

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF TOMAH

and

TOMAH CITY EMPLOYEES LOCAL 180, AFSCME, AFL-CIO

Case 52

No. 68638

MA-14292

(Subcontracting Grievance)

Appearances:

Penny J. Precour-Berry, Assistant City Attorney, 917 Superior Avenue, P.O. Box 110, Tomah, Wisconsin, 54660, appeared on behalf of the City of Tomah.

Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-2900, appeared on behalf of Tomah City Employees Local 180 AFSCME, AFL-CIO.

ARBITRATION AWARD

The City of Tomah, herein the City, and Tomah City Employees Local 180, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the City agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of the Union concerning the subcontracting of cleaning services. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on June 12, 2008 in Tomah, Wisconsin. No transcript was prepared. The parties filed briefs and reply briefs and the record was closed on August 4, 2009.

ISSUES

The parties stipulated to the following issues:

Did the City violate the Labor Agreement when it contracted with ServiceMaster Commercial Cleaning Services to provide cleaning services for the newly constructed Tomah Police Building?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I – UNION REPRESENTATION

1.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of establishing salaries, wages, hours and other conditions of employment for all regular full-time and regular part-time employees of the City of Tomah Water and Sewer Department, Public Works Department, Parks and Recreation Department, the Library Department and the custodial, maintenance and clerical employees at the Tomah City Hall; excluding supervisory, confidential, managerial, executive or seasonal employees. Seasonal employees shall be defined as those employees hired for a specific season only (as in the case of those hired in connection with the operation of the City's recreational programs).

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ARTICLE XIV – HOURS OF WORK

14.01 The regular hours of service each day shall be consecutive except for interruptions for lunch.

A. Department of Public Works and Sanitation Department

The work week shall consist of five (5) consecutive eight (8) hour days, Monday through Friday. The work day shall consist of eight (8) consecutive hours: 7:00 a.m. -12:00 noon and 12:30 p.m. – 3:30 p.m.

B. Sewer and Water Departments

The daily, hourly and weekly schedules shall be worked out between the employees and their supervisor. The normal work period shall consist of not more than forty (40) hours per week. The work day shall consist of eight (8) consecutive hours: 7:00 a.m. – 12:00 noon and 12:30 p.m. – 3:30 p.m. Second Shift: 3:00 p.m. – 11:30 p.m. Monday through Friday in the Sewer Department and alternating weekends at regular shift time, the number of alternating weekends being dependent upon the number of active employees available.

C. Park and Recreation Department

The work week shall consist of five (5) consecutive eight (8) hour days, Monday through Friday. The work day shall consist of eight (8) consecutive hours: 7:00 a.m. – 12:00 noon and 12:30 p.m. – 3:30 p.m.

D. City Hall

The present practices of scheduling work hours shall be maintained. The work week for the Custodial/Maintenance Worker shall consist of five (5) consecutive eight (8) hour days, Monday through Friday. The work day for the Custodian/Maintenance Worker shall consist of eight (8) consecutive hours: 6:30 a.m. – 12:00 noon and 12:30 p.m. – 3:00 p.m.

E. Library Department

The City of Tomah shall provide the Library employees with the following functioning hours, which are subject to reasonable modifications made from time to time in the future by the Tomah Library Board:

Monday-Wednesday – 9:00 A.M. to 8:00 P.M.

Thursday-Saturday – 9:00 A.M. to 5:00 P.M.

Sunday-1:00 P.M. to 5:P.M.

The City of Tomah shall provide all regular full time employees of the City of Tomah Library with forty (40) hours per week of employment, and all regular part time employees with a minimum of twenty (20) hours per week of employment.

The City of Tomah Library employees who held full-time positions as of March 6, 2001, will be covered by a grandfather clause and will not be required to work evenings and weekends on a regular basis.

F. Police Department Clericals

The work week shall consist of five (5) consecutive eight (8) hour days, Monday through Friday. The work day shall be from 8:00 a.m. to 4:30 p.m. with a one-half (1/2) hour unpaid lunch and two (2) fifteen (15) minute paid breaks per day.

* * *

ARTICLE XXIII – RESERVATION OF RIGHTS

23.01 The City retains all of the rights, powers and authority exercised or had by it prior to the time that the local became the collective bargaining representative of the employees here represented except as specifically limited by express provisions of this Agreement. The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Local or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent, or purposes of this Agreement. In keeping with the intent of this Article, the City agrees it will not sub-contract or farm out work which is normally done by the employees in the bargaining unit or if it will result in layoff or loss of time worked by the employees.

BACKGROUND AND FACTS

Since the 1974 bargain, Section 23.01 of the collective bargaining agreement has contained the language prohibiting the subcontracting or farming out of work which is normally done by the employees in the bargaining unit or if it will result in layoff or loss of time worked by the employees. Custodial, janitorial and maintenance work at the Tomah City hall has been done by an employee in one position at all material times herein. The custodian's immediate supervisor for all of his duties is the Director of Public Works Department. The position is titled "custodian" in the City of Tomah job description. That job description is an accurate description of the duties of the position and contains duties and requirements that are custodial, janitorial and maintenance in nature and includes cleaning duties. The recognition clause in the parties' collective bargaining agreement identifies custodial, maintenance and clerical employees at City Hall, among other, including employees of the Public Works Department. The custodian position was added to the bargaining unit in the 1977-1978 collective bargaining agreement. The collective bargaining agreement has, in its salary and wage schedule in Article XXII, a position at City Hall identified as "CUST/MAINT WKR". The current custodian has been so employed approximately 12 years and considers his custodial work to include janitorial and maintenance duties.

In the past City Hall has housed the ambulance service and Senior Center in addition to other City Offices and the Police Department. The custodian provided custodial and maintenance services there. Around 1995 the ambulance services moved to a different building. When that happened the custodial and maintenance duties at the new building were subcontracted out. The Senior Center also left City Hall in about 2002, and similar duties were subcontracted for at the new Senior Citizen Center location. Additionally, the Library, which is not at City Hall, subcontracts out those services, as does the City Public Housing Authority which is not located at City Hall. No grievances have ever been filed by the Union concerning the subcontracting of these custodial, maintenance or cleaning duties at locations outside of City Hall.

In 2008 the City built a new 15,000 plus square foot building adjacent to City Hall for the Police Department. The Police Department space in City Hall had been approximately 3,500 square feet. The City Hall custodian, a member of the bargaining unit, has performed some maintenance and other duties in the new building, mostly during its construction, but continues to work primarily at the City Hall where he has full time work. The City has also subcontracted with ServiceMaster to provide janitorial/cleaning services in the new Police Department Building pursuant to a task schedule. The work is estimated to take approximately 20 hours per week, and the 2009 cost is approximately \$1,395.00 per month, or \$16,740.00 per year. The estimated cost of a half time bargaining unit custodial position doing this work at starting pay in the 2009 contract for salary and benefits is approximately \$25,700.00. These subcontracted services in the new building are essentially the same as the custodial and janitorial services provided by the custodian at City Hall. To accommodate Police Department and customer work and traffic patterns in the new building, these subcontracted custodial/janitorial duties will be done during times of the day different than the hours worked by the City Hall custodian. The City Hall custodian has continued to perform some

maintenance work at the new building as it is being finished as part of his regular work assignment and as directed by his immediate supervisor, the Director of the Public Works Department. He continues to take care of some custodial matters on the outside of the building, such as cleaning the windows.

Before entering into the ServiceMaster subcontract, the Chief of Police for the Police Department did a type of needs and cost analysis in determining whether to have the new building's janitorial/custodian/maintenance needs met by using either the City's Union personnel or by subcontracting. The Chief and City Administrator considered and investigated several different ways to obtain those services. The Chief and City Administrator did not discuss this with Union personnel, and no one from the City attempted to negotiate the matter with the Union. In October of 2008 the Chief and City Administrator compared several alternatives of subcontracting with the alternative of using Union personnel for the Police Department custodial work. That report estimated a lower hourly rate for the union option of \$13.41 plus benefits compared to the 2009 collective bargaining agreement starting rate of \$16.01 plus benefits (as used in the preceding paragraph). They prepared a report and cost analysis for the responsible committee and City to consider. They then made a recommendation to the City to use ServiceMaster as a subcontractor, and the City followed that recommendation. That recommendation was later summarized by the Chief and City Attorney, for hearing purposes herein, in seven points as follows:

BUSINESS BENEFITS TO SERVICEMASTER

1. Cost to taxpayers
2. Level/availability/efficiency of service to meet needs
3. Own liability insurance
4. Instant availability of OSHA trained individuals
5. Minimal administrative time required by City
6. At-will arrangement with both ServiceMaster and individuals assigned by ServiceMaster
7. Immediate flexibility with changes to level and type of service

No custodial or like position was posted by the City to the Union for the custodial or janitorial services in the new building. The City did not create any new positions to use to meet those custodial needs. No one, including the City Hall custodian, was laid off or lost any work time or overtime due to the subcontracting with ServiceMaster.

The Union filed a grievance stating that the City contracted out a custodial position at the Police Department that was normally done by a Union employee. The Union contended that this violated Articles I, III, XXIII and any other applicable Article. The City denied the grievance, stating that it did not violate the collective bargaining agreement, the subcontracting was reasonable, based upon the circumstances, done in good faith, that it has the power to take such action under Article XXIII, this work has never been done by a Union employee, no work was taken from a Union employee, and referencing the prior circumstances where such work was subcontracted. This arbitration followed.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that Section 23.01 of the collective bargaining agreement provides the City will not undermine the Union and will not subcontract work or farm out “work which is normally done by employees in the bargaining unit. . . .” Under Section 23.01, “the powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Local or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purposes of this Agreement. In keeping with the intent of this Article, the City agrees it will not sub-contract or farm out work which is normally done by the employees in the bargaining unit or if it will result in layoff or loss of time worked by the employees.” The subcontracting clause is clear, unambiguous and not subject to two or more interpretations. The arbitrator must interpret the language as written. Past practice is not germane. The answer to the question of which work is normally done by employees in the bargaining unit can be discerned from the City job description. The contract does not distinguish between custodial and maintenance duties.

The Union argues that the City’s theory of the case is that a window cleaned on the outside is maintenance, and the same window cleaned on the inside is custodial so it is free to subcontract. Prior to ServiceMaster the custodian cleaned both sides in the Police Department. The City divided normal work by building or location so that, according to the City, this is not normal work because the building did not previously exist. Work was subcontracted out in the past when departments changed location. The City proved lax enforcement by the local Union, which does not equate to loss of future contract benefits and rights. The Union is not asking that the number of positions provided for in the City table of organization should be changed. There are to the means to cope with this, such as overtime.

The Union argues, citing arbitral authority, that a bigger project is not an exception to the broad subcontracting protections, and that the City action would undermine the Union. The testimony of the Chief made it clear the City preferred to abandon the Union. The City made no proposals to modify the Union contract and unilaterally disposed of any need to have to deal with the Union. Regular work, customary work and normal work are synonymous terms in this case in keeping with the intent of the contract. The City interpretation translates into an extreme measure such that each time a new subdivision is opened, the street maintenance could be subcontracted as could additional sewer, water maintenance and so forth.

In reply to the City’s arguments, the Union contends the City’s argument perverts the clear meaning and intent of Section 23.01, which is a negotiated subcontracting provision which provides employees and the bargaining unit with job security protection from subcontracting. The contract is not silent or ambiguous. The City’s arguments deviate from the language of Section 23.01, and digress into irrelevant tests of good faith, past practice, reasonableness, efficiency, and misplaced precedent. The Police Chief’s intent was to

undermine the Union. The Chief never presented his concerns to the Union but instead

unilaterally by-passed the bargaining agent. The City did not violate that portion of the subcontracting clause if subcontracting must result in either layoff or lost time. But the instant contract has much more protection. The City argument fails when it contends work normally done by employees in the bargaining unit is limited to work that existed when the language was bargained into the agreement. The language is dynamic with no date certain to stifle the future extension of the meaning of “work normally done by employees in the bargaining unit.” The language is all encompassing and it is the customary work done, not the facilities that define the subcontracting restriction. The use of the word “or” instead of “and” means the City agreed not to subcontract bargaining unit work even when employees do not lose hours or were laid off. Meaning must be given to all terms and interpretations that result in a nullity must be avoided. The work is custodial in nature and there is no delineation between custodial and maintenance duties, the work is paid the same and there was only one position assigned to both custodial and maintenance work. The City’s parceling of custodial work from maintenance work is akin to severing the head from the body. The subcontracting provision has two parts that have meaning and co-exist.

The Union contends that the City’s cited precedent cases are not applicable and are distinguishable. The language is not ambiguous, so past practice cases are misplaced. This case is not without any subcontracting language in the agreement. This case is not about bargaining unit work being assigned to non-bargaining unit employees (as opposed to subcontracting). And, the reasonableness factor is not applicable here because the agreement is not silent on subcontracting.

City

In summary, the City argues that the work subcontracted by the Police Department does not fall under the bargaining agreement either in word or in practice. The language in the agreement is clear. The bargaining unit is limited to specific locations and job titles. Article 1.01 defines Union representation to include certain custodial, maintenance and clerical employees at City Hall, and covers only one custodial position for the City which is limited to City Hall. Section 14.01(D) refers to the City Hall custodian and sets the hours for the worker. The wage and salary schedule limits the location of the custodian position to City Hall. The agreement only covers custodial work for City Hall, so the janitorial work inside the new building is not covered by the agreement.

The City argues that past practice has shown that janitorial/cleaning services are not interpreted to be the “work normally done by the employees in the bargaining unit” so that the City cannot contract out the services. Both before and after the addition of the anti-subcontracting language in 1974 janitorial work has been done by non-union employees in the Library, Ambulance Service, Senior Center and apartments owned by the Public Housing Authority. Ambulance and Senior Center services had been in the City Hall and upon relocation those Departments contracted out janitorial duties. No grievances were filed and no negotiations challenged this. Where past practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement the language will be presumed to have the meaning given it by that practice, citing arbitral authorities. The

language of the agreement and the manner in which it has been interpreted in the past by the parties provides clear direction on this issue. This kind of past practice cannot be repudiated by one party. It would require termination by written agreement, which has not occurred. The City did not violate the labor agreement.

The City argues that the subcontracting of janitorial work by the City was reasonable and in good faith. Subcontracting grievances are often decided by a test of reasonableness that balances the interests of the employer with that of the Union, citing arbitral authorities. The scales weigh on the side of the City because its interests are served by subcontracting without any damage to the interests of the Union. Past practice weighs heavily in the City's favor. There are numerous business justifications as explained by the Chief. Lowered costs favor the City starting at comparing \$25,720.12 and up for Union with \$16,740.00 for ServiceMaster. Other costs are removed by subcontracting. Time of cleaning can be done when activity is lowest or special attention is needed. Security and confidentiality concerns are handled by ServiceMaster. Replacements can be made immediately. Vacations do not disrupt service. Nothing in the agreement requires the City to hire or create more Union positions. The City can get the best bang for the buck if it is in good faith and acts reasonably, which it is. ServiceMaster is more flexible than the Union position. Because of past practice and the growth of the building size, the City was reasonable and acted in good faith. And, there is no negative effect on the bargaining unit. The current custodian has not lost any work, including the rare overtime. The custodian is not available to meet the needs in the new building and he has enough work at City Hall. He is perfectly happy with that. No other bargaining unit employees are otherwise being deprived of any hours, overtime, or layoff. This subcontracting does not represent a removal of work from the bargaining unit. This is a new building and not within the agreement and per past practice it would not automatically be included for janitorial service. Even if this were work normally done by the Union, other factors still weigh in favor of the City: whether the work was covered by the contract, the effect on the quantity of work, effect on the bargaining unit is minor, and past practice indicates the work has not been done exclusively by bargaining unit employees, citing arbitral authorities. The Union erroneously sees the decision to subcontract as one encroaching on their security, leading to future layoffs or subcontracting of Union work. This is not the truth. The City is committed to a continuing good faith relationship with the Union. City decisions are made on the merits of that decision and on a case by case basis. Future grievances can be dealt with at that time. These "open the door" arguments are denied by arbitrators, citing arbitral authority. Subcontracting here does not injure anybody or frustrate the goals of the Union. Management had a legitimate interest in the efficient operation of its work force and the decision was the honest exercise of business judgment rooted in years of past practice. The balance weighs heavily in favor of the City.

In reply to the Union's arguments, the City contends that the City did not violate the plain language of the contract because it does not include custodial, maintenance, or janitorial worker at the Police Department. The Union fails to address the fact that Article 1.01 clearly delineates the members of the bargaining unit. Janitorial or custodial work at the new building is not included. Therefore, it follows that the work at issue is not Union work and the City has a management right to determine how it will be completed. The City did not violate the

The City argues that it did not violate the spirit of the agreement or undermine the Union because they followed past practice in making a reasonable, good faith business decision. In order for the arbitrator to determine whether the type of work at issue is “work which is normally done by the employees in the bargaining unit”, then past practice must be reviewed. It would be the only way to define what work is “normally done.” Past practice evidences how the language has been determined in the past by the parties. This is how the parties handled the same contracting out of janitorial services over several years and contracts. In the context of past practice, the Union “undermining” argument falls flat on its face. This not a matter of lax Union enforcement. The contract has never been acted on through grievance or negotiations by either side as if janitorial positions outside the City Hall were within the scope of the contract. There has never been anything to enforce in the first place. The Union wants the standards of arbitration to be ignored. Subcontracting grievances are rooted in a question of balance between the integrity of the Union and the business justifications of the City. Numerous cases have established the contracting out standards which are normally used by arbitrators in evaluation this balance in such cases, those are the *Elkouri* Standards. The Union is understandably silent on their application because they all favor the City. The Union admits no current employees have been negatively affected by this subcontract. No one has been laid off and not one has lost work or overtime. The Union “floodgate” argument is sensationalist, not founded in reason, and fails to recognize the facts of this case. In this case plain language and past practice define a job for custodial work at City Hall. When departments leave they are “on their own”. The balancing test of reasonableness favors the City and its actions did not violate the agreement.

The City also argues that the Union’s arguments are not supported by arbitration case law and should be disregarded accordingly. None of the cases cited by the Union support a finding that he City violated the agreement. The issue here is not about a one time project. Overtime in perpetuity is neither viable nor legally required in the case at hand. There are no employees laid off here who were available to complete the work. The use of a plain English definition is contrary to the numerous subcontracting cases which address the issues, and these standards of analysis should be followed.

The City requests that the grievance be denied.

DISCUSSION

The issue requires determining if the subcontract with ServiceMaster for cleaning and janitorial services at the new Police Department Building violates the collective bargaining agreement, particularly Sections 1.01, 14.01, and 23.01. As set out in the background and facts, the work at issue in the new building is essentially the same type of work done by the custodian in City Hall, although the custodian may perform more and additional duties in terms of maintenance. The Union argument is that this type of work may not be subcontracted out under Section 23.01 because it is the same custodial cleaning and janitorial work normally done by employees in the bargaining unit. It is work that is contained in the job description of

the custodian, argues the Union. The City argues that the work that cannot be subcontracted

under Section 23.01 is the work that is performed at City Hall, because that is the work normally done by the employee position in the bargaining unit under the recognition clause of Section 1.01 and further identified as the singular custodial position in the Hours of Work Section 14.01D, and that is supported by a past practice of subcontracting for these services when other City Departments moved out of City Hall. The work here, argues the City, is in a new building and not at City Hall, so Section 23.01 is not violated by subcontracting there. The City maintains it made a good business decision which was not done to undermine the Union and, on balance, should prevail over the negligible impact, if any, on the bargaining unit.

Section 23.01 states:

23.01 The City retains all of the rights, powers and authority exercised or had by it prior to the time that the local became the collective bargaining representative of the employees here represented except as specifically limited by express provisions of this Agreement. The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Local or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent, or purposes of this Agreement. In keeping with the intent of this Article, the City Agrees it will not sub-contract or farm out work which is normally done by the employees in the bargaining unit or if it will result in layoff or loss of time worked by the employees.

Section 1.01 States:

1.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of establishing salaries, wages, hours and other conditions of employment for all regular full-time and regular part-time employees of the City of Tomah Water and Sewer Department, Public Works Department, Parks and Recreation Department, the Library Department and the custodial, maintenance and clerical employees at the Tomah City Hall; excluding supervisory, confidential, managerial, executive or seasonal employees. Seasonal employees shall be defined as those employees hired for a specific season only (as in the case of those hired in connection with the operation of the City's recreational programs).

The parties agree and the record confirms that no bargaining unit member was laid off or lost any work time as a result of the subcontracting. The Union concedes that the last clause in the last sentence of Section 23.01 was not violated by the City. The Union focuses on the preceding clause concerning work normally done by the employees in the bargaining unit, pointing out that those clauses are separated by the word "or", arguing that the City agreed not to subcontract bargaining unit work even when employees did not lose hours or were laid off. The City's point is that the work normally done by the employee is the custodial work in the City Hall, not in any other location. The parties have used the disjunctive "or" rather than the

conjunctive “and” in Section 23.01. The latter clause does not modify or condition the former. The fact that no bargaining unit member was laid off or lost time worked is not dispositive of the issue.

The interpretation of the collective bargaining agreement starts with the language used by the parties in their agreement and determining its intent. Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH Ed., P. 448. Here, the agreement does not contain any definitions relative to the issues. There is no evidence that any of the words were used in any different sense than their ordinary meaning when Sections 23.01 was adopted in 1974 and Section 1.01 was modified to include the custodian at City Hall in the 1977-1978 bargain. There is no evidence in the record to indicate that the parties placed any special or different meaning on this language when it was negotiated. Similarly, there is no evidence that the words or phrases in Section 23.01 or Section 1.01 had or have any special colloquial meaning. What is left is the plain language of the two Sections and the relevant clauses therein.

The plain language of Section 23.01 is the work normally done by the employees in the bargaining unit, and in this case that is the cleaning done as part of the custodial work. That is work normally done by a member of the bargaining unit, in this case, the City Hall custodian. As set out in the Facts and Background, the duties of the custodian and the cleaning work done in the new Police Department building are essentially the same in that regard. It follows that that type of work is not to be subcontracted out under Section 23.01. As discussed below, the plain language of Section 1.01, the recognition clause, does not modify or conflict with Section 23.01. Section 1.01 does not define work or the type of work covered in the agreement. It defines what positions or employees are in the bargaining unit. This is different than the type of work normally done by members of the bargaining unit. Because of this substantive difference in what the two clauses are dealing with, recognition of the bargaining unit for Section 1.01 and prohibiting the subcontracting of certain types of work for Section 23.01, they are separate and distinct concepts. Neither specifically refers to the other. That there is only one position of custodial or CUST/MAINT WKR in the recognition clause and in Article XIV for the wage schedule is because there was only one custodian at City Hall when the position was added to the bargaining unit and the wages subsequently negotiated. The wage provisions, like the recognition clause, do not define the work normally done by the employees in the bargaining unit. Indeed, the work normally done by the employees, the City Hall custodian particularly, is contained in the job description, not the agreement. Those duties in the job description are essential the same as those subcontracted for to be done in the new building. The Union is correct that if, as argued by the City a bargaining unit member would have to be laid off or lose time worked, then the preceding clause would be a nullity. Contract language cannot be interpreted to be meaningless. The addition of work in the new building that is to be done by the approximate equivalent of a half time position does not, to the undersigned, represent a far greater magnitude than the work currently being done by the custodian so as to change the context of the plain meaning of the language used. Thus, under the plain language of Section 23.01 this work is not to be subcontracted.

This is plain language and it is not ambiguous. Section 23.01 alone is not ambiguous. And, as set out immediately above, Section 1.01 does not conflict with that so as to create an ambiguity. It is not plausible to read Section 23.01 and Section 1.01 together to find that the work normally done by employees in the bargaining unit is limited to the physical location of where that employee was when their position was recognized as being in the bargaining unit or when the restrictions on subcontracting in Section 23.01 were added. The City bolsters its argument by pointing out that in Hours of Work, Article XIV. D. City Hall, the reference is to “the custodian/maintenance worker” and that only one custodian is mentioned. But Article XIV. F. Police Department Clericals is the wage and hour provision for the Police Department Clericals who are also in the bargaining unit. In Article XIV they are not identified as being at City Hall, but rather as Police Department Clericals. They are not limited to City Hall in Article XIV, yet clericals are mentioned in the same sub-clause in Section 1.01 that mentions the “custodial, maintenance and clerical employees at City Hall. The Police Department Clericals are not otherwise mentioned in Section 1.01. The wage Article clearly shows that they are in the bargaining unit without being mentioned as at City Hall. Beyond this, the custodian’s immediate supervisor is the Director of the Public Works Department, who has assigned him some maintenance duties in the new building while it was being built. Section 1.01 refers to and includes employees in the Public Works Department as well as those mentioned in City Hall. Reading the contract as a whole, which must be done in interpretation, Section 1.01 does not read to identify employees included in the bargaining unit by their location. It defines the bargaining unit as employees in various Departments, not locations, which later added various positions that were, at the time, at City Hall. It cannot be read to limit the work of the bargaining unit employees by the location where they might work. It would be impossible for the physical restriction of the City Hall location to have been the intent of the parties when they added the Section 23.01 subcontracting limitations because the custodian at City Hall was not added to the bargaining unit until approximately three years after Section 23.01 was agreed to. To read Section 1.01 as a physical location limitation on the subcontracting provisions in Section 23.01 would be to add language or conditions to the parties’ agreement, which is something an arbitrator cannot do. Section 1.01 does not create an ambiguity when read with Section 23.01.

The City places a great deal of reliance on what it perceives as a past practice of the parties whereby when a Department leaves City Hall, the custodian/janitorial services performed in a new location are not covered by Section 23.01. The Union denies that it has mutually recognized a practice so as to be binding. However, as the Union also argues, reliance on a past practice is only used in interpreting ambiguous contract language or as a gap filler. See, e.g. *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 6TH Ed., P. 623. This is a well accepted principle, and enunciated in the case of GREEN COUNTY (PLEASANT VIEW HOME), MA-1062 (WERC, Jones, August, 1999), wherein arbitrator Jones explained in that case:

Past practice is a form of evidence which is commonly used and applied in contract interpretation cases. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence

of what a particular provision means. Arbitrators traditionally look at past practice when the contract language is ambiguous, or when the contract is silent on a given point. In the former situation (i.e. where the language is ambiguous, indefinite or capable of different meanings), the past practice is viewed as the binding interpretation the parties themselves have given to the disputed term. In the latter situation (i.e. where the contract is silent on a given matter), the past practice may be binding upon the parties if it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

In this case, neither of the situations referenced above is present. Specifically, the contract is not silent on the matter of Sunday pay, nor is the contract language contained in Sec. 22.01 ambiguous, indefinite or capable of different meanings. Instead, the situation present here is that there is contract language in Sec. 22.01 which is directly on point, and that language is clear and unambiguous in providing that so long as the employee meets certain qualifications, “all” work that is performed on Sundays is paid at the rate of double time.

It is a generally accepted principle of contract interpretation that contract language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of the contract and a long-standing past practice, arbitrators usually follow the contract, and not the past practice. In accordance with that generally-accepted view, the undersigned holds likewise. In this case, the practice clearly conflicts with the language in Sec. 22.01 because that section does not require triple time and one-half for those hours; instead, it only requires that employees receive double time for those hours. Thus, in this case, the language of Sec. 22.01 prevails, not the conflicting practice.

Id. pp. 6,7.

Stated another way, the often quoted statement of arbitrator Jules Justin is applicable here. He stated:

Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator’s function is not to rewrite the Parties’ contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. PHELPS DODGE COPPER PRODS. CORP., 16 LA 229 at 233 (1951).

Cited in CITY OF GREEN BAY, MA-10313 (WERC, Crowley, April, 1999).

There is no gap to be filled here. And because there is no ambiguity, past practice is not to be resorted to. It is therefore unnecessary to determine if there was a past practice as argued by the City or merely lax enforcement of the contract, as argued by the Union. The fact that custodial duties have been performed by non-bargaining unit personnel or subcontracted at new locations when other Departments left City Hall (whether it is a practice or not) does not change the plain and unambiguous meaning of Section 23.01.

The City makes a detailed analysis and argument of the 11 standards or factors cited by the City and listed in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 5TH Ed., in its argument that these factors favor the City having subcontracted for the work at issue. The Union argues that the City never negotiated with the Union over this work, so the City assumptions are suspect and in conflict with the plain language of Section 23.01. Those arguments are summarized above in the Positions of the Parties. However, it must be pointed out that these Standards for Evaluating Propriety of Subcontracting, as recognized in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, 5TH Ed. p. 749, are used where the labor contract is silent about subcontracting:

“Where the labor agreement is silent about subcontracting, . . .”

But in this case the labor agreement is not silent about subcontracting. It contains Section 23.01 which clearly addresses the subject. In cases where a labor agreement does address subcontracting, arbitrators apply and interpret that language, not the 11 standards used in its absence. These subcontracting clauses have been the subject of study and analysis. See, e.g. *Sinicropi*, *Revisiting an Old Battle Ground: The Subcontracting Dispute*, PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS (BNA Books, 1980). See also, *Hill & Sinicropi*, *Subcontracting Clauses in Collective Bargaining Agreements*, REMEDIES IN ARBITRATION, pp. 340 – 368, (BNA Books 2nd Ed., 1991) Whether the City’s 11 standard’s analysis justify its subcontracting is not a basis to determine if it breached the collective bargaining agreement here, where specific language applies. In the face of Section 23.01, the 11 standards analysis does not supply the City with a basis for subcontracting the work at issue in this case. The contract says it will not.

The parties argue that prior arbitration decisions support their case. The City cites CITY OF FOND DU LAC, MA-12945(WERC, Gordon, November, 2006) in support of its argument that a past practice has developed that provides meaning for the language in the agreement. But the citation noted by the City dealt specifically with whether there had been a renunciation of a practice by one of the parties therein, which is not the issue in this case. It also noted that a change in a practice would require clear and unambiguous direction in the language (of the agreement). Here, the contract language at issue is clear, not ambiguous and is vastly different than that at issue in CITY OF FOND DU LAC where the Union argued a seasonal employee clause and an overtime clause were violated by the City’s use of interns. That award does not help the City here. Rather, the rule referenced there concerning use of

past practice favors the Union position here. The City cites TEAMSTERS “GENERAL” LOCAL NO. 200, A-5715 (WERC, Nielson, October, 2001) in support of the use of the 11 *Elkouri* standards of analysis for subcontracting. However, in that case there was no language in the collective bargaining agreement which specifically dealt with subcontracting, as in the case here. As detailed above, such analysis is not germane where the contract contains subcontracting language. Similarly, CITY OF FOND DU LAC, MA-8139, (WERC, Shaw, September, 1994, is cited by the City for factors to determine the propriety of assigning Union work to non-Union employees. In that case there was, again, no specific subcontracting language in the parties’ agreement, and arbitrator Shaw specifically stated in his award that “It is initially noted that this is not a subcontracting dispute”. What arbitrator Shaw had to decide in that case was an issue concerning the assignment of duties under the terms of the parties’ agreement there. That is not the issue here, and the factors he used there do not effect the application of the plain meaning of the language in Section 23.01 here. Similarly, in HYATT REGENCY – MILWAUKEE, A-5496 (WERC, Nielsen, September, 1996) there was no subcontracting language in the parties’ labor agreement. Arbitrator Nielsen therefore went on to apply the 11 *Elkouri* subcontracting standards and in that context rejected the Union’s “open the door” argument under the particular facts of that case. As explained above, the 11 standard analysis is not applicable in this case.

Here the clear, plain and unambiguous language of the collective bargaining agreement does not allow the subcontracting of cleaning services in the new building. Past practice is not applicable, not are the 11 *Elkouri* subcontracting standards. The City violated the agreement. The matter of remedy must be considered. The City has a management right to determine hiring and scheduling decisions subject to the terms of the collective bargaining agreement. The City cannot continue to violate the agreement and a cease and desist remedy is appropriate. Beyond that, as there has been no lost work time or layoff, a traditional make whole remedy for any employee or employees is not called for. This is not a case where the work at issue was only for a short and unrecoverable duration, such as constructing of the building itself. Rather, the building is there and its cleaning needs will continue into the future. Therefore, an award to the Union generally for past wages or overtime opportunities is not required where there remains the opportunity for the parties to bargain over the matter for the future. Cf. ROCKWELL INTERNATIONAL CORP., 85-1 ARB ¶8217 (Wren, 1985), (a meet and discuss subcontracting contractual clause), with IDEAL ELECTRIC & MANUFACTURING CO., 67 LA 227 (Chockley, 1976) (a restriction where work is normally performed by unit employees clause). In this case the City did not discuss or negotiated with the Union about the work in the new building. The collective bargaining agreement does not specifically require the City to do so, but it does say the City agrees it will not sub-contract or farm out work which is normally done by employees in the bargaining unit. The undersigned will therefore afford the parties an opportunity to discuss and negotiate the matter of custodial and cleaning duties in the new Police Department building before fashioning a further remedy if needed. Realizing this will take some time and that the building will need to be cleaned in the meantime, a cease and desist directive will issue and become effective as set out below.

Accordingly, based on the evidence and arguments in this case, I make the following

AWARD

1. The grievance is sustained.
2. The parties are directed to discuss and negotiate over the matter of custodial and cleaning duties in the new Police Department building and report to the undersigned what, if any, resolution of the matter they voluntarily reach.
3. Jurisdiction will be retained by the undersigned for a period of 60 days during which time the issue of Remedy may be presented by the parties if not otherwise resolved by them.
4. The City will cease and desist from violating the collective bargaining agreement within 60 days of the date of this award.

Dated at Madison, Wisconsin, this 29th day of October, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator