STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES & HELPERS UNION LOCAL 695, Complainant, vs. CITY OF MONONA, Respondent.	Case 36 No. 52402 MP-3014 Decision No. 28405-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Ms. Marianne Goldstein Robbins, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, 119 Martin Luther King Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, by Mr. Jack Walker, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695, hereinafter referred to as the Union, filed a complaint on March 21, 1995, with the Wisconsin Employment Relations Commission alleging that the City of Monona had committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 4 and 5, Stats., when it bypassed the Union and sought to bargain directly with the Union's stewards concerning its decision to subcontract refuse collection and sewer cleaning, and when it unilaterally implemented its decision to subcontract same in violation of the parties' labor agreement and without a meaningful opportunity for bargaining. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On May 30, 1995 the City filed an answer to the complaint. On June 26, 1995 the Union filed a motion seeking to quash a subpoena sought by the City. The subpoena matter was subsequently resolved. A hearing was held in Madison, Wisconsin, on June 27 and August 2, 1995, at which time the parties were given full opportunity to present

their evidence and arguments. Both parties filed briefs and reply briefs whereupon the record was closed October 23, 1995. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695, also known as Teamsters Union Local 695, hereinafter referred to as the Union, is a labor organization with its offices located at 1314 North Stoughton Road, Madison, Wisconsin 53714-1293. The Union is the exclusive collective bargaining representative for all full-time public works hourly employes employed by the City of Monona. Ruth Ann Stodola is a business representative for the Union who services the Monona public works bargaining unit. The Union's stewards in the public works bargaining unit are Steve Culbertson and Dave Blaser.

2. The City of Monona, hereinafter referred to as the City, is a municipal employer with its offices located at 5211 Schluter Road, Monona, Wisconsin 53716. At all times material hereto, Kevin Brunner was the City Administrator. Among its many governmental functions, the City operates a public works department. Richard Vela is Director of Public Works (as well as the City Engineer) and Roger Jones is Public Works Superintendent. Jones is the line supervisor for the employes in the public works department.

3. The Union and the City have been parties to a series of collective bargaining agreements going back to 1974. The parties' most recent agreement covered 1994 and 1995. None of these agreements, including the 1994-95 agreement, contained the word "subcontracting." The 1994-95 agreement contained, among its provisions, the following:

> **ARTICLE 2 - RECOGNITION**
>
> **Section 1.** The Employer hereby recognizes the Union as the exclusive bargaining agent for its full-time public works hourly employees but excluding supervisors, confidential employees, office clerical employees, temporary or seasonal employees, and elected officials.
>
> **Section 2.** Full-time employee is an employee who is scheduled to work forty (40) or more hours during a regular workweek and excludes seasonal or temporary employee. No seasonal or temporary employee shall be employed to replace a full-time employee except when any such employee is absent and has been given the opportunity to perform the work for which such seasonal or temporary employee is to be employed.

Section 3. A temporary or seasonal employee is an employee hired on a temporary basis for a period of not more than ninety (90) consecutive workdays in any calendar year. The Employer's past practice in employing students and other temporary employees during vacation periods is recognized and accepted.

. . .

ARTICLE 4 - MUNICIPAL AUTHORITY

The Employer has the sole right to plan, direct and control the public works force, to schedule and assign work to employees, to promulgate reasonable rules and regulations, to determine the means, methods and schedules for continuance of its operations, to establish standards and to maintain the efficiency of its public works employees. The Employer also has the sole right to require public works employees to observe its reasonable rules and reasonable regulations, to hire, lay off or relieve such employees from duties, to maintain order and to suspend, demote, discipline and discharge employees for just cause; however, the Employer shall not take any action which would in any way violate the provisions of the Wisconsin Statutes. The enumeration of the authority of the Employer is by way of illustration only and not by limitation.

. . .

ARTICLE 10 - GRIEVANCE AND ARBITRATION

The parties agree that grievances are to be resolved as soon as possible and in order to do so, establish this procedure:

Section 1. Definition. A grievance is defined as any dispute involving the meaning, application or interpretation of the terms and provisions of this Agreement. A grievance shall be processed within five (5) working days of its occurrence or knowledge thereof or it shall be barred.

Section 2. Procedure.

Step One -- An employee who has a grievance shall submit it to his/her supervisor, in writing on a form provided by the Union, who shall render his/her decision in writing within five (5) working days after receiving the grievance. The employee may have the steward with him/her is he/she desires.

Step Two -- If the supervisor and the employee cannot reach a mutually satisfactory decision, the grievance shall be referred by the Union to the Director of Public Works or designated representative for settlement. If the grievance is not settled within five (5) working days after a meeting for that purpose, it may be referred by either the Employer or the Union to Step Three.

Step Three -- If the Director of Public Works or designated representative and the Union cannot reach a mutually satisfactory decision within five (5) working days, the grievance may be submitted by the Union to the Employer's Administrator who shall have ten (10) working days to resolve it.

Step Four -- If the parties are unable to resolve the grievance in Step Three, it may be referred by either to a committee appointed by the Mayor and approved by the Employer's Council not to exceed three (3) of its members including the Mayor, or designee, who shall meet with the Secretary-Treasurer of the Union, or designee, to resolve the grievance. If the parties are unable to resolve the grievance within ten (10) working days after a meeting for that purpose, it may be referred by either to Step Five.

Step Five (A) -- If the parties are unable to resolve the grievance at Step Four, either party may submit the grievance within ten (10) working days to the Wisconsin Employment Relations Commission, who shall provide a list of five (5) arbitrators from which the parties shall alternately strike names until one (1) remains. The party requesting arbitration shall strike first.

(B) -- The arbitrator shall have the authority to determine issues concerning the interpretation and application of all Articles or Sections of this Agreement. While the arbitrator shall have no authority to change any part of this Agreement, he/she may make recommendations for such changes which in his/her opinion would add clarity or brevity or which might avoid future controversy. Determinations of the arbitrator shall be binding upon the parties but his/her recommendations shall not be.

(C) -- Each party shall bear the cost of preparing and presenting its own case before the arbitrator and further, shall share any costs or expenses of the proceeding. Transcripts ordered by the

parties shall be at their own expense.

Section 3. Miscellaneous. Time limits set forth shall be exclusive of Saturdays, Sundays and holidays. The time limits set forth in the foregoing steps may be extended by mutual agreement in writing. Failure to abide by such time limits or any extension thereof shall cause the grievance to be barred. Grievances not decided by the Employer within the prescribed time limits or any extension thereof shall proceed automatically to the next step, except this shall not include Step Five.

The provisions of this Article are available to the employees, the Union and the Employer.

. . .

ARTICLE 12 - SENIORITY

Section 1. The Employer recognizes that the principle of length of continuous service, with due regard for qualifications and ability, shall be controlling in employment matters. Where factors other than seniority are relatively equal between two (2) employees, seniority shall control.

Section 2. Seniority is defined to be the total time elapsed since the last date of hire provided that seniority shall not be diminished by temporary layoff or authorized leaves of absence. A layoff for one (1) year or the length of an employee's service, whichever is less, shall terminate seniority. Failure to respond and report to work within seven (7) days after a recall from layoff received by certified mail sent to the last address of record shall also terminate seniority. Seniority may also be terminated by other provisions in this Agreement.

Section 3. Any employee who has quit or who has been discharged and is later rehired shall be considered as a new employee.

Section 4. A seniority roster will be maintained showing the names and date of hire and a copy shall be sent to the Union upon

request.

. . .

ARTICLE 19 - COMPENSATION AND WORKWEEK

Section 1. Hourly Rates.

	Hire	1 Year	2 Years	3 Years
January 1, 1994	9.60	10.59	12.06	12.57
July 1, 1994	9.82	10.83	12.33	12.85
January 1, 1995	10.21	11.26	12.82	13.36

"Year" means the first of the month following completion of twelve (12) months consecutive full-time employment.

. . .

ARTICLE 32 - MAINTENANCE OF STANDARDS

The Employer agrees that all conditions of employment relating to wages, hours of work and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement, and such conditions of employment shall be changed only where specific provisions for improvement are made elsewhere in the Agreement.

It is agreed that the provisions of this Article shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within thirty (30) days from the date of such error.

No evidence of intent or bargaining history regarding any of the above-noted provisions was adduced by either party.

4. The public works department is responsible for maintaining the City's infrastructure including the City's streets, sewer and water utilities and park system. There are currently eleven employees in the bargaining unit, one of whom is responsible for maintaining the department's equipment and vehicles. The job description for these employes lists 21 specific types of duties. The job duties pertinent herein are as follows:

1. Collection of residential and commercial refuse, as required. Tasks include driving and operating refuse trucks throughout the City along designated routes and manually loading/picking up refuse.

. . .

3. Tree and shrub trimming and chipping of tree branches.

4. Collection of large household items for disposal and/or recycling.

. . .

6. Patching of City streets using asphalt cold patch.

7. Maintenance and repair of storm sewer facilities.

8. Maintenance and repair of sanitary sewer facilities, including cleaning and root cutting of sewer mains.

. . .

10. Grass cutting with tractor, lawn mower, or week trimmer.

11. Maintenance and repair of park facilities including playground equipment, benches, tables, boat launches, restrooms, park shelters, and other grounds facilities.

. . .

13. Installation, maintenance, and repair of signs and pavement markings.

. . .

16. Maintenance and repair of City owned motorized vehicles and equipment, tools, and supplies.

17. Maintenance of Public Works Garage and yard facilities.

18. Setting up and removal of road barricades, snow fences, temporary signage, and other temporary facility installations.

19. Operation of dump trucks; road grader; front-end loader; refuse trucks; leaf collection equipment; wood chipping equipment; vac-all truck; sewer cleaning equipment; and other light, medium, and heavy equipment and vehicles, as

needed.

5. Over the years, some work previously performed by public works employes has been completely subcontracted by the City, to wit: Employes use to perform lake shore clean up, but this work has been performed by Dane County since about 1976. Employes use to repair or replace sections of concrete sidewalks, but this work has been subcontracted since about 1977. Employes use to repair or replace storm water inlets and catch basins, but this work has been subcontracted since about 1977. Employes use to maintain the baseball diamonds in City parks, but this work has been performed by the Softball Association since about 1980. Employes use to perform all permanent asphalt street patching of water main breaks, but this work has been subcontracted since about 1982. Employes use to mow the lawn surrounding the City's buildings, but this work has been performed by other city employes (outside the department of public works) since about 1982. Employes use to plant new trees, but this work has been subcontracted since about 1982. The department's mechanic use to maintain police and fire department fleet vehicles, but this work has been subcontracted since about 1985. Employes use to perform crack filling of cracks in street pavement, but this work has been subcontracted since about 1985. Employes use to repair or replace sanitary sewer manhole structures, but this work has been subcontracted since about 1985. Employes use to break up the concrete pavement in order to fix water main breaks, but this work has been subcontracted since about 1988. Employes use to perform the barricading and traffic control work on Monona Drive for water main breaks, but this work has been subcontracted since about 1988. Employes use to pick up residents' yard waste and take it to the landfill, but in 1989 the City began requiring residents to haul their yard waste to a drop off site where it is picked up by a paid outside contractor who hauls it to a landfill. Employes use to pick up plastic, glass, newspaper and metal as part of the refuse collection, but in July, 1990, the City started a recycling program wherein the foregoing items were identified as recyclables which had to be bagged separately by city residents. The collection of those items (i.e. recyclables) was subcontracted to Green Valley Disposal, an outside contractor. Thus, employes have not collected recyclables since that work was subcontracted in 1990 to Green Valley Disposal. City Administrator Brunner estimated that yard waste and recyclables constituted half of the total refuse. Employes use to perform jet rodding and stringing of lines in preparation of sanitary sewer televising, but this work has been subcontracted since about 1992.

