STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2494, AFSCME, AFL-CIO, Complainant, vs. WAUKESHA COUNTY, Respondent.	Case 139 No. 53236 MP-3093 Decision No. 28726-C

Appearances:

Mr. Bruce F. Ehlke, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, for Local 2494, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Marshall R. Berkoff, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, for Waukesha County, referred to below as the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural history of this case through November 27, 1996, is summarized in Waukesha County, Dec. No. 28726-A (McLaughlin, 7/96) and in Waukesha County, Dec. No. 28726-B (WERC, 11/96). The evidentiary hearing ordered in Dec. No. 28726-A was conducted in Waukesha, Wisconsin, on February 6, 1997. A transcript of that hearing was mailed to the Commission on February 10, 1997. The parties filed briefs and reply briefs by May 5, 1997.

FINDINGS OF FACT

1. Local 2494, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization which maintains its principal offices in care of W237 S4626 Big Bend Road, Waukesha, Wisconsin 53186.

2. Waukesha County, referred to below as the County, is a municipal employer which maintains its principal offices at the Waukesha County Administration Building, 1320 Pewaukee Road, Waukesha, Wisconsin 53188.

3. The Union and the County have been parties to a series of collective bargaining agreements. One of these agreements was in effect, by its terms, from January 1, 1992 until December 31, 1993. This agreement is referred to below as the 1992-93 agreement. Included among its provisions were the following:

ARTICLE I

MANAGEMENT RIGHTS RESERVED

1.01 Except as otherwise specifically provided herein, the Management of the County of Waukesha and the direction of the work force, including but not limited to . . . the right to subcontract work (when it is not feasible or economical for County employees to perform such work) . . . are vested exclusively in the Management . . .

ARTICLE III

RECOGNITION AND BARGAINING UNITS

3.01 The Employer hereby recognizes the Union . . . as the exclusive collective bargaining agent on matters pertaining to wages, hours, and other conditions of employment for the bargaining units described below:

. . .

3. Units Represented by Local 2494 (Formerly 1365-B)

a. All clerical, maintenance, and custodial employees employed in the Waukesha County Courthouse, and all maintenance and custodial employees employed in the University of Wisconsin, Waukesha facility, excluding elected County officials, professional employees, craft employees, confidential employees, supervisory employees, and all other County employees, as certified by the Wisconsin Employment Relations Commission under date of July 3,

1968, Decision No. 8545 . . .

ARTICLE VI

GRIEVANCE PROCEDURE

6.01 A grievance is a claim or dispute by an employee of the County concerning the interpretation or application of this Agreement. Any other complaint or misunderstanding may be processed through Step three (3) of the grievance procedure. To be processed, a grievance shall be presented in writing to the department head with a copy to the Director of Human Resources under Step two (2) below within thirty (30) days after the time the employee affected knows or should know the facts causing the grievance. Grievances shall be processed as follows:

. . .

Step four (4) If a satisfactory settlement is not reached as outlined in Step three (3), the grievance may be submitted to arbitration, within twenty (20) work days; one (1) arbitrator to be chosen by the County, one (1) by the Union, and a third to be chosen by the first two and he shall be the Chairman of the Board. (If the two cannot agree on the selection of the third member, the parties shall request a panel of names from the Wisconsin Employment Relations Commission and shall alternatively strike a name from such panel until the name of one person remains who shall serve as Board Chairman.) The Board of Arbitration shall after hearing by a majority vote, make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application or interpretation of this contract are subject to arbitration.

. . .

Attached to the 1992-93 collective bargaining agreement was the following letter, dated February 26, 1992, from the then incumbent County Executive to the then incumbent Union Business Representative:

> The purpose of this letter is to confirm an agreement reached during collective bargaining process covering AFSCME Locals No. 1365 and 2494 for the calendar years 1992 and 1993.
>
> It was agreed that Waukesha County would not subcontract its custodial work now currently being performed by employees represented by AFSCME.

This attachment is referred to below as Side Letter 1.

