In the Matter of the Petition of

RICHLAND CENTER PUBLIC WORKS EMPLOYEES
LOCAL 2387, AFSCME, AFL-CIO

to Initiate Mediation/Arbitration Between said Petitioner

Decision No. 21648-A

and

CITY OF RICHLAND CENTER

Appearances: Jack Bernfeld, Staff Representative, for the Union
Paul Hahn, Attorney at Law, for the Employer

Richland Center Public Works Employees Local 2387, AFSCME, AFL-CIO, hereinafter referred to as the Union, filed a petition on January 4, 1984 with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, alleging that an impasse existed between it and the City of Richland Center, hereinafter referred to as the Employer, in their collective bargaining. It requested the Commission to initiate mediation/arbitration pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act.

The Union is the exclusive collective bargaining representative of certain employees of the Employer in a collective bargaining unit consisting of all full time and part time employees of the Employer's street department, parks department, cemetery department, water department and waste water treatment plant, but excluding managerial, supervisory, confidential, clerical, casual and seasonal recreational employees. The Union and the Employer have been parties to a collective bargaining agreement covering wages, hours and working conditions of the employees in the bargaining unit and that agreement expired on December 31, 1983. On September 26, 1983 the parties exchanged their initial proposals on matters to be included in a new collective bargaining agreement and the parties met on four occasions in an effort to reach accord. After the Union filed its petition requesting mediation/arbitration on January 4, 1984 the Employer and the Union met on February 16, April 12 and April 27, 1984 with a member of the Commission's staff who conducted an investigation that reflected that the parties were deadlocked in their negotiations. On April 27, 1984 the parties submitted their final offers.

The Commission concluded that an impasse existed between the parties with respect to negotiations leading toward a new collective bargaining agreement covering wages, hours and conditions of employment and it ordered that mediation/arbitration be initiated. At the request of the parties the Commission appointed Zel S. Rice II as the mediator/arbitrator to mediate issues in dispute. In the event that endeavor did not result in a resolution of the impasse between the parties the mediator/arbitrator was directed to issue a final and binding award to resolve the impasse by selecting either the total final offer of the Union or the total final offer of the Employer.

A mediation session was conducted at Richland Center, Wisconsin on July 6, 1984 at Richland Center, Wisconsin. The final offer of the Union, attached hereto and marked Exhibit "A", proposed that the wage rates be increased by 29¢ per hour effective January 1, 1984 and another 8¢ per hour effective July 1, 1984. It proposed that a new section be included in the collective bargaining agreement to provide that part time employees be defined as employees who customarily and regularly worked less than 40 hours per week and that such employees should be entitled to all rights and benefits of the collective bargaining agreement on a prorata basis and should be paid in accordance with the rates set forth in the salary schedule. The proposal contained a provision that part time employees would not be used to reduce the hours of full time employees. The Union's final offer proposed that a provision be added to the agreement providing that the landfill operator should work a normal work schedule of 40 hours Tuesday through Saturday. If the incumbent landfill operator left the position and it was not filled pursuant to other provisions of the agreement the Employer could assign the junior employee in the street department to the position if the remaining employees were capable of performing the available work. The Union proposed that a new provision be included in the collective bargaining agreement providing that if bargaining unit work is subcontracted it would not result in the layoff or reduction of hours of regular employees.

The Employer's final offer, attached hereto and marked Exhibit "B", proposed a wage increase effective January 1, 1984 of 29¢ per hour and an additional increase of 8¢ an hour on July 1, 1984. It contained a proposal for a new sec-

tion that provided that the part time employees should be defined as employees other than temporary who are customarily and regularly employed less than 40 hours a week and that they would not receive any fringe benefits and would be paid at the rate of $5.00 an hour. It provided that part time employees would work only when work was available and would not be used to reduce the regular hours of regular employees. In the event of a reduction in force resulting in a layoff, part time employees would be given layoffs prior to the layoff of any full time employees. The Employer's proposal provided that the landfill operator would work a normal work week schedule of Tuesday through Saturday. The Employer proposed a temporary employee rate of $4.50 an hour as well as the part time employee rate of $5.00 an hour.

During the course of the mediation session on July 6, 1984 the issues with respect to wage increases, the landfill operator and the temporary wage rates were resolved. After some discussion between the parties it was mutually agreed that each party would be permitted to amend its final offer. The amended final offers were set forth in the letter attached hereto and marked Exhibit "C". The Employer's amended final offer proposed that a part time employee should be defined as an employee other than temporary who was customarily and regularly employed less than 40 hours a week. The proposal provided that part time employees would not receive any fringe benefits and would be paid at the wage rate of $5.00 per hour. It provided that part time employees would work only when work is available and would not be used to reduce the regular hours of regular employees. In the event of a reduction in force resulting in a layoff; part time employees would be given layoffs prior to the layoff of any full time employees. The Employer made no proposal with respect to any other issue. The Union's amended final offer proposed that part time employees would be defined as employees who customarily and regularly worked less than 40 hours per week. It provided that part time employees would be entitled to all rights and benefits provided by the agreement on a prorata basis and would be paid in accordance with the regular wage scale contained in the collective bargaining agreement. The Union proposal provided that part time employees would not be used to reduce the hours of full time employees. It proposed that if bargaining unit work is subcontracted it should not result in the lay off or reduction of hours of regular employees.

The mediation phase of the proceedings ended on July 6, 1984 and the arbitration hearing was conducted at Richland Center, Wisconsin on July 20, 1984.

The Union relied on a comparable group consisting of nine cities of comparable size, most of which are located in southwestern Wisconsin. Those cities were Baraboo with a population of 8,189, Lancaster with a population of 3,998, Prairie du Chien with a population of 5,900, Reedsburg with a population of 5,228, Sparta with a population of 7,052, Tomah with a population of 7,142, Waupun with a population of 8,368, Wisconsin Dells with a population of 2,613 and the Employer with a population of 5,182.

The City of Baraboo has a collective bargaining agreement covering all employees but excluding seasonal and casual employees. It has no part time employees in its department of public works but it does have seasonal employees. The collective bargaining agreement does not make direct reference to the status of part timers. The city engineer indicated that if part time employees were hired they would receive the same wage rate as regular employees and holidays, vacations, sick leave, insurance and retirement benefits would be prorated. The City of Lancaster has a collective bargaining agreement with its public works employees and it covers all regular, full time and regular part time employees. Part time employees are defined as employees working a minimum of 600 hours per year and they receive the same wage rates as full time employees. They are paid for holidays; and vacations and sick leave are provided on a prorata basis. Part time employees receive full payment of a single plan or a prorated contribution toward a family plan and are eligible for retirement benefits. The City of Prairie du Chien has a collective bargaining agreement with employees in a general unit and it covers all regular full time and regular part time

part time employees and it has no part time employees in either bargaining unit. The collective bargaining agreements contain no definition of part time employees and the wage rates are the same for all employees. The city clerk indicated that if regular part time employees were hired they would receive holiday pay and vacation, sick leave, insurance and retirement on a prorata basis. The City of Sparta has a collective bargaining agreement covering all regular full time and regular part time employees in the department of public works, sewer and parks. There is no definition of part time employees and the wage rate is the same for all employees. Holidays are given to each regular employee and probationary employee and vacation accrues to each regular full time employee. Regular employees accrue sick leave retroactive to the first day of employment after the completion of a probationary period. Each employee receives health insurance and life insurance and retirement. The City of Tomah has a collective bargaining agreement covering all regular full time and regular part time employees except seasonal employees in its water, sewer and public works departments. It contains no definition of part time employees but seasonal employees are defined as employees hired for a specific season such as swimming or ice skating programs. The wage rates for part time employees are the same as those for full time employees. All employees receive holidays and vacation is provided on a prorata basis. Each employee is credited with sick leave and is provided with health and life insurance and retirement benefits. The City of Waupun has a collective bargaining agreement covering all employees in its department of public works and it defines part time employees as employees who work more than 1,040 hours a year. Part time employees receive the same wage rates as other employees and those who work in excess of 1,040 hours in a calendar year receive prorated fringe benefits. The City of Wisconsin Dells has a collective bargaining agreement covering employees of the city in a general unit. The part time employee is defined as an employee who works more than 1,040 hours a year and the wage rates for part time employees are the same as those of a regular employees. Time off with pay is provided for all employees on holidays and vacation and sick leave are provided on a prorata basis. The Employer pays the health insurance for all employees and they participate in the state group life insurance plan. Retirement benefits are provided to all employees. The Employer has collective bargaining agreements with

two bargaining units other than its public works department. The collective bargaining agreement covering employees in the police department includes all full time and part time law enforcement employees. There is no definition of part time employees and all employees receive the regular wage rates. All employees in the police bargaining unit receive holidays and are entitled to vacation, sick leave, health insurance and retirement. The Employer's collective bargaining agreement with its public utility commission employees includes all regular full time employees and there is no definition of part time employees.

The City of Baraboo collective bargaining agreement covering its employees in the department of public works provides that the Employer shall have the right to subcontract work that has been subcontracted consistently in the past or work that the employees are not qualified to perform or work that requires equipment not regularly used by the Employer. The city agrees that subcontracting will not be used to erode the bargaining unit. The City of Lancaster's collective bargaining agreement with its department of public works provides that if the Employer proposes to subcontract bargaining unit work in addition to work presently subcontracted it will give the Union prior notice in writing about the proposal and bargain about the proposal. The Employer may implement all or part of its proposal, after impasse, absent a contrary agreement. The City of Prairie du Chien's collective bargaining unit with its general unit employees makes no reference to subcontracting. The City of Reedsburg's collective bargaining agreement with its general city employees provides that the work covered by the agreement consists of all of the work now customarily performed by the general city employees. Reedsburg's collective bargaining agreement with its utility employees provides that the work covered by the agreement consist of all work now customarily performed by the city's utility department. The City of Sparta's collective bargaining agreement with its public works, sewer and parks department employees provides that the city and utility will not subcontract work that is normally done by the employees in the bargaining unit that will result in lay offs or loss of normal time worked by employees. The collective bargaining agreement between the City of Tomah and its water, sewer and public works department employees provides that the city will not subcontract

work that is normally done by employees in the bargaining unit or if it will result in lay offs or loss of time worked by the employees. The City of Waupun and its department of public works employees have a collective bargaining agreement that provides that the city shall have the right to subcontract provided that no present employees shall be given lay offs or suffer a reduction of normally scheduled hours as a result of subcontracting. The Employer has the right to subcontract work when employees are on lay off provided that the employees on lay off are not capable of performing the subcontracted work or the work to be subcontracted cannot be performed by the Employer. The City of Wisconsin Dells has a collective bargaining agreement with a general unit and it is silent with respect to subcontracting. The City of Richland Center has a collective bargaining agreement with its police department and it is silent about subcontracting. Its collective bargaining agreement with the public utility employees provides that it may subcontract any of the work as long as the subcontracting does not cause the lay off of any bargaining unit employees or eliminate normal overtime.