Other work performed by public works employes in the past has been subcontracted in part, to wit: in house plumbing; in house water heater replacement; in house window and door repair and replacement; in house electrical work; roof repair or replacement; tree trimming; and asphalt patching jobs. Depending on the size of the job, the work just noted is performed by either public works employes or paid outside contractors.

6. The Union, through its stewards, was aware that the City subcontracted in whole or in part the work identified in Finding of Fact 5. When the City subcontracted in whole or in part

the work identified in Finding of Fact 5, it never offered to bargain with the Union about either the decision to subcontract or its potential effects. The Union did not grieve any of the subcontracting noted in Finding of Fact 5.

7. In 1990, the City considered subcontracting municipal refuse collection. After doing so, it decided to not subcontract same. Thus, prior to the action involved herein, the City provided municipal refuse collection service with City employes to City residents. In doing so, it was one of three municipalities in Dane County (the others being the City of Madison and the Village of Maple Bluff) which provided refuse collection using municipal employes. Refuse collection is subcontracted in all other communities in Dane County. Prior to the action involved here, the City's department of public works crew collected refuse from about 2,400 single family and duplex residential units and about 500 commercial establishments and apartments. The City collected refuse each week Tuesday through Friday. About 14 man hours per day, or 2,900 man hours per year, were devoted to collecting refuse. This figure represents about 1.5 FTE's (full-time equivalents). As of September, 1994, the City paid $36.00 per ton in landfill tipping fees (i.e. the cost per ton paid to dispose of waste at a landfill). The City projected it would collect 2,200 tons of solid waste in 1994, so the yearly tipping fees for this refuse amounted to $78,500.

8. In August of 1994, City officials met with department of public works employes and informed the employes that they wanted to form committees to study the work done by the department. The employes were asked to participate on study committees with management representatives and some employes volunteered to do so. The City did not advise Union business representative Stodola of the existence of the study committees or ask her to serve on any. One of the study committees became known as the "Sewer Cleaning Committee". One member of that committee was bargaining unit employe (and Union steward) Steve Culbertson. This committee discussed chronic sewer trouble lines, the frequency at which (sewer) cleaning and rebuilding should occur and the possible purchase of a new jet rodder (which is used to clean sewers). The cost estimates for a new rodder ranged from $119,000 to $150,000. Another study committee became known as the "Refuse and Recycling Study Team". The members of that committee were Alonzo Elvord, Dan Edgington, Rich Vela, Roger Jones, and Kevin Brunner. The first two individuals just noted are bargaining unit employes who regularly work as refuse collectors and the last three individuals are part of the City's management. This committee met at various times for about two months. During that time this committee looked at various ways to improve the collection of refuse and recycling materials. In doing so, committee members discussed equipment cost (including the possible purchase of a new garbage truck), operational cost, labor cost and tipping fees. Insofar as the record shows, the committee did not address any labor relations matters that related thereto. For example, the committee did not address the topics of wage rates, conditions of employment, layoffs, subcontracting or other bargainable matters.

9. Brunner then wrote a report entitled "Report On Improvements to City Refuse And

Recycling Collection Programs" which he submitted to the City's public work committee. This report, dated September 21, 1994, indicated it was from the five members of the Refuse and Recycling Study Committee. The introductory paragraph of that report contained the following statements:

> Important budgetary decisions such as appropriate DPW staffing levels, the purchase of a new refuse packer, possible contracting out of refuse collection services and continuation of recycling collection and disposal services with Green Valley Disposal (the current five year contract will expire on June 30, 1995) need to be made.
>
> This report will present baseline operations and cost data for each of these two programs prepared by the study team as well as suggested improvements for possible future implementation.

The report then went on to state:

> The study team looked at the possible cost savings of contracting out refuse collection and disposal to the private sector. The cost analysis following this report shows the projected savings to the City if it contracted with Green Valley Disposal for both refuse and recycling collection and disposal services. Green Valley Disposal submitted a proposal to the City on August 23rd which indicated that the cost to the City would be $4.52 per unit/per month for a co-collection service (see Exhibit B) for the proposed first year of a five year contract. This equates to $2.28 per month the first year for recycling service and $2.24 per month for refuse service with all landfill tipping fees to be paid directly by the City to Dane County. Green Valley Disposal would be using a dual collection truck (only one vehicle would be used with one operator) that would necessitate going back to a Monday to Friday collection schedule.
>
> The study team projects that it will cost the City $120,886 to continue the current City refuse collection program by the Department of Public Works. Total tipping fees are projected to be $81,235. The total annual cost per unit of service would thus be $69.41 if the current status quo would remain.
>
> Based upon the proposal received from Green Valley Disposal to provide refuse collection and disposal services, it would cost the $78,275 in 1994. With the same projected tipping fees noted above, the total annual cost per unit of service would be $54.78. Based

> upon 2910 units this would mean the City would save approximately $42,573 annually if the service would be contracted out. In addition, the $85,000 the City has included in its capital budget in 1995 for a new refuse packer could be reallocated for other DPW equipment needs.
>
> It is important to point out, however, that the direct savings to the City would only be approximately $18,850 because City administrative and overhead costs as well as mechanic and garaging costs would still be incurred by the City (albeit these would have to be absorbed by other public works programs).
>
> The biggest benefit to the City if the refuse collection program would be contracted out would be the ability to reallocate the 1.5 FTE to other public works programs. With ever increasing responsibilities in the water and sewer utilities as well as more park and open space maintenance, this ability to reallocate DPW personnel would be extremely beneficial to the City.

The report then went on to make the following seven recommendations:

> **Recommendation #1**- Contracting out the City's refuse collection program will save the city funds, however, direct cost savings are not as significant when discounting administrative, overhead and garaging costs that will continue regardless of whether the service is provided by the Monona DPW or not. The biggest benefit is the ability to reallocate existing personnel to other DPW programs where additional staffing is needed.
>
> **Recommendation #2-** If the decision to contract out refuse collection is made then the City should solicit competitive proposals from qualified firms to provide refuse/recycling co-collection services. . . .
>
> **Recommendation #3-** Effective, January 1st of 1995, the City should eliminate all commercial properties and apartments from municipal refuse and recycling collection and disposal. . . .
>
> **Recommendation #4-** The City should consider charging separately for residential refuse collection and disposal services if Recommendation #3 is adopted. . . .

> **Recommendation #5-** The City should continue to contract out the collection and disposal of recyclable materials. If the decision is made to contract for refuse collection and disposal then proposals should be sought from qualified firms to provide both services (ideally a four to five year contract should be sought to provide sufficient time for capitalization recovery by the private vendors). . . .
>
> **Recommendation #6-** Because of the increasing markets for recyclable materials, the City should reinstate a cost sharing provision with the vendor for the sale of collected recycled material in any new contract for these services. . . .
>
> **Recommendation #7-** The City should expand its current recycling program to include plastics #3 through #7 as well as institute the changes included in Exhibit D to this report. . . .

The Union did not receive a copy of this report at the same time as the City's public works committee did.

10. The City's public works committee considered the above report at its meeting on September 28, 1994. The Committee's minutes for that meeting provide in pertinent part:

> Much of the discussion centered around the proposed manpower allocation and options for contract services. City Administrator Kevin Brunner presented the report on proposed improvements to City refuse and recycling collection programs prepared by the City refuse and recycling study team. The report analyzed current refuse and recycling operations, explored possible cost savings through changes in the collection program and/or through contract services, and provided recommendations. Much discussion centered around refuse/recycling collection for commercial/multi-family properties. Mr. Jankowski suggested that the City provide recycling collection to all City properties as an incentive to recycle and limit refuse collection to residential properties only (3 units or less). It was acknowledged that there would be savings to the City if refuse/recycling collection was contracted out. The Committee formed the following consensus:
>
> 1. Contract out refuse collection as part of a refuse/recycling co-collection program.
> 2. Collect recyclables from all City properties.

3. Eliminate refuse collection from all City commercial and multi-family (4 units and more) properties.
4. Expand recycling program to incorporate changes to current program as necessary to follow updated recycling collection as depicted in Exhibit D of study team report.
5. Pursue revenue sharing of recyclable materials collected in the City.

The Committee also reviewed the analyses of contract services versus City forces for the brush collection and sanitary sewer cleaning programs. The Committee looked favorably towards contract services for sewer cleaning. City Administrator Brunner said there may be a possibility that the City of Sun Prairie may be interested in providing sanitary sewer cleaning services.

A motion by Mr. Taylor, seconded by Mr. Jankowski, to recommend obtaining contract services for refuse collection and sanitary sewer cleaning and to reallocate the dedicated manpower allotment for those functions to other areas of the budget, maintaining a total manpower allotment of 12, was carried.

11. Following this action the City issued a "Request For Proposals - Refuse and Recyclable Collection and Disposal Services". Paragraph 1 of the Overview section of that document, which was entitled "Request For Proposals" provided as follows:

The City of Monona (hereinafter "City"), Dane County, Wisconsin, a municipal corporation acting under its statutory home-rule powers, is seeking proposals for the provision of professional services for refuse and recyclable collection and disposal. The City desires to provide its residents with comprehensive, high quality refuse and recyclable collection services. The City intends to enter into a contract with a qualified and responsible firm for such services, and accordingly is furnishing herein a set of specifications by which such proposals shall be judged. Any firm (hereinafter "Contractor") desiring to furnish a quotation for such services shall submit proposals following the instructions and format of the attached Request For Proposal (RFP) documents.

Paragraph 4 of the Overview section of that document, which was entitled "Proposal Delivery Procedures" provided as follows:

> Sealed proposals shall be delivered to the office of the City Administrator, City of Monona, City Hall, 5211 Schluter Road, Monona, Wisconsin 53716, by no later than 11:00 a.m. on Wednesday, December 7, 1994. . . .

After the Request For Proposals was issued, three vendors responded to same with written proposals: Waste Management, Browning-Ferris Industries and Green Valley Disposal.

At about the same time, the City solicited bids for sewer cleaning. The record does not identify how many vendors responded to same. One of the vendors which responded was McCann Sewer and Drain Cleaning Services.

12. On October 10, 1994, Brunner and Mayor Tom Metcalfe transmitted the "1995 Executive City Budget", along with a cover memo, to the members of the city council. The cover memo provided in pertinent part:

> The following is a summary of the major changes from 1994 that are proposed as part of the 1995 Executive Budget:
>
> **1. Contract Privately for Refuse Collection/Disposal Services-**An employee team did an excellent job of reviewing and recommending improvements to the City's refuse and recycling programs. Based upon this analysis, the Public Works Committee has proposed and we concur that refuse collection and disposal be contracted out to the private sector. A co-collection program with recyclables is proposed that will result in savings of over $42,000 annually (direct and indirect cost savings). In addition, we are proposing that all commercial refuse collection by the City be eliminated with recyclable collection to those commercial businesses currently receiving service still being provided (the Public Works Committee has recommended that commercial recyclable collection be expanded to all commercial properties in the City but we find that service expansion both too costly and impractical to implement).
>
> . . .
>
> **3. Savings in Capital Budget from Contracting of Service-**By contracting out refuse service and sewer cleaning, the City will save $210,000 in its capital budget because equipment previously

borrowed for will no longer need to be purchased. . . .

13. At its meeting of December 7, 1994, the public works committee reviewed the bids which had been received from Waste Management, Browning-Ferris Industries and Green Valley Disposal to perform refuse and recycling collection. After doing so, the committee voted to recommend acceptance of the Waste Management bid to the full city council. Later during that same meeting the committee reviewed the proposals for sanitary sewer cleaning services. After doing so, the committee voted to recommend acceptance of McCann's Sewer and Drain Cleaning Services bid to the full city council.

14. Brunner then scheduled a meeting with Union stewards Culbertson and Blaser to inform them of the public works committee's recommendations referenced in Finding of Fact 13. That meeting was held December 14, 1994. Those present during same were Brunner, Vela, Jones, Culbertson and Blaser. Union representative Stodola was not advised of the meeting or invited to it. At the start of this meeting Brunner informed Culbertson and Blaser of the public works committee's recommendations to subcontract refuse collection and sewer cleaning. The matter was then discussed in detail. During this discussion the stewards expressed concerns about layoffs (namely that there be no layoffs as a result of the subcontracting) and the way DPW employes would be assigned other duties. During the meeting Brunner suggested the stewards talk with Stodola as soon as possible about the proposed subcontracting of refuse collection and sewer cleaning, to which the stewards responded that they would. At some point during the meeting Brunner gave the stewards a document he had prepared from the refuse collection bids the City had received. This two-page document, which had the caption "Monona Refuse/Recycling Price Quotation Summary Based Upon Proposals Received Dec. 7, 1994", consisted of statistics and numerical figures. At some point during the meeting Brunner referred to another document he had brought with him to the meeting that listed the items/areas he thought needed to be addressed with the Union in order to avoid a grievance and/or litigation over the proposed subcontracting. In essence, this document contained the City's proposed settlement terms. This document never materialized as an exhibit. Brunner did not give this document to the stewards or ask them to sign it during this meeting. Blaser took some notes at this meeting but no one else did. Blaser's notes were written on his copy of the statistics sheet. Blaser's notes don't say anything about being asked to sign anything, nor do they indicate that the stewards objected to having the meeting without Stodola being there.

15. The next day, December 15, 1994, Brunner sent the stewards and Stodola a proposed settlement agreement along with a cover letter. The cover letter provided as follows:

> Enclosed please find a proposed agreement that addresses the intent of the City to subcontract refuse collection and sewer cleaning work, pursuant to the meeting we had on December 14, 1994. As you are aware, we have been studying this possible subcontracting since September. In drafting this agreement I wanted to address the two major concerns that you both expressed, that being that there will be no layoffs as a result of this subcontracting as well as that any

re-assignment of job duties be subject to the terms and conditions of the Union Contract.

I am sending a copy of this agreement to Ruth Ann Stodola at Teamster's Local 695. I would appreciate your review of the agreement with Ruth Ann as soon as possible. My intent is to present this agreement to the City Council before the end of 1994, so I would appreciate your response as soon as possible.

Thank you for the opportunity to discuss this matter with you yesterday. If you have any further questions you would like to discuss, please do not hesitate to contact me.

The attachment to this letter provided as follows:

AGREEMENT

This agreement is between Teamsters Local 695 and the City of Monona.

WHEREAS, the administration of the City of Monona believes that it is in the best interest of the City to subcontract refuse collection and sewer cleaning work, which is presently performed by employees in the Public Works Unit represented by Teamsters Local 695, in part for the reason that it will assist the City in remaining within cost control limits and still have a work force sufficient to meet other work requirements; and

WHEREAS, some savings will result to the City because of subcontracting due to contractor tipping fee and equipment costs being lower than those currently paid by the City; and

WHEREAS, the administration of the City of Monona intends to present a proposal for such subcontracting to the City Council of the City of Monona on or before January 1, 1995;

NOW, THEREFORE, it is agreed:

1. If the City Council accepts this agreement on or before January 1, 1995, it will become a binding agreement between the City and the Union.

2. If the City Council does not accept this agreement on or before January 1, 1995, the agreement is void and without effect.

3. The City may subcontract said refuse collection and sewer cleaning work without further discussion or bargaining with the Union, regarding the decision or the effects thereof, and the Union agrees to make no claim that the subcontracting breaches the collective bargaining agreement between the parties, or breaches the employer's duty to bargain with the Union.

4. No Unit employee will be laid off as a result of such subcontracting, but will be assigned to other duties. Any layoff occurring within two (2) years after the effective date of the subcontracting will be deemed to have been a result of the subcontracting, and thus a breach of this agreement by the City.

5. Unit employees will be re-assigned by the City subject to the terms and conditions of the Union contract.

Dated this _____ day of _____, 1994

CITY OF MONONA TEAMSTERS LOCAL NO. 695

_____ _____

The above-noted document entitled "Agreement" (i.e. the document attached to the cover letter) is different from the document which Brunner brought with him to the December 14 meeting which contained the City's proposed settlement terms. The last sentence of the first paragraph of the cover letter establishes that the version of the "Agreement" attached thereto was intended to address the concerns about layoffs and unit work assignments which the stewards had raised at the December 14 meeting.

16. On December 16, 1994, while Stodola and Brunner were at a bargaining meeting for another bargaining unit, they had a short conversation about Brunner's letter of the previous day (December 15, 1994). In this discussion Stodola told Brunner that the Union would not allow the subcontracting to occur and that the Union would fight it. Brunner responded to Stodola by asking her whether the parties were at impasse on the issue, to which Stodola replied yes, but that the parties needed to talk about it further. Then they scheduled a meeting to do that for December 21, 1994.

17. On December 19, 1994, Brunner faxed Stodola the following letter:

I want to confirm the scheduling of our meeting on Wednesday, December 21, 1994, at 1:00 p.m. in the Monona City Hall Main Conference Room to discuss the City's proposed contracting of refuse collection/disposal and sewer cleaning services currently performed by Monona Public Works personnel.

You had previously received the written proposed agreement on the subject.

I also want to confirm your statement to me at our December 16, 1994 collective bargaining session regarding a successor agreement for the City's Police Dispatchers, that "we will not allow this (i.e., the City's proposal to contract for refuse collection/disposal and sewer cleaning) to happen and we will fight this". In addition, when I asked you whether the two parties were at impasse on this issue, you stated that "yes but we need to talk about it further". Both Police Chief Paul Welch and Lieutenant Zeno Reithmeyer, who were present in the room at the time, concur that these statements were made by you to me.

Frankly, the City did not anticipate any problems in seeking an agreement with the Union to contract for these services. Contracting for refuse service has been discussed at various times for over ten (10) years in Monona and DPW personnel including the Union stewards, have been involved in studying possible changes in how the City provides refuse collection and sewer cleaning services since August of this year.

The Monona City Council was scheduled to approve contracts for both of these services at its regularly scheduled December 19, 1994 meeting; however, I am requesting that the Council postpone approval until December 28, 1994 so that these matters can be discussed with the Union and its representatives.

If you have any questions before Wednesday's meeting, please contact me so that Wednesday's meeting may be a productive meeting.

Labor cost is not the primary motivation for this proposed decision. For this reason we do not believe the decision itself is bargainable. However, we are willing to bargain about the decision as well as its effects.

Stodola did not respond in writing to the above letter and did not call Brunner concerning same.

18. The public works committee's recommendations to subcontract refuse collection and sewer cleaning were on the agenda to be discussed at the city council meeting on December 19, 1994. The matter was tabled.

19. The meeting between the City and the Union occurred as scheduled on December 21, 1994. Those present at the meeting were Brunner, Vela and attorney Jack Walker for the City and Stodola, Culbertson and Blaser for the Union. At the start of the meeting Stodola expressed her opinion to management that the proposed subcontracting violated the parties' labor agreement. Stodola then handed City representatives a grievance dated that day (i.e. December 21, 1994) which provided in pertinent part:

> The City of Monona's proposed contracting of refuse collection/ disposal and sewer cleaning services currently performed by bargaining unit employees is a violation of Articles 2, 12, 19 and 32 of the Labor Agreement. As a remedy, the Union seeks that the City cease and desist violation of the Agreement and retain refuse collection/disposal and sewer cleaning services within the bargaining unit.

Walker then questioned Stodola about the basis for the grievance. Stodola responded by reviewing how in her opinion the proposed subcontracting violated Articles 2, 12, 19 and 32 of the labor agreement. She then requested that the grievance arbitration be held on an expedited basis. During the meeting Walker asked Stodola what the Union proposed to resolve the matter, to which Stodola replied retain the work. Walker then asked Stodola if the Union had any flexibility in its position, to which Stodola replied it did not. At the end of the meeting Walker told the Union representatives that the City's administration would be recommending to the city council at the next council meeting that refuse collection and sewer cleaning be subcontracted effective February 1, 1995. Stodola's notes of the meeting indicate in pertinent part that the City's "administration will be recommending approval to the council at the next meeting". Stodola's notes do not indicate what the date of the next city council meeting was to be. Stodola thought that the date for the next city council meeting was December 28, 1994.

20. Later that same day (December 21), Brunner replied in writing to the grievance he had just received. His letter to Stodola provided as follows:

> I am replying to the grievance you filed with me on December 21, 1994, regarding certain additional subcontracting of refuse collection/disposal and sewer cleaning.
>
> The grievance was not filed at step one with a supervisor.

> Reserving the view that the grievance is improperly and untimely filed for this reason, this is the city's response at steps preceding step four.
>
> The grievance on its face does not allege a breach of the contract. The grievance is denied.
>
> You suggested an expedited arbitration. Based upon the language of the agreement and your arguments for arbitrability, I do not see an arbitrable issue.

21. On December 22, 1994, Blaser gave Public Works Superintendent Jones a copy of the grievance referenced in Finding of Fact 19. When he received the grievance, Jones told Blaser that he had no authority to resolve the matter (i.e. the proposed subcontracting of refuse collection and sewer cleaning). The grievance was resubmitted to Jones on January 10, 1995.

22. Brunner then scheduled a special city council meeting for the sole purpose of taking action on the public works committee's recommendations to subcontract refuse collection and sewer cleaning. Brunner tried to schedule this meeting for December 28, 1994, but could not get a quorum together for that date. The meeting was scheduled for December 27, 1994. After this date was selected and finalized, an official notice was posted concerning same. This notice provided that a special meeting of the city council was set for December 27, 1994 at 5:00 p.m. The notice further provided that the two items on the agenda for the meeting were "(1) approval of contract proposal for sanitary sewer cleaning services (public works committee) and (2) approval of five year contract for refuse/recyclable service (public works committee)". Stodola was not sent a copy of this meeting notice or specifically told that the city council meeting had been scheduled for December 27, 1994.

23. Stodola sent letters to all the members of the city council informing them of the Union's opposition to the proposed subcontracting. The following letter dated December 22, 1994 is an example of same:

> I am writing to you on behalf of the City of Monona Public Works employees represented by Teamsters Local 695. We urge you to vote against the proposed contracting out of City services presently performed by City employees.
>
> While the privatization of refuse collection and sewer cleaning may show potential short-run savings on the City Administrator's proposal, you should also know how unlikely it is that you will save taxpayer dollars in the long run. Once your City services are turned over to private contractors, the natural drive to make a profit will take over and the contractor's costs will increase. After a while, the City of Monona will lose the ability to perform the

work and then become dependent on the contractor, no matter what the cost!

You should also be aware of many hidden costs. Drafting, negotiating, and monitoring compliance with contractors can require a whole new layer of government bureaucracy. Although the City Administration may attempt to persuade you that a private firm is more efficient than government employees, no one has ever demonstrated that it is true. Examples of inefficiency on the part of private companies that contract with government, however, are numerous.

Private contractors to the Pentagon are legendary for inefficiency, such as charging thousands of dollars for a hammer or a toilet seat. Many less famous examples exist at state and local levels.