4. During the effective term of the 1992-93 agreement, the Union filed Grievance No. 1993-09, referred to below as Grievance #1. The grievance form is dated August 9, 1993, and states it was filed as a "Union grievance." The form states the following as the relevant factual background:

> Waukesha County approved cleaning services of the Mental Health Center to Gibb Building Maintenance, is a direct violation of the contract, all custodial worker's (sic) are AFSCME represented.

The grievance form states the source of the violation as "Article 1.01, Past Practice, Letter of Agreement, & any other provisions that may apply." The form states the following remedial request: "That the County cease & desist this practice, & honor the letter of agreement that has been part of the contract."

5. Grievance #1 was submitted to arbitration under the terms of the 1992-93 labor agreement. Hearing on Grievance #1 was conducted on June 20, 1994 and the parties filed written argument by August 22, 1994. The panel met in executive session to consider the matter on November 21, 1994, and on March 7, 1995. The panel issued its award, captioned by the Commission as Case 130, No. 50393, MA-8241, on April 7, 1995. The Chairman of the panel which issued this award was Amedeo Greco. The Union appointed member was Robert Chybowski and the County appointed member, at the time the award was issued, was James Richter. The award stated the following:

. . .

ISSUE

Since the parties were unable to jointly agree to the issue, I have framed it as follows:

> Has the County violated the letter of agreement attached to the collective bargaining agreement by using an outside vendor to perform custodial work at its mental health offices on Airport Road, Waukesha, Wisconsin, and, if so, what is the appropriate remedy?

DISCUSSION

The County for a number of years provided mental health services in its Northview Road, Waukesha, Wisconsin, facility. Throughout that time, employes represented by the Union and classified as Building Service Workers I and II performed all custodial services at that facility. The job descriptions for the Building Service Workers I and II do not refer to any specific building locations or County departments. Building Service Worker I Mary Stone thus testified that these employes over the years have been assigned to clean various parts of the County's facilities and that they have been rotated and transferred from one building to another.

The Northview building also housed the County's Department of Aging whose offices were, and still are, cleaned by employes represented by the Union. A Metro Drug unit also was located there before September, 1993, and it has been expanded since then. Its offices, too, are cleaned by bargaining unit personnel. In addition, the County after September, 1993, moved a microfilm service to the Northview facility. Its offices also are cleaned by bargaining unit personnel. The County in April, 1994, opened up a Huber facility there and its facilities are cleaned by the inmates.

The County in September, 1993, moved its Mental Health Department from Northview to a larger County-owned building located at 1501 Airport Road, Waukesha, which is better equipped and which offers better services than the Northview facility. Thus, County Labor Relations Manager Jim Richter testified that the

"primary reason" for the move was that "a broader range of services could be provided at less cost." From that time forward, those offices have been cleaned by custodial employes employed and supervised by Gibb Maintenance Co., Inc., an outside vendor which successfully bid for that work. As a result, no bargaining unit employes clean those offices. The County estimates that it will save about $20,000 a year under its arrangement with Gibb, which it has not yet finalized.

No bargaining unit employes have been displaced or suffered any reduction in hours because of the County's actions in transferring its mental health services from the Northview building to the Airport Road facility and using Gibb to clean it. Thus, two custodial employes who formerly cleaned the Mental Health offices at the Northview facility have been transferred to do custodial work in the County's Courthouse. As a result, only one custodial employe remains at Northview to clean the building.

In addition to the aforementioned facilities, the County since about 1986 has operated a public health office in a privately-owned building located at 325 East Broadway, Waukesha, Wisconsin. Its rented offices at that building are cleaned by Program Cleaning, Inc., a private contractor, and not County employes. The Union has never filed a grievance protesting the fact that non-bargaining unit personnel clean those offices and that bargaining unit personnel at one time cleaned the public health offices when they were previously located in the Courthouse.

From about 1972 to the present, the parties have agreed to a series of side letters appended to their collective bargaining agreements which have been addressed to the Union's various staff representatives and signed by County representatives on County stationery which have stated in substance:

. . .

