STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL NO. 695, Complainant,

vs.

SAUK COUNTY, Respondent.

Case 126
No. 54365
MP-3204

DECISION NO. 29055-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, by **Ms. Marianne Goldstein Robbins** and **Ms. Andrea F. Hoeschen,** on behalf of Teamsters Local No. 695.

Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by **Mr. James R. Scott,** on behalf of Sauk County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 15, 1996, Teamsters Local No. 695 filed a complaint with the Wisconsin Employment Relations Commission alleging that Sauk County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act by transferring out bargaining unit work to non-bargaining unit individuals, by refusing to bargain with the Union regarding its unilateral decision to subcontract work previously performed by bargaining unit members, and by refusing to consider and process the Union's grievance over same despite the grievance and arbitration procedure contained within the parties' collective bargaining agreement. The Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on August 21, 1997 in Baraboo, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on January 8, 1998.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and

Order.

No. 29055-A

FINDINGS OF FACT

Teamsters Local No. 695, hereinafter referred to as the Complainant or Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal place of business at 1314 North Stoughton Road, Madison, Wisconsin, 53714-1293.

Sauk County, hereinafter referred to as the Respondent or County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal place of business at 515 Oak Street, Baraboo, Wisconsin, 53913.

At all times material hereto, the Union has been the exclusive bargaining representative of certain Courthouse and Human Services Department non-professional and Highway Department clerical employes.

The Union and the County were party to a collective bargaining agreement which covered the period of January 1, 1995 through December 31, 1997. Said Agreement contained, in relevant part, the following provisions:

ARTICLE III - MANAGEMENT RIGHTS

The Employer possesses the sole right to operate the County and all management rights reposed in it, subject only to the express terms of this Agreement. These rights include, but are not limited to, the following:

. . .

K. To contract out for goods or services, provided, however, that the Employer shall not contract out for services which will result in a layoff of bargaining unit employees unless there are sound reasons therefor;

. . .

ARTICLE VIII - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Grievance - A grievance is defined to be a controversy between the Union and the Employer, or between any employee or employees and the Employer, as to a matter involving the interpretation and application of a specific provision of this Agreement.

Section 2. Procedure - Grievances shall be processed in the following manner (time limits set forth shall be exclusive of Saturdays, Sundays and holidays):

Step 1.

The employee and/or the Committee chairman shall take the grievance up orally with the employee's immediate supervisor within five (5) days of their knowledge of the occurrence of the event causing the grievance, which shall not be more than fourteen (14) days after the event.

The supervisor shall attempt to make a mutually satisfactory adjustment, and, in any event shall be required to give an answer within five (5) days.

Step 2.

The grievance shall be considered settled in Step 1 unless, within five (5) days after the supervisor's answer is due, the grievance is reduced to writing and presented to the department head. The department head shall respond to the grievance in writing within five (5) days.

Step 3.

The grievance shall be considered settled in Step 2 unless, within five (5) days from the date of the department head's written answer or last date due, the grievance is presented in writing to the Personnel Committee. The Personnel Committee shall respond in writing to the Committee Chairman, Grievance Committee or employee representative within five (5) days.

Step 4.

If an employee grievance is not settled at Step 3 or if any grievance filed by the Employer cannot be satisfactorily resolved by conference with the appropriate representatives of the employees, either party may take the matter to arbitration as hereinafter provided.

Section 3. Arbitration -

The grievance shall be considered settled in Step 3 above, or if an Employer grievance in Step 4 above, unless within ten (10) days after the last response is received, or due, the dissatisfied party (either party) shall request in writing to the other that the dispute be submitted to an arbitrator.

The Wisconsin Employment Relations Commission shall be requested to submit a panel of five (5) arbitrators. The parties shall alternately strike names until one remains and the party requesting arbitration shall be the first to strike a name. Each party shall pay one-half (1/2) of the cost of the arbitrator.

The impartial arbitrator shall have the authority to determine issues concerning the interpretation and application of all Articles and Sections of this Agreement. He/she shall have no authority to change any part; however, he/she may make recommendations for changes when, in his/her opinion, such changes would add clarity or brevity which might avoid future disagreements.

Section 4. General Grievances - Grievances involving the general interpretation,

application or compliance with this Agreement may be initiated with Step 3 of the procedure.

Section 5. Time - The time limits set forth in the foregoing Steps may be extended by mutual agreement in writing.

Said Agreement also contained the following relevant provisions: Article II - Union Recognition, Article V - Reserved, Article IX - Seniority Rights, Layoffs and Job Postings and Article X - Wages, Hours of Work and Overtime.

Toward the end of September, 1995, Tim Stieve, Director of Emergency Government, met with the County Finance Committee regarding the budget for cleaning services for the new West Square Annex Building. The original budget for the Maintenance Department had projected four additional positions with a total of four and one-half positions to do the

cleaning for the new facility. During the review of this budget proposal, Committee members asked questions about other ways to perform these services. This led to a discussion of whether the cleaning services could be contracted out. Following this discussion, the Committee directed Stieve to gather some information about the feasibility of contracting out the cleaning services and report back to the Committee at its next meeting.

6. The minutes of the County Finance Committee meeting of October 10, 1995, reflect the following discussion and action:

> Stieve and Werla then discussed the revised Maintenance budget request for 1996. They have received rough quotes from six housekeeping firms who range in price per year from $112,200 to $348,996. If housekeeping was privatized, there would not be the need to hire the four new workers previously requested in the budget. The cleaning supplies could be reduced if the private firm supplied its own materials. The department also expects to reduce staff by one once the Reedsburg buildings are consolidated. Motion by Mack, second by Geffert to ask the Property and Insurance Committee to interview housekeeping companies and choose one for consideration at the November County Board session. The Committee also recommended deleting from the budget the four new positions, $30,000 from supplies, and adding $200,000 for privatized janitorial services. Motion carried.

The minutes of the Property & Insurance Committee meeting of October 23, 1995, reflect the following discussion and action:

> Stieve, Emergency Government Director discussed the process to be utilized for today's interviews with vendors for the provision of housekeeping services for the County Courthouse and West Square building for 1996. Mr. Stieve noted that a request for quotes (RFQ) for housekeeping had previously been sent out and the County received six responses, summarized on a handout. Each vendor was then invited to the interview process to follow. Mr. Stieve distributed a handout showing the cleaning duties required as part of the RFQ and a list of questions to be asked to

each vendor. The Committee agreed that Mr. Stieve would ask the list of questions to each vendor and Committee members would follow with additional questions. Each vendor will be given approximately 20 minutes for the interview; questions first, then a chance to provide information about their firm, and provide a summary for the Committee. Mr. Stieve noted that one vendor, Major Clean of Madison, had called and indicated they were no longer interested in performing the service for Sauk County.

Following conclusion of the interviews, and discussion by various Committee members, the Committee took the following action:

Motion by Schreiber, second by Schuette to accept the proposal of Crest International at the reduced rate to provide housekeeping services for the Sauk County Courthouse and West Square Building for 1996. County staff to check references, review contract content with Corporation Counsel and prepare appropriate resolution for County Board action on November 14, 1995. Bring information to Property & Insurance Committee at regular meeting of November 1, 1995. Motion carried.

The minutes of the Property & Insurance Committee meeting of November 1, 1995, reflect the following discussion and action:

HOUSEKEEPING SERVICES
Committee discussed resolution to accept the proposal from Crest International of Madison, Wi. for provision of housekeeping services for the Courthouse and the West Square building. MOTION by Hartje seconded by Schreiber to take resolution to the full Board authorizing the County Board Chairperson to enter into such contracts as necessary for performance of work. Carried.

On or about November 10, 1995, Ruth Ann Stodola, Business Representative for the Union, contacted Todd J. Liebman, County Corporation Counsel, regarding some rumors that she had heard about the County's plans to contract out for cleaning services. Stodola asked if this was the County's intention and Liebman confirmed same. Stodola asked for a copy of the County's contract with Crest International which Liebman did not provide because it "was still preliminarily being reviewed". However, in response to Stodola's inquiry, by letter dated November 13, 1995, Liebman sent Stodola a copy of a resolution being considered by the County Board at its November 14, 1995 meeting concerning a proposal to contract for janitorial services with Crest International.

Business Representative Stodola received a copy of the above letter with the enclosed resolution from Liebman on November 14, 1995, the same date that the County Board approved a resolution to subcontract cleaning work. Stodola was unable to attend said County Board meeting as a result of the late notice regarding same.

On November 15, 1995, the Baraboo News Republic reported that the County Board had "elected" at its meeting the previous day, to contract with "Crest International Housecleaning

Services of Madison to clean the new building at a cost of $166,000 per year".

On November 21, 1995, Business Representative Stodola and Union Steward Sharon Herndon met with County representatives Todd Liebman and Michael Wolfe, Human Resources Director. The original purpose of the meeting, which was initiated by Ken Cady, Deputy Director for Human Services for the County, was to deal with various layoff issues involving five training specialists, all members of the bargaining unit, at the Jefferson House. Toward the end of the meeting, Stodola indicated to the County representatives that she was "troubled by the specter of subcontracting in light of the layoffs we were also discussing at that meeting". Stodola pointed out that the layoffs would be unnecessary if the cleaning work was not subcontracted. Stodola also tried to ascertain the status of the plan to subcontract by asking for a copy of the contract or other documents that might indicate same Liebman informed Stodola that the County could not provide her with a copy of the contract because it was sill in its preliminary stages. Liebman also informed Stodola that the Union was not entitled to the contract at that point because it was "a work in progress". Stodola testified that she then advised the County representatives that they should consider her statements as the initiation of a grievance protesting the County's contemplation of subcontracting the cleaning services. Stodola added that Liebman responded by stating that the Union didn't have a grievance. Liebman, on the other hand, testified that Stodola did not indicate that she was going to file a grievance or that she was making an oral grievance regarding the subcontracting. Wolfe offered the employes affected by the layoff an opportunity to work as Nursing Assistants at the Health Care Center. Some were interested in this offer and others were not.

By letter dated November 27, 1995, to Corporation Counsel Liebman, Business Representative Stodola enclosed a grievance on behalf of the Union "protesting Sauk County's proposed subcontracting of bargaining unit work to Crest International". The letter indicated that said grievance "was presented to you orally at a meeting to discuss layoffs on November 21, 1995, and in response to your notification to Local 695 that the County Board has authorized the subcontracting of bargaining unit work". The letter also confirmed Liebman's "refusal to

provide Local 695 with a copy of Sauk County's contract with Crest International". The letter added that Stodola looked "forward to Sauk County's written response to this grievance within five days as is required by the Labor Agreement".

14. The grievance enclosed with Business Representative Stodola's November 27th letter to Corporation Counsel Liebman noted above provided as follows:

Date of Complaint November 21, 1995

> TO BE FILLED OUT BY COMPLAINANT: Grievance in detail, citing Article(s) of the Labor Agreement believed to be involved in this complaint, and the remedy you are seeking. (Use reverse side if necessary).
>
> Sauk County's intention to subcontract cleaning services to Crest International beginning on or about December 15, 1995 is a violation of Articles II, III, V, VIII, IX and X of the Labor Agreement. As a remedy, the Union seeks that the County cease and desist violation of the Agreement, retain cleaning work within the

bargaining unit and withdraw from plans to enter into a contract with Crest International.

Has this complaint been discussed with your Employer? Yes X No ___

Sauk County — Name of Employer

Ruth Ann Stodola /s/ — Signature of Complainant

By letter dated December 1, 1995 Corporation Counsel Liebman rejected the Union's grievance stating: "Sauk County will not be submitting this issue to the grievance process nor will we submit to grievance arbitration concerning this matter". In said letter, Liebman directed Stodola's attention to Article VI, Section 1 of the Agreement noting that while Stodola cited a number of Articles of the expired contract in her grievance "none of those Articles applies to the County's contracting of cleaning services". Liebman concluded, therefore, that the County's decision had noting "to do with a 'controversy . . . involving the interpretation of a specific provision' of the agreement. Further, the County's decision does not impact wages, hours or working conditions". Liebman added regarding the status of the Crest contract:

> You indicate in your letter that I am refusing to furnish a copy of the County's contract with Crest International. In reality, I indicated to you as soon as the contract was signed I would provide you copy. I would do so for any member of the public.

No contract was enclosed, although the contract had been signed by Sauk County Board Chair Roger Shanks on November 14, 1995 and by a representative of Crest International on November 17, 1995, and was in the County's possession albiet not in Liebman's office.

On December 6, 1995, Business Representative Stodola filed an appeal of "Todd Liebman's denial of my grievance protesting the subcontracting of bargaining unit work directly to the Personnel Committee". Also by letter dated December 6, 1995, to Corporation Counsel Liebman Stodola asked to bargain over the subcontracting of cleaning services to Crest International.

By letter dated December 12, 1995, the County informed the following five training specialists that they would be laid off effective January 1, 1996: Marilyn Theis, Bethel Barreau, Judy Meyer, Janet Kolze and Carol Sussex. All were bargaining unit employes. Thies was laid off for approximately 18 months until she was hired by the County on July 14, 1997 as an

Administrative Assistant III. Barreau terminated her employment and chose to take retirement on December 31, 1995. Meyer remained on layoff status until November 21, 1996 when she terminated her employment with the County on that date. Kolze remained on layoff status until July 8, 1996 when she began work as a vocational specialist position with the County's Human Services Department. Sussex accepted an Administrative Assistant III position, also in the aforesaid Department, effective February 5, 1996.

18. By letter dated December 13, 1995, Corporation Counsel Liebman denied Stodola's request to bargain over the contracting of cleaning services. In said letter Liebman informed Stodola that her request to bargain was untimely because she had "known about Sauk County's

plans for cleaning services since before we spoke by telephone in early November, 1995." Liebman also reminded Stodola about his letter dated November 13, 1995 wherein he informed her "that the proposed contract with Crest International was being presented to the County Board for approval on November 14, 1995." Liebman added that despite their aforesaid telephone conversation and their meeting on a different subject on November 21, 1995, "you have never requested to bargain over this issue until your letter of December 6, 1995."

Liebman also reiterated the County's opposition to accepting a grievance on the matter and/or processing same to arbitration. In this regard, Liebman noted:

> From my letter of December 4, 1995 you should be well aware that the County will not accept your grievance of November 27, 1995. (I will again point out that the grievance is dated November 21, 1995 even though you did not present it to the County until November 28, 1995). I will reiterate that your claim is not a dispute under the contract and will not be accepted for grievance or arbitration by Sauk County.

Finally, Liebman enclosed with the letter a copy of the contract with Crest International as well as the minutes of the Board Meeting for November 14, 1995 wherein the contract was approved.

In mid-December of 1995, Crest International started performing cleaning work for the County. Crest International uses eight employes to perform these cleaning services for the County including six janitors, one team leader and one operations manager. The janitors are paid $6.00 per hour, the team leader is paid $7.00 per hour, and the operations manager is paid $8.00 per hour. There is no health insurance for said employees and they work an average of 4-5 hours per night at various County facilities, Monday through Friday. Crest International utilizes two upright vacuums. On January 1, 1997 the County entered into a one-year contract with Crest International to continue to perform the cleaning services that they had been performing for the County.

The Crest International employees noted above have taken over bargaining unit work. They do the same tasks that the maintenance and cleaning employees used to do. Before the subcontracting there were seven employees in the maintenance classification. Now there are only five.

Sometime prior to October 15, 1991, the County Human Services Board voted to eliminate six positions in the Department of Human Services as a result of purchasing sheltered employment services from Handishops in Tomah and submit a resolution to that effect to the County Board on October 15, 1991. By letter dated October 16, 1991, Carol A. Bassett, Personnel Coordinator for the County, confirmed a meeting with Business Representative Stodola wherein the parties would "discuss the scheduled lay-off of staff as a result of the decision to contract for sheltered employment." Bassett wrote: "this meeting will allow us to identify concerns and issues, hopefully, with ample time to resolve them before the actual layoff

occurs." Bassett added: "Thank you for your willingness to cooperate in a mutual attempt to accomplish the necessary staff reduction with as little negative impact on individual employees as is possible."

By letter dated December 27, 1994 Human Resources Director Michael A. Wolfe informed Fred Cobbs that he would be placed on lay-off status "and have the rights related to such status as specified within Article VIII of the Collective Bargaining Agreement." Cobbs worked as a community treatment aide at the Jefferson House at the time of his layoff. By letter dated January 30, 1995 Cobbs informed Wolfe that he accepted the LTE maintenance position offered to him by the County effective that date. By letter dated December 1, 1995 Cobbs was recalled to a regular full-time maintenance position with the County.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

The grievance signed by Business Representative Ruth Ann Stodola and filed by letter dated November 27, 1995, raises issues which are arguably covered by the arbitration clause in the 1995-1997 Collective Bargaining Agreement between Teamsters Local No. 695 and Sauk County, and which are not specifically excluded from the grievance and arbitration procedure contained in that Agreement, and is therefore arbitrable.

Disputes as to whether the aforesaid grievance is timely filed and as to whether Sauk County violated Article III and/or other provisions of the Agreement named in the grievance by its action in contracting out the cleaning services in the County to Crest International are issues that are to be decided by an arbitrator.

By refusing to proceed to arbitration on the grievance filed on November 27, 1995, by Business Representative Ruth Ann Stodola protesting "Sauk County's intention to subcontract cleaning services to Crest International beginning on or about December 15, 1995", Sauk County, its officers and agents, have violated its agreement with Teamsters Local No. 695, to arbitrate disputes involving the interpretation, application or enforcement of the terms of the parties' 1995-1997 Collective Bargaining Agreement, and thereby violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Because the Examiner has deferred the instant dispute to grievance arbitration, the Examiner will not assert the Commission's jurisdiction to determine whether by its conduct Sauk County has failed to bargain collectively and in good faith with Teamsters Local No. 695 by unilaterally contracting out its cleaning services to Crest International without notification to or bargaining with the Union, and has interfered with, restrained or coerced employees in the exercise of their rights, as guaranteed in Sec. 111.780(2), Stats., thereby violating Secs. 111.70(3)(a)1 and 4, Stats.

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

ORDER

The Respondent Sauk County, its officers and agents, shall immediately:

Cease and desist from refusing to proceed to arbitration on the grievance filed by Business Representative Ruth Ann Stodola.

Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

Participate in the arbitration of the grievance noted above.

Post the Notice attached hereto as Appendix "A" in conspicuous places in the County's buildings where notices to employes are posted. The Notice shall be signed by the representative for the County and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the County has taken to comply with this Order.

Although the above grievance is deferred to grievance arbitration, the Examiner will retain jurisdiction over the matter, to ensure that the issues raised by the complaint are both resolved, and if appropriate, adequately remedied by arbitration.

Dated at Madison, Wisconsin this 27th day of February, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan

an,

Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT violate Sections 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to participate in the arbitration of grievances which raise contractual issues not specifically excluded from the contractual arbitration process.

WE WILL participate with Teamsters Local No. 695 in the arbitration of the grievance of Business Representative Ruth Ann Stodola.

Dated this _____ day of _____, 1998.

SAUK COUNTY

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

Sauk County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant's Position

Complainant, in its brief, argues that the Respondent committed prohibited practices by subcontracting bargaining unit work and refusing either to arbitrate the Union's resulting grievance or bargain over the subcontracting and its effects.

In this regard, the Complainant initially argues that the dispute is arbitrable and that Respondent has a duty to arbitrate same. In support thereof, the Complainant first maintains that the Commission has adopted federal law as embodied by the Steelworkers Trilogy in determining whether a dispute is substantively arbitrable citing ASHLAND UNIFIED SCHOOL DISTRICT NO. 1, DEC. NO. 12071-A (MALAMUD, 2/75), AFF'D BY OPERATION OF LAW, DEC. NO. 12071-B (WERC, 3/75). Based on the above, the Complainant cites the following federal standard to be applied herein:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
>
> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. United Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574, 581 (1960).

Applying the above standard, the Complainant maintains that the Commission has consistently held that a party to an arbitration clause has a right to proceed to arbitration whenever it makes a claim that on its face is governed by the collective bargaining agreement. JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., 78 WIS. 2D 94, 253 N.W.2D 536 (1977); CITY OF CUDAHY, DEC. NO. 28167-A (CROWLEY, 4/95), AFF'D BY OEPRATION OF LAW, DEC. NO. 28167-B (WERC, 5/95).

Given the above standard, the Complainant believes the Respondent's refusal to arbitrate is groundless for the following reasons. One, the contract clearly addresses subcontracting in Article III (J) which states:

> To contract out for goods or services, provided, however, that the Employer shall not contract out for services which will result in a layoff of bargaining unit employees unless there are sound reasons therefor;

Two, based on the above, the Respondent violated the agreement if it subcontracted without sound

reasons and layoffs resulted. Three, this is exactly what the Complainant alleges occurred when the Respondent subcontracted the cleaning work to Crest. Four, the Complainant specifically alleged a violation of Article III in its written grievance notwithstanding the Respondent's claim that the grievance did not implicate the agreement.

The Complainant points out that its grievance also alleged violations of Article IX, which pertains to seniority rights, layoffs and job postings. The Complainant notes that Mr. Wolfe

conceded that the agreement addresses layoff and recall. The Complainant concludes that while the Respondent may dispute whether it violated the agreement, "there can be no doubt that the Union's grievance relates to the interpretation and application of the collective bargaining agreement and is therefore covered by the parties' arbitration clause. CITY OF MENOMONIE, DEC. NO. 5180-A, P. 5 (MCGILLIGAN, 4/78), AFF'D BY OPERATION OF LAW, DEC. NO. 15180-B (WERC, 5/78).

The Complainant also maintains that the grievance is timely, and that Respondent's claim otherwise first raised in its Answer to the Prohibited Practice Complaint is untimely because it was not raised during the grievance procedure, and therefore should be deemed waived. DOW JONES & CO., INC., 67 LA 965 (TURKUS, 1976); DEXTER CO., 60 LA 1101 (SINICROPI, 1973). The Complainant adds that the Respondent set forth no evidence of untimeliness at the hearing and has given no explanation of how the grievance could be untimely when it "failed to provide or acknowledge the Crest contract to the Union until December 13 - four weeks after the first step oral grievance and three weeks after the second step written grievance."

The Complainant next maintains that the subcontracting violated the collective bargaining agreement because the subcontracting resulted in layoffs in the bargaining unit in violation of the aforesaid contractual provision; because there is no merit to the Respondent's claim that subcontracting is allowed if there are no layoffs in the classification subject to subcontracting; because the subcontracting was not for sound reasons and the Respondent offered no factual evidence of same; and because there is no past practice of allowing subcontracting.

Assuming arguendo that the parties' collective bargaining agreement does not address subcontracting, the Complainant maintains that the Respondent was obligated to bargain with the Union over its decision by producing timely advance notice, the opportunity to bargain and responding promptly to requests for information. VILLAGE OF SAUKVILLE, DEC. NO. 28032-A, P. 19, NOTE 18 (CROWLEY, 10/94), AFFIRMED, DEC. NO. 28032-B (WERC, 3/96). Instead, according to the Complainant, the Respondent misled the Complainant about the imminence of subcontracting "until it felt a sufficient amount of time had passed, and then claimed the Union's request was untimely."

The Complainant adds that there is no question that the transfer of work out of the unit and the resulting layoffs are mandatory subjects of bargaining primarily related to wages, hours and working conditions. BROWN COUNTY, DEC. NO. 20857-B (WERC, 7/85) finding subcontracting of youth home services to be a mandatory subject of bargaining; CITY OF GREEN BAY (CITY HALL), DEC. NO. 18731-B (WERC, 6/83); UNIFIED SCHOOL DIST. NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89, 102 (1977).

The Complainant claims that its request for bargaining was timely, and adds that there was no waiver of its right to bargain citing CITY OF BELOIT, DEC. NO. 28270-B (BUFFETT, 11/95) for the proposition that any waiver of the right to bargain must be clear and unmistakable. The Complainant also relies on RICHLAND COUNTY, DEC. NO. 27856-C (GRECO, 1/95) which held that "where a Union waited five weeks after notification of a change in health care benefits to respond and request bargaining, the union did not waive its right to bargain."

The Complainant further adds that the Respondent's refusal to bargain was further exacerbated by its failure to provide the Union with the contract and the November 14 meeting minutes in a timely fashion. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92). The Complainant concludes that the Respondent's own obstructionist tactics foreclose it from claiming the Union's request to bargain was untimely.

For the foregoing reasons, the Complainant requests that the "arbitrator" sustain the Union's grievance and that the "examiner" find that the Respondent violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by transferring and subcontracting unit work and laying off four human services employees. The Complainant further requests that the arbitrator/examiner order the Respondent to make the laid off employees whole for all losses resulting from its contractual and statutory violations and that Respondent be ordered to cease and desist the subcontracting of cleaning work.

In its reply brief, the Complainant makes the following principal points in opposition to Respondent's brief. One, the grievance on its face addressed a violation of the collective bargaining agreement. Two, the subcontracting resulted in layoffs within the bargaining unit. Three, the Respondent lacked sound reasons for the subcontracting. Four, both the grievance and the request to bargain were timely.

In support of the above, the Complainant points out that in mid-December of 1995, the same time that Crest started performing the cleaning work, the County notified four unit members in the Human Services Department that they would be laid off effective January 1, 1996. The Complainant notes that all were unit members who would have had bidding rights to vacant positions in the cleaning department. The Complainant concludes: "The subcontracting resulted in the layoff of these employees. But for the subcontracting, they would have had bargaining unit jobs."

The Complainant rejects the Respondent's position that it may subcontract and layoff as much as it likes, as long as the layoffs are in a different job classification than the subcontracted jobs. The Complainant argues that clear contract language contradicts this interpretation by the Respondent. In this regard, the Complainant maintains that the agreement protects bargaining unit work, not merely job classification work, by providing that the County is allowed:

> To contract out for goods or services, provided, however, that the Employer shall not contract out for services which will result in a *layoff of bargaining unit employees* unless there are sound reasons therefor; (Emphasis added)

The Complainant also rejects the Respondent's reliance on hypothetical facts to argue that the contract does not protect unit work. For example, the Complainant notes that at page 2 of the County's brief it asserted that on December 31, 1995, the individuals in question would have lost their employment even if the Respondent had not constructed a new courthouse annex. However, the Complainant points out that in fact the County did construct the annex. The Complainant also notes that at page 3 the Respondent argued what if the layoff occurred six months before or after the subcontract. Complainant maintains that the Examiner does not have to decide those situations because the layoffs occurred at the same time as the subcontracting. The Complainant further argues that where a collective bargaining agreement prohibits subcontracting that results in layoffs, the subcontracting is violative if the layoff was reasonably foreseeable at the time of the contracting. COLUMBUS AUTO PARTS CO., 36 LA 1079 (ALEXANDER, 1961). The Complainant points out that under the circumstances as they existed, the layoffs were foreseeable at the time of the subcontract since the County issued the layoff notices on December 12, the same time Crest took over the cleaning work.

The Complainant reasserts its argument that the Respondent had a duty to arbitrate the dispute. In addition to repeating the arguments made in its brief on the subject, the Complainant rejects the Respondent's claim that the Union waived its right to contest subcontracting. In this regard, the Complainant points out that at page 4 of its brief the Respondent concedes that its right to subcontract has limits. The Complainant contends the "limited exceptions" referred to in the Respondent's brief apply to the contested subcontracting, thus the dispute is arbitrable.

The Complainant also argues that it did not waive its right to challenge the subcontracting by not challenging "numerous previous . . . decisions to subcontract out work," as alleged by the Respondent. First, the Complainant maintains that the aforesaid "insinuation has no basis in the record." Secondly, the Complainant maintains that its failure to grieve one isolated incident of layoff even arguably resulting from subcontracting does not translate into a waiver of the right to challenge all subcontracting.

The Complainant next argues that the grievance was timely. In support thereof, the Complainant maintains that the Respondent is relying on semantics when it accuses Stodola of stating on cross-examination "that at the November 21, 1995 meeting, she stated that <u>if</u> the County subcontracted the work, she <u>would</u> grieve." (Emphasis in original and supplied by the Complainant) The Complainant argues that Stodola's choice of words stems from the fact that on November 21, the County was representing that it had not yet signed a subcontract. The Complainant adds that Stodola "unequivocally" stated the Union's opposition to the subcontracting and timely filed a first step grievance. If anything, according to the Complainant, Stodola filed the grievance early since the Respondent led her to believe the subcontract had not yet been signed, and a first step grievance need only be filed within five days of when the Union learns of the contract violation. In any event, the Complainant opines that "the County waived its untimeliness argument by not raising it during the grievance process. (County Exhibit No. 10, TR 164).

The Complainant adds contrary to the Respondent's assertion that Stodola was involved in "backdating" November 21 is simply the date Stodola filed the first step oral grievance, and it is accurately referenced as same in the second step written grievance.

The Complainant next argues that there is no support for the Respondent's claim that on November 21 Stodola had "constructive, if not actual, notice that the County Board had approved the letting of a contract for cleaning services in the new facility." First, the Complainant notes that there was no evidence that she had constructive knowledge, "and the County makes no argument as to why constructive knowledge should be imputed to Stodola." Secondly, the Complainant contends that "the County's assertion concedes what the Union has argued all along: Stodola had no actual knowledge of the subcontracting." Finally, the Complainant points out that Stodola, Liebman and Wolfe stood in the same room on November 21 yet no one from the Respondent had enough courtesy to inform her that the Respondent had subcontracted the cleaning work. The Complainant concludes by stating that the Respondent "never acknowledges or even defends the only source of any delay in this matter - its own intentional misrepresentations to the Union."

Based on all of the above, the Complainant maintains that the Respondent failed to satisfy its burden of proving that the Union's grievance is untimely.

The Complainant further argues that the Respondent has waived any argument that it had sound reasons for subcontracting by not identifying same either in the evidence or its arguments.

Finally, the Complainant argues that the Respondent's waiver defense is inconsistent with its refusal to arbitrate. In this regard, the Complainant notes that the County admits that it refused to bargain over subcontracting and claims that it had no duty to bargain because the right to bargain was waived when the parties agreed to address the issue in their labor agreement. The Complainant argues that the County cannot have it both ways. In other words, if the parties did not address the issue in negotiating their labor agreement, then it is subject to bargaining now; if the issue at hand is already addressed in the labor agreement, then the dispute is arbitrable.

The Complainant adds that in alleging "the Union waived its right to bargain over the issue of subcontracting by language now found in the collective bargaining agreement, the County has, essentially, conceded that the present dispute involves application of the" agreement, and is therefore arbitrable. The Complainant concludes that the Respondent's claim to the contrary "is to direct opposition to its defense of waiver and cannot withstand scrutiny." In the alternative, assuming arguendo that the issue at hand is not addressed as the Respondent implies in claiming the present grievance is not arbitrable, "then there can be no question that the County was obligated to bargain over the issue and, since it refused to do so, violated Sec. 111.70(3)(a)3., stats. when it decided to opt out of its duty to bargain."

Respondent's Position

The Respondent basically argues that a clear and unequivocal waiver of the duty to bargain occurred as a result of contract language extending to the County "the virtually unfettered right to subcontract." Furthermore, because of the waiver, the Respondent argues that the dispute is not arbitrable and the Complainant's interpretation of the disputed contract language is implausible. In addition, the Respondent argues that the grievance is untimely and requests "that the Examiner reach the issue of timeliness."

In support of the above, the Respondent first argues that it has no duty to bargain the decision to subcontract because "the Union had unequivocally waived its right to bargain." In this regard, the Respondent points out that the Management Rights Clause, Article III, "is broad and encompasses a wide range of municipal powers." In particular, the Respondent notes that subparagraph (K) extends to the County the right to contract for "goods and services" subject only to the restriction that it not contract out for services which will result in the layoff of bargaining unit employees. (Emphasis supplied) According to the Respondent, the aforesaid contractual language on its face, creates a causation standard not met herein. Said standard was not met, according to the Respondent, because the decision to subcontract out cleaning services in the new West Center annex did not result in the layoff of any unit employees. In support thereof, the Respondent notes the following:

> In December of 1995, six training specialists were laid off as a result of Sauk County's decision to get out of certain human services functions. (TR 35-36, 128) On December 31, 1995, those individual would have lost their employment even if the County had not constructed a new courthouse annex. Their layoffs occurred as a result of the County's decision to close Jefferson House and stop performing training specialist work. It did not occur as a result of the decisions to subcontract carpet cleaning work.

The Respondent also notes that no unit employee who was engaged in the kind of work being performed by Crest personnel (cleaning) was laid off as a result of the County's action in November of 1995 approving a resolution agreeing to contract with Crest International to provide cleaning services at the new West Square annex building.

The Respondent further argues in support of the above that adoption by the Examiner of the Complainant's point of view would require the Respondent "to halt the use of an outside cleaning contractor and re-employ the laid off social workers" any time employees were on layoff and the subcontract was let. The Respondent concedes that if "the Union had negotiated language which said the County could not subcontract so long as bargaining unit employees are on layoff (not an uncommon provision), then the Union's position would be viable." However, according to the Respondent, the Complainant is attempting to gain an advantage "through its odd logic rather than at the bargaining table."

The Respondent adds that the Complainant's "interpretation" would in effect eliminate all subcontracting. In this regard, the Respondent first notes that every contract by its terms has a fixed duration. The Respondent next notes that according to the Complainant's view, when a contract expired, if there were unit employees on layoff, the County would be prevented from renewing its contractual relationship. The Respondent believes that such a result was not intended, "as the language of Article III, Section K, reflects a broad grant of power to the County."

In conclusion, the Respondent again emphasizes that it has no duty to bargain the decision to subcontract the janitorial services. The Respondent reiterates its opinion that there was no "impact" on the workforce as a result of the decision and hence no duty to bargain. The

Respondent concedes that there was an "impact" from the decision to close the Jefferson House but claims it "did bargain over the impact and offered comparable positions in the laid off workers."

Regarding the second issue before the Examiner, the Respondent argues that it has no duty to arbitrate this dispute because the contract is not susceptible to the interpretation offered by the Complainant. In support thereof, the Respondent acknowledges the broad duty to arbitrate disputes arising under the contract but "notes that the arbitration process need not be invoked when it appears 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers this dispute. See JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D 94, 112 (1977). The Respondent adds that all of the rationale supporting the proposition that the Complainant waived its right to bargain the decision to subcontract is equally applicable to the contention that the dispute is not arbitrable. In addition, the Respondent maintains that the grievance is untimely. The Respondent states that while said defense is procedural, "it has been fully litigated and the County (with no apparent protest from the Union) would invite the Examiner to determine that threshold issue, if necessary."

In support of its claim that it has no duty to arbitrate, the Respondent also points out that a grievance is defined in Article VIII, Section 1 as a "controversy" involving the interpretation and application of a specific provision of the agreement but that the grievance in question references a number of sections having nothing to do with the underlying dispute. The Respondent adds that the Complainant waived its rights with limited exception (not applicable herein) to the County's right to subcontract. The Respondent believes that any requirement that it arbitrate the bogus claim herein would frustrate the grievance/arbitration process. The Respondent concludes that based on Ms. Stodola's testimony it is clear that the Complainant has no clue to the meaning and impact of subcontracting language.

Finally, the Respondent argues that Ms. Stodola's testimony, on its face, demonstrates that the Union's grievance is untimely. In this regard, the Respondent points out that she was present at a November 21, 1995 meeting called by Ken Cady, Deputy Director of Human Services, to discuss the impending layoff of five training specialists. The Respondent notes that Corporation Counsel Liebman recalled that she made a "fleeting reference" to the subcontracting of janitorial services and in no sense filed an "oral grievance." The Respondent also points out that on cross-examination, she indicated that at said meeting she stated that <u>if</u> the County subcontracted the work, she <u>would</u> grieve. (Emphasis supplied) According to the Respondent, this statement "is a far cry from actually filing an oral grievance as required by the agreement." The Respondent argues at that point in time Stodola had constructive, if not actual, notice that the County Board had approved the letting of a contract for cleaning services in the new facility. The Respondent opines that Stodola's "subsequent efforts to cure the untimeliness by backdating the written grievance demonstrates the fact that she is fully aware of her problems. (<u>See</u> Complainant Exhibit No. 9)."

Based on all of the above, the Respondent requests that the aforesaid claim be resolved in the County's favor, and that the complaint of prohibited practices be dismissed.

DISCUSSION

By letter dated November 27, 1995, Complainant filed a grievance protesting Respondent's "intention to subcontract cleaning services to Crest International beginning on or about December 15, 1995," and alleging that this action was in violation of certain provisions of the parties' collective bargaining agreement. For relief, Complainant requested in said grievance "that the County cease and desist violation of the Agreement, retain cleaning work within the bargaining unit and withdraw from plans to enter into a contract with Crest International." Complainant argues that said grievance is timely filed, that the dispute is arbitrable and that Respondent has a duty to arbitrate same. Respondent takes the opposite position.

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 . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of the 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.

Respondent freely acknowledges that it has refused to proceed to arbitration on the aforesaid grievance, but claims a variety of defenses. As stated in its brief, Respondent explains its refusal on the following grounds: the contract is not susceptible to the interpretation offered by the Complainant; the arbitration process need not be invoked where it appears 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers this dispute citing JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., SUPRA, AT 112; the Complainant waived its right to arbitrate the dispute by its agreement to the aforesaid Management Rights Clause giving the County "virtually unfettered right to subcontract"; and the grievance was not filed in a timely manner.

The law in Wisconsin with respect to enforcing an agreement to arbitrate is well-settled. In DENHART V. WAUKESHA BREWING COMPANY, INC., 17 WIS.2D 44 (1962), the Wisconsin Supreme Court adopted the U.S. Supreme Court's view of a court's limited function in these cases, as is expressed in its decisions in the STEELWORKER'S TRILOGY. UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 U.S. 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593 (1960). In its decision in JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, SUPRA, which both parties cite in support of their position, the Wisconsin Supreme Court explained a court's function and the test to be applied in determining arbitrability:

> The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. . . . The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it.
>
> 78 Wis.2d at 111.

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

78 Wis.2d at 113.

The first question to be answered is whether or not the parties have agreed to arbitrate the matters raised in the aforesaid grievance, remembering that doubts should be resolved in favor of finding that they have.

The parties' collective bargaining agreement provides, in relevant part, as follows:

ARTICLE VIII - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Grievance - A grievance is defined to be a controversy between the Union and the Employer, or between any employee or employees and the Employer, as to a matter involving the interpretation and application of a specific provision of this Agreement.

Section 2. Procedure - Grievances shall be processed in the following manner (time limits set forth shall be exclusive of Saturdays, Sundays and holidays):

Step 1.

The employee and/or the Committee chairman shall take the grievance up orally with the employee's immediate supervisor within five (5) days of their knowledge of the occurrence of the event causing the grievance, which shall not be more than fourteen (14) days after the event.

Section 3. Arbitration -

The grievance shall be considered settled in Step 3 above, or if an Employer grievance in Step 4 above, unless within ten (10) days after the last response is received, or due, the dissatisfied party (either party) shall request in writing to the other that the dispute be submitted to an arbitrator.

. . .

The impartial arbitrator shall have the authority to determine issues concerning the interpretation and application of all Articles and Sections of this Agreement. He/she shall have no authority to change any part; however, he/she may make recommendations for changes when, in his/her opinion, such changes would add clarity or brevity which might avoid future disagreements.

Thus, to be grievable and subject to arbitration, a matter must involve "a controversy between the Union and the Employer . . ., as to a matter involving the interpretation and application of a specific provision of this Agreement." The grievance in this case alleges, in relevant part:

> Sauk County's intention to subcontract cleaning services to Crest International beginning on or about December 15, 1995 is a violation of Articles II, III, V, VIII, IX and X of the Labor Agreement.

The record is clear that this is a dispute or "controversy" between the Union and the County over the County's subcontract of cleaning services to Crest International. The record is also clear, Respondent's arguments notwithstanding, that this "controversy" involves a number of specific provisions of the parties' collective bargaining agreement as noted above including Article III which specifically addresses the issue of subcontracting – the subject of the parties' dispute or "controversy" and arguments herein. It is clear from the foregoing that, on its face, the grievance arguably raises issues involving the "interpretation and application of specific provisions of the Agreement," and therefore meets the first element of the Court's analysis in JEFFERSON.

The first element of the test in JEFFERSON having been met, it is necessary to apply the second element of that analysis, i.e., to determine whether there is a provision of the parties' Agreement that specifically excludes such matters from arbitration. In this regard, Respondent relies on the language of Article III, Section K in support of its position that Complainant has clearly waived its right to arbitrate the instant dispute. However, as pointed out by Complainant, Respondent concedes in its brief that there are some limits on its right to subcontract. Complainant contends that the "limited exceptions" referred to in Respondent's brief apply to the contested subcontracting, thus the dispute is arbitrable. More particularly, Article III, Section K on its face provides one large restriction on Respondent's right to contract out for services: such contracting out shall not "result in a layoff of bargaining unit employees unless there are sound reasons therefor." It is up to an arbitrator, not the Examiner, to determine whether Respondent's action herein violated said contract provision.

Respondent also argues that the grievance in question references a number of sections having nothing to do with the underlying dispute. That may be. However, again that is a question for the arbitrator, not the Examiner to decide. In addition, as noted above the grievance does specifically reference Article III, the contract provision dealing with contracting out, which is at the heart of this dispute. For these reasons, the Examiner rejects this argument of Respondent.

Finally, Respondent makes a number of other arguments in support of its position that it has no duty to arbitrate this dispute. I don't want to sound repetitious, but again these are arguments best left to the arbitrator to decide.

A question remains as to Respondent's procedural defense; that the grievance was not timely filed and therefore it is not arbitrable. However, a procedural defense "is certainly for the arbitrator to decide." CITY OF MADISON, DEC. NO. 26486-A (ENGMANN, 10/90), AFF'D BY OPERATION OF LAW, DEC. NO. 26485-B (WERC, 11/90). As pointed out by the Commission recently:

> We note that the County has raised a number of procedural defenses. We are not the forum in which these defenses should be raised. Nor is this the appropriate forum for us to express *any* view as to the merits of those defenses. That is a matter solely for the arbitrator to determine. Thus, the Examiner's conclusions as to those defenses are not only *dicta*, but constitute an invasion of the arbitrator's province and are set aside for that reason.

MILWAUKEE COUNTY, DEC. NO. 28944-B (WERC, 10/97).

Therefore, I leave the determination on the issue of procedural arbitrability where it belongs, with the arbitrator.

For the foregoing reasons, the Examiner has concluded that by refusing to proceed to arbitration on the aforesaid grievance, Respondent has violated Sec. 111.70(3)(a)5, and derivatively, Sec. 111.70(3)(a)1, Stats.

Complainant initially filed a grievance over Respondent's intent to subcontract cleaning services with Crest International. It was only after Respondent refused to process this grievance through the grievance procedure or submit it to arbitration that Complainant made a request to bargain over same. Based on same, and the entire record, the Examiner is of the opinion that issues concerning interpretation of the contract which can be resolved through the grievance arbitration process predominate over statutory issues herein. In addition, there do not appear to be significant legal issues or policy considerations present at this point for the Examiner to exercise the Commission's jurisdiction to adjudicate the alleged prohibited practices related to Respondent's refusal to bargain. For all of the foregoing reasons, the Examiner defers the complaint to grievance arbitration. However, the Examiner retains jurisdiction over the matter to ensure that the issues raised by the complaint are resolved, and, if appropriate, adequately remedied by arbitration.

Dated at Madison, Wisconsin this 27th day of February, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

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