Privatization will decrease the quality and service Monona citizens have come to expect. Quality usually decreases under privatization because private managers cut corners to reduce costs. They tend to hire inexperienced, low-paid workers who do not get training on how to do the job right. Also, the low pay and poor working conditions often cause high turnover of employees.

You may also face accountability problems if you contract out City services. It is often not clear who is responsible to taxpayers -- the government agency or the contractor. Contractors can pass the buck for shoddy work, claiming that it is the government's fault. Citizens often do not know who is supposed to receive complaints or fix problems.

Furthermore, it is impossible to design bid specifications and contracts that foresee all of Monona's future needs. As elected officials, you lose your ability to respond to new situations.

The City of Monona deserves much better than this! Please cast your vote against the proposal to contract out refuse collection and sewer cleaning.

On behalf of all the Teamsters living and working in the City of Monona, we thank you for your support.

24. On December 27, 1994, Brunner sent the following letter to Stodola:

I am writing to confirm what occurred at the meeting between the City and Teamster's Local 695 on December 21, 1994. The meeting began at 1:00 p.m. at the Monona City Hall. In attendance for the Union were yourself, David Blaser, and Stephen Culbertson.

The City had made a proposal to the Union on December 15, 1994, in fulfillment of the City's duty to bargain "effects", under which the Unit employees would be guaranteed of no layoff for two years resulting from the current proposed subcontracting. You had stated to me on December 17, 1994 (sic) that the Union "would not allow" the subcontracting, but that you would meet further. I thereupon sent you a facsimile letter on December 19, 1994 confirming the meeting for December 21, 1994.

You stated that you had received my letter, that the Union wanted to avoid a grievance, but that "now that you've invited Mr. Walker, we aren't going to avoid a grievance."

Walker asked what the Union proposed to resolve the issue. You said the Union proposes the City retain the work. Walker asked if you had flexibility on that proposal. You said, "no, sir". Walker asked if you would have any flexibility if Walker was not here, and you said "no, it would be the same".

Walker asked you what the nature of the grievance was. You said here's a copy, and gave us each a typed document titled grievance form.

Walker asked you how the proposal violated Article 2, and you said it violates recognition. Walker asked you if you had any law on that and you said no. Walker asked you what your theory was and you said it was the mutual intent of parties 100 years ago or whenever the recognition clause came into existence.

Walker asked what you based that on, and you said the clause contrasted with clauses that say the recognition clause means nothing else but recognition.

Walker asked is there any other basis and you said no.

Walker asked you how Article 12 constitutes a restriction on subcontracting, and you said it is obvious that it violates seniority if

not allowed to select work on the basis of seniority. Walker asked if you had cases on that and you said no.

Walker asked how the subcontracting would violate Article 19 and you said that is the wages the City agreed to pay for the work. Walker asked if you had any other theories, and you said no. Walker asked if you had any cases on that and you said not off hand and you were not a lawyer but you were sure there were some cases on it.

Walker asked how the subcontracting violated Article 22, and you said that's a typo, its 32, maintenance of standards.

Walker asked how maintenance of standards constitutes a restriction on subcontracting and you said picking up garbage was a condition of employment for some of these people. Walker asked if you had any cases on that and you said, "me? no." Walker asked if you knew of any cases and you said no, but I know what the contract says.

Walker said the contract says what's typed here (referring to the contract), doesn't it?, and you said "um hum".

Walker asked, "you have rejected?" You said yes. Walker asked if you had a counterproposal, and you said what the grievance calls for, retain the work. Walker asked if you had any flexibility and you said "nope".

The City caucused. After the caucus Walker said he would like to give and confirm notification that the administration will recommend to the City Council and the City Council will probably vote next week to subcontract refuse and sewer cleaning effective February 1, 1995.

You asked if the City would agree to expedited arbitration to get an arbitrator's view on your grievance.

Walked (sic) said no, the City didn't think it was arbitrable, and the City would be happy to process the grievance through normal channels.

Walker asked if there was anything else, you said no, and the meeting adjourned at 1:50 p.m.

25. A special meeting of the city council was held on December 27, 1994. The purpose of this special meeting was to take action on the public works committee's recommendations to subcontract refuse collection and sewer cleaning. After discussing same, the city council voted to subcontract refuse collection and sewer cleaning. The council's minutes for that meeting provide in pertinent part:

> Motion of Littel/Taylor to approve the contract proposal for sanitary sewer cleaning services with McCann Sewer and Drain Cleaning Services at an estimated annual cost of $22,164.30; when the contract is drafted language which appears in Section 1 of the Addendum to the Contract with Green Valley will be added to this contract. On a roll call vote all members voted in favor of the motion.
>
> Motion of Littel/Taylor to approve the five year contract for refuse/recycling services with Waste Management - Madison, recycling services to start January 3, 1995 and refuse services in February, 1995; approval of this contract includes the addendum. On a roll call vote all members voted in favor of the motion.

Stodola was not in attendance at this meeting.

26. On the evening of December 27, 1994, after the council vote referenced above had occurred, Stodola was called by a newspaper reporter concerning same. By this call, Stodola learned that the city council meeting was December 27 -- not December 28 as she had thought.

27. On December 28, 1994, City Clerk/Deputy Treasurer Nanette Ursino sent the following letter to Stodola:

> This letter is to inform you that the Monona City Council, at its meeting last night, awarded the contracts for sanitary sewer cleaning and refuse collection effective February 1, 1995 by unanimous vote.
>
> If you have any questions or need any additional information, please feel free to contact me.

28. On January 26, 1995, Brunner and Vela met with Union stewards Culbertson and Blaser concerning the grievance noted in Finding of Fact 19.

29. The next day, January 27, 1995, Vela sent the following letter to Culbertson and

Blaser regarding the grievance:

> This letter serves as a formal response to the grievance presented to me on January 23, 1995 pertaining to the contracting of refuse collection/disposal and sewer cleaning services by the City. This is Step Two of Section 2, Article 10 of the current labor agreement between the City of Monona Public Works Department and Teamster's Union Local 695. The grievance, as submitted, is denied for the following reasons:
>
> 1. The grievance was presented to Public Works Superintendent Roger Jones on January 10, 1995, which was more than five (5) days notice from the date of the grievance occurrence of December 21, 1994.
>
> 2. The grievance on its face does not allege a breach of the labor agreement.
>
> Given the history surrounding the path of the grievance since its occurrence on December 21, 1994 and the decision of the Monona City Council to proceed with the contract services, the City Administrator is requesting that the grievance proceed directly to Step Four of Section 2, Article 10 of the aforementioned agreement.

30. On February 24, 1995, the Union requested a panel of arbitrators from the Wisconsin Employment Relations Commission (WERC) to arbitrate the grievance referenced in Finding of Fact 19. Walker responded to the Union's request in a letter to the WERC which provided in pertinent part:

> . . . I do not know what the Union sent to you purporting to be the City's response, but the City has consistently taken the position that the matter is not arbitrable.
>
> Therefore, the City declines to arbitrate the grievance, does not agree that you should issue a panel of arbitrators, and objects to your issuing a panel of arbitrators.

31. The City still provides refuse collection to City residents, but it no longer does so with City employes. The City implemented its decision to subcontract refuse collection on February 1, 1995. Waste Management began performing refuse collection for the City on that date. The individual employed by Waste Management to perform refuse collection is paid $9.82 per

hour and receives less fringe benefits than DPW bargaining unit employes.

32. The City's contract with McCann Sewer and Drain provides that the City will pay the Company a set rate per foot for sewer cleaning which the Company performs for the City. This contract does not identify that a set amount of sewers will be cleaned per year. As of the first day of the hearing herein, the Company had not performed any sewer cleaning work under this contract. The record does not identify how many man hours City employes previously worked cleaning sewers, nor does it identify how many man hours McCann's employes will work cleaning sewers for the City.

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

CONCLUSIONS OF LAW

1. The Union's grievance dated December 21, 1994 challenging the City's proposed subcontracting of refuse collection and sewer cleaning is substantively and procedurally arbitrable. The City's subsequent subcontracting of refuse collection and sewer cleaning did not breach the parties' 1994-95 collective bargaining agreement. Therefore, the City did not violate Sec. 111.70(3)(a)5, Stats., by subcontracting same.

2. The City did not bypass the Union and engage in individual bargaining with the Union stewards by its conduct herein, and therefore did not violate Sec. 111.70(3)(a)4, Stats.

3. The City offered to bargain with the Union about both the decision to subcontract refuse collection and sewer cleaning and the impact thereof, but the Union waived its right to bargain about same by its inaction. Therefore, the City did not refuse to bargain with the Union and did not make an unlawful unilateral change. Thus, the City did not violate Secs. 111.70(3)(a)4 and 1, Stats.

4. The City has not been shown to have committed any prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by subcontracting refuse collection and sewer cleaning.

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

ORDER 1/

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

(Footnote continued on page 27)

The instant complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

1/ (Continued)

> 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

City of Monona

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Union's complaint alleged that the City committed prohibited practices in violation of Secs. 111.70(3)(a)4 and 1, Stats., when it bargained directly with the Union's stewards concerning the decision to subcontract refuse collection and sewer cleaning work, and when it unilaterally implemented its decision to subcontract that work without giving the Union a meaningful opportunity to bargain over same. The complaint also alleged that the City's subcontracting of the refuse collection and sewer cleaning work violated the parties' labor agreement which, in turn, violated Sec. 111.70(3)(a)5, Stats.

The City's answer denied it committed any prohibited practices by its conduct herein. The answer also raised the following affirmative defenses: that the purported grievance is not arbitrable, that no grievance was timely and properly filed, and that the Union waived any right to bargain about the decision and the effects of the decision to subcontract.

POSITIONS OF THE PARTIES

Union's Position

The Union begins by making the following arguments concerning the City's alleged breach of contract.

First, the Union contends that its subcontracting grievance is substantively arbitrable. It asserts that the applicable legal standard for determining substantive arbitrability is whether the grievance makes a claim which on its face is covered by the labor agreement. The Union argues that the instant grievance meets this standard because it (the grievance) claims that the City's contracting of refuse collection/disposal and sewer cleaning violated Articles 2, 12, 19 and 32 of the labor agreement. It submits that while the City may dispute whether these provisions were violated, the grievance nevertheless raises a question concerning the application or interpretation of the terms and provisions of the agreement.

Next, the Union contends the subcontracting grievance is procedurally arbitrable. It notes in this regard that the grievance contesting subcontracting was served on City representatives on December 21, 1994, which was before the final decision of the city council had been reached. It therefore asserts that the grievance was filed well within five (5) working days of its occurrence and, if anything, preceded the occurrence. With regard to the City's contention that the grievance was improperly filed with the City Administrator and the Director of Public Works, rather than the

employes' immediate supervisor at Step 1, the Union argues this claim raises form over substance. In support thereof, it notes that the labor agreement does not state that all grievances must start at Step 1, but rather provides a Step 1 procedure where an employe submits a grievance to his or her supervisor; if there is no mutually satisfactory decision, then Step 2 provides "the grievance shall be referred by the Union to the Director of Public Works or designated representative for settlement." The Union submits that what happened here was that Stodola prepared a grievance and referred it directly to the Director of Public Works (Step 2). Thus, this grievance was prepared by the Union, not an individual employe. The Union asserts there is no requirement in the grievance procedure that a grievance filed by the Union commence at the first step. The Union argues in the alternative that even if there was a basis for insisting that the grievance be filed with Superintendent Jones, that occurred because Blaser submitted a copy of the grievance to Jones on December 22, 1994, one day after City representatives rejected the Union's position and still six days before the city council approved the subcontracting. The Union also argues in the alternative that even if the grievance was initially submitted to Jones on January 10, 1995, it was still timely because refuse collection was first performed by subcontractors on February 1, 1995. Moreover, the Union contends that submitting the instant grievance to Jones would have been, and ultimately proved to be, a useless act. It notes in this regard that the recommendation to subcontract had been initiated by the City Administrator and the final decision resided with the city council. That being the case, the Union submits that Jones had no authority to sustain the grievance and when the Union submitted an additional copy of the grievance to Jones, his response was that he had no authority to address same. The Union summarizes its argument that the grievance is procedurally arbitrable by contending that since the subcontracting was effective in February, 1995, the grievance was timely whether measured from the December 21, 1994 submission to Vela and Brunner, the December 22, 1994 submission to Jones, or the January 10, 1995 resubmission to Jones.