The Employer has placed advertisements in the newspaper inviting bids for garbage pickup, work that is now performed by employees represented by the Union. On February 27, 1984 the Employer's public works committee conducted a meeting for the purpose of finding the difference in costs from city owned garbage pickup and contract garbage collection. Interested contractors were directed to have proposals ready by March 15th of 1984. On March 15th, 1984 three firms appeared before a meeting of the public works committee of the Employer and presented proposals outlining their plans for contracting to pick up garbage for the Employer. The Employer has 18 full time employees in the bargaining unit represented by the Union and no regular part time employees. There never have been any part time employees although the Employer has hired temporary employees in accordance with a provision in the collective bargaining agreement. Three employees in the collective bargaining agreement are involved in garbage pick up and they would be affected by subcontracting of that work.

Richland County has a collective bargaining agreement with a bargaining unit consisting of deputy sheriffs, investigators, radio operators and office cleri-

cal employees. The agreement is silent with respect to subcontracting and contains no definition of part time employees. It provides life insurance, health insurance, retirement and sick leave to all employees and holidays and vacations are prorated to part time employees. The collective bargaining agreement contains a provision providing that casual or temporary employees shall receive the minimum classification rate for the job classification they assume and the temporary employees and regular part time employees who average 20 hours per week or more on a quarterly basis are eligible for fringe benefits.

The Employer has no history of using part time employees. It expresses no intention to immediately hire any part time employees. The Employer has made no commitment to subcontracting thus far. It has never given a full time employee a lay off, although employees have been terminated and were not replaced. This was usually done when there was less work available. The Employer has subcontracted curb and gutter construction and major street resurfacing. This was done even prior to Union representation of employees in the public works department. The Employer has considered subcontracting other work and there have been proposals discussed. The council has received proposals to subcontract garbage collection. The Employer needs a new garbage truck that would cost $85,000.00. Proposals were submitted by collectors to pick up garbage for the Employer after the Employer solicited them. The proposals would result in economies. The Employer has three employees in the bargaining unit who pick up garbage on Mondays and Tuesdays and two pick up garbage on Thursdays. These employees also do other work in the bargaining unit. If the Employer subcontracted the garbage pickup it would not have to buy a truck and it could get landfill work done for $9.00 a ton as opposed to its current cost of $15.00 per ton. The Employer is contemplating subcontracting garbage pick up because it feels that a savings in operating costs would result. No decision on subcontracting has been made and its impact on the jobs of current employees is not known.

Richland County nursing home employees are represented by a Union but no contract had been agreed upon at the time of the hearing. The current practice is that part time employees receive the same wage rates and all fringe benefits that are provided to regular full time employees.

The Employer relies on a comparable group consisting of 18 cities, most of which are located in southwestern Wisconsin. The comparable group includes eight of the municipal employers relied on by the Union plus seven communities whose employees are not represented by labor organization and two others that have Union contracts. The comparable group consists of Baraboo which had a 1984 population of 8,088, Boscobel with a population of 2,662, Darlington with a population of 2,300, Dodgeville with a population of 3,500, Fennimore with a population of 2,368, Horicon with a population of 3,617, Lancaster with a population of 4,076, Mayville with a population of 4,375, Mineral Point with a population of 2,259, Platteville with a population of 9,695, Prairie du Chien with a population of 6,000, Reedsburg with a population of 5,038, the Employer with a population of 5,182, Sparta with a population of 7,282, Tomah with a population of 7,200, Viroqua with a population of 3,872, Waupun with a population of 7,800 and Wisconsin Dells with a population of 2,521.

Boscobel has a full time department of public works crew of 11 employees and they are not represented by a union. The employees in the department of public works perform maintenance work and Boscobel regularly subcontracts curb and gutter construction work. Boscobel has the right to subcontract and if a position is abolished it gives consideration to the employees seniority rights. It has never had a layoff due to subcontracting. It pays its part time employees $5.00 an hour and its full time permanent employees $6.90 an hour. Darlington has seven employees in its public works department and they are not represented by a union. The city subcontracts large construction jobs such as street work and curb and gutter work. Darlington has no part time workers in the department of public works and they would not receive prorata fringe benefits if they had part time workers. Darlington provides its part time office workers benefits on a prorata basis. Dodgeville has no department of public works but it has 11 employees in the water, sewer, street and sanitary departments. The employees are not represented by a union and the city subcontracts curb and gutter construction. There are four part time employees in the cemetery and five seasonal employees in the parks department. The part time employees receive no benefits. Part time students between the ages of 16 and 18 are paid $3.55 an hour and part time adults are paid $4.50 an hour. Regular employees are paid

$6.25 an hour. Fennimore has a department of public works crew consisting of 12 employees and they are not represented by a union. There is no restriction on subcontracting. Fennimore has 11 part time summer pool workers and they receive no fringe benefits. Their pay rates range from $3.10 an hour to $3.95 an hour according to experience and license certification. The full time street employees at Fennimore receive $7.97 an hour. Mineral Point has a department of public works crew consisting of 11 full time employees and they are not represented by a union. There are no restrictions on subcontracting. Mineral Point has one part time employee and one seasonal employee and they receive no fringe benefits. The seasonal employee is paid $3.60 an hour and the part time employee is paid $4.00 an hour. The permanent employees receive $5.62 an hour. Viroqua has a department of public works crew consisting of 15 full time members. They are not represented by a union. Viroqua subcontracts road construction and other construction work. They have never given layoffs to employees because of subcontracting. Viroqua has four seasonal employees in the summer time. Three of them are paid $4.00 an hour and one is paid $4.25 an hour because of experience. One of the full time employees serves as a permanent foreman and receives $7.08 an hour. Two others receive $6.98 an hour because of their experience and the rest receive $6.93 per hour. Platteville has 13 full time employees in the street department and 12 full time employees in its department of public works. They are not represented by a union and there are no restrictions on subcontracting. Platteville does not have any part time employees and no policy has been established with regard to fringe benefits for part time employees. Mayville has six full time employees in its department of public works and four employees in the utilities and waste water department. They are represented by a union and the collective bargaining agreement contains no restrictions on subcontracting. Mayville does subcontract garbage pickup. The collective bargaining agreement contains no provisions with respect to paying or not paying fringe benefits to part time employees. Mayville has six seasonal employees in the park department and three seasonal employees in the utility and waste water treatment department. There are six employees in the street department that are not represented by a union. The part time workers in the street department receive prorated fringe benefits. Mayville pays its seasonal employees $3.35 an hour. The part time employees in the utility and

park department receive $5.00 per hour. The permanent full time employees are paid $8.35 an hour. Horicon has six full time employees in the street department and five full time employees in the waste water treatment plant. They are represented by a union. There is no provision in the collective bargaining agreement with respect to subcontracting and major projects are subcontracted but there has never been a lay off because of subcontracting. Horicon has four part time employees and they receive no fringe benetits. Three of the part time employees are paid $3.50 an hour and the group leader receives $5.50 an hour. The permanent full time employees are paid from $8.01 an hour to $8.35 an hour.

DISCUSSION:

Section 111.70(4)(cm)7 of the Wisconsin Statutes sets forth the factors to be considered in making decisions under the mediation/arbitration procedure. The mediator/arbitrator is required to give weight to the following factors:

A. The lawful authority of the municipal employer.

B. Stipulations of the parties.

C. The interest of welfare of the public and the financial ability of the unit of government to meet the costs.

D. Comparison of wages, hours and conditions of employment of the employees involved in the proceedings with the wages, hours and conditions of employment of other employees performing similar services and other employees generally in public employment and private employment in the same community and in comparable communities.

E. The cost of living.

F. The overall compensation presently received by the municipal employees including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits.

G. Changes in any of the foregoing circumstances during the proceedings.

H. Such other factors that are normally or traditionally taken into con-

sideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties and the public service or in private employment.

Neither of the parties has taken a position that the lawful authority of the Employer was involved or that the stipulations of the parties have any impact. There is no issue about the financial ability of the Employer to meet the costs of any proposed settlement. The cost of living has no impact on the issues involved nor have there been any changes during the proceedings that would impact upon the arbitrator's award. Accordingly the arbitrator finds that the Employer has the lawful authority to agree to its proposal or that of the union and the stipulations of the parties have no impact on either proposal. The arbitrator further finds that the Employer has the financial ability to meet the cost of either proposal and the cost of living is not a factor to be considered. The arbitrator finds that there have been no changes during the pendency of the proceedings that has any impact on either of the proposals. The parties have argued about the interest and welfare of the public, comparisons of wages, hours and conditions of employment, overall compensation and other benefits received and the factors that are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise.

Each of the parties has proposed a different comparable group. The comparable group proposed by the Union consists of nine cities, including the Employer, all but two of which are located in southwestern Wisconsin and all of which have collective bargaining agreements with their employees. The Employer has a larger comparable group consisting of the nine cities included in the Union's comparable group plus nine others located in the same general geographic area. Only two of the nine additional cities included in the Employer's comparable group have collective bargaining agreements with their employees. Each of the comparable groups proposed by the parties has some validity. There is a trace of common ground between each of them and the Employer. The comparability group proposed by the Employer includes all of the cities included by the Union in its comparability group. However, the Employer's comparability group includes seven cities that do not have collective bargaining agreements covering

employees of the type involved in this dispute. Unilateral determinations of conditions of employment are not particularly applicable as comparables to be considered in making determinations between parties that are bargaining with each other as equals. The Union contends that a proper comparison would involve the examination of the rights given organized public employees similarly employed in surrounding communities as well as the treatment of other organized employees of the Employer. It takes the position that comparing unionized and nonunionized employees with respect to the issues involved herein merely skews the data and blurs the sample.

The issues in dispute are creatures of collective bargaining. The issue of subcontracting can only surface where a bargaining relationship exists. The issue relating to the treatment of part time employees is in a similar status. The Employer argues that the criteria to be considered by the arbitrator as set forth in Section 111.70(4)(cm)7d states nothing about limiting the comparison of wages, hours and conditions of employment to situations covered by collective bargaining agreement. While that is true it should be pointed out that Section 111.70(4)(cm)7h does direct the arbitrator to consider factors that are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through collective bargaining, mediation, fact finding or arbitration. Thus the statute does direct the arbitrator to specifically consider comparables that involve collective bargaining relationships. The arbitrator does not operate in a vacuum and he must face up to the fact that a collective bargaining relationship does exist between the parties. While consideration of comparisons of relationships involving nonunionized employees does have validity in some situations, the arbitrator must rely heavily on comparisons with other collective bargaining relationships in making determinations involving issues that are only created by and arise out of collective bargaining relationships.

The arbitrator is faced with three questions:

A. Should the Union's proposed language regarding part time employees be added to the agreement?

B. Should the Employer's proposed language regarding part time employees

and a rate for part time employees be added to the agreement?

C. Should the Union's proposal on subcontracting language added to the agreement?

Treatment of part time employees will be considered first. The Union proposes to treat employees who work less than a full time schedule of 40 hours each week on a basis similar to regular full time employees while the Employer proposes to create a new class of employees who are paid lower wages for performing work identical to full time employees and are given no fringe benefits. At the present time the Employer has no part time employees in the bargaining unit. The 1983 labor agreement between the parties makes no distinction between the treatment of full time and part time employees. Part time employees are specifically included in the recognition clause in the current collective bargaining agreement and they are entitled to all benefits provided by the agreement from which they are not specifically excluded. The agreement does define temporary employees and excludes them from fringe benefits and establishes a separate wage rate for them. Had the parties intended to treat part time employees differently than full time employees the collective bargaining agreement would have provided for it. The Employer, in seeking a separate wage rate for part time employees and to exclude them from fringe benefit coverage, seeks to depart from the existing policy established by the prior collective bargaining agreements. The Employer's collective bargaining agreement with its police department makes part time employees eligible for the same wage rates and fringe benefits that full time employees receive. It contains no distinct wage rate and no exclusion from fringe benefits for part time employees. The Employer's agreement with its utility employees covers just full time employees and is not applicable to part time employees. There are no part time employees in that bargaining unit. Richland County does not have any part time employees in its highway department but its collective bargaining agreement provides a lower rate of pay for part time employees than the wage rates for full time employees. Richland County employs part time employees in its health care facility and sheriffs department and they receive the same wage rates that are paid to full time employees and they receive prorated fringe benefits.

Of the eight comparables other than the Employer included in the Union's comparable group, six either provide a specific definition of regular part time employees or provide for their coverage under the recognition clause. The remaining two define the bargaining unit to include all employees. Thus the wage rates and benefits provided to full time employees would be applicable to part time employees. While few of the cities in the comparable group relied upon by the Union employ part time employees, their collective bargaining agreement provided part time employees the same wage rate as full time employees; and, with a few exceptions, they are eligible for all of the fringe benefits.

Part time employees would be entitled to full benefits under the Employer's current collective bargaining agreement with the Union and they are not prorated. At the present time it employs no part time employees. The Union has proposed a concession that regular employees who work less than full time will receive fringe benefits on a prorated basis. The Employer's proposal would depart substantially from the current contractual provision by paying part time employees $2.00 an hour less than employees doing similar work and providing them with no fringe benefits. Such a substantial departure from the existing collective bargaining agreement should come about as the result of bargaining across the table as opposed to having it imposed upon the parties by an arbitrator. The give and take of collective bargaining and the trade offs that occur at the table might justify a departure from the status quo and the insertion of a new concept in the collective bargaining agreement such as the one proposed by the Employer. In the absence of some unique circumstance such as inability to pay on the part of the Employer or a pattern developed through collective bargaining among comparable groups, the arbitrator is reluctant to depart from the existing collective bargaining agreement and carve out a new path for the parties to follow. The Employer proposes to establish a part time wage of $5.00 an hour regardless of the work performed by an employee. It has offered no justification for this position other than the fact that some cities whose employees are not unionized have unilaterally determined to do just that. The Employer's proposal would pay part time employees two-thirds of the wage of regular employees with whom they work side by side as well as eliminating holidays pay, vacation, sick pay and health insurance coverage. The statutory cri-

teria requires the arbitrator to consider the overall compensation presently received by municipal employees including wages and fringe benefits. Under the prior agreements part time employees were eligible to receive the same wages and the same benefits as full time employees and that factor supports a continuation of the practice. The Employers and Unions do not normally and traditionally enter into agreements that result in "take aways" of existing benefits and rates of pay in the absence of unusual circumstances that would justify them. The Employer has offered no justification for such a dramatic change nor has it demonstrated any need for one.

The Employer contends that it does not employ part time employees, has not employed part time employees and does not contemplate employing part time employees in the future. The Union has agreed that temporary employees which the Employer has utilized in the past can be paid a special rate of pay and will not receive any fringe benefits. The Employer has the right to hire part time employees. As the Employer states, the only two questions for the arbitrator are which proposal is more reasonable as it relates to the receipt of fringe benefits by part time employees and whether a wage rate different than the wage rate for other classified employees is justified. The only argument the Employer makes is that some communities without collective bargaining agreements do not provide part time employees with the same wage rates and fringe benefits that are provided to regular full time employees. That is not an overwhelming argument. The Employer uses a chart to show that the average wage for part time employees among five of the 21 municipalities it proposes as comparables is $4.80 per month and those same employees pay their full time employees an average of $7.02 per month. The average differential between full time and part time employees in those five communities is $2.22 an hour. The Employer compares its proposed part time rate of $5.00 per hour and full time rate of $7.25 per hour with a differential of $2.25 per hour and it contends that its proposal is on target and reasonable. Only two of the five municipalities utilized by the Employer in making this comparison have collective bargaining agreements. The great majority of communities that have agreed upon wage rates through collective bargaining pay their part time employees the same rate that is paid to full time employees. The Employer argues that it does not prorate fringe

benefits for its part time employees in other bargaining units. The fact is that it does not have part time employees in the other bargaining units, but under its collective bargaining agreement it would be required to provide fringe benefits to its part time police in the event that it hires any. The Richland County Union contracts do prorate fringe benefits in the health care center and sheriffs department as well as the highway department. The sheriffs department and health care center do have part time employees but the highway department may not have ever hired part time employees.

The Employer quotes the award of arbitrator Edward Krinsky In the Matter of the Petition of Barron County (Public Health Agency) to Initiate Mediation/Arbitration and Northwest United Educators, Case L No. 31492 in support of its position. In that case arbitrator Krinsky was faced with a situation where the labor organization sought to change the status quo on a mileage allowance. Krinsky stated that it is was not uncommon for part time employees to receive benefits inferior to those given to full time employees and changes in them should be negotiated and not established through arbitration. He then went on to point out that the labor organization had not presented any evidence of benefits paid to other employees of the county or comparable municipalities to support its position that benefits of part time employees should be changed. What the Employer seems to have missed is that Krinsky stated a change in the status quo with regard to fringe benefits should be negotiated and not established through arbitration. Currently the Employer is required to pay employees the same rates of pay and provide the same fringe benefits to all regular full time and regular part time employees. It is the Employer that seeks to change the status quo and it has failed to achieve that result through negotiations. Now it is asking the arbitrator to do the very thing that Krinsky suggested should not occur. The Employer argues that selecting its position on part time employees would cause the least modification of the current labor agreement between the parties but the opposite is true.

For all of the above reasons the arbitrator favors the Union's position on the issue of part time employees.

The second issue to be considered by the arbitrator relates to the rights

accorded to employees should the Employer subcontract bargaining unit work. The Union's proposal is quite simple. It provides that if bargaining unit is subcontracted it will not result in the lay off or reduction of hours of regular employees. The Union has demonstrated the need to address this issue in the labor agreement. The Employer has been contemplating subcontracting at least a part of the bargaining unit work. The Union does not seek to contractually bar the subcontracting of work. It simply proposes that if bargaining unit work is subcontracted, regular employees will not be given lay offs or have their hours cut. The position of the Employer is not to address the matter in the collective bargaining agreement at all. This would permit the Employer to continue to subcontract and it would also permit the Employer to lay off or reduce the hours of employees in the bargaining unit. That is the status of the issue in the current agreement with the Union.

The Employer has a collective bargaining agreement with the employees in its public utility which permits it to subcontract any work as long as it does not cause a lay off of any bargaining unit employees or eliminate normal over time. That is exactly the kind of provision sought by the Union. The Employer's agreement with its police does not contain any restrictions on subcontracting and it appears that the Employer has no intention to subcontract the work of its police force.

Four of the eight communities in the comparable group relied upon by the Union contractually restrict the right of the Employer to subcontract work. The same four and one other community in that comparable group provide incumbent employees protection from lay off or reduction of hours if work is subcontracted.

While the Employer contends that it has made no decisions with respect to subcontracting it does appear that it is seriously considering doing it. Currently the Employer has the right to subcontract bargaining unit work even if it would result in the lay off of employees. It has had this right since the initial collective bargaining agreement between it and the Union. The Employer has subcontracted curb and gutter construction and major street resurfacing for a number of years but it has never resulted in the lay off of any employees.

The Employer subcontracted the resurfacing of its streets and it resulted in a reduction of the need for patching crews but the Employer did not lay off any bargaining unit employees and waited for attrition to reduce the work force. The Employer has never terminated bargaining unit employees because of subcontracting or for any other reason. The proposal of the Union would contractually guarantee the practice that has been followed by the Employer over the years. The Employer contends that it has not made any decisions about subcontracting even now but its actions and words have made the bargaining unit employees nervous.

The Employer argues that the majority of cities in the comparable group relied upon by it do not have subcontracting limitations in their labor agreements. Out of the 21 comparable cities relied upon by the Employer only seven have specific language limiting the Employer's right to subcontract. Since at least seven of the 21 cities do not have collective bargaining agreements there could be no limitation on their right to subcontract. It is interesting to note that even in those seven communities that have no restrictions on subcontracting and where subcontracting has been done, there have been no lay offs as a result of subcontracting.

The Employer argues that the comparables do not present an overwhelming case for the need to include the Union's subcontracting language in the 1984 labor agreement between the parties. It contends that they do not establish a pattern or a trend. The fact is that there is a pattern among all the communities in both comparable groups to not lay off employees or reduce their hours because of subcontracting even where there is no restriction. Most communities in southwestern Wisconsin do not have their right to subcontract restricted in any manner. Most of those communities that do have collective bargaining agreements with their employees do have some restriction on subcontracting that prohibits the Employer from giving lay offs to employees as a result of subcontracting.

The Employer argues that the Union has not demonstrated any immediate or probable harm to the employees that would warrant the inclusion of subcontracting language in the 1984 agreement. It denies that it has made any decision about subcontracting and it asserts that the employees have nothing to

fear because no employee had ever been given a lay off for lack of work. While those assertions may be true, the words and actions of the Employer have been sufficient to strike fear into the hearts of its employees.

The Employer relies on a decision by Arbitrator Frank Ziedler In the Matter of Final and Binding Final Arbitration, Dane County Joint Council of Unions, AFSCME, AFL-CIO, and Dane County, Case XCIII No. 32554, Med/Arb-2537 Decision No. 21458-A, Frank P. Ziedler (July 30, 1984). In that case Arbitrator Ziedler ruled that a proposal that would forbid the Employer to subcontract if any employee was on lay off was too restrictive. Ziedler found that to be an unwarranted limitation on the Employer's statutory right to subcontract. In the Dane County case the Union was in effect seeking to deny the Employer the right to subcontract as long as an employee was on lay off. Here the Union seeks a substantially less restrictive provision. It would permit the Employer to subcontract whenever it chose to do so but it would preserve the jobs of those employees who were then employed.

The Employer has the right to subcontract and it is only the limitation on that ability that is in issue. It is not unique for limitations to be attached to an Employer's right to subcontract work. The Employer relies on the decision of Arbitrator Joseph B. Kerkman In the Matter of the Petition of the City of Kenosha and the City of Kenosha Employees Local 71, AFSCME, Council 40, Wisconsin Council of County and Municipal Employees, AFL-CIO, WERC Case LIV, No. 22482 Med/Arb - 15 Decision No. 16159-C, Joseph B. Kerkman, (August 14, 1978). In his decision Kerkman conceded that many collective bargaining agreements do contain some limitation on the right of subcontracting. He found only three contracts had provisions similar to the one sought by the labor organization out of the 17 contracts introduced. Kerkman found the provision proposed by the labor organization to be considerably more restrictive than the provisions found in other collective bargaining agreements which limited the right to subcontract and concluded that the proposal was too limiting. The Employer reaches the conclusion that Kerkman would find that the language sought by the Union is too restrictive. It should be pointed out that the language sought by the Union is not very restrictive. Five of the eight municipalities in the comparable group relied upon by the Union have restrictions on subcontracting similar to that

proposed here. The Employer has reached an agreement with another labor organization that represents another one of its bargaining units that contains a similar restriction. Seven of the twelve municipalities that have collective bargaining agreements with labor organizations in the comparable group relied upon by the Employer have similar restrictions. The Union proposal would contractually adopt the practice that the Employer has followed in the past and from which it asserts it has made no decision to depart.

Arbitrators have been reluctant to support restrictive subcontracting language without evidence of a strong need for protection. The arbitrator finds that there is nothing in the past history of the relationship between the Employer and the Union that would indicate an intention to subcontract bargaining unit work and then lay off employees. There have been some recent actions and statements by the Employer during the current negotiations that cast some doubt on the Employer's intention to continue following its long established policy. Because of the arbitrator's reluctance to insert a new provision into the collective bargaining agreement when the parties have been able to get along without such a provision since their collective bargaining relationship began, the arbitrator finds the Employer's position on subcontracting to be preferable to that of the Union.

Since Wisconsin's mediation/arbitration law requires the arbitrator to resolve the dispute by selecting either the total final offer of the Employer or the total final offer of the Union, the arbitrator cannot take the Union's position on one issue and the Employer's position on the other. The parties have maintained a successful collective bargaining relationship for a period of years. The prior collective bargaining agreement provided that all employees would receive the same rate of pay regardless of whether they were full time employees or part time employees and the agreement provided that all employees would receive holidays, vacation, sick leave, insurance and retirement. The proposal of the Union would continue the practice that the parties have established through the collective bargaining. The Employer's proposal would substantially change the established practice by paying part time employees a lower rate than is paid to full time employees doing the same work and by denying them the right to any fringe benefits. Even prior to its first collec-

tive bargaining agreement with the Union the Employer has subcontracted work but it did not give employees lay offs or reduce their hours as a result of subcontracting. The Union's proposal would give the Employer the right to continue to subcontract as long as it did not lay off employees or reduce their hours. In effect the Union's proposal on subcontracting do no more than contractualize the practice that the Employer has followed even prior to its first collective bargaining relationship with the Union. The Employer indicates that it has made no decision about subcontracting and it has never given lay offs to employees as a result of subcontracting. Thus the restriction proposed by the Union should not hamper it.

There is reluctance on the part of arbitrators to impose contractual conditions through the process of binding arbitration that would change the policies that the parties have agreed upon or adopted by practice. The Union's proposal does insert a new provision into the collective bargaining agreement with respect to subcontracting but it only restates the practice followed by the Employer even prior to its first collective bargaining agreement. It continues the existing status of part time employees with a small concession to the Employer on prorating fringe benefits. The Union's proposal makes the most minor modification in the collective bargaining relationship. The Employer retains its statutory right to subcontract and the only limitation on it is one that it has followed voluntarily even before the existence of its collective bargaining relationship.

It therefore follows from the above facts and discussion thereon that the undersigned renders the following

AWARD

After full consideration of the criteria listed in the statute and after careful and extensive examination of the exhibits and briefs of the parties the arbitrator finds that the Union's amend final offer more closely adheres to the statutory criteria than that of the Employer and orders that the Union's amended proposal contained in Exhibit "C" be incorporated into an agreement containing the other items to which the parties have agreed.

Dated at Sparta, Wisconsin, this 2nd day of October, 1984.

Zel S. Rice II, Arbitrator

EXHIBIT "A"

Name of Case: CITY OF RICHLAND CENTER (MSF XX No. 32707 MED/ARB-2604

The following, or the attachment hereto, constitutes our final offer for the purposes of municipal interest arbitration pursuant to Section 111.77 of the Municipal Employment Relations Act. A copy of such final offer has been submitted to the other party involved in this proceeding, and the undersigned has received a copy of the final offer of the other party. Each page of the attachment hereto has been initialed by me.

4/27/84 (Date)

Jack Benfield (Representative)

On Behalf of: Richland Center Department of Public Works ~~AFSCME~~ Local 2387-A, AFSCME, AFL-CIO

FINAL OFFER
OF
LOCAL 2387-A, AFSCME, AFL-CIO
TO
RICHLAND CENTER

April 27, 1984

The 1983 labor agreement shall remain unchanged except as provided for in the "Stipulations of Agreement" dated March 8, 1984, and the changes cited herein.

1. Amend "Appendix A" by increasing the wage rates listed under heading of "Effective 9/1/83" subject to paragraph 5 of the "Stipulations of Agreement" by:

   A) 29¢ per hour effective 1/1/84
   B) 8¢ per hour effective 7/1/84.

2. Create a Section 1.05 as follows:
   "Part-time employees shall be defined as employees who customarily and regularly work less than forty (40) hours per week. Such employees shall be entitled to all rights and benefits provided by this Agreement on a prorata basis and shall be paid in accordance with Appendix A. Part-time employees will not be used to reduce the hours of full-time employees."

3. Amend Section 5.01 by adding the following at the end of the current Section 5.01: "The landfill operator shall work a normal work week schedule of forty (40) hours, Tuesday through Saturday. If the incumbent landfill operator leaves the position and if the position is not filled pursuant to Section 4.03, the City may assign the junior employee in the Street Department to the position if the remaining employees are capable of performing the available work.

4. Create a Section 17.09: "If bargaining unit work is subcontracted, it shall not result in the layoff or reduction of hours of regular employees."

EXHIBIT "B"

Name of Case: CITY OF RICHLAND CENTER Case XX No 32707 MED/ARB 2604

The following, or the attachment hereto, constitutes our final offer for the purposes of municipal interest arbitration pursuant to Section 111.77 of the Municipal Employment Relations Act. A copy of such final offer has been submitted to the other party involved in this proceeding, and the undersigned has received a copy of the final offer of the other party. Each page of the attachment hereto has been initialed by me.

4/27/84
(Date)

Paul A Hahn
(Representative)

On Behalf of: City of Richland Center

CITY OF RICHLAND CENTER
DEPARTMENT OF PUBLIC WORKS

Final Offer
4/27/84

1. Wages:

1/1/84	$.29
7/1/84	$.08

2. Article IV, Seniority
New Section 4.08

Section 4.08 -- The term part-time shall be defined as employees other than temporary who are customarily and regularly employed less than forty hours a week. Part-time employees shall not receive any fringe benefits provided by this Agreement and shall be paid a rate pursuant to Appendix A. Part-time employees will work only when work is available and will not be used to reduce the regular hours of regular employees. In the event of a reduction in force resulting in a layoff, part-time employees will be laid off prior to the layoff of any full time employees.

3. Article V, Workday

Section 5.01. The landfill operator shall work a normal workweek schedule of Tuesday through Saturday.

4. Appendix A

Temporary Employee Rate	$4.50
Part time Employee Rate	$5.00

5. Signed Stipulation of Agreements Dated March 8, 1984.

Submitted by
City of Richland Center
By Counsel
Paul A. Hahn

EXHIBIT "C"

ROBERT W LYONS
EXECUTIVE DIRECTOR

Wisconsin Council 40

AFSCME, AFL-CIO

5 ODANA COURT • MADISON, WISCONSIN 53719 • 608/274-9100

FILE

JACK S. BERNFELD
STAFF REPRESENTATIVE

July 13, 1984

Paul Hahn, Attorney
Boardman, Suhr, Curry & Field
P. O. Box 927
Madison, WI 53701 0927

Re: Richland Center DPW/AFSCME Local 2387-A
Mediation/Arbitration

Dear Mr. Hahn:

This letter shall summarize my understanding of the issues that remain in dispute for the 1984 contract. The issues that are to be arbitrated on July 20 are:

1. Part-time employees:
   A) The City offer includes your proposal #2 (New Section 4.08) and the wage rate ($5.00) to be included in Appendix A.

   B) The Union offer includes our proposal #2 (New Section 1.05).

2. Sub-contracting:
   A) The City does not have an offer that addresses this issue.

   B) The Union offer includes our proposal #4 (New Section 17.09).

The references to proposals means the respective final offers of the parties dated April 27, 1984.

It is my understanding that the following issues are no longer in dispute:

1. Wages: Both final offers (4/27/84) are identical on this issue.

2. Landfill Operator: The Union proposed amendment to Section 5.01 in its final offer of 4/27/84 will be incorporated in the 1984 contract with the addition of the parenthetical "(classification)" after the term "Street Department" (Line 5 of our proposal).

3. Temporary Wage Rate: The 1984 temporary wage rate will be $4.50.

Please advise me if this summary is inaccurate.

Sincerely,

Jack Bernfeld

JACK BERNFELD
Council 40 Staff Representative

JB:ch
opeiu #39, afl-cio