine Co. v. WERC, 81 Wis.2d 89, 103 (1977); and City of Green Bay, Dec. No. 18731-B (WERC, 6/83).

7/ It is unnecessary, to determine whether the decision to subcontract under the facts set forth in the Findings is a mandatory subject of bargaining given the conclusion that a contractual waiver exists.

that very clear given that the -- that the Union doesn't have available to it during the mid-term, or during the term of the contract a -- we don't have access to mediation, arbitration, and we felt that bargaining over the decision that definitely would become a sham, the bargaining over that, and based with the prospect of that we wanted to insure that if we couldn't bargain to a satisfactory conclusion that -- that at least we would be protected in terms of the impact." tr. at p. 10 (Emphasis added)

Moreover, while admittedly, in one part of its brief to the mediator/arbitrator, the Union attempts to preserve its statutory right to bargain during the mid-term period with respect to subcontracting; in the same brief, it admits that the language of Section 17.09 is almost identical to the following language: "The Employer may subcontract any of the work as long as the subcontracting does not cause the layoff of any bargaining unit employees, or elimination of normal overtime."

Where, as here, it is the Union which raised the subject of subcontracting during contract negotiations, and included a provision in its final offer specifically addressing the subject as well as the impact upon bargaining unit employes, and successfully gained its inclusion into the agreement, it must be concluded that the contract language applies and the Union has waived its right to bargain over both the decision and additional impact, if any, upon the employes during the term of the agreement.

To hold otherwise, would permit the parties to evade their previous agreement on these subjects as set forth in the collective bargaining agreement.

Inasmuch as the Union has failed to adduce any evidence which would support finding violations of either Section 111.70(3)(a)2 or 3, these allegations are deemed unproven also and dismissed on their merits.

Dated at Madison, Wisconsin this 30th day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

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