With regard to the merits of the grievance, the Union argues that the City violated the recognition clause (Article 2), the wage clause (Article 19), the seniority clause (Article 12) and the maintenance of standards clause (Article 32) of the parties' labor agreement when it subcontracted refuse collection and sewer cleaning previously performed by bargaining unit employes. Each provision is addressed below. First, the Union contends that by removing the work of refuse collection and sewer cleaning from the bargaining unit, the City violated the agreement it made in the recognition clause to recognize the Union as the representative of its public works employes. According to the Union, that clause limits management's power to assign bargaining unit work to anyone who is not a member of the unit. Second, the Union asserts that the City's subcontracting also violates the wage clause because the employes of both subcontractors are paid less than bargaining unit employes and have a lesser fringe benefit package. The Union submits that subcontracting which avoids the contractual wage and benefit provisions of a labor agreement violates the implied covenant which underlies that agreement. Third, the Union argues that removing the refuse collection and sewer cleaning work from the bargaining unit constitutes a violation of the employes' rights under the seniority clause. The premise for this argument is that every bargaining unit member has lost job security (which is established through the seniority clause) when the refuse collection and sewer cleaning work was subcontracted. Fourth, the Union

contends that the subcontracting violated the maintenance of standards clause since more than ten percent of the work in the unit was lost to lower wage contractors.

The Union asserts that the City's contention that unlimited subcontracting is permitted under the parties' agreement is contrary to the vast body of arbitral decisions on the issue. To support this premise, the Union cites several arbitration decisions wherein the arbitrators held that even in the absence of an express prohibition against subcontracting, the collective bargaining agreement implies limitations on subcontracting even if it does not prohibit all subcontracting.

The Union also submits that the subcontracting involved here is substantively different from all subcontracting which preceded it. In other words, it believes all prior instances of subcontracting which have occurred can be distinguished from the instant subcontracting. To support this premise, it asserts that all previous subcontracting occurred because bargaining unit personnel and equipment were not available to do the work. It submits that here, though, bargaining unit personnel and equipment are available to perform the work in question (i.e. refuse collection and sewer cleaning). The Union then makes the following comments about the subcontracting which has occurred. With regard to recycling, the Union submits that it (i.e. recycling) has never been performed by the bargaining unit on a regular ongoing basis. With regard to tree trimming, the Union asserts it has been and continues to be done by the bargaining unit except where trees are too high and special equipment is needed. With regard to breaking up of concrete, it notes that while that work is contracted out because of a lack of equipment, asphalt is broken up by the bargaining unit because equipment is available. With regard to traffic control, it avers that work is provided by subcontractors when the City does not have the required equipment. With regard to raising manholes, it submits that work is also contracted out because the City does not have the necessary equipment. With regard to both patching jobs and roof replacement, it asserts that large jobs are subcontracted while small jobs are performed by the bargaining unit. Overall, the Union characterizes the Employer's previous subcontracting as projects of short duration, construction and road work, new roofs, projects wherein the City lacked the necessary equipment (such as paving, breaking up concrete, tree trimming tall trees and traffic control) and jobs which were too large for the bargaining unit to complete. The Union also argues that what distinguishes the subcontracting involved here from the subcontracting which preceded it is that the work involved here is permanent ongoing work for which the bargaining unit is qualified. It notes in this regard that the City still has a garbage truck which will remain serviceable for a number of years. Additionally, the Union notes that no prior subcontracting involved this much work (i.e. the equivalent of one and one-half jobs). Finally, the Union submits that employes of the subcontractor now performing refuse collection work are compensated at five dollars an hour less than bargaining unit employes. The Union therefore contends the City's decision to subcontract refuse collection and sewer cleaning work violates the parties' labor agreement and constitutes a violation of Section 111.70(3)(a)5.

Next, the Union argues the City bypassed the Union and sought to bargain directly with the Union's stewards concerning its decision to subcontract refuse collection and sewer cleaning. First, it notes that the City solicited individual public works employes in August, 1994, to serve on study committees which addressed refuse collection and sewer cleaning. According to the Union, the

City was obligated to contact Union representative Stodola rather than seek volunteer employes to provide such input. Next, it notes that one of the topics addressed by this study committee (which did not include Stodola) was alternate means of providing refuse collection. In the Union's view, the refuse collection committee was used to legitimize subcontracting. The Union contends that by using the study committee to legitimize subcontracting and bypass the Union, the City violated its duty to bargain with the Union regardless of whether or not the subject of subcontracting itself is a mandatory subject of bargaining.

Second, the Union notes that after the City's public works committee adopted the City Administrator's study on September 28, it thereafter solicited contracts for refuse collection and sewer cleaning without notifying the Union of same. It also notes that after the bids were returned, the City contacted Union stewards Culbertson and Blaser, but still did not contact Stodola concerning the proposed subcontracting. According to the Union, the City sought to address the matter directly with stewards Culbertson and Blaser on December 14, thereby bypassing Union representative Stodola. The Union further asserts that when Brunner met with stewards Culbertson and Blaser on December 14, he gave them an agreement which would have waived all claims concerning the contemplated subcontracting whether through a grievance or a demand to bargain and invited them to sign same. The Union argues that Brunner's testimony that he did not hand the proposed agreement to Culbertson and Blaser or seek to have them sign it should not be credited. According to the Union, Brunner's testimony is contradicted not only by both Blaser and Culbertson but by the City's own witness, Superintendent Jones. Additionally, the Union calls the Examiner's attention to the fact that the document itself has the designation 12-14.02 on the bottom. The Union characterizes the City's claim that this document was not printed until December 15 as incredible. The Union also argues that the computer log which the City submitted fails to provide any support for the City's position.

Third, the Union submits that when Stodola finally learned on December 15 of the City's intention to subcontract, she told City Administrator Brunner of the Union's objection to same the next day. The Union asserts that in a letter dated December 19, Brunner informed Stodola that the City's final decision on subcontracting would be made by the city council on December 28, 1994. The Union contends that Brunner confirmed this date (i.e. December 28) as the date for the city council meeting when the parties met on December 21. The Union characterizes the city council meeting as the one opportunity Stodola had to address the issue of subcontracting with those making the decision. It notes that before the meeting, Stodola sent letters to city council members and prepared to attend the meeting. The Union contends that after the city council meeting was rescheduled to December 27 from December 28, the City failed to inform Stodola of the scheduling change. The Union argues that by misleading the Union as to the date when the city council would meet, the Union was completely foreclosed from addressing the city council on the issue of its decision to subcontract and the council never heard from Stodola. In short, the Union avers it was shut out of the decision making process.

The Union further asserts that by the time Stodola met with City representatives on

December 21 to discuss subcontracting, the City had finalized its decision to subcontract refuse collection and sewer cleaning and consequently was not honestly open to bargaining over the decision itself. According to the Union, the City paid only lip service to bargaining over the decision so there was no meaningful opportunity for bargaining. To support this contention, it cites the formation of the study committee, the bypassing of Stodola, the City's insistence that the Union submit the grievance to Superintendent Jones (who had no authority to act on the matter) and the City's disclaimer of any responsibility to correct its misrepresentation that the city council would meet on the issue on December 28.

Finally, the Union contends that the City's decision to unilaterally subcontract the refuse collection and sewer cleaning work without bargaining over same with the Union was a unilateral change in the terms and conditions of employment for the employes of the Public Works Department. According to the Union, the decision to subcontract involved a mandatory subject of bargaining. The Union contends that the City's unilateral change of a mandatory subject of bargaining constitutes a violation of its duty to bargain in good faith. The Union asserts that a review of the contracts which the City has entered with Waste Management and McCann Sewer and Drain indicate that it (the City) has not established any new procedures for performing refuse collection or sewer cleaning. The Union further asserts that the equipment listed by Waste Management for potential use in the City of Monona is equipment that is virtually identical to the 1991 garbage truck owned by the City of Monona. The Union argues that what is different is that the employes of Waste Management and McCann Sewer and Drain are paid less per hour than bargaining unit employes. The Union therefore contends the City has violated Sections 111.70(3)(a)4 and 1 by its actions herein.

As a remedy for the City's alleged contractual and statutory violations, the Union asks that the City be ordered to terminate its subcontract with Waste Management and McCann Sewer and Drain and to return refuse collection and sewer cleaning work to the bargaining unit. The Union also asks for a make whole order for any losses resulting from the City's contractual and statutory violations.

City's Position

The City begins by making the following arguments concerning the City's alleged breach of contract.

First, the City contends at the outset that the question of whether the grievance is arbitrable is moot since the Union is not seeking an order compelling arbitration, but rather is seeking a determination whether the action (i.e. subcontracting) breached the contract. The City asserts that even if it were not moot, there still is a question about whether the grievance is substantively arbitrable. It notes in this regard that none of the articles cited in the grievance says anything about subcontracting and no person reading them could rationally find that they say anything about subcontracting. It further notes that in addition to the contract not covering subcontracting, no

evidence of bargaining intent or history was offered by the Union. That being so, the City asserts there is no reason to imply something into the contract that is not there.

Next, the City argues that the Union's breach of contract claim should be barred because the Union failed to follow the contractual grievance procedure. The City avers in this regard that the Union skipped both steps one and two of the grievance procedure and filed the grievance with the City Administrator (the third step). The City contends that the Union's stated reason for ignoring the express provisions of the grievance procedure (namely that Superintendent Jones could not grant the grievance) is speculative, since no grievance was initially presented to Jones, and Jones neither tried to persuade the public works committee to change its recommendation to the council, nor to persuade the council not to adopt that recommendation. The City asserts that even if it was futile to talk to Jones (as the Union contends), it was the Union's act, not the City's act, which caused the futility. The City submits there were other possible solutions which might have been reached if the grievance had been presented to Jones, to wit: Jones might have persuaded the presenter to drop the grievance or Jones might have given some assurance, even an oral one, that would have been an acceptable compromise. According to the City, that is what the lower level procedures are for. The City believes the Union was not privileged to skip them as it did.

The City argues in the alternative that its subcontracting of refuse collection and sewer cleaning did not breach the parties' labor agreement. According to the City, the Union has the burden of proving a breach of contract. In the City's view, it failed to do so. The City initially notes that the word subcontracting does not appear in either the parties' present labor agreement or any labor agreement going back to 1974. The City contends that since the contract is silent on subcontracting, there is no express restriction on same. The City also argues that a restriction should not be implied either. The City then goes on to make the following arguments concerning the four contract provisions which the Union alleges were violated. With regard to the recognition clause (Article 2) the City contends that clause does not implicitly restrict subcontracting. To support this premise, it notes that the clause has never been used previously to prevent subcontracting which the Union knew had been ongoing for years in other areas. With regard to the seniority clause (Article 12), the City believes that clause contemplates employment rights among bargaining unit employes; not (rights) between bargaining unit employes and outside contractors. It also notes that there has been a seniority clause in every labor agreement the parties have had since 1978 and none of the clauses contained therein addressed subcontracting. With regard to the compensation clause (Article 19), the City notes that there has been such a clause in every labor agreement the parties have had and none of the provisions contained therein addressed subcontracting. With regard to the maintenance of standards clause (Article 32), the City argues that clause does not limit subcontracting inasmuch as subcontracting is not wages, hours of work or a general working condition. The City contends that even if subcontracting were thought to be one of those three things, it avers that the highest minimum standard in effect was that the Employer had subcontracted continuously. The City asserts that arbitrators generally construe maintenance of standards clauses narrowly. To support this contention, it cites a recent arbitration decision which involved the City and the same Union, albeit in a different bargaining unit. In that case, the arbitrator rejected the Union's argument that changes in partner assignments were governed by the maintenance of standards clause. As further support of its contention that the instant subcontracting

did not violate the contract, the City cites the municipal authority clause (Article 4). The Employer reads that clause as granting it the right to subcontract so long as seniority is followed in any resulting layoff. The City therefore believes it has the contractual right to subcontract.

Putting that premise conversely, the City asserts there is no evidence of it refraining from subcontracting either. In fact, it submits the evidence shows just the opposite since the record contains numerous examples of past subcontracting by the Employer. It specifically notes that the City subcontracted recycling pick up in 1990. According to the City, recyclables constitute about half of the total refuse. The City reasons that if subcontracting the refuse collection was equivalent to one and one-half jobs (as asserted by the Union), then the recycling collection (which was subcontracted in 1990) must have been one and one-half jobs as well. The City also avers that all its previous subcontracting was done without objection (i.e. grievances) from the Union. The City believes this establishes that subcontracting has been a constant fact of life throughout the parties' bargaining relationship, so much so that it is the status quo as measured by past practice. Finally, the City notes that in this case, nobody was laid off and there were non labor reasons for the subcontracting, namely capitol cost and tipping fees -- not wage cost.

The City notes that the Union relies exclusively on private sector arbitration awards to support its claim that subcontracting violates the contract. The City characterizes those awards as dated. Additionally, the City asserts that the arbitration awards upon which the Union relies are inapposite from this case because the City's decision to subcontract was based on the allocation of capitol resources. Finally, the City views the Union's breach of contract claim as an attempt to split hairs about how much subcontracting occurred in each category and why the decisions (to subcontract) were made.

Next, the City argues it fulfilled whatever bargaining duty there was. It makes the following arguments in support thereof. First, it contends that in this case the decision to subcontract was not a mandatory subject of bargaining because the predominant interests were not labor cost, but rather the allocation of capitol resources and the conclusion that City labor talents could be better used on things other than picking up garbage and cleaning sewers. Second, regardless of whether subcontracting is a mandatory or permissive subject of bargaining in this case, the City argues the Union waived its bargaining rights both contractually and by inaction. With regard to the former, the City asserts that the municipal authority clause constitutes an express waiver of the right to bargain about either a decision or the effects of a decision to subcontract. With regard to the latter (i.e. waiver by inaction) the City submits that even if there was no waiver by contract of the Union's right to bargain with respect to subcontracting, the City asserts it offered to bargain about both the decision and its effects before a decision was made by the city council. The City believes that once it expressly offered to bargain by its letter dated December 19, 1994, the burden was on the Union to make a proposal. It notes in this regard that while it made a bargaining proposal which contained a no layoff provision, the Union never made a counter-proposal other than claiming breach of contract. It further notes that the Union never asked for more delay, never indicated flexibility, never asked for information before the implementation date, and never asked for a meeting after the

December 21, 1994 meeting date or the actual subcontracting implementation date. The City asserts that by failing to make any counter-proposal, failing to ask for more bargaining, and claiming a breach of contract without also asking to bargain, the Union intentionally relinquished (i.e. waived) any right it had, and any duty the Employer had, to bargain. Thus, in the Employer's view, it was the Union that chose not to bargain and therefore spurned its bargaining rights. The City asserts that the reason its ultimate decision to subcontract was unilateral was due to the fact that the Union did not accept the City's invitation to bargain.

Third, the City argues in the alternative that the parties' bargaining reached an impasse, so it was lawfully able to implement the action (i.e. subcontracting) which gave rise to the duty to bargain. To support this premise it notes that although the parties had just one meeting, the Union indicated at that meeting that it had no flexibility on its part aside from "don't do it" (i.e. subcontract). The City believes it was under no obligation to beg for bargaining with the Union or to alter its subcontracting proposal. It therefore asserts the parties were at an impasse.

Next, the City contends it did not bypass the Union by meeting with the Union stewards on December 14. The City asserts that what happened on that date was that Brunner presented the Employer's position to the Union stewards on the proposed subcontracting. According to the City, there is no showing that either the intent or the effect of Brunner's meeting with the Union stewards was to undercut bargaining or to undercut the Union. Thus, the City believes there was no impropriety in meeting with the stewards. The City further notes that after meeting with the stewards, it (the City) dealt with Stodola. The City argues that if it were held to be illegal to make contact with any agent of the other party other than the one who has been or is the principal spokesperson, the formalities of contacts between unions and employers would be hazardous indeed, and considerable litigation would ensue to no good purpose. In the alternative, the City asserts that even if it was illegal for city representatives to meet with the Union stewards, that act did not prejudice the ability of the Union to bargain. Finally, the City avers that this particular claim (i.e. that the City violated the law by meeting with the Union stewards about the proposed subcontracting) is intended to deflect attention from the fact that it was the Union, and not the Employer, which failed to bargain.

The City therefore contends the complaint is without merit and it asks that the complaint be dismissed.

DISCUSSION

The Union contends that the subcontracting involved here violated both contractual and statutory rights. In the analysis which follows the breach of contract claim will be addressed first. After it is resolved the statutory claims will be addressed.

Alleged Violation of Sec. 111.70(3)(a)5

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer

To violate any collective bargaining agreement previously agreed

> upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

A labor organization having exclusive bargaining status can file a complaint with the Commission under this section alleging (1) a breach of contract (specifically that the Employer has violated the parties' collective bargaining agreement); (2) a refusal to arbitrate; or (3) a refusal to accept the terms of an arbitration award.

In this case the Union is not seeking an order to compel arbitration (i.e. (2) above), but rather is seeking a determination from the Examiner whether the subcontracting in issue breached the parties' collective bargaining agreement (i.e. (1) above). The Commission's long-standing policy regarding breach of contract allegations has been to not assert jurisdiction to determine the merits of breach of contract allegations where the parties' collective bargaining agreement provides for final and binding arbitration of such disputes and such procedure has not been exhausted. 2/ Here, the parties' labor agreement provides for arbitration of disputes in Article 10. However, that contractual mechanism has been exhausted because as noted in Finding of Fact 30, the City has refused to arbitrate the Union's subcontracting grievance. Under these circumstances, it would be futile to defer the matter to arbitration when, as just noted, the City has already indicated it is unwilling to arbitrate that grievance. It is therefore held that since the contractual mechanism has been exhausted with regard to the Union's subcontracting grievance, the Examiner will assert the Commission's jurisdiction to address and decide the contractual claim. In so finding, it is specifically noted that the parties fully litigated the merits of the contractual claim as part of their overall case, and neither party ever asserted that the Examiner should defer it to arbitration.

Since the City questions at the outset whether the Union's grievance is substantively arbitrable, it is necessary to determine whether it is. The focus of inquiry in determining arbitrability is whether the parties' arbitration clause is susceptible of an interpretation that covers the asserted dispute. 3/

The Examiner finds that the subcontracting grievance is substantively arbitrable. My analysis begins with a review of the grievance itself. It provides as follows:

2/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 18525-B, C (WERC, 6/79); and Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

3/ Joint School District. No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977).

> The City of Monona's proposed contracting of refuse collection/ disposal and sewer cleaning services currently performed by bargaining unit employees is a violation of Articles 2, 12, 19 and 32 of the Labor Agreement. As a remedy, the Union seeks that the City cease and desist violation of the Agreement and retain refuse collection/disposal and sewer cleaning services within the bargaining unit.

On its face, this grievance challenges the City's proposed subcontracting of refuse collection and sewer cleaning. Article 10, Section 1 defines a grievance as "any dispute involving the meaning, application or interpretation of the terms and provisions of this Agreement". While it remains to be seen whether the subcontracting violates any of the provisions noted above, the grievance arguably raises a question concerning "the meaning, application or interpretation" of the agreement. Moreover, there is nothing in this provision which specifically excludes issues concerning subcontracting of work from the scope of the arbitration clause. Since it cannot be said with positive assurance that the arbitration clause in question is not susceptible of an interpretation that covers the asserted subcontracting dispute, the grievance is arbitrable.

Having so found, attention is now turned to the question of whether the Union's subcontracting grievance is procedurally arbitrable. The City contends that the grievance is procedurally defective while the Union disputes this assertion. The City's contention that the grievance is procedurally defective is based on the premise that the Union skipped steps one and two of the grievance procedure and filed the grievance at step three.

The facts pertinent in deciding whether the grievance is procedurally arbitrable are as follows. Union representative Stodola gave the Union's subcontracting grievance to City representatives Vela, Brunner and Walker at the December 21, 1994 meeting. Vela is the Employer representative for the second step of the grievance procedure and Brunner is the Employer representative for the third step. The Employer representative for the first step of the grievance procedure, Roger Jones, was not at the meeting. Since Jones was not at the December 21, 1994 meeting, and did not receive a copy of the grievance at that time, it is apparent that the Union did not file its grievance at the first step of the grievance procedure (i.e. with Jones). Instead, it filed it simultaneously with Vela and Brunner who, as just noted, are the Employer representatives for the second and third steps of the grievance procedure.

Give the foregoing, the question is whether the Union's failure to file the grievance with Jones on December 21, 1994 (i.e. at step one of the grievance procedure) bars a review of the grievance on the merits. I find it does not for the following reasons. First, it is noted at the outset that the subcontracting grievance was prepared and filed by the Union, not an individual. There is no requirement in the grievance procedure that a grievance filed by the Union must commence at the first step. Step one deals with a situation where an individual employe submits a grievance to

his or her supervisor. As just noted, that was not the situation here. Second, although Jones did not get a copy of the grievance on December 21, 1994, he received a copy of it the next day (December 22, 1994) when Union steward Blaser gave him one. As a result, the Union did file the grievance with Jones at step one, albeit the day after it filed the grievance with Vela and Brunner simultaneously. Moreover, in the end, submitting the grievance to Jones turned out to be a useless act because his response upon receiving the grievance was that he had no authority to address same. It is therefore held that the Union's failure to file the instant grievance with Jones before it filed same with Vela and Brunner is not fatal. As a result, the Union's subcontracting grievance is procedurally arbitrable.

The focus now turns to the merits of the grievance. The Union contends, contrary to the City, that the City's subcontracting refuse collection and sewer cleaning previously performed by bargaining unit employes violated the parties' labor agreement.

It is noted at the outset that the word subcontracting does not appear in the parties' present labor agreement or any labor agreement going back to 1974 (when the parties commenced a collective bargaining relationship). Since the labor agreement is silent on subcontracting, it follows that there is no express restriction against same in the agreement.

Notwithstanding the foregoing, the Union argues that several provisions in the labor agreement implicitly limit management's right to subcontract, to wit: the recognition, seniority, wage, and maintenance of standards clauses. Each provision is examined below.

Attention is focused first on the recognition clause (Article 2). The Union contends that by removing the work of refuse collection and sewer cleaning from the bargaining unit, the City violated the agreement it made in the recognition clause to recognize the Union as the representative of its public works employes. According to the Union, that clause limits management's power to assign bargaining unit work to anyone who is not a member of the unit. The problem with this contention however is that there is nothing in the clause which restricts or limits subcontracting. Additionally, as will be addressed in more detail later, the Union knew that subcontracting has been ongoing for years in other areas and the recognition clause has never been used previously to prevent subcontracting. Additionally, nothing in this clause guarantees the right to perform refuse collection and sewer cleaning work to members of the bargaining unit. This is so because the clause refers to "employees" rather than jobs or functions. On its face this particular provision recognizes the Union for purposes of collective bargaining and thereby establishes that the City must bargain with the Union concerning the employes in the bargaining unit. The employes of the subcontractors involved here (i.e. Waste Management and McCann Sewer and Drain) are not employes of the City and therefore are not members of the bargaining unit covered by the recognition clause. Accordingly, the subcontracting involved here did not violate the recognition clause.

The focus now turns to the seniority clause (Article 12). The Union argues that removing

the refuse collection and sewer cleaning work from the bargaining unit constitutes a violation of the employes' rights under the seniority clause. The premise for this argument is that every bargaining unit member lost job security (which is established through the seniority clause) when the refuse collection and sewer cleaning work was subcontracted. The Examiner does not find this contention persuasive for the following reasons. First, like the recognition clause, there is nothing in this clause which restricts or limits subcontracting. Second, the seniority clause has never been used previously to prevent subcontracting from occurring. Third, the Examiner reads the seniority clause to regulate the employment rights among bargaining unit employes, not the rights between bargaining unit employes and outside contractors. In this case the Union has not shown that the employment rights of bargaining unit employes have been adversely affected by the subcontracting at issue here. It is noted in this regard that no bargaining unit employes were laid off or displaced as a result of the subcontracting in issue. Accordingly, the subcontracting involved here did not violate the seniority clause.

Next, the Union contends that the City's subcontracting also violates the wage clause (Article 19) because the employes of both subcontractors are paid less than bargaining unit employes and have a lesser fringe benefit package. The Union submits that subcontracting which avoids the contractual wage and benefit provisions of a labor agreement violates the implied covenant which underlies that agreement. The Examiner does not find this contention persuasive either. To begin with, like the recognition and seniority clauses there is nothing in the compensation clause which restricts or limits subcontracting. Second, there has been such a clause in every labor agreement the parties have had and this clause has never been used previously to prevent subcontracting from occurring. Third, the Examiner reads the wage rates to apply only to bargaining unit employes. As previously noted, the employes of Waste Management and McCann Sewer and Drain are not bargaining unit employes so this provision does not apply to them. Accordingly, the subcontracting involved here did not violate this provision either.

Finally, the focus turns to the maintenance of standards clause (Article 32). That clause provides in pertinent part that all "conditions of employment relating to wages, hours of work and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement". The Union contends that the subcontracting involved here violated this provision since about ten percent of the unit's work was lost. For purposes of discussion herein, it is assumed that subcontracting falls into one of the three categories just referenced (i.e. wages, hours of work or a general working condition).

The record contains numerous examples of past subcontracting by the City. The following work use to be done by public works employes but has been completely subcontracted by the City to other entities: lake shore clean up; repair or replacement of sections of concrete sidewalks; repair or replacement of storm water inlets and catch basins; maintaining City baseball diamonds; asphalt street patching of water main breaks; planting new trees; maintaining police and fire department fleet vehicles; filling of cracks in street pavement; repair or replacement of sanitary sewer manhole structures; breaking up concrete pavement in order to fix water main breaks; barricading and traffic control work on Monona Drive for water main breaks; picking up plastic, glass, newspaper and metal (i.e. recyclables) as part of the refuse collection; and jet rodding and stringing of lines in preparation of sanitary sewer televising. None of this subcontracting was grieved.

Additionally, the following work done by public works employes has been subcontracted in part by the City: in hours plumbing; in house water heater replacement; in house window and door repair and replacement; in house electrical work; roof repair or replacement; tree trimming; and asphalt patching jobs. Depending on the size of the job, both unit employes and subcontractors have done these jobs. None of this subcontracting was grieved either.

In addition to the items referenced above which have been subcontracted in whole or in part, the City no longer picks up residents' yard waste and takes it to the landfill. This service, which was eliminated, use to be done by public works employes; residents now do this work themselves. The elimination of this work was not grieved either.

A major difference between the subcontracting of refuse collection and most of the matters noted above is the amount of work involved. The Union characterizes the amount of work involved in refuse collection as the equivalent of one and one-half jobs, and the Employer does not dispute this characterization. Most of the matters previously subcontracted or eliminated did not involve the loss of this much work. The exceptions to this statement are the yard waste collection (which was eliminated in 1989) and recyclable collection (which was subcontracted in 1990). These two areas (i.e. yard waste and recyclables) together constituted about half of the total refuse then collected. If the subcontracting of refuse collection is equivalent to one and one-half jobs, it logically follows that yard waste and recyclables together constituted a like amount. This means that the City has previously subcontracted or eliminated the same amount of work as refuse collection involved.

Applying the maintenance of standards clause to the facts referenced above, the Examiner finds that the "highest minimum standard" in effect in February, 1995 was that the City had subcontracted continuously without limitation throughout the parties' bargaining relationship without the Union ever previously grieving same (prior to the instant matter). Moreover, when the City eliminated yard waste collection and subcontracted recyclable collection, this involved the same amount of work as refuse collection did. That being the case, the subcontracting involved here did not violate the maintenance of standards clause.

In summary then, it is held that the subcontracting of refuse collection and sewer cleaning which previously had been performed by bargaining unit employes did not breach the parties' collective bargaining agreement. As a result, the City did not violate Sec. 111.70(3)(a)5 by subcontracting same.

Alleged Violation of Secs. 111.70(3)(a)4 and 1

Individual Bargaining Claim

Section 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts . . . with individuals in the collective bargaining unit . . .

This provision establishes that once a group of employes has chosen its majority representative for purposes of collective bargaining, the municipal employer is precluded from negotiating directly with any individual in the bargaining unit regarding wages, hours, or conditions of employment.

The Union contends at the outset that the City could not legally include bargaining unit employes on study committees. Since the City disputes that assertion, it is necessary to make a call concerning same.

The facts pertinent in making this call are as follows. In August, 1994, the City solicited bargaining unit employes to serve on committees with management representatives to study the work done by the department. Some bargaining unit employes volunteered to serve on these committees. One committee became known as the sewer cleaning committee and another became known as the refuse and recycling study team. The bargaining unit employes who served on these two committees worked in these respective areas, namely sewer cleaning and refuse collection. These committees looked at ways to improve the cleaning of sewers and the collection of refuse and recycling materials. In doing so, they discussed problem areas, equipment cost, operational cost, labor cost and tipping fees (i.e. the cost per ton paid to dispose of waste at a landfill). That said, they did not discuss labor relations matters which related to these topics such as wage rates, conditions of employment, layoffs, subcontracting or other bargainable matters.

Based on the rationale which follows, the Examiner finds that the study committees referenced above did not illegally bypass the Union or constitute individual bargaining. To begin with, it was not illegal for the City to solicit employes to volunteer to serve on study committees to address work related matters. Additionally, the City was not obligated to contact Union representative Stodola before it did so. That said, it is emphasized that a municipal employer cannot negotiate directly with the employes on such study committees about wages, hours and conditions of employment (i.e. mandatory subjects of bargaining). Here, though, that did not occur. What happened here is that the City used the study committees to discuss and solicit employe views on various non-mandatory subjects. In point of fact, the committees did not address any mandatory subjects of bargaining, specifically subcontracting. Since the management representatives on these study committees did not solicit employe views on any mandatory subjects of bargaining, it follows that no individual bargaining occurred. Additionally, it is held that the study committees did not supplant the Union or undermine the Union's status as the collective bargaining representative. The fact that Union representative Stodola was not advised of the existence of the study committees by the City or asked to serve on same does not change this result.

Having held that the study committees were not illegal, attention is now turned to the Union's contention that the City used the refuse collection study committee to legitimize subcontracting. There is no question that Brunner ultimately used the refuse collection committee

to his advantage. First, when he wrote his extensive report to the public works committee that, in part, recommended subcontracting, he indicated on the document's cover page that it (i.e. the report) was from the five members of the refuse collection study committee. By listing all five names on the report, this made it appear that everyone on the committee, including the two bargaining unit members, agreed with all the recommendations contained therein, including subcontracting. The problem with this is that the refuse committee never discussed subcontracting, let alone unanimously agreed on same. Second, Brunner later used the committee's existence to question the Union's opposition to the proposed subcontracting. Brunner's December 19, 1994 letter to Stodola provided in pertinent part: "[f]rankly, the City did not anticipate any problems in seeking an agreement with the Union to contract for these services. Contracting for refuse service has been discussed at various times . . . and DPW

personnel . . . have been involved in studying possible changes in how the City provides refuse collection and sewer cleaning services since August of this year". The foregoing shows that Brunner initially used the refuse committee as cover for his report to the public works committee and later to question the Union's opposition to the proposed subcontracting. However, just because Brunner ultimately used the refuse study committee to his advantage does not make it unlawful. As previously noted, the study committees were not illegal. The fact that Brunner used the refuse study committee as identified above does not change this result.

Next, the Union asserts that the City bypassed the Union when it failed to contact Stodola about the December 14 meeting that was held with the stewards. Since the City disputes that assertion, it is necessary to make a call concerning same.

The facts pertinent in making this call are undisputed. After the public works committee decided to recommend to the full city council that the City subcontract refuse collection and sewer cleaning, Brunner scheduled a meeting with Union stewards Culbertson and Blaser about the proposed subcontracting. Union representative Stodola was not advised of the existence of this meeting or invited to it.

Notwithstanding the Union's contention to the contrary, the Examiner finds no impropriety in Brunner's meeting with the two Union stewards on that date without Stodola being present. The rationale for this decision is that the stewards are the Union's agents at the job site. That being so, it was acceptable for Brunner to meet with them to discuss union matters and communicate with the Union. Moreover, Brunner did not meet with Culbertson and Blaser in their capacities as bargaining unit employes; he expressly met with them in their capacity as Union stewards. Furthermore, nothing in the record shows that either the intent, or the effect, of the meeting was to undercut either the Union as an entity or Stodola personally. It is therefore held that Brunner's meeting with the Union stewards without Stodola being present was not unlawful. The fact that the Union would have preferred that Stodola be at this meeting does not make it illegal. Were the Examiner to find otherwise and hold that employers could not meet, speak or have contact with local union stewards or officers about union matters without a union staff representative being present, this would unduly complicate communications between unions and employers.

In light of this finding that the City's management could meet with the stewards without Stodola being present, the next question is what they could do after they met. Certainly the City's management could inform the Union stewards about the public works committee's recommendations to subcontract refuse collection and sewer cleaning, which in fact is what occurred. After hearing this news, it is not surprising that the stewards would have questions about it. Consequently the stewards asked questions about the proposed subcontracting and the City representatives responded to same. Such informational questions and responses do not constitute individual bargaining. 4/

The Union contends that during the course of the meeting, Brunner went beyond just responding to questions from the stewards about the proposed subcontracting. According to the Union, Brunner gave the stewards a proposed settlement agreement and urged them to sign it. Since the City disputes that assertion, it is necessary to determine if that occurred.

My analysis begins with a review of the pertinent facts. Brunner brought at least two documents with him to this meeting. One was a sheet of statistics he (i.e. Brunner) had compiled from the three refuse collection bids the City had received. The other document which Brunner brought listed the items/areas which Brunner thought needed to be addressed with the Union in order to avoid a grievance or litigation over the proposed subcontracting. In essence, this document contained the City's proposed settlement terms. At some point during the meeting Brunner gave the stewards a copy of the statistics sheet he had prepared. Steward Blaser took notes during the meeting and wrote them on the statistics sheet. Blaser was the only person at the meeting who took any notes.

The first question is whether Brunner gave the stewards a proposed settlement agreement during the meeting. The Examiner finds that while Brunner did refer to a document during the meeting which contained the City's proposed settlement terms, he did not give that particular document to the stewards during the meeting. This finding is based on the following. The next day (i.e. December 15), Brunner sent a proposed settlement agreement, along with a cover letter, to the stewards and Stodola. The proposed settlement agreement which was attached was different from the document that Brunner brought with him to the December 14 meeting with the stewards. The cover letter proves this because it provides in pertinent part:

> . . . In drafting this agreement I wanted to address the two major concerns that you both expressed, that being that there will be no layoffs as a result of this subcontracting as well as that any re-assignment of job duties be subject to the terms and conditions of the Union Contract.

4/ Beaver Dam Unified School District, Dec. No. 20283-A (Jones, 10/83), aff'd Dec. No. 20283-B (WERC, 5/84).

This sentence establishes that Brunner redrafted/revised the City's original settlement terms to specifically incorporate the stewards expressed concerns with the proposed subcontracting, namely that there be no layoffs as a result of the subcontracting and that any reassignment of job duties be done in accordance with the labor agreement. If Brunner had given the stewards a proposed settlement agreement document at the December 14 meeting which differed from the one he mailed to them and Stodola the next day, it is logical to assume that the Union would have offered it into evidence to buttress its contention that Brunner gave the stewards such a document and tried to get them to sign it. However, no such document was offered into the record. Instead, the only document offered into the record was the proposed settlement agreement attached to the December 15 cover letter, which as previously noted differs from the one Brunner brought to the December 14 meeting and discussed with the stewards. Given the foregoing finding, it is held that the Union did not establish that Brunner gave the stewards a proposed settlement agreement at the December 14 meeting.

Having so found, the next question is whether Brunner urged or pressured the stewards to sign the Employer's proposed settlement terms at the December 14 meeting. The Examiner finds he did not. Union steward Blaser was the only participant at the meeting on either side who took notes. If Brunner had urged or pressured him to sign a settlement document at this meeting, it is logical to assume he would have referenced same in his notes. His notes though don't say anything about being asked to sign a proposed settlement agreement. This fact, plus the testimony of the City witnesses present at the meeting that no one was asked to sign anything at the meeting, persuades the Examiner that Brunner did not urge or pressure the stewards to sign a proposed settlement agreement at the meeting. The Union simply did not prove its contention to the contrary. It is therefore held that the evidence fails to demonstrate that the City engaged in individual bargaining with the stewards at the December 14, 1994 meeting.

Unilateral Change/Refusal to Bargain Claim

The Union contends that by subcontracting refuse collection and sewer cleaning, the City violated its duty to bargaining good faith. The MERA duty to bargain is enforced by Sec. 111.70(3)(a)4, Stats., and derivatively by Sec. 111.70(3)(a)1, Stats. The duty to bargain in good faith is broad, and the standards which define it are fact-driven. Pursuant to that duty, the municipal employer must bargain with the employes' bargaining representative during the term of a contract on all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. 5/ Thus, an employer may not normally make a unilateral change during the term of a

5/ School District of Cadott, Dec. No. 27775-C (WERC, 6/94); City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County, Dec. No. 20623 (WERC, 5/83); and Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

contract to existing wages, hours or conditions of employment without first bargaining on the proposed change with the collective bargaining representative. 6/

The first line of inquiry in a unilateral change/refusal to bargain case is whether the subject matter involves a mandatory subject of bargaining. Under Wisconsin law, the principle determining mandatory or permissive status is whether the subject matter is primarily related to wages, hours and conditions of employment or whether it is primarily related to the formation and choice of public policy; the former subjects are mandatory and the latter permissive. 7/

While the City contends that the subcontracting involved here was not a mandatory subject of bargaining, it (i.e. the City) treated it as mandatory because it offered to bargain with the Union about both the decision and its effects. For purposes of discussion herein, the Examiner will likewise assume that the subcontracting involved here was a mandatory subject of bargaining.

6/ City of Madison, Dec. No. 15095 (WERC, 12/76) at 18 citing Madison Jt. School Dist. No. 8, Dec. No. 12610 (WERC, 4/74); City of Oak Creek, Dec. No. 12105-A, B (WERC, 7/74); and City of Menomonie, Dec. No. 12564-A, B (WERC, 10/74).

7/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979); Unified School District No. 1 of Racine County v. WERC, 81 Wis.2d 89 (1977); and Beloit Education Association v. WERC, 73 Wis.2d 43 (1976).

A condition precedent for finding a refusal to bargain is that the Union must make a request for bargaining. 8/ Inasmuch as the City asserts that never happened here, this must be the next line of inquiry.

The following facts are applicable in making this call. On December 14, 1994, Brunner informed the Union stewards that the public works committee was going to recommend subcontracting refuse collection and sewer cleaning to the full city council. On December 15, 1994, Brunner sent a settlement proposal to the Union. This settlement proposal can certainly be viewed as an impact bargaining proposal. On December 16, 1994, Stodola and Brunner talked briefly about the matter and Stodola said that the Union would fight the proposed subcontracting, but that the parties needed to talk about it further. On December 19, 1994, Brunner wrote Stodola and expressly offered to bargain about both the decision and its effects. (The specific words which Brunner used were: "we are willing to bargain about the decision as well as its effects"). On December 21, 1994, the parties held their one and only meeting concerning the proposed subcontracting. During the meeting the Union grieved the proposed subcontracting as allegedly breaching the parties' collective bargaining agreement. However, the Union did not make a bargaining proposal (other than the breach of contract claim) at this meeting or any time subsequent thereto. During the meeting Stodola said that the Union had no flexibility on its part aside from "don't subcontract". At the end of the meeting the Union was notified that the full city council would consider the proposed subcontracting at its next meeting. On December 27, 1994, the full city council voted to subcontract refuse collection and sewer cleaning.

Application of the law to the foregoing facts yields the following results. The City offered to bargain about both the decision and the impact of the proposed subcontracting before the full city council made a decision concerning same. Since it did so, it was incumbent upon the Union to request bargaining and make a bargaining proposal. 9/ It did neither. Specifically it never requested a bargaining meeting after December 19, 1994, nor did it ever make a bargaining proposal to the City. Instead, all it (i.e. the Union) ever did was object to the proposed subcontracting. However, simply objecting to subcontracting, as the Union did here, does not constitute a request for bargaining or a bargaining proposal. 10/ Moreover,

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8/ Racine Unified School District, Dec. No. 18810-A (Shaw, 7/82), aff'd by operation of law, Dec. No. 18810-B (WERC, 8/82).

9/ Ibid.

10/ Walworth County, Dec. Nos. 15429-A and 15430-A (Gratz, 12/78), affirmed by operation of law, Dec. Nos. 15429-B and 15430-B (WERC, 1/79).

the Union never asked for more delay or time, never indicated flexibility in its position, never asked for information before the implementation date, and never asked for a meeting after the December 21, 1994 meeting date or the actual subcontracting implementation date.

Waiver is the intentional relinquishment of a known right. Here, the Union was well aware that it had a right to bargain about the decision and its effects since the City expressly said so and made an impact bargaining proposal. At that point, the Union could have requested bargaining and made proposals while reserving the view that the action breached the contract. The Union did not do this but instead spurned its bargaining rights. Since it was the Union that chose not to bargain, it is now hard pressed to claim, as it does here, that the City only paid lip service to bargaining and was not honestly open to bargaining over the decision itself. Additionally, the Union's contention that the City had finalized the decision to subcontract by the time the parties had their one and only meeting on December 21 is not supported by the record because the final decision to subcontract was made by the city council and it made that decision after December 21 (namely on December 27). The Examiner therefore finds that by failing to make any counterproposal to the City's offer and failing to ask for more bargaining, the Union waived any right it had, and any duty the City had, to bargain. 11/ Given the foregoing, it follows that the City fulfilled whatever bargaining duty it had herein.

In reaching this conclusion, the Examiner has carefully considered the Union's contention that Stodola was deliberately misled as to the date that the city council would meet and vote on the proposed subcontracting. Stodola thought the city council would meet and vote on December 28, 1994, when it actually met and voted on December 27, 1994. Brunner tried to set the city council meeting date for December 28, but a quorum was not available for that date so December 27 was selected. After the date of December 27 was selected, a formal notice concerning same was posted. However, Stodola was not expressly notified that the city council meeting date was December 27. Stodola planned to attend the city council meeting to make a personal appeal to the council members before they voted on the proposed subcontracting. That did not happen though because Stodola was not in attendance at the December 27 meeting when the full city council voted on the matter.

Certainly it would have been preferable if the City had notified Stodola that the city council meeting date was December 27. However, that did not happen. That being so, the question here is whether the City's failure to expressly notify Stodola that the city council meeting date was December 27 constitutes unlawful conduct. The Examiner finds it was not for the following reasons. First, the Examiner is persuaded that the City's administration did not deliberately mislead Stodola as to the date of the city council meeting. When the parties met on December 21, Stodola

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11/ In light of this finding that the Union waived its bargaining rights by inaction, it is unnecessary to address the City's contention that the Union also waived its bargaining rights contractually. Accordingly, no comments are made concerning same.

was told that the city council would vote on the proposed subcontracting "at the next (city council) meeting" and this is what Stodola wrote in her notes. Although Stodola testified that Brunner said the city council meeting was going to be on December 28, 1994, her notes do not list a specific date for the meeting. 12/ Thus, her own notes of the December 21 meeting do not substantiate her assertion that the date of December 28, 1994 was specifically mentioned during the meeting. Second, the City posted a formal notice which indicated that the city council meeting date was set for December 27. This posting satisfied the City's legal obligation to give notice of that meeting. Finally, while Stodola did not get to make a personal appeal to the city council before they voted as she had planned, she certainly was not shut out of the decision making process politically. This is because several days prior to the vote Stodola mailed letters to all the members of the city council informing them of the Union's opposition to the proposed subcontracting. Given the existence of this letter, the Union's assertion that the city council never heard from Stodola on the proposed subcontracting is not supported by the record.

The conclusion reached previously that the City fulfilled its bargaining duty also disposes of the unilateral change claim. The reason the City's ultimate decision to subcontract was unilateral was because the Union never accepted the City's invitation to bargain. Since the City offered to bargain, and the Union never accepted that offer, the City could lawfully implement the subcontracting which gave rise to the duty to bargain in the first place. As a result, the alleged violation of Sec. 111.70(3)(a)4 and 1, Stats., has been dismissed.

In summary then, it is concluded that the City's subcontracting of refuse collection and sewer cleaning did not breach the parties' collective bargaining agreement. As a result, the City did not violate Sec. 111.70(3)(a)5, Stats., by subcontracting same. Additionally, it is concluded that the City did not bypass the Union and engage in unlawful individual bargaining with the Union stewards. Finally, it is concluded that the City offered to bargain with the Union about both the decision to subcontract refuse collection and sewer cleaning and the impact thereof, but the Union waived its right to bargain about same by its inaction. Therefore, the City neither refused to bargain with the Union nor made an unlawful unilateral change. Given the foregoing, the City did not violate Secs. 111.70(3)(a)4 and 1, Stats., either. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of March, 1996.

12/ While Stodola's notes do contain the date "2-1-95", that date referred to the effective date of the subcontracting; not the date that the city council was to meet and vote on the proposed subcontracting.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner