

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**KEWAUNEE COUNTY PROFESSIONAL EMPLOYEES' UNION,  
LOCAL 2959, AFSCME, AFL-CIO**

and

**KEWAUNEE COUNTY**

Case 70  
No. 66366  
MA-13505

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**Appearances:**

**Mr. Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1311 Michigan Avenue, Manitowoc, Wisconsin 54220, on behalf of the Union.

**Ms. Elma Anderson**, Columbia County Corporation Counsel, 613 Dodge Street, Kewaunee, Wisconsin 54216, on behalf of the County.

**ARBITRATION AWARD**

Kewaunee County Professional Employees Union, Local 2959, AFSCME, AFL-CIO (herein the Union) and Kewaunee County (herein the County) have been parties to a collective bargaining relationship for many years. At all times pertinent hereto, the Union and the County were parties to a collective bargaining agreement covering the period January 1, 2005 to December 31, 2007, and providing for binding arbitration of certain disputes between the parties. On October 11, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the subcontracting of building cleaning services by the County. The undersigned was appointed to hear the dispute and a hearing was conducted on February 13, 2006. The proceedings were not transcribed. The parties filed initial briefs by March 26, 2007. On May 31, 2007 the parties notified the arbitrator they would not be filing reply briefs, whereupon the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issues. The Union would frame the issues, as follows:

Did the Employer violate the collective bargaining agreement when it subcontracted custodial work in the spring of 2006?

If so, what is the appropriate remedy?

The County would frame the issues, as follows:

Does any provision of the Collective Bargaining Agreement prohibit the County from hiring out side contractors to perform cleaning services in County owned buildings?

The Arbitrator adopts the issues as framed by the Union.

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE 1: RECOGNITION**

The County Board recognizes the Union as the exclusive bargaining agent of all employees of Kewaunee County employed in the Courthouse and associated departments, including secretarial-clerical employees in the Highway Department and professional employees in the Department of Social Services, excluding elected officials, supervisory, managerial, confidential and deputized law enforcement employees pursuant to the elections conducted by the Wisconsin Employment Relations Commission on January 10, 1975, and as amended on October 2, 1979, in regard to any and all issues involving wages, hours, or conditions of employment.

#### **ARTICLE 18: VESTED RIGHT OF MANAGEMENT**

##### **A. GENERALLY**

Except as otherwise provided in this agreement, the right to employ, to promote, to transfer, to discipline and discharge employees, for good and sufficient causes, and the management of the property and equipment of Kewaunee County is reserved by and shall be vested exclusively in the Kewaunee County Board of Supervisors through its duly elected Personnel Committee and through the duly appointed or elected department head. The Personnel Committee of the County Board shall have the right to determine how many employees there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the county operations. The Personnel Committee shall have the exclusive right to determine the hours of employment and the length of the work week and to make changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the county, and the

union and the members agree to cooperate with the board and/or its representatives in all respects to promote the efficient operation of the county departments.

### **BACKGROUND**

Local 2959, AFSCME, AFL-CIO (herein the Union), has been in existence since 1979 and represents a number of different groups of employees within Kewaunee County, as set forth in the recognition clause referenced above. Prior to 2005, one of the positions in the bargaining unit, located within Grade 6, was that of Assistant Janitor I and, historically, employees in that classification have been responsible for the cleaning and maintenance of County buildings, including the Courthouse, Annex, Jail and Ski Chalet, under the supervision of the Maintenance Manager. The job description of the Assistant Janitor I provided, in pertinent part:

#### **ASSISTANT JANITOR I**

##### **Characteristic Work of the Position**

Nature: Under the direction of the Maintenance Manager to provide general building and facility maintenance to include groundskeeping, general electrical and mechanical maintenance, general carpentry, as well as housekeeping duties at the various County facilities located throughout Kewaunee County.

##### **Example of Duties:**

1. Sweeping, snow removal, sanding ice conditions of all walks and yard areas at the Safety Building, Courthouse and Courthouse Annex.
2. Sweep, vacuum and wax floors at the aforementioned facilities.
3. Maintain and clean doors and windows to include repairing springs and sashes.
4. Cleaning and dusting of furniture, desks, and equipment.
5. Collecting trash and recyclables from offices and disposing of properly.
6. Clean restrooms to include toilets, urinals, sinks, water fountains and drains. Make minor repairs, as needed.

7. Clean boilers yearly. Daily maintenance of boiler such as adding treatment; setting steam pressure when needed and changing combustion timers.
8. Test fire alarm systems and emergency generator on a monthly basis.
9. Groundskeeping such as grass cutting, raking, edging, seeding, weed control, care of trees and bushes.
10. Refuel car pool vehicles and do routine maintenance.
11. Refill the salt tank on water softener.
12. Re-light water heater pilot when needed.
13. Perform general carpentry work and painting.
14. Move office equipment and furniture.
15. Check furnace and buildings every other weekend; Saturday 3/4 hour, Sunday 3/4 hour; holidays only where assigned. The work schedule on the previous Friday shall be reduced by the hours worked on the weekend/holiday.

The above duties are normal for the position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

In 2000, Greg Gabriel was promoted from Assistant Janitor I into the Maintenance Manager position. At that time, the County hired Noel Baudhuin as a full-time Assistant Janitor I to replace Gabriel. At that time there was also another part-time Assistant Janitor I, Dale Wavrunek. Wavrunek was laid off in 2003.

In 2005, the County commissioned a study of its job classifications by Carlson Dettman Associates LLC, which resulted in a number of changes to the classifications in the bargaining unit. One such change was the change of the title of the Assistant Janitor I position to that of Custodian/Maintenance Technician and its upgrade From Grade 6 to Grade 7 within the County's pay structure. Other than the title of the position, the written job description of the Custodian/Maintenance Technician is identical to that of the former Assistant Janitor I position. At the time Baudhuin was hired, however, Gabriel and County Administrator Ed Dorner restructured the position to emphasize mechanical/maintenance duties to a greater degree, with a corresponding reduction in emphasis on cleaning and upkeep.

Also in 2005, Gabriel did an assessment of the Department's staffing needs in order to adequately maintain the County's buildings, inasmuch as the County was contemplating the impending addition of a new administration building in addition to its existing facilities. Gabriel concluded that, with the addition of the new administration building to the existing County facilities, an additional 2-3 FTEs were required to handle the cleaning of the County buildings, apart from the Department staff's other maintenance and repair duties, which he reported to County Administrator Ed Dorner. Dorner reviewed the County's options and concluded that subcontracting the cleaning of the buildings, rather than hiring three additional Custodial/Maintenance Technicians, would generate \$11,000.00 of savings for the County, which was having budget difficulties. Dorner let out bids for the cleaning work and ultimately awarded the contract to Servicemaster, Inc. on April 1, 2006.

While Dorner and Gabriel met with Baudhuin, who was also Union President, in January to discuss staffing needs, there is no evidence that the County discussed with him its intention to subcontract the work. There is also no history in the bargaining unit of cleaning work having been contracted out in the past, although the County has occasionally subcontracted some painting work and the plowing of the County parking lots, which arguably are covered in the Custodial/Maintenance Technician's job description. Another notable fact is that the Highway Department bargaining unit, which, although separate from the Courthouse unit is also represented by AFSCME, at one had a Janitor position within it which was responsible for cleaning the Highway Department facilities. When the Janitor retired, however, the Department eliminated the position and subcontracted the cleaning work to Servicemaster, which continues to do the work to the present day. It should also be noted, however, that the Highway Department contract contains different language than that in effect here on the subject of the County's ability to subcontract.

On April 11, the Union filed a grievance, alleging that the subcontracting of the cleaning work was a violation of the Collective Bargaining Agreement. The County denied the grievance and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

### POSITIONS OF THE PARTIES

#### The Union

The Union asserts that the contract does not give management the right to subcontract and that subcontracting violates the management rights clause. The Union's position on this point has previously been upheld by the WERC. In KEWAUNEE COUNTY, DEC. NO. 21624-A (McLaughlin, 11/5/84), Examiner McLaughlin held that nearly the identical language did not give the County the right to subcontract. Subcontracting also violates other core provisions of the contract, such as the recognition clause and wage, seniority and benefit provisions.

In this case, subcontracting is also a breach of the employer's duty to act in good faith when determining to contract out work. Management decisions to subcontract work must be

made in good faith, rather than out of anti-union bias. In examining management's motives, arbitrators look at a number of factors, many of which come into play here. First, many of the subcontracted cleaning duties are core functions of the Assistant Janitor and Custodian/Maintenance positions. Furthermore, the WERC, in a decision clarifying this bargaining unit, determined that the subcontracted work is bargaining unit work. KEWAUNEE COUNTY, DEC. NO. 13185-E (WERC, 3/31/88). Also, the subcontracting in this case resulted in the layoff of a bargaining unit employee, the elimination of the classification of Assistant Janitor and the impairment of bargaining unit members' seniority rights. In this case, the subcontracted work was not emergent, temporary, experimental, or requiring special skills or equipment and there is no history in this unit of this work in the past. There are no compelling advantages or efficiencies inherent in the subcontracting here and the employer cannot be permitted to undercut the Union by subcontracting merely because it wants to save money. The grievance should be sustained.

### **The County**

The County points out that there is no language in the contract prohibiting the County from subcontracting for services from outside vendors. Where that is the case, arbitrators have held that management has the right to subcontract for services so long as the right is exercised in good faith, is a reasonable business decision and does not subvert the collective bargaining agreement or weaken the bargaining unit. Here, there is no negative impact on any employee. No employee who would have performed cleaning duties was on layoff at the time of the contracting. The employee who had previously done the work was laid off for over two years and had no recall rights. There was no reduction of staff, nor did any Union member lose work. The current Custodial/Maintenance employee is fully employed in his assigned duties.

A review of the criteria typically considered by arbitrators in evaluating subcontracting includes past practice, justification, effect on the bargaining unit, effect on employees, type of work involved, availability of qualified employees, availability of equipment and facilities, regularity of subcontracting, duration of subcontract, unusual circumstances and bargaining history. On balance, most of these criteria support the County's position. There is a practice of hiring outside contractors, the decision was justified by cost considerations and there was no effect on the Union or its members. The current might Custodian might have obtained more overtime, but overtime is not guaranteed and the County might have elected to either cut back his other duties or to reduce the amount of required cleaning. Availability of employees or facilities is not a consideration because this is unskilled work requiring little training and no special technology. It would be unreasonable to expect the County to hire another Custodial/Maintenance employee, at a relatively high wage, to do this work. The duration of the contract is unknown. The unusual circumstance is the addition of an additional County facility to be cleaned. Finally, there is no bargaining history on this point, so one cannot argue that the County ever gave up the inherent management right to contract out work.

## DISCUSSION

The essence of the Union's grievance is that the County subcontracted cleaning work that heretofore had been done by bargaining unit employees. It contends that this action, while not expressly restricted by the contract, violates a variety of provisions, was not undertaken in good faith and has the effect of undermining the bargaining unit. As a result, the Union submits that the subcontracting should be discontinued and that the County should, instead, post and fill openings for bargaining unit positions to perform the cleaning services currently being done by the subcontractor.

The record reveals that when the position of Assistant Janitor I was reclassified to Custodial/Maintenance Technician in 2005, the top pay rate for the employee occupying the position increased from \$15.92 per hour to \$17.08 per hour. The only employee in that position at the time was Noel Baudhuin and no additional employees were hired as Custodial/Maintenance Technicians prior to the County's decision to subcontract the building cleaning work in 2006. Baudhuin continues to work full-time in that capacity and has experienced no reduction of hours or loss of overtime as a result of the subcontracting. The Union notes that other employees in the bargaining unit have been laid off or had their hours reduced since 2006, but it is conceded that none of them are qualified to perform all the duties of the Custodial/Maintenance Technician. Further, at the time the subcontracting decision was made the Assistant Janitor I who had been laid off in 2003 no longer had recall rights.

It is true, as the Union contends, that once the need for additional cleaning services was established the County could have posted additional Custodial/Maintenance Technician positions to address it. Certainly, the cleaning functions now being performed by the subcontractor are encompassed within the job description of the Custodial/Maintenance Technician. The County points out with equal force, however, that Article 18 states that management retains the right "...to determine how many employees there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of county operations." Further, it is noted that to some degree the upgrade of the Custodial/Maintenance Technician position as a result of the Carlson Dettman study was likely due to the fact that it had become a skilled position to a greater extent as more emphasis was placed on the mechanical functions of the job and less on the cleaning and upkeep functions. The County was reluctant, therefore, to hire employees to do the relatively unskilled work of cleaning buildings, but pay them the higher wage rate of a skilled Custodial/Maintenance Technician.

The Union asserts that the County was held to not have the power to subcontract in KEWAUNEE COUNTY, WERC DEC. NO. 21624-A (McLaughlin, 11/5/84). In that case, Hearing Examiner McLaughlin was required to construe the collective bargaining agreement between Kewaunee County and its Highway Department employees. Factually, the County had decided to open a landfill and hired two non-represented employees to operate it. Subsequently, Kewaunee County Highway Employees Local #1470 petitioned the WERC to clarify the bargaining unit by adding the landfill operators. A hearing was held and the Commission

subsequently issued an order adding the positions of Solid Waste Manager and Solid Waste Manager Assistant to the bargaining unit. Thereafter, in order to circumvent the Commission's decision, the County entered into a private agreement with the landfill operators and asserted that they were subcontractors. The Union filed a prohibited practice complaint over the County's act of privately contracting out the landfill work to the employees performing those duties after the WERC had ruled that they were properly members of the bargaining unit. Examiner McLaughlin sustained the complaint, finding that the County's decision to privately contract with municipal employees to operate the landfill was a mandatory subject of bargaining and its action of going forward without bargaining the impact with the Union was a violation of Sec. 111.70(3)(a)1 and 4, Wis. Stats.

This case, however, is not a prohibited practice complaint where the County is alleged to have violated a statutory duty to bargain over a decision to subcontract bargaining unit work. This is a grievance arbitration concerning the County's asserted contractual right to subcontract the work, irrespective of any statutory obligation to bargain the impact of that decision. As an arbitrator, my authority does not extend to enforcement of the provisions of the Municipal Employment Relations Act, but is only to interpret and apply the provisions of the contract to the facts before me. Thus, the question before me is only whether the County has the contractual right to subcontract cleaning work, not whether it is legally bound to bargain the impact of that decision. If the Union wishes to pursue a statutory claim it must do so in another forum. I would also note in passing that there were some key factual distinctions between KEWAUNEE COUNTY and this case in addition to the legal ones. First, the case dealt with a different bargaining unit and different contractual language. Second, in that case the County, in effect, engaged in a "shell game" where it took employees who had been determined by the Commission to be in the bargaining unit and attempted to turn them into private contractors in order to avoid the contractual wage and benefit provisions. Here, the County entered into an "arms length" agreement with a private contractor to clean its buildings and the only question before me is whether it was contractually barred from doing so.

The contract is silent on the subject of subcontracting. In such cases, arbitrators generally hold that management has the reserved right to contract out work, but that the right is limited in that it must be exercised in good faith. Many factors go into the determination of whether the decision to subcontract was made in good faith. Among them are whether the stated rationale for the decision is reasonable, whether there is an existing practice of subcontracting, whether there is relevant bargaining history on the issue and the effect on the bargaining unit and employees. Here, the record reveals that the County subcontracted the cleaning work primarily because 1) it would realize annual savings of approximately \$11,000 and 2) it did not want to assign essentially unskilled cleaning work to skilled employees who were at the top end of the wage scale. In addition, there is evidence that the County has subcontracted some custodial work in the past, including snow removal and painting. There is no bargaining history as to subcontracting. Also, there has been no direct negative impact to the bargaining unit shown by the contracting - no employees have been laid off, had their hours reduced, or have lost overtime as a result of the subcontract. Further, while the decision to subcontract the work has deprived other bargaining unit members, some on layoff, from



posting into or being recalled to, Custodial/Maintenance Technician positions, the record reveals that none were qualified to perform the duties of the position.

In HAYWARD COMMUNITY SCHOOL DISTRICT, Case 68, No. 59974, MA-11478 (Emery, 12/20/01), the District contracted out night cleaning work in its primary school, which had previously been done by bargaining unit employees, in a situation where there was contract language restricting management's power to subcontract. In that case, also, there was no corresponding layoff, reduction in hours or loss of overtime to bargaining unit members. However, the applicable contract language made the District's ability to subcontract contingent upon there being no corresponding layoffs or reduction in hours among bargaining unit members. In effect, the language created the standard whereby the reasonableness of the subcontracting decision was to be determined. There, this arbitrator held that without a clear showing of bad faith or direct negative impact on bargaining unit employees, as defined by contract, the subcontracting was permissible. Here, however similar the facts, there is no corresponding definitive language and so the County's act must be evaluated in light of the existing practice and surrounding circumstances. Troubling to me is the fact that the County makes no bones about the fact that its decision was purely based on economics – the subcontractor was able to supply the services cheaper. There is no contention that the subcontractor has access to facilities or technology that the County cannot provide for itself, nor are there applicable economies of scale. Generally, this is a poor rationale for contracting out bargaining unit work. Further, this work had been done by bargaining unit employees up to the point it was contracted out and the decision to contract the work was clearly in opposition to the alternative of posting more bargaining unit positions. As recently as the end of 2003, the County had laid off a part-time Assistant Janitor I, ostensibly for lack of work, and while he no longer had recall rights at the time the subcontracting decision was made, the fact that the County's reaction to a subsequent increase in custodial work was to contract it out does not bespeak good faith.

The County asserts that its decision was necessitated by budget problems. Whether or not that was the case, it was not restricted in its alternatives to contracting the work out to a cheaper supplier. It could have continued to have the work done by the existing custodial staff. It could have sought economies elsewhere that would have permitted hiring more Custodial/Maintenance Technicians. It could have discussed with the Union the possibility of creating a new less-skilled classification of custodial employee at a lower rate of pay. The record reflects no consideration of these alternatives. It is not the arbitrator's mandate in this matter to tell the County which if any, of the foregoing options it must exercise. Notwithstanding, whatever it may do to solve the problem, it may not solve it by subcontracting bargaining unit work unless it is unable through posting bargaining unit positions to fill its custodial requirements.

For the reasons forth above, and based upon the record as a whole, I hereby enter the following

**AWARD**

The County violated the collective bargaining agreement when it subcontracted custodial work in the spring of 2006. The County shall, therefore, cease and desist from subcontracting bargaining unit cleaning work unless and until it can establish that it is unable to fill the necessary bargaining unit positions with employees qualified to do the work.

Dated at Fond du Lac, Wisconsin, this 12th day of December, 2007.

John R. Emery /s/

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John R. Emery, Arbitrator