> The purpose of this letter is to confirm an agreement reached during collective bargaining process covering AFSCME Locals No. 1365 and 2494 for the calendar years 1992 and 1993.
>
> It was agreed that Waukesha County would not subcontract its custodial work now currently being

performed by employees represented by AFSCME.

. . .

The Union filed the instant written grievance on August 9, 1993, wherein it asserted that the use of the Gibb cleaning service to perform custodial services at the County-owned Airport Road facility violates this letter of agreement.

In support thereof, the Union mainly argues that the grievance must be sustained because the County's position "conflicts with the plain language of the letter of intent" since the County has "failed to demonstrate that the custodial work was new work within the meaning of the letter of agreement. . .", and because past practice "with regard to other County facilities supports the grievance". The Union also maintains that bargaining unit employes inevitably will be laid-off if the County's position is sustained because the County then will be free to open up new facilities which are not cleaned by bargaining unit employes. As a remedy, the Union requests that the disputed work be assigned to members of the bargaining unit it represents.

The County, in turn, mainly contends that using an outside vendor "is not subcontracting of custodial work in violation of the letter of agreement" because the phrase therein stating "now currently being performed" refers to the custodial work being performed within the facilities which actually existed at the time that the letters were agreed to, as opposed to any new facilities opened up thereafter.

The resolution of this issue must start out by examining Article I of the contract, . . .

Article I, however, goes on to limit the County's rights by providing that they are curtailed to the extent "specifically provided herein." This dispute therefore boils down to whether the County has violated the parties' letter of agreement spelled out ante, at page 3, as said letter provides a further refinement regarding what the County can do in this area.

. . .

The resolution of this issue hence must try to accommodate the two fundamental objectives which underlie many contractual subcontracting clauses: on the one hand, subcontracting cannot erode the bargaining unit by taking away the work actually being performed by bargaining unit personnel on a day-to-day basis; on the other hand, an employer can subcontract new and different work which has never been actually performed by bargaining unit employes in the past, provided only that the size of the bargaining unit remain the same.

Applying these principles here, it follows that the County did not violate the letter of understanding because its awarding of the Gibb contract has not reduced the number of custodial employes in the bargaining unit in any way. Thus, there were 28 custodial employes in the unit before Gibb came on the scene, and there were 28 custodial employes in the unit at the time of the hearing. The scope and integrity of the bargaining unit therefore have not suffered.

However, the County's right to subcontract is conditioned on the fact that the number of custodial employes not shrink through the simple device of subcontracting custodial work as the number of custodial employes shrinks through attrition. As a result, the County cannot subcontract any custodial work if there are less than 28 full-time custodial employes and if it does not otherwise meet the requirements of Article 1.

In light of the above, it is my

AWARD

1. That because the number of custodial employes in the bargaining unit has remained the same, and because there was no reduction in the number of hours worked by custodial employes in the bargaining unit, the County did not violate the Letter of Agreement attached to the collective bargaining agreement by using an outside contractor to perform custodial work at its mental health offices on Airport Road, Waukesha, Wisconsin;

2. That the County is free to subcontract custodial work only if the number of full-time custodial employes in the bargaining unit remains the same and only if there is no reduction in their hours, provided that the County otherwise meets the contractual requirements regarding subcontracting which are spelled out in Article 1 of the contract.

. . .

Attached to the award is Richter's concurring opinion, dated December 28, 1994, which states:

The undersigned, representing the County in this phase of the proceeding, while concurring in the decision wishes to express the

County view on 2 points in the decision:

1. While the County agrees that the fact no County employees were laid off as a result of the County using an outside vendor in the new Mental Health Center is a relevant consideration for the panel in this case, the County disagrees with any rationale which suggests the County's right to future subcontracting is based in any way on the future size of the unit.

2. It then follows that the County specifically disagrees with paragraph 2 of the award which purports to add a "unit size" criteria to any future subcontracting.

   Article VI of the governing contract does not empower grievance arbitrators to add to the terms of a contract which the undersigned believes paragraph 2 of the award arguably does.

. . .

Also attached to the award is Chybowski's undated dissenting opinion which states:

> I dissent. In my opinion the County violated the Agreement by contracting with Gibb Building Maintenance Company to have custodial work performed at the County-owned Airport Road facility.
>
> It is a well established principle of contract construction to interpret ambiguity against the party selecting the language. To the extent that the language of the side letter in question is ambiguous, as Arbitrator Greco has found, it must be construed against the County. On its face, the side letter (page 31 of the parties' Agreement) shows the County to be the drafter. A unique page of the Agreement, it is the only part of the Agreement that appears as a letter on Waukesha County stationery, signed only by a County official. The record before us does not show that the language of the side letter was drafted jointly, the result of give-and-take negotiations, or based on the language of a Union proposal; thus we can only take it at face value. By agreeing to put this part of the Agreement in the form of an official letter from the County to the Union, the County accepted

> the inherent risk of having any ambiguity construed against it.
>
> Certainly under the factual circumstances of this case no employee should have been laid off or suffer a reduction in hours worked, but, in my opinion, for reasons different from those presented by Arbitrator Greco.
>
> . . .

Neither the County nor the Union appealed the award.

6. Included among the agreements referred to in Finding of Fact 3 is an agreement in effect, by its terms, from January 1, 1994 until December 31, 1995. This agreement is referred to below as the 1994-95 agreement. Articles I, III and VI, as cited in Finding of Fact 3, did not change in any respect relevant here from the 1992-93 to the 1994-95 agreement. Attached to the 1992-93 collective bargaining agreement was the following letter, dated December 16, 1994, from the then incumbent County Executive to the then incumbent Union Business Representative:

> This letter outlines an agreement reached during negotiations between Waukesha County and AFSCME Local 2494.
>
> It is agreed that for the 1994-95 Contract term between Waukesha County and AFSCME Local 2494 the County would not subcontract its custodial work now currently being performed by employees represented by AFSCME in the following buildings and facilities.
>
> Courthouse
> Courthouse Annex
> Human Services Center
> Huber Center
> Public Health Center
> Juvenile Center
> Justice Center
> North Prairie Sub-Station

This attachment is referred to below as Side Letter 2.

7. During the effective term of the 1994-95 agreement, the Union filed a grievance labeled "#2," which is referred to below as Grievance #2. The grievance form is dated June 7, 1995, and states Mary Stone as the affected employe. The form states the following as the relevant factual background:

> Management not enforceing (sic) the arbitration decision.

The grievance form states the source of the violation as:

> In the arbitration papers on page 5 the 5th paragraph down. Number of people we have working.

The form states the following remedial request: "To hire two (2) people we need." The "fifth paragraph down" on page 5 of the arbitration award is set forth above, in Finding of Fact 5, under the "DISCUSSION" section as the paragraph beginning "Applying these principles herein,".

8. The parties processed Grievance #2 through the first three steps of the contractual grievance procedure in August, September and October of 1995. The Union determined not to process Grievance #2 to Step 4 of the grievance procedure, but determined to file a complaint of prohibited practice to enforce the arbitration award issued regarding Grievance #1 to the allegations made in Grievance #2. The Union filed the complaint on October 24, 1995. The County has formally requested that Grievance #2 be submitted to arbitration under the terms of the collective bargaining agreement, and has renounced any technical objections which could prevent the determination of the merits of the grievance.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The Union and the County have, through Article VI of the labor agreements noted in Finding of Fact 3 and Finding of Fact 6, "agreed to accept the terms" of an arbitration award issued pursuant to the terms of those collective bargaining agreements, "as final and binding on them" within the meaning of Sec. 111.70(3)(a)5, Stats.

4. Under Sec. 111.70(3)(a)5 and, derivatively, Sec. 111.70(3)(a)1, Stats., the doctrine of claim preclusion is not available to enforce on Grievance #2 the result reached in the arbitration award on Grievance #1. The issues posed by Grievance #2, including the relationship between that grievance and Grievance #1, must be resolved through the grievance arbitration process contained in the collective bargaining agreement between the Union and the County.

ORDER 1/

The complaint filed in this matter is dismissed, without prejudice to the right of the Union to refile the complaint if the County raises any procedural issue which would interfere with the Union's ability to submit the merits of Grievance #2 to the grievance and arbitration procedure under the collective bargaining agreement between the Union and the County.

Dated at Madison, Wisconsin, this 15th day of September, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union argues that the "threshold issue here is whether the rule of res judicata should apply to bar Waukesha County's relitigation of that part of the April 7, 1995 Arbitration Award which imposed limits on the County's right to contract out for custodial services." Since "the parties are the same," there "is no significant discrepancy of fact" and "the issue presented is essentially the same," the Union concludes that Commission case law establishes that "the rule of res judicata applies."

The only arguable point regarding the application of res judicata is whether the issue posed by Grievance #2 is the same as the issue posed by Grievance #1. Since the operative language of the side letter interpreted in the first arbitration award has not changed and since the reduction in the size of the bargaining unit is essentially the same, the Union concludes that the issue addressed in Grievance #1 is precisely the issue posed by Grievance #2. The Union then contends that the complaint is "properly before" the Commission and that the Union "should not have to relitigate the issue that already has been resolved by the Arbitrator." It follows that "the County has violated Secs. 111.70(3)(a)1 and 5, Wis. Stats., and the Commission should enforce the Arbitration Award issued on April 7, 1995."

The County's Initial Brief

After a review of the evidence, the County argues that Sec. 111.07(14), Stats., bars the processing of the complaint. Noting the complaint was initially filed on October 24, 1995, the County urges that "the number of employees fell to below 28 more than (emphasis from text) one year earlier." The statute, according to the County, clearly requires that "the running of the statute is the time when the county employment levels fell rather than the date of the later Greco decision." If it is possible to "look past the clear language of the statute," then judicial precedent requires that breach of contract actions accrue at the time of breach, not at the time of discovery.

Regarding the issue of claims preclusion, the County argues that the only relevant criteria defining that doctrine which is applicable here is the identity of parties. Since the side letter interpreted under Grievance #1 changed, the facts and issues underlying Grievances #1 and #2

cannot be considered the same. The County contends that the significance of this change is sufficiently dramatic that if the language of the revised side letter had been in place "when the Mental Health Center moved to Airport Road," Grievance #1 "would surely not have been filed." Beyond this, the County asserts Grievance #2 depends, for its existence, on the arbitration award. The allegations underlying Grievance #1 could not have been advanced in Grievance #2 without the arbitration award because the language of the side letter had changed. Because there is no identity of fact or issue, claims preclusion does not apply.

The County also argues that the two grievances "are . . . totally different" regarding the remedies sought. Grievance #1 sought to bar the use of subcontracted employes at the new Mental Health Center location, while Grievance #2 sought the hiring of two employes. This reflects the fundamental change effected by the changes to the side letter, and establishes that Commission case law requires the underlying dispute be submitted to grievance arbitration.

The Union's Reply Brief

The Union urges that the evidence "admits of but one conclusion," which the Union puts thus:

> (T)he core language of the parties' collective bargaining agreement has remained the same at all times material to this proceeding and the condition on Waukesha County's contracting out for custodial services that is established by this language -- as interpreted and applied by Arbitrator Greco, remains unchanged.

The County cannot claim a victory from the decision denying Grievance #1 without living up to the obligation imposed by that award. Its refusal to accept that award as binding constitutes a prohibited practice.

The County's Reply Brief

The County argues initially that the Union "misstates the applicable legal standard." Commission case law requires no change in material fact to apply the doctrine of claims preclusion, but the evidence demonstrates material changes in fact, issue and remedy between Grievance #1 and Grievance #2. Recent judicial precedent underscores the inapplicability of claims preclusion to the allegations of the complaint. A review of the evidence will not support the assertion that the changes to the side letter constitute anything less than a dramatic change in material fact. There has been no County commission of a prohibited practice, and the allegations of Grievance #2 should be

submitted to arbitration.

DISCUSSION

At hearing, the County advanced a threshold issue concerning the timeliness of the complaint. Sec. 111.07(14) Stats., read with Sec. 111.70(4)(a), Stats., governs this issue and provides:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged.

The County contends the "specific act . . . alleged" involves the reduction in custodial staff below 28, which occurred "in August or September of 1994," more than one year prior to the filing of the complaint on October 24, 1995.

The County's contention cannot be accepted. The "prohibited practice alleged" is the County's failure to abide by the terms of the April 7, 1995 panel award. There was, prior to April 7, 1995, no award to enforce. Grievance #2 was filed the following June, and the parties processed the grievance through the first three steps of the grievance procedure in the summer and fall of 1995. The complaint was filed on October 24, 1995, well within one year from the panel award the complaint seeks to enforce.

Even if the reduction in custodial staff below 28 is taken as the "specific act" upon which the operation of Sec. 111.07(14), Stats., is based, the County's contention cannot be accepted. Initially, it can be noted that the staffing level of 28 had no meaning until the issuance of the panel award. To the extent the reduction in staff is viewed as vital to the operation of the limitations period, it cannot be precisely traced to August or September of 1994. The vacancies which brought the custodial complement below 28 can be rooted in August and September of 1994. The vacancies, however, are insignificant in themselves. The prohibited practice turns on the County's refusal to fill them. Richter's testimony indicates the County has filled one of the vacancies and acted in November of 1994 to abolish the other vacant position effective January 1, 1995. In either case, the October, 1995 complaint falls within one year of County action to abolish the position.

The more troublesome aspect of the County's position is how, if at all, its jurisdictional assertion applies to the contractual issues it has requested to have deferred to arbitration. That issue is addressed below. The complaint was, in any event, timely filed.

In Dec. No. 28726-A, I determined that Commission case law required an evidentiary

hearing to determine how the doctrine of claim preclusion should be applied to the County's Motion to Defer. I stated the governing legal background (citations omitted) thus:

> The Commission applies claim preclusion thus:
>
> > (T)he dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought (must) share an identity of parties, issue and remedy. In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute . . .
>
> The complaint of prohibited practice states a contested case under Chapters 111 and 227. . . . The facts underlying the parties' conflicting characterizations of the dispute must, then, be determined after evidentiary hearing.
>
> The Commission's view of claim preclusion, however, potentially limits the scope of hearing. If, as the County asserts, there is no identity of fact, issue or remedy between the two grievances, the assertion of the Commission's authority under Sec. 111.70(3)(a)5, Stats., is inappropriate and the matter must be placed before an arbitrator.
>
> In sum, hearing on the complaint is appropriate to determine if there is an identity of parties, issue, remedy and fact between the Award and Grievance #2. If claim preclusion is appropriate, the Award can be enforced under Sec. 111.70(3)(a)5, Stats. If claim preclusion is not appropriate, then Sec. 111.70(3)(a)5, Stats., is not available to enforce the Award, and the merits of Grievance #2 must be determined by a grievance arbitrator.

It is undisputed that Grievance #1 and Grievance #2 share an identity of parties.

The issue thus posed for determination is whether the grievances share an identity of fact, issue and remedy. As preface to this determination, it should be noted that the "identity" requirement is significant. The Commission's assertion of claim preclusion to grievance arbitration recognizes that the finality sought to be enhanced through the application of the doctrine comes at the price of invading the agreed-upon dispute resolution procedure. The requirement of "identity"

of the components of the doctrine is to minimize encroachment on the grievance arbitration process.

The evidence will not support finding the requisite identity of fact, issue and remedy. The governing contract language did not change between the 1992-93 and the 1994-95 agreements, but the language of the Side Letter did. The impact of those changes is arguable, but the change in language cannot be brushed aside, and is meaningful under Commission case law. In State of Wisconsin, Department of Employment Relations, Dec. No. 23885-D (WERC, 2/88), the Commission found a bargained change in contract language which occurred in the interim between two grievances sufficient to bar the application of claim preclusion, even though the impact of the change was arguable. Beyond this, it can be noted that the size of the custodial complement changed during the pendency of Grievance #1. While this seems to have played no role in Grievance #1, the impact of the staffing change made effective January 1, 1995, poses another arguably significant change in fact.

The issue regarding issue and remedy is more troublesome, but the record will not support a conclusion that Grievance #1 and Grievance #2 share the requisite identity. The issue stated in the panel award is narrow and focuses, factually, on the move of the Mental Health Center offices from the Northview facility to a new facility. The award resolving that issue is arguably broader. The parties' arguments on Grievance #1 focused on whether the Union could claim custodial work as "bargaining unit work" or whether it could claim only custodial work at certain facilities. Grievance #2 focuses on whether the County violated a level of staffing set in the resolution of Grievance #1. It is not immediately apparent whether Richter's concurrence and Chybowski's dissent should be read to form a majority holding on the staffing level. More significantly here, it is not apparent the panel addressed a commonly understood issue. Against this background, it is difficult to find an identity between the issues argued before the panel and those advanced in Grievance #2.

Nor can remedy be considered identical between Grievance #1 and Grievance #2. Grievance #1 sought a definition of bargaining unit work traceable to the nature of the work, not to the location of the facility. Grievance #2 seeks to enforce a staffing level.

In sum, the identity of fact, issue and remedy necessary to the application of claim preclusion has not been demonstrated. Accordingly, the matter should be resolved through the grievance procedure. I stress that nothing said above should be read to establish any fact or conclusion concerning the arbitration. That claim preclusion is not appropriate does not mean a grievance arbitrator cannot treat the panel award as binding authority on Grievance #2, nor does it mean an arbitrator must give it such force. Rather, that determination must be left for the arbitration panel.

The Order set forth above requires some comment. As noted in Dec. No. 28726-A, the line between deferral of a complaint and the Commission's refusal to assert its statutory jurisdiction to

interpret a contract can be indistinct. Because the underlying allegation here is Sec. 111.70(3)(a)5, Stats., the matter would not seem to be one of deferral. However, claim preclusion is a legal doctrine, and Sec. 111.70(3)(a)5, Stats., grants the Commission the authority to enforce grievance arbitration awards in addition to the authority to interpret labor agreements. The authority to enforce a prior arbitration award is not, strictly speaking, a contractual authority granted an arbitrator. Thus, this case involves a limited type of deferral necessary to preserve the contractually set means of dispute resolution.

The Commission has effected the deferral of grievances in two ways. First, it has retained jurisdiction when it issues an order including the deferral of a complaint allegation. See, for example, Brown County et. al., Dec. No. 19314-B (WERC, 6/83) and State of Wisconsin, Dec. No. 25393 (WERC, 6/83). Second, it has issued an order dismissing a complaint "without prejudice to the complainant's right to refile a complaint" and without exposing the complainant to an argument that the refiling of the complaint is time-barred based on the Commission's action. State of Wisconsin et. al., Dec. No. 15261 (WERC, 1/78) at 4.

The Order set forth above adopts the latter approach, by dismissing the complaint, conditioned on the County's already stated willingness to renounce "any procedural issue which would interfere with AFSCME's access to the grievance and arbitration procedure under our collective bargaining agreement." Because the County's assertion of a jurisdictional challenge in this proceeding conceivably has a parallel argument as a procedural objection in the arbitration process, the Order of dismissal noted above states the dismissal is "without prejudice." I have done this to clarify that the deferral rests on the County's waiver of procedural objections and to make the Order final and thus appealable to the Commission. One attempt at appeal has already been denied due to the interim nature of the Order stated in Dec. No. 28726-A. There is no persuasive reason to further complicate or delay the appellate process in this matter, should either party wish access to it. Hopefully, this will facilitate a final answer to the issues posed by Grievance #2. The Order stated above establishes my opinion that the final answer to those issues should be that of a grievance arbitrator.

Dated at Madison, Wisconsin, this 15th day of September, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner