BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 67, AFSCME, AFL-CIO	Case 346 No. 43640 MA-6030
and	
CITY OF RACINE	

Appearances:
Mr. Bruce F. Ehlke, Lawton & Cates, S.C., Attorneys at Law, appearing on behalf of the Union.
Mr. Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, appearing on beh

ARBITRATION AWARD

The Union and the City named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to resolve a grievance concerning the Racine Zoo. Hearings were held in Racine, Wisconsin, on January 10 and March 4, 1991, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed their briefing schedule on June 7, 1991.

BACKGROUND:

This grievance is over the City's transfer of operations at the Racine Zoo to the Racine Zoological Society, effective January 1, 1989. Seven bargaining unit members who worked at the Zoo up until that date were transferred into the Parks Division. No one was laid off. The City absorbed these positions into the bargaining unit by means of attrition, thereby reducing the total size of the bargaining unit by seven. The bargaining unit currently consists of approximately 155 employees.

The Racine Zoological Society was established in 1924 to aid the City in developing and maintaining the Zoo. The Society is a nonprofit corporation as defined in Section 501(c)(3), U.S. Code, and is incorporated in Wisconsin. The Society's address is 2131 North Main Street in Racine, on the Zoo grounds, with its office above the Zoo office in the main building. The Executive Director of the Society is Ronald Glazier, who has held that position since June of 1988. The Society is controlled by a board of directors of 23 seats, including two directors appointed by the City.

In December of 1987, the Society started talking with the City about the possibility of operating and managing the Zoo on a daily basis. On December 10, 1987, Society President Merll Korndoerfer sent a letter to Racine Mayor N. Owen Davies and City Alderman requesting a meeting with the Finance/Personnel Committee in January of 1988 to discuss the Society's assumption of operations of the Zoo and what financial support the City would be willing to provide. The City was interested in the Society's proposal because the it indicated that the City could save money on operating expenses, and the City also wanted to get out of the Zoo business because it required a certain level of expertise in animal care.

A negotiating team for the City was created to explore the possibility of a contract with the Society. The team, made up of City Attorney Joseph Boyle, Personnel Director James Kozina, Director of Parks and Recreation Fred Zimdars, and Finance Director Jerome Maller, was authorized to meet with the Society to form a contract governing operations of the Zoo.

The City's negotiating team and members of the Society met three or four times during 1988. Glazier took over the primary role as negotiator for the Society when he became Executive Director in June of 1988. Glazier cited two major problems in reaching an agreement -- the amount of subsidy the City would provide, and the disposition of City employees who were working at the Zoo. Boyle saw the primary issue in the negotiations as money -- the City wanted to pay the Society a certain annual fee for its management of the Zoo, and the Society wanted more money. The City wanted a declining contribution, with the first year at a higher level of contribution, and declining the following years, so that the Society would be forced to obtain non-City funds for Zoo operations. During the early negotiations, the Society wanted more money, and the money to remain at the same level for each of three years of the projected contract.

One of the meetings took place May 4, 1988, between the City team of Boyle, Kozina, Maller, Zimdars, and Michael Truckey, with Society members Korndoerfer, Gary Pape, Tom Torhorst, John Knuteson, and Denis Murphy. The meetings of the meeting show that the following items were discussed:

1. Objectives in having Society run Zoo:
   A. Society feels it can run the Zoo more efficiently, can get funding from the private sector, and eventually save the taxpayers money.
   B. City believes the main concern is to save taxpayers money. The Zoo serves more than the City of Racine and taxpayers should not pay for everyone using it. City wants Zoo maintained at its current level. Any improvements should not be paid for by taxpayers.

2. Contract
   A. Society had prepared first draft based on City's contract with Wustum.
   B. City feels we may have to start over; it can't be based on Wustum's.
   C. Society would be responsible to Common Council.
   D. Contract would have to be negotiated by September 1 in order to take effect January 1, 1989.

3. Budget
   A. Society feels the subsidy from the City would have to be higher the first year and more equitable by the third year.
   B. City would like a meaningful savings in the beginning. City may say there's a certain amount it will subsidize and anything over that might be a loan.
   C. Current yearly budget for running Zoo is about $700,000 (including insurance).

4. Personnel
   A. Plan is for Zoo Director to become employee of Society.
   B. There are currently three vacant Keeper positions at Zoo (temporary employees doing work now).
   C. Six union positions (Keepers) and one

salaried Foreman would have to be put in other jobs in Parks Department.
D. There is a Zoo Clerk that is paid ten hours a week by the City and ten hours a week by the Society.

5. Executive Director
A. Society would like to hire an Executive Director in June. His responsibilities would be to raise funds and help negotiate the contract with the City. He would also work on a membership drive and education. When we do have a contract, he would be involved in replacing staff.
B. Before hiring an Executive Director, Society wants assurance from City that we have a chance of getting contract for takeover.
C. City Finance Director said the City is not trying to waylay the Society takeover. If City feels that Society cannot do it, he will speak up.

The next meeting took place on May 25, 1988, with Boyle, Kozina and Maller representing the City, and seven members of the Society. Items discussed at this meeting show the following:

1. Budget
A. Society presented proposed operating budget for 1989 of $617,000.
B. City provided actual 1987 operating cost figure of $686,000.

2. Contract
A. Society asked that City subsidize $617,000 for each year of a three year contract. A clause should be written into contract that extra funds would be needed if something major needed to be replaced or repaired (such as the heating system). Society asked that City provide liability insurance.
B. City said $617,000 was higher than the figure it had in mind. City was not ready to state its figure at this time. City felt Society should provide insurance for animal care.
C. Society would be a tenant leasing property. City, as landlord, would decide if any improvements would be done. Society could use its own funds for improvements it wants. City would maintain grounds, but groups such as garden clubs could come in to plant flowers, etc.

3. Personnel
A. City said there would be six Local 67 positions and one supervisor to absorb into the Parks Department (estimate cost at $250,000). May take up to three years to absorb all positions.
B. Union had approached City as to whether the

Local 67 members could be kept at the Zoo until they take other jobs in the Parks Department.
C. Society would be willing to have City people work second shift if everything could be worked out. There is the question of union and non-union people working side by side with double management.

4. Next Step
A. City will meet with Union to determine if Union is serious in its request to keep a work force at Zoo for a time.
B. Society will draft a proposal to present to Common Council, including proposed revenue and expense budgets.

On September 26, 1988, Society members and Glazier wrote Maller, noting that they had received comments from Boyle on their draft of the operating agreement, and noted the following:

> Two points did arise from our Executive Committee meeting regarding budget. The first is the amount of the initial City contribution. Ron Glazier submitted a budget of $546,300 which included two City employees contracted to the Society or $514,000 with no City employees. These figures represent a minimum budget that is required to operate the zoo. The issue centers around the projected net revenue from the Society. Your proposal calls for reducing the City's contribution by that amount or to $431,000.
>
> The Society is not adverse to using its funds to support the zoo, that is our stated purpose. However, at this time we need all of the funds raised by the Society to support a budget that includes fund raising, promotions and capital improvements. If we put these funds into the operating budget there are no funds for other critical zoo expenditures.
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> . . .
>
> Our proposal is this. The City will contribute $550,000 and contract two City employees to the Society or $520,000 with no City employees. The Society will develop funding plans that will contribute to the operating budget as well as increasing our activities for capital improvements.
>
> The second issue concerns the decreasing City contribution to the operating budget. We would request the same amount be contributed to the budget for the first three years of the contract until we have sufficient experience to determine the true cost of operating the zoo. Undoubtedly, there will be expenses arise that have been covered in the past from Park Department and other City funds. Any increase in future zoo budgets will be covered by the Society. Once a good base budget is determined we can negotiated a reduced City involvement.
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> . . .

The City met with the Union several times during 1988 about the potential takeover of the Zoo by the Society . As noted above, the Union had approached the City by May of 1988 about jobs at the Zoo. On November 1, 1988, three Union representatives met with City officials and Society representatives in the Mayor's office. The Union was concerned with a further erosion of Union jobs within the City, and it was displeased with the City's reduction of Union jobs by attrition as well concerned about the loss of jobs at the Zoo. Union representatives were assured at this meeting that there would be no layoffs as a result of the transfer of bargaining unit members working at the Zoo into the general system of the Parks Department. According to Kozina, the Union made one proposal that the current zookeepers would be allowed to remain at the Zoo until they voluntarily posted out or transferred out of the Zoo, and then those positions could be taken over by the Society. The City took that proposal under advisement, but quickly rejected it.

On November 2, 1988, Douglas Dresen, President of AFSCME Local 67 wrote Kozina the following letter:

> Following our meeting with you, Mayor Davies, and other City officials, AFSCME Local 67 is requesting the City to create permanent, full time positions for the zoo employees, within the Park and Recreation Department. We feel that this form of action by the City would assure an amicable and cooperative transition of the planned take over of the zoo by the Zoological Society.
>
> I'm sure that the City wants full cooperation with the membership of Local 67, and the employees of the Society, should it come to our people working together at the zoo. The creation of positions for these employees would go a long way towards that affect.
>
> Local 67 would reconsider it's position on the grievance pending regarding the original three (3) positions eliminated earlier, as a sign of good faith.
>
> I'm sure that neither the City or the Society wants a continue of action by Local 67 in the form of informational picketing, new grievances, lobbying of elected officials, and petition drives. Working together to resolve these problems is best for both parties, and I assure you Local 67 will do everything in it's power, should we come to an understanding, to make the taking over of operations by the Society a smooth and cooperative effort.
>
> As time is short before this issue comes before the Council, we ask that this matter be taken into consideration as soon as possible.

The City rejected the above proposal, because the City felt it would have created seven new positions within the Parks Department.

Boyle had prepared a draft of a proposed contract or operating agreement between the City and the Society. An outline (dated November 10, 1988) of major contract items shows the following:

1. Contract to be of a Management/Operational function

2. Term to be initially three (3) year period with an

option by Zoological Society to renew for another period of three (3) years.

3. Title of all assets to remain in the name of the City of Racine.

4. Major policy matters remain vested in the City.
   A. Major repairs and capital expansions - City decisions
   B. Daily operating decisions - Zoological Society
   C. City reserves the right of inspection in regards to operations and facilities.
5. A yearly level of support from the City.
   A. First year -- $495,000.
   B. Subsequent years to be based on a decreasing scale but not falling below an agreed upon base.

6. City employees to remain under the jurisdiction of the Park and Recreation Department and assigned to general operations.
   A. Any labor requested by the Zoological Society to be performed by City employees, to be purchased on a time and material basis.
   B. City reserves the right to provide and operate winter activities under its jurisdiction and support at the Zoo.

7. City reserve the right to terminate contract at any time, if loss of accreditation in accordance with National Zoo standards, results.

On November 15, 1988, Glazier addressed a letter to individual Aldermen urging the Aldermen to support the concept of transferring the management of the Zoo to the Society. Boyle drafted a contract, and on December 12, 1988, he sent a letter to Glazier indicating that the Board of Parks, Recreation and Cultural Services Commissions had both approved the agreement. Boyle reminded Glazier that there was an outstanding security contract with a third party which would run until March of 1990 if not terminated. In this letter, Boyle also informed Glazier that he conferred with the City's insurance carrier, and it was not possible for the City to insure the Society or its employees, and that the Society should obtain coverage for the negligent acts of its employees and insure its own equipment or property used in operations at the Zoo.

The following are excerpts from the terms of the contract that was signed by both the City and the Society on December 21, 1988:

. . .

1. OPERATING CONTROL. That effective on the 1st day of January, 1989, the City shall transfer to the Society and the Society shall accept general operating control of the Zoo. General operating control for purposes of this agreement shall mean full authority to administer, control and manage the Zoo in such as will best serve the interest of the City and Society. Said general operating control shall continue during the term of this agreement. Authority retained by the City in this agreement shall be exercised by its Common Council and Board of Parks, Recreation and Cultural Services

Commissioners. The powers of the Society under this agreement shall include but not be limited to the following:

(a) Management and control of zoo exhibitions.

(b) The conduct of classes and lectures or other public functions relating to Zoo exhibitions.

(c) Operation of Zoo concessions and temporary amusement rides including the right to subcontract. Subcontracting shall be subject to approval by the City.

(d) Authority over the scheduling of events at the Zoo by individuals or community groups. The City specifically reserves however the right to continue existing City sponsored special events which shall be scheduled in cooperation with the Society. This reservation shall include but not be limited to Municipal Band Concerts, summer playground activities and ice skating activities.

(e) General authority to designate the uses to which the Zoo grounds and facilities may be put subject to reserved City uses as set forth above.

(f) The employment of sufficient personnel to staff the Zoo and all of its operations. Said personnel shall be deemed employees of the Society which shall fix their compensation and determine other conditions of employment. Said personnel shall be competent to discharge duties relating to animal care and general Zoo operation and maintenance and shall further be able to effectively deal with the public in a courteous and helpful manner in a recreational setting.

(g) Responsibility for the performance of operational maintenance work at the Zoo which shall be performed at Society expense. As used herein, operational maintenance is defined as any single event necessitating repairs or maintenance to continue normal Zoo activities, the cost of which is less than $2,500.00. If said items reach an aggregate cost of more than $25,000.00 in any year of the term of this agreement, the Society may apply to the City for contribution toward the cost of any additional items of operation maintenance. The cost of said additional items may be shared by the Society and city pursuant to mutual agreement. The Society shall, however, be responsible for all damages regardless of costs caused by the negligence of its employees or agents.

(h) Management and control over buildings and land described on Exhibit A and the public parking lot herein before described. Said management and control shall include the public sidewalks and parkway panels adjacent to real estate and the Society's responsibilities shall include but not be limited to grass cutting and watering, flower planting and watering, snow plowing, salting and sanding, trash removal, heat plant maintenance, janitorial services and the furnishing of chemical supplies with respect to the real estate under its management and control. (Snow and ice control on the parking lot shall be retained by the City Parks Recreational and Cultural Services Department.) It is the intent of this agreement that legal title to said real estate shall

remain in the name of the City. The Society may however make capital improvements to said real estate subject to City approval. For purposes of this agreement, capital improvement shall include the construction, demolition, removal or major alteration of buildings and major excavations or alterations in the contour of land. The Society shall further be authorize to perform ordinary and necessary landscaping. The removal of mature trees shall be subject to City approval. In the performance of the aforementioned activities the Society shall be prohibited form placing liens or encumbrances on City-owned real estate. Society will also provide some storage to the City at the Zoo as agreed upon by the parties and consistent with efficient Zoo operations (It is expected that the Zoo will no longer be provided storage by the City at Rickeman Court).

(i) Responsibility to obtain necessary licenses and permits.

(j) Responsibility to solicit contributions and Society memberships from the general public which funds shall be used for the benefit of Zoo operations and capital improvements.

2. GENERAL INTENT. . . .

3. CITY RESPONSIBILITIES. The City agrees that during the term of this agreement it shall continue to perform the following functions:

(a) It shall be responsible for major maintenance and repair at the Zoo. As defined herein, major maintenance and repair is any single event necessitating the expenditure of maintenance and repair costs exceeding $2,500.00.

(b) It will promptly review or cause to be reviewed any capital improvement project recommended to it by the Society. Said capital improvement projects shall be reduced to writing and be comprised of sufficient detail so as to be suitable for review by the City. Said projects shall be submitted to the City of Racine Common Council through the City Clerk and referred to the proper committee or commission for review. The City agrees that in the event the proposed capital improvement project is to be financed solely from Society funds, that approval of said project by the City will not be unreasonably withheld.

(c) It will approve service by an aldermanic representative and the City Director of Parks, Recreation and Cultural Services or designee as regular voting members of the Society Board of Directors. The Society herewith agrees to accept said members on its Board.

(d) It shall supply City personnel and equipment at City discretion to assist the Society in the operation and maintenance of the Zoo as may be from time to time requested by the Society. The Society shall however be responsible to pay the City for services and use of said personnel and equipment at rates to be agreed upon between the parties.

(e) It shall retain title to the real estate, which is made the subject of this agreement, and shall include all buildings and improvements hereon and shall retain

these in its insurance coverage so as to protect the City's interests therein.

(f) The City will permit usage of City-owned equipment as listed on Exhibit B attached hereto and supplies presently located on the Zoo premises by the Society during the term of this agreement. This usage shall be at no cost to the Society but the Society shall be obligated to maintain any City-owned equipment in good order at Society expense. Upon termination of this agreement said equipment shall be returned to the City.

4. CITY SUBSIDY. It is expected that the transfer of operating control of the Zoo by the City to the Society will effectuate a substantial savings to the taxpayers of the City. It is recognized however by the City that Society is not capable at the present time of providing all of the financial needs for zoo operations. The City therefore agrees to contribute a fixed sum to those operations and that it will during the term of this agreement make no further contributions (other than capital improvements or major maintenance) to said operations. The City agrees therefore that it will contribute to the Society the following sums for the following years for the purpose of Zoo operation and maintenance:

Calendar year 1989, the sum of $495,000.00
Calendar year 1990, the sum of $475,000.00
Calendar year 1991, the sum of $450,000.00

. . .

5. TERM. The term of this agreement shall be for three years commencing on January 1, 1989 and terminating on December 31, 1991. This agreement shall at the expiration of said term automatically review itself for an additional three year period upon the same terms and conditions as herein set forth unless 60 days or more prior to the expiration of the original term, either party shall give to the other a written notice of termination. If the agreement is automatically renewed as provided above, the City reserves the right to renegotiate its commitment for financial contribution to Zoo operations for the renewed term.

. . .

6. ZOO ANIMALS. . . .

7. CITY ACCESS. The City shall at all times, through its authorized representatives, as designated by the Director of Parks, Recreational and Cultural Services have access without restriction to all parts of the Zoo. The Society further agrees to keep the Zoo open to the general public during the term of this agreement on a regular basis at such times as shall afford the general public an opportunity to have reasonable access thereto. Society is authorized to make and enforce rules and regulations affecting public use of the Zoo as may be necessary to insure an orderly operation and in the interest of public health and safety, and the health and safety of the Zoo animals. These rules and regulations shall however be subject to review and amendment by the City. It is agreed that the hours of

operation of the Zoo during the term of this agreement shall be as follows:

May 1 to September 30 - 9:00 A.M. to 8:00 P.M.
October 1 to April 30 - 9:00 A.M. to 4:30 P.M.

Said hours shall apply to every day during the term of this agreement except December 25 of each year when the hours shall be 12:00 Noon to 4:30 P.M. The Society shall have the authority to alter said opening hours on an emergency basis involving matters of public health and safety or at times when special events sponsored by City or the Society may warrant such alteration. It is agreed by the parties however that public access to the Zoo is of paramount importance and alterations of normal opening hours should be on a limited basis for a good cause only. The City reserves the right under this agreement to review the opening hours of the Zoo during the term if it deems that Society has altered those hours to the detriment of the general public. The Society shall not charge an admission fee without approval by the City. . . .

8. NOTICES. . . .

9. INSURANCE. The City shall maintain its present levels of insurance coverage relating to the Zoo during the term of this agreement. The Society shall provide public liability insurance coverage relating to its general operating control of the Zoo and shall name the City as a party insured as its interest may appear. The Society shall also provide its own insurance covering personal property which it owns and uses in conjunction with Zoo operations. The Society shall further provide all insurance which is required under law relating to its employees at the Zoo. The Society shall further assume full responsibility to the City for damage or injury to persons or property caused by negligence of its agents or employees at the Zoo.

10. ASSIGNABILITY . . .

11. SEVERABILITY . . .

The amounts of City contributions stated in the above contract were changed, with $495,000 remaining in the first year of the contract, but $480,000 being the actual contribution for the second and third years of the contract. The Society contributed approximately $100,000 a year to the Zoo before the take over in 1989. The Society provided nearly $128,000 for the 1989 operations, and over $150,000 for 1990. The Society projected that the operating budget for 1991 will be about $671,000, so if the City has provided $480,000, the Society will need to provide approximately $191,000. The money received from the City is not earmarked for any specific purpose but is put into the Society's operating revenue accounts and dispensed as the Society uses it.

There is no charge for admission to the Zoo. The Society generates money through fund raising and volunteer assistance in a number of ways, such as dues for memberships, promotional programs such as Adopt the Animal and Commemorative Brick Programs, concessions, vending of animal food, special events, fund raisers, bequests, interest income, corporate donations, and general public donations. All those sources of income continued to be available to the Society both before and after the management contract with the City took effect. Before 1989, most of the money generated by the Society was used for capital improvements at the Zoo, and since 1989, these funds were used for operations to supplement the money from the City.

In 1988, the Society used its funds to build a small bobcat exhibit, paid salaries to Glazier and a secretary, and put a new manhole in the grounds. During 1989 and 1990, the Society put in a new prairie dog exhibit, added a new barn in the family farm, remodeled the orangutan exhibit (which was started in 1988 and finished in 1989), resurfaced some of the roads, added new fencing in the family farm area and put in drain tile, changed practices for water consumption, made changes in the animal collection by adding some and deleting others, added flower gardens, rebuilt electric motors, etc. Many of these expenditures were the items that the Society contributed to the Zoo before the 1989 takeover, such as animal purchases, the family farm, the orangutan exhibit.

The Society added an event in the last two years called Zoo Debut, which is a fund raiser for capital improvements, and that event has generated about $53,000. One of the directors of the Society set up an Animal Trust Fund which is managed by the Racine County Area Foundation, and interest on funds in excess of $20,000 can be used to buy animals. The Adopt the Animal is a promotional program that has been in existence about six years, where individual can make a specific donation for animal care. The Society maintains a Brick Fund, by selling a brick with the buyer's name engraved on it, and the brick is placed in the walkway. Since 1987, there has been a group for the Animal Crackers jazz concerts that puts on a series of concerts to raise money for the Zoo. Other community organizations, such as scouts, have contributed to the Zoo, either through buying a brick, adopting an animal, or service projects such as planting flower gardens.

Glazier noted that there are foundations that will not give grants to governmental entities but will give grants to nonprofit organizations, such as the Society. The Society has applied for a grant from the Institute of Museum Services to support educational activities at the Zoo. The Society could have applied for such a grant before it took over the day to day management of the Zoo.

The Society has not changed its location since the take over of the Zoo; it maintains its same office above the zoo office in the main building on the Zoo grounds. The telephone number for the Zoo, listed under City of Racine agencies, is separate from the number for the Society.

The Society maintains books and records internally with the Zoo staff, which are separate from those of the City. The Society buys its own equipment for the Zoo, raises funds specifically for capital improvements, and has its own internal payroll system. Glazier is responsible to day-to-day operations at the Zoo as well as supervision of employees, which he may delegate to area supervisors.

If the Society needs services that are provided by the City, it pays the prevailing rate established by the City for work done by the Parks Department. The Society acts independently for equipment purchases, animal purchases, small exhibit construction or modification, but if the Society wants to make major changes to the physical plant or make a major exhibit, it needs to get City approval.

There are currently 15 employees at the Zoo hired by Glazier or supervisors, plus some seasonal employees. The City does not hire or discipline those employees. Wages and benefits are determined by the Society, with Glazier making budget proposals which are reviewed by the Society's finance committee and approved by the Society's board of directors. Zoo employees are currently covered by a privately funded tax sheltered annuity program and not covered under the Wisconsin Retirement System. The Society

provides health insurance for employees, pays workers' compensation insurance, unemployment compensation, and provides liability insurance for the acts of employees. The Society establishes hours of work, vacations and holidays. The Society has its own personnel manual.

City employees have to make arrangements to get access to work on Zoo grounds if the work is to be done outside of normal Zoo hours, because a gate is locked with keys available only to Zoo employees.

Before the 1989 transfer of operations, the City maintained four different class titles or types of positions -- head zookeeper, zookeeper, laborer-keeper, and zoo maintenance. City employee Lee Schmidt was the second shift zookeeper. John Willett, James Herman, Melford Gray, Edwin Thornton were also zookeepers, Delbert Schatzman was a laborer keeper, and Randy Fornes was zoo maintenance. The position of head zookeeper was rotated among three employees who were zookeepers due to the seven day a week operation.

When the City ran the Zoo, it had been operating with substantial amounts of overtime being filled by regular employees. Kozina stated that at least in the two years before the Society took over the operations of the Zoo, there had been illnesses and industrial injuries which created a lack of a full complement of employees at the Zoo, and therefore, exorbitant amounts of overtime. The zoo maintenance and laborer keeper positions were scheduled Monday through Friday, but the five zookeepers were on rotating shifts which included regular overtime built into the schedule. The other two positions also included some overtime.

Following the takeover of the Zoo by the Society, the Union filed grievances in 1989 which were settled on December 14, 1989. In the settlement, the City agreed to make a one-time lump sum payment to the seven transferred employees for a disputed loss of hours and the parties agreed that the settlement would not serve as precedent for any other dispute.

In preparation for the instant grievance, Schmidt calculated three years of overtime to find an average of the overtime earned in 1986, 1987, and 1988, the three years preceding the transfer of the Zoo to the Society. He further looked at the overtime worked in 1990, to show what the employees would have earned in overtime in 1990 had they remained at the Zoo, or what kind of adjustment would be needed for the lost overtime. For example, his calculations show the following for Melford Gray:

Melford Gray:	
1986 overtime wages -	$5,313.35
1987 overtime wages -	4,280.27
1988 overtime wages -	4,999.75
3 yr. average overtime -	4,864.45
Overtime worked in 1990 -	653.23
3 yr. avg. minus 1990 O.T.-	4,211.22

The three year average minus the 1990 overtime would have been $2,761.36 for Herman; $935.46 for Schmidt; $2,874.50 for Thornton; $3,261.81 for Willett; $3,511.73 for Schatzman; and $2,838.50 for Fornes. Those figures for the 1990 overtime do not include increases in wage rates, and thus, the actual amount of projected overtime would be a higher dollar amount.

All seven employees were transferred to positions in the City's Parks Department on January 1, 1989. None was laid off or had a break in employment. Schmidt was transferred from a zookeeper position in pay grade HU-6 to a position as an equipment operator in the Parks Department, which is a pay grade of HU-7, and is currently on the forestry crew. Schmidt's change in pay grades resulted in a higher base salary, but he lost his shift differential. All but

one of the transferred employees moved to a HU-7 pay grade, which was a higher base pay than their positions at the Zoo.

The Society has advertised jobs for keepers and a senior keeper. The keeper position was advertised as requiring two years of experience or a degree in zoology or related field and one year's experience working with mammals, birds, and limited reptile collection. The senior keeper position was advertised as requiring four years of experience, degree in zoology or related field, and additional experience may be substituted for a degree. The advertised salaries were significantly less than City employees working at the Zoo were being paid in 1988. The Society made one proposal to the City on September 26, 1988, with would have retained two City employees at the Zoo.

One City employee, Mary Jo Pynaker, remained at the Zoo when the Society took over. The Society offered her an administrative position, and she resigned from the City and was hired by the Society. Her wage rate stayed about the same. Pynaker is no longer works at the Zoo.

The jobs performed by City employees when working at the Zoo before January 1, 1989, and the jobs performed by employees hired by the Society after that date are similar. Glazier stated that duties performed by the Society's zookeepers which were not done by the City's zookeepers involved special projects related to animal husbandry, breeding, and research. The research involves contacting other zoos and keepers about problems with animal nutrition, reproduction, disease, and preventative health programs. The Society maintains fewer animals than the City did, primarily due to the removal of one population of monkeys and a reduction in bears.

Kozina noted that the language in the collective bargaining agreement regarding contracting out has been there since he has been a City employee, more than 20 years. The City has contracted out with private services for the operation of the golf courses, operation of the cemetery, maintenance of various community and recreation centers, custodial work in City Hall, City Hall Annex, and the Safety Building. The City owns the Charles A. Wustum Museum of Fine Arts, and about 10 years ago, the operations were transferred to the Racine Art Association. The City-owned festival hall has a private security force for security services. In most of those cases, the work had previously been done by bargaining unit members who were transferred to other departments. Union members never provided security at the festival hall.

The City the contracted with Bencriscutto & Associates at the golf course. Bencriscutto was a golf professional and a private entrepreneur who managed golf courses. The City contracted out with Burgess Ice & Snow for work at the cemetery. Burgess Ice & Snow is a Milwaukee based business involved in lawn maintenance and ice and snow removal. The Union filed a grievance over the golf course work, and that grievance was settled. The Union did not file a grievance over the contracting with the cemetery, because, as Schmidt explained, the jobs in the cemetery were basically 40 hours a week, while the jobs at the golf course included a lot of overtime. Several different companies have performed the custodial work at City Hall over the years, generally cleaning and custodial companies in the area.

Kozina noted that most of the grievances filed regarding the City's contracting out were settled with the exception of the City Hall custodial work. When bargaining unit positions were eliminated by attrition, the overall number of hours available for bargaining unit employees was reduced. Kozina stated that in applying the labor contract's language about contracting out, a reduction in hours was applied on an individual basis, not on a unit-wide basis.

On December 13, 1989, the Union filed the instant grievance, which states: The Racine Zoo is a city operated and controlled facility. The City violated the articles of agreement between the city and the union by transferring local 67 zoo employees from the zoo and replacing them with other employees. The city is also violating the contract by not providing replacement employees with all contractual rights, benefits and wages.

ISSUES:

The parties do not agree on the framing of the issues. The Union is alleging the during 1989 to date, the City has violated Articles X and XI by failing to pay the employees employed at the Zoo the wages and benefits called for by the Articles of Agreement; that the City has violated Article XII of the Articles of Agreement by failing to post openings that occurred at the Zoo, and by failing to permit more senior, qualified City employees to bid on said openings. In the alternative, the Union alleges that during 1990 the City violated Article II, E, 7 of the Articles of Agreement by causing a reduction in the hours worked by bargaining unit employees as a result of a contracting out for services.

The City raises one procedural issue and asks whether the grievance is arbitrable. If the Arbitrator reaches the merits, the City frames the issue as this: did the City violate the provisions of Article II, Section E of the 1988-89 collective bargaining agreement when it transferred operation of the City Zoo to the Racine Zoological Society? If so, what is the remedy?

The Arbitrator will address the following issues:

> Is the grievance arbitrable?
>
> Did the City violate the collective bargaining agreement by contracting out the operations of the City Zoo to the Racine Zoological Society? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

ARTICLE II

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

7. To contract out for goods or services; however, there shall be no layoffs or reduction in hours due to any contracting out of work.

. . .

ARTICLE III

. . .

Step 1. The employee, with his department steward (or alternate if the department steward is unavailable due to illness or vacation), shall reduce his grievance to writing on an approved form and shall present it to the employee's immediate supervisor within fifteen (15) working days after he knew or should have known of the cause of such grievance. A copy of the grievance shall also be submitted at the same time to the Personnel Director. The immediate supervisor may confer with the grievant and his department steward (or an alternate if the department steward is unavailable due to illness or vacation) before preparing the Step 1 answer.

. . .

ARTICLE X
Insurance - Retirement

. . .

ARTICLE XI
Hours and Wages

. . .

ARTICLE XII
Job Postings

. . .

SCHEDULE A
Hours of Work

. . .

EXHIBIT "A"
Base Wage Rate Schedule -- January 1, 1989 (cont'd.)

. . .

THE PARTIES' POSITIONS:

The Union:

The Union asserts that the Society is not an independent contractor, but rather, a voluntary agent of the City. The Union points out that the City has used independent and outside suppliers for services in the past, as well as arranging to have employees of a division or department provide services, with the department providing the service establishing a "going" rate for use or equipment or services. The Union contends that in this case, the City did not contract with an independent, outside supplier, but, instead, arranged to have the management of the Zoo handled by another division or department of City government, one that is a voluntary agent of the City.

The Union argues that the Society always has been an agent only of the City. It is not like the grounds keeping company from Milwaukee, the professional golf management company, the private security companies, or the different custodial services with whom the City has contracted out in the past. The Society does not exist to sell services to anyone or to serve anyone other than the City. It has never supported any zoo other than the City's Zoo, and exists only to serve the City of Racine Zoo by raising money to support it. The Society is a voluntary service organization established to serve only one zoo and has no existence independent of the City and the Zoo. The Society is a voluntary agent of the City, a "captive" agent. It exists only to serve the interest of the City and has never served any interest outside of the City's interest.

The City's management arrangement with the Society is in practical effect a contract with itself, and thus, the City is still the employer of the employees at the Zoo, the Union contends. Except for the fact that it is a voluntary membership organization, the Society serves much like a division or department of City government. The City's operating agreement with the Society provides for City oversight of the Society's spending activities and permits the Society to use City equipment and services of other City employees at the same cost charged to other City departments. The City directly contributes 80 percent of the Society's budgeted income, and the rest is provided as it always has been, by way of membership fees and various contributions.

Given that the level of its other sources of income has remained essentially unchanged, the Union finds it apparent that the City's "subsidy" of its Society is primarily intended to cover the cost of providing the Society's newest service, the wages and benefits of employees now employed at the Zoo. Given that those employees are paid less and receive fewer benefits, it is apparent that the operating agreement is a scam, an artifice designed and implemented in an effort to reduce wages and benefits of the City Zoo employees without having to bargain such a reduction with the Union.

The Union maintains that the City, having contracted with itself, is obliged to see to it that those employees are paid the collectively bargained wage rates of the Articles of Agreement with the Union, and its failure to do so constitutes a breach of the agreement. In order to remedy this breach, the Union asks that the City be ordered to pay to all employees employed at the Zoo the difference between wage rates they were paid in 1989 and 1990 and their current rates, and the collectively bargained wage rates, and to make them whole for other benefits the City has failed to provide them. Additionally, jobs openings at the Zoo should be posted, and more senior, qualified City employees should be permitted to bid on those openings.

Even if the Society has some sort of independent existence outside of its relationship to the City and its Zoo, the Union argues that at best that would make the City the dominant party in a "joint employer" relationship. The Society's investment and activity is limited to the administrative task of hiring and supervision of employees and managing Zoo affairs for the City, while the City owns the property and is responsible for providing the entire means of carrying on the operation of the Zoo and for providing all of the funding for employees' wages and benefits. Without the City's contribution, there would be no Zoo, and no one employed there.

Next, the Union contends that if the Society is a true outside, independent contractor, the City has breached the contracting out provision in Article II, E, 7, which calls for no reduction in hours due to any contracting out of work. The City has admitted that bargaining unit hours have been reduced. Beyond the general reduction in bargaining unit hours, seven

individual employees have suffered a direct and devastating loss of regularly worked hours because of the arrangement with the Society. That loss amounts to at least $20,394.58 in lost wages, and this does not take into account the present value of their lost work hours. The remedy for this should be that the former Zoo employees are reimbursed the value of wages they lost as a result of the reduction in their regularly worked hours, adjusted to account for the present value of said wage loss. Also, the hours worked by the Society's "employees" should be calculated and said hours should be attributed to bargaining unit members in general, and paid for at collectively bargained wage rates, in compensation for the general reduction in hours.

The Union concludes that what the City has done is take a voluntary membership organization that is captive to the City's interest, and attempted to substitute that organization as the manager of City activities solely for the purpose of evading its collectively bargained responsibilities. That organization never existed as anything other than a voluntary agent of the City, and from a labor relationship standpoint, is the equivalent of a division or department of the City government that must "stand in the shoes" of the City as it concerns the Articles of Agreement with the Union.

The City:

The City first asserts that the grievance was not filed in a timely fashion pursuant to the grievance procedure, and is therefore not arbitrable. The grievance was filed on December 13, 1989, while the transfer of the seven employees from the Zoo to other City positions took place 11 and 1/2 months prior to the filing of the grievance. The contract provides that grievances must be filed within 15 working days after one knows or should have known of the cause of a grievance. Anticipating the Union's response that this is a continuing grievance, the City contends that the transfer of employees is the triggering event which should have resulted in a filing of the grievance, and the grievance must be considered to have been waived by the Union.

The City followed the contractual procedure for contracting of services. The City met with representatives of the Union prior to the establishment of a contractual arrangement between the City and the Society. It complied with the requirement that there be no layoffs or a reduction in hours as a result of such contracting out of work. None of the seven employees sustained a break in employment, and it was the City's intention throughout its negotiations with the Society that it adhere to its contractual obligation with the Union. The majority of employees received a salary increase as a result of the transfer.

Moreover, the City contends that no employees suffered a reduction in regular work hours as a result of the subcontract between the City and the Society. In the past, the City has engaged in similar types of subcontracting, and Union employees have been transferred into other City departments, resulting in an attrition of the total number of Local 67 employees in the City. A reduction of the total number of work hours performed by Local 67 employees has never been challenged by the Union in the past. The "reduction in work hours" language of Article II, Section E,7 has always been applied on an individual employee basis.

The City rejects the Union's argument that employees suffered a loss in overtime hours which were allegedly built into the work schedule at the Zoo. All positions at the Zoo are 8-hour positions, incurring no automatic or guaranteed overtime. There were mitigating, temporary factors which resulted in a temporary surge in overtime for certain Zoo employees. Furthermore, employees transferred from the Zoo have also earned overtime in their new positions. This issue was already raised and resolved voluntarily between the parties in 1989. The settlement renders the overtime argument irrelevant.

The City states that it is not the "alter ego" or the Society, nor is it a "joint employer" with the Society. The U.S. Supreme Court has promulgated four criteria to determine if a "single employer" status exists: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. Of the above criteria, only common ownership exists in the relationship between the City and the Society.

The Seventh Circuit Court of Appeals found that the Chicago Zoological Society was an independent contractor, and not a political subdivision, by looking at a two-part test to determine whether an entity is a state or political subdivision. Similarly, the Seventh Circuit has found that whether two separate entities are to be treated as joint employers is a factual question depending on such factors as supervision of employees, authority to hire or fire, promulgation of work rules, work assignments, etc., and whether the employer claimed to be a joint employer possess sufficient control over the work of employees to qualify as a joint employer with the actual employer. The NLRB has noted that there must be a showing that the alleged joint employer meaningfully affects matters such as hiring, firing, discipline, supervision and direction.

Except for the landlord-tenant relationship between the City and the Society, there is no integration of operation between the City and the Society concerning the Zoo operations, the City asserts. The zoo operates independently of almost all control by the City, particularly in the area of employment of Society employees. The City lists 31 factors which show the extent of segregation between the City and the Society. There is no centralized control of labor relations, and there is no common management. The financial dependence of the Society on the City does not, in the absence of other criteria, establish a joint employer or alter ego relationship between the City and the Society. The degree to which the Society is operating independently of the City is spelled out in the contract between the two parties, and that contract, along with the personnel policies pertaining to employees of the Society, leave no doubt as to the degree of independence exercised by the Society.

The City asserts that the negotiations between the City and the Society were conducted at arm's length and the parties did not engage in a "sweetheart" deal. The negotiations took place over several months. The Society asked for a far larger subsidy, one to be maintained at the same level for three years, while the City wanted to attain a declining balance. Such rigorous, arm's length negotiations do not typically occur between two parties engaged in a joint employer or alter ego relationship. The City contends that its financial assistance to the Society is not dispositive to an analysis of alter ego or joint employer status. The City is not the sole source of revenue for Zoo operations, and the City's subsidy is declining over the course of the three-year contract, while the revenue demands on the Society are increasing over the same term. The Society must continue to seek its own sources of revenue, as its needs increase and the City subsidies decrease, and this scenario cannot give rise to any inference that the Society is a single entity with the City.

The Union's Reply:

The Union claims that the City has failed to come to grips with the reality of the long standing agency relationship between the City and its Zoological Society, and restates its argument that the Society is not an independent contractor, but is and always has been a voluntary agency of the City. Whether the Society may be an "alter ego" of the City, a "joint employer" with it, or a "subdivision" of the government does not address the essential reality that the Society has no existence other than as a voluntary

agent of the City.

The Union asserts that the fact that the Society is incorporated and may have negotiated its Zoo management responsibilities at "arms length' does not change the fact that it serves as the City's agent. Unlike the independent contractors the City used in the past, the Society has no entrepreneurial purpose, and its existence is tied to service the City, in particular, the City Zoo. The Union notes that the City's level of funding is greater than that called for in the Operating Agreement, and the increased funding, which was in response to the Zoo Director's request, underscores the City's continuing and active concern for and involvement in Zoo management.

The Union objects to the City's reliance on Brock v. Chicago Zoological Society, 820 F.2d 909 (7th Cir. 1987), as the issue in that case was whether the OSHA applied to an organization that for over 50 years had been independently managing a zoo and acted as if it were subject to the OSHA, where the violation was subject to OSHA and one for which the Society was directly responsible. The Union finds the facts and history in the Chicago case very different from Racine, where the City only recently contracted with its Society for the purpose of evading its collectively bargained obligations.

The Union continues to argue that if the Society is somehow found to be an independent entrepreneurial entity, then the City has breached the contracting out provision of the labor contract. The City has admitted that as a direct result of its Operating Agreement with the Society, bargaining unit hours have been reduced in violation of Article II, E, 7. The Union rejects the City's argument that this language does not apply to unit work as a whole but only to the hours on an individual employee. The Commission noted in AFSCME Local 67 v. City of Racine, Dec. No. 24949-B (WERC, 1989) that it could be argued that the loss of unit work constituted a "reduction in hours" under Section E.

Beyond the general reduction in bargaining unit hours, the Union states that seven employees who were employed at the Zoo before January 1, 1989, suffered a loss of regularly worked hours. The overtime work was regularly scheduled as a result of a conscious and long-standing policy decision made by the City that such work should be scheduled on a regular and ongoing basis. Both the unit losses and the individual losses constitute a violation of the collective bargaining agreement, according to the Union.

The Union concludes by noting that the Society has never existed and cannot exist as anything other than a voluntary agent of the City, and as such, from a labor relation standpoint, given the peculiar facts here, it is the equivalent of a division or department or agency of the City that must "stand in the shoes" of the City as it concerns the contract with the Union. The City would ignore that reality and substitute technical form for common sense substance.

The City's Reply:

The City objects to the Union's characterization of certain facts, such as the purpose of the subsidy paid by the City, control over standards for employees, the method of paying for City services, the purpose of the Operating Agreement between the Society and the City, and the overtime hours worked by Union employees.

In restating its argument that the grievance is untimely, the City points to a recent decision by a WERC arbitrator who rejected a union's claim of a continuing grievance where there was a specific point at which the grievant and the union became aware of the adverse position of the employer. The City

submits that similar considerations must prevail in this case, as the Union became aware of the transfer as of January 1, 1989, but did not grieve the matter until December 13, 1989, despite a specific date upon which employees discovered the cause of the grievance.

The City calls the Union's attempt to distinguish between its relationship with the Society and previous subcontractors unsupported and not developed or addressed in the record in this case. Also, the Union's characterization of the Society as a captive agency relationship ignores the law surrounding agency relationships, citing Jahns v. Milwaukee Mutual Ins. Co., 37 Wis.2d 524 (1967). The Jahns decision concludes that where a principal exercises little or no direct control over day-to-day operations of the alleged agency, there is no agency relationship. Here, the City retained only ownership of the Zoo facilities as a landlord, and the Society operates independently with its own personnel rules. The City asserts that none of the indicia of an employer-employee relationship as noted by the Fifth Circuit Court of Appeals in a case cited by the Union are present in this case. All the decisions cited by the City show that the critical factor is the degree of control retained by an alleged employer over an independent contractor. The Society is completely independent of any control by the city, and the City has not entered into a contract with itself, as the Union claims.

The City has previously addressed the issue of overtime and maintains that there is no guaranteed overtime and that this issue was voluntarily resolved on December 14, 1989, by a settlement between the parties. The contractual guarantee is the work day established pursuant to Schedule A, Hours of Work, and Article II gives the City the right to schedule overtime work. The Union's allegation that there is an extra-contractual entitlement to formerly worked overtime hours cannot co-exist with the contract language.

The City calls the Union's allegation that the City's agreement with the Society is a contract with itself unsupportable. The Society existed from 1924 to 1989 with no subsidy from the City, and when it negotiated a subsidy, the City played no role in the Society's operations. The City asserts that the existence of financial support cannot create a "joint employer" or "alter ego" status where there is no control or interrelationship of operations between the two entities. Even if the City provided the Society with its entire operating revenue for the three years of the Operating Agreement, the financial assistance would not have determined that the City and the Society are joint employers or alter egos of one another. A party does not spend six months negotiating with itself.

DISCUSSION:

The delay of more than 11 months in bringing this grievance from the effective date of the contracting out of the Zoo to the Society is troubling and needs to be addressed. The Union did not address the timeliness issue in either its initial or reply brief, but during the hearing, it asserted that the contracting out of the Zoo to the Society is an ongoing and continuing violation, and that the grievance is timely, if not, in fact, anticipatory of continuing breaches of contract.

Article II, Section D, Step 1, calls for grievances to be filed within 15 working days after an employee knows or should of known of the cause of the grievance. The Union makes no claim of lack of knowledge of the contracting out of the Zoo to the Society on January 1, 1989. The only way this grievance can survive a question of timeliness is if the alleged violation of contract can be considered to be a continuing violation.

Continuing Violations:

Arbitrator Seward in Bethlehem Steel Co., 20 LA 76 (1953), defined a continuing violation as the following:

> . . . there is a clear distinction between claims which arise from single isolated events and those which are based upon a continuing course of Company action. It would be one thing to hold that when a transaction has been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance within 30 days would be a bar to all future efforts to have that course of conduct corrected.

Arbitrator Feinberg, in Bethlehem Steel Co., 26 LA 550 (1955), explained that a continuing grievance is one where the act complained of may be said to be repeated from day to day, such as the failure to pay appropriate wage rates, but held that a layoff, even in violation of seniority, was not a continuing violation. The purpose of the continuing/recurring grievance or violation rule is to be able to make an equitable adjustment if a violation if found, that there be some remedy and that the employer not be allowed to continue sheltering a violation which occurred some time ago in a manner to erode the bargaining agreement.

Grievances involving benefits are often considered to be of a continuing nature, as contract violations remain unremedied each pay period. 1/ Examples of disputes which have been held to be continuing violations include: improper wage rates, Bethlehem Steel Co., 34 LA 896 (Seward, 1960) and Steel Warehouse Co., 45 LA 357 (Dolnick, 1965); erroneous placement of an employee on a seniority list, American Suppliers, Inc., 28 LA 424 (Warns, 1957); misassignment of work, Copolymer Rubber & Chemical Co., 40 LA 923 (Oppenheim, 1963); reductions of sales commissions, Sears, Roebuck & Co., Inc., 39 LA 567 (Gillingham, 1962); failure to grant merit increases, Taylor-Winfield Corp., 65-2 CCH ARB Para. 8651 (Kates, 1965); transfer of teacher from counselor to classroom, Board of Education of Special School District 1, 81 LA 41 (Rotenberg, 1983); etc.

Arbitrators have reached different conclusions on whether contracting out is a continuing violation. For example, in Tenneco Oil Co., 40 LA 707 (Abernethy, 1963), the Arbitrator found no continuing violation of a company's contracting out of janitorial work. The parties' contract called for a grievance to be filed within five working days, and even allowing for extra time to allow the grievants to gain knowledge of the alleged wrong, the grievance was untimely. Addressing the continuing violation theory, the Arbitrator stated:

> The Arbitrator cannot agree that this is the kind of company action that is sometimes accepted by arbitrators as a "continuing" or repeated offense which permits the grievants to present a grievance on any of the occasions on which the offense is repeated. The

1/ See Neville Chemical Co., 73 LA 405 (Richman, 1979).

> act of contracting out the work in question was the act which gave rise to this complaint. That act occurred only once, and on a specific date, August 22, 1962. Time limits for grieving must run from the time when the grievance arose out of that act. As has been found above, the required time limits thereafter were not met in this instance, whether the grievance be considered to have "occurred" when the act complained of occurred, or when the grievants had knowledge of that act.

However, Arbitrator Williams ruled in ACF Industries, Albuquerque Division, 62-1 CCH ARB Para. 8257 (1962) that the contracting out of lawn care was a continuing violation, stating:

> The reason for the doctrine of continuing violation is demonstrated by this case. There was no official notification to the union concerning the subcontracting of the care of the lawn. This all took place in a time of extensive lay-off in the plant when the employees who would have been eligible to be retained to care for the lawn had been laid off. There was no way the union could know that this was a permanent or a temporary matter. It is certainly well established in subcontracting cases that management has greater rights to subcontract temporarily under certain circumstances than to establish a new permanent subcontracting policy which eliminates bargaining unit jobs. Thus it can properly be said that each day that the company continues to have the lawns maintained by the independent contractor is a violation of the contract for that day, assuming that the contract forbids such subcontracting.

Similarly, in Hartley and Hartley, Inc., 74 LA 196 (Daniel, 1980), the Arbitrator found improper subcontracting of work to be a continuing violation under circumstances where there was considerable confusion at the site of the work being subcontracted, and where the company failed to prove to the Arbitrator's satisfaction that the grievants knew what was happening at the job site within the time period specified. Arbitrator Daniel further considered that if such action was a violation of the contract, it occurred each day that the work was done by contractors and a separate grievance could have been filed.

A continuing violation may be found where an employer has not informed the Union about its actions which are the subject of the grievance filed some time after the event. In Republic Steel Corp., 27 LA 262 (Platt, 1956), the Arbitrator noted that the company gave no notice to the union that the practice of assigning helpers to certain employees was being eliminated, and it in fact led the union to believe that the layoff of such helpers was only temporary. While the grievance was not filed until 16 months after the company actually changed the practice, it was considered to be a continuing violation due to the lack of knowledge on the part of the union. In Miller Brewing Co., 67-2 CCH ARB Para. 8383 (Slavney, Anderson and Rice II, 1967), the panel applied the continuing violation theory to a dispute concerning an employee's pension where neither party's conduct was so culpable or so blameless as to extinguish the arbitrability of the dispute.

Arbitrators have found grievances not to be continuing violations where the grievance procedure sets time limits to run when the alleged violation came to the grievant's attention, as opposed to merely setting a time limit

following the existence or occurrence of a fact or event. 2/ Where arbitrators have found violations or grievances to be of a continuing nature, they recognize that late filings of grievances may affect the remedies to be imposed. 3/

Continuing Violation Not Applicable:

There is no universally accepted method of treating contracting out cases as continuing grievances, and the Arbitrator has looked to the specific facts on the record of this case in determining that it is not a continuing grievance or violation. While contracting out may be characterized as a continuing grievance in some cases, a number of factors weigh against the continuing violation theory in this case. They are the following:

> 1. The collective bargaining agreement specifically allows for contracting out, with the restrictions as noted in Article II, Section E,7.
>
> 2. The parties have a long-standing relationship, are well aware of the provisions of the bargaining agreement, and have litigated contracting out decisions in the past.
>
> 3. The Union knew in advance of the City's intent to contract out the work at the Zoo, at least by May 25, 1988, according to notes kept by the City. Further discussions with the Union occurred in November of 1988.
>
> 4. There was a specific event affecting bargaining unit employees -- the transfer of seven employees from the Zoo to the Parks Division, which occurred on a specific date, January 1, 1989.
>
> 5. The grievance procedure of the bargaining agreement defines the time for filing a grievance as 15 working days from the time a grievant knew or should have known of the cause of the grievance.
>
> 6. The parties did not engage in conduct which would lead one to conclude that they shared in the responsibility for a delay in filing the grievance.
>
> 7. The Union does not claim that it could not discover the nature of the relationship between the City and the Zoological Society in a more timely manner, or that the City or the Society prevented it from investigating the facts which have led to the claims of a captive agency, alter ego, joint employer, or a scam.
>
> 8. The Union filed grievances following the contracting out of the Zoo to the Society, which were settled on December 14, 1989. Although the instant

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2/ See Truitt Mfg. Co., 27 LA 157 (Livengood, 1956).

3/ See Miller Brewer Co., 67-2 CCH ARB Para. 8383 at page 4377 (Slavney, 1967), and Neville Chemical Co., 73 LA 405, 408 (Richman, 1979).

> grievance differs in substance, the Union revives the overtime issue as part of its requested remedy, and the settlement precludes a reconsideration of that part of the claim.
>
> 9. There is no evidence that the contract between the City and the Zoological Society is a scam, or evidence of an improper relationship between them that would offset the other factors noted above.

The above factors are significant in this case for several reasons. First, the collective bargaining agreement specifically allows for contracting out, unlike collective bargaining agreements which are silent with respect to contracting out, or those that prohibit it altogether. The contract contains the restrictions for contracting out in Article II, Section E,7. Kozina testified that this provision had been in the collective bargaining agreement for at least 20 years, as long as he had been employed by the City.

Secondly, the record shows that the City has invoked the contracting out provision of the bargaining agreement on many occasions in the past, for the golf courses, the cemetery operations, custodial work, maintenance work, the Wustum Museum. The parties have been involved in grievances over contracting out decisions before and are well aware of their respective rights and responsibilities in processing this type of grievance. The parties are well known to this Arbitrator, and they are experienced, sophisticated negotiators and knowledgeable about the administration of their labor contract.

The third factor, the Union's advance knowledge of the City's intent to contract out the work at the Zoo, shows that there was no subterfuge involved, unlike the cases cited above -- particularly ACF Industries, Albuquerque Division, Hartley and Hartley, Inc., and Republic Steel Corp. The Union was apprised of the plan to contract out the work at the Zoo at least six months in advance of the actual event. The City made no attempt to avoid the Union's concerns about the contracting out. After the Union made a proposal on November 2, 1988, the City responded promptly, rejecting the Union's proposal to create seven new positions in the Parks Department. The City did nothing to mislead or deceive the Union about its position in this dispute.

The fourth factor is that there was a specific event affecting bargaining unit employees -- the transfer of seven employees from the Zoo to the Parks Division. As of January 1, 1989, the seven employees were transferred permanently from the Zoo. This event is like that in Tenneco Oil Co. (a layoff as a result of subcontracting) where time limits start to run. The takeover of the operations of the Zoo by the Society was not a gradual event, where bargaining unit members were slowly absorbed into the larger Parks Division by attrition as other bargaining unit members retired or quit, but occurred all at once on January 1st of 1989. No bargaining unit members were held over to make the transition.

Article III of the bargaining agreement defines the time for filing a grievance as 15 working days from the time a grievant knew or should have known of the cause of the grievance. A contract that specifically allows for the time to start running from the time a grievant knew or should have known of the cause of the grievance arguably gives greater leeway to the grievants than a contract which simply sets a time of so many days, even though arbitrators often imply the former standard to the language with the latter type of time limitation. The Union knew the cause of the grievance as of January 1, 1989.

Unlike the case in Miller Brewing Co., the parties here make no claim that each other's conduct has led to the 11 month delay in filing the

grievance. Therefore, there is no conduct which would lead one to conclude that the parties shared responsibility for the delay in filing the grievance.

Additionally, the Union does not claim that it could not discover the nature of the relationship between the City and the Zoological Society in a more timely manner, or that the City or the Society prevented it from investigating the facts which have led to the claims of a captive agency, alter ego, joint employer, or a scam. In fact, the Union does not explain its delay in filing this grievance in any manner. Normally, the party being charged with a lack of timeliness has some explanation or reason for its delay. It would almost appear as if the Union got a better theory, or at least an interesting one, late in the day (or year). If the Union attempted to discover facts and were denied discovery of material information, it could claim that a delay in filing a grievance was necessary. However, there is no contention that either the City or the Society did anything the deceived the Union or prevented it from bringing its current claims.

While the prior grievances settled on December 14, 1989, were settled without precedent, the Union continues to make a claim for overtime which was settled. While the Union claims that the overtime settlement was only for the year of 1989, and overtime for subsequent years is still an issue, the settlement does appear to preclude a reconsideration of the same issue, where the Union is trying out alternate theories in a difference grievance but still raising the original claims. The Union cannot get a second kick at the cat by continuing to raise claims at any time, where some of those claims are the same as those raised in prior grievances which were settled.

Finally, the Arbitrator finds that there is no evidence that the contract between the City and the Zoological Society is a scam, or evidence of an improper relationship or arrangement between them that would offset the other factors noted above. The consideration of the relationship between the Society and the City results in the entanglement of the merits with the arbitrability question. However, there is no avoiding such an entanglement where this kind of claim is made, because if there were a scam going on, the City should not be allowed to profit from it in a permanent arrangement on the basis of a 15 day filing time. If the Union could prove its claim of a scam, the continuing grievance or violation theory would have some viability, as every day the scam continues unremedied could potentially create a continuing violation of appropriate wage rates, as well as other benefits under the collective bargaining agreement. As in Hartley and Hartley, Inc., improper contracting out may occur each day that the work is done by contractors. But also differing from Hartley, the grievants here knew what was happening within the time period specified.

Relationship Between the Society and the City:

Questions over an employer's status and claims of alter ego relationships, joint employer status, or agency status, are usually brought in a legal forum. However, they are resolved on a factual basis, and there is nothing preventing an arbitrator from considering such questions to resolve a contract issue in an appropriate case. 4/ The Arbitrator has looked at the claims being made, but only in the context of determining whether there is a continuing grievance or violation. If there is no reason to conclude that the grievance should be considered to be a continuing grievance, the grievance is not arbitrable and the Union's claims cannot survive the arbitrability issue.

4/ See Charles W. Hogg Co., Inc., 84-1 CCH ARB Para. 8244, at page 4101 (Baroni, 1984).

Accordingly, this Award should not be read as determining the employer status of the two entities of the City and the Zoological Society. Rather, the Arbitrator has confined her review of the record to see if there is evidence of a scam or some improper arrangement in order to determine whether to apply the continuing grievance theory to this case.

The Union has vigorously asserted that the Racine Zoological Society is not an independent contractor, but is a voluntary agent of the City and the City's arrangement with the Society is in practical effect a contract with itself. The Union has argued that the Society is the equivalent of a division or department or agency of the City and must stand in the shoes of the City. In other words, the Union has claimed that the Society is a political subdivision of the City.

The basic test used by the NLRB to establish whether an entity is a political subdivision is (1) whether the entity is created directly by the state so as to constitute a department or administrative arm of the government, or (2) whether the entity is administered by individuals who are controlled by public officials and responsible to such officials or to the general public. 5/ This is an either-or test -- an entity fitting either part of the test may be deemed to be a political subdivision. In St. Jude Industrial Park Board, the NLRB found that the Park Board was not a political subdivision where it met neither test, and noted that the city did not control supervision, discipline, grievance procedure, seniority, hiring, firing, wages, insurances, or benefits.

In Founders Society Detroit Institute of Arts, 271 NLRB 285 (1984), 1984-85 CCH NLRB Para. 16,533, a nonprofit corporation that existed for the purpose of assisting operations of the city's art museum and was headed by a person responsible to public officials was a political subdivision exempt from NLRA coverage. The directorship of the nonprofit corporation and the directorship of the museum were held by the same person, who was responsible to the city's mayor and responsible for a financial plan subject to approval of the city's arts commission. The director served at the mayor's pleasure, with a signed letter of resignation held in the mayor's office. Thus, the society met the second part of the test.

The Zoological Society does not meet either part of the test. It was not created directly by the City so as to constitute a department or administrative arm of the City's government. The Society existed since 1924, without being created by the City. It can and did exist without the City's financial support. There is no statutory authority creating such a Society, unlike the Milwaukee Auditorium Board, which will be noted later. Additionally, the Society is not administered by individuals who are controlled by public officials and responsible to them or the general public. As part of the management contract with the City, the Society agreed to accept two City representatives on its board of directors. There is no evidence on the record that Glazier is accountable to City officials, and when asked how much influence the City can exert through the board of directors, Glazier replied: "As much as two out of 23 votes can exert." (TR - 36.)

The Union asserts that even if the Zoological Society has some sort of independent existence outside of its relationship to the City, the City would be the dominant party in a joint employer relationship, citing Milwaukee Auditorium Board, Dec. No. 6543 (WERC, 1963). In Milwaukee Auditorium Board, the City of Milwaukee was the senior partner in an organization with the

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5/ St. Jude Industrial Park Board, 265 NLRB 597 (1982), 1982-83 CCH NLRB Para. 15,552.

Auditorium Board, and employees employed by the Auditorium Board were deemed to be municipal employees when the WERC ordered an election to be held. A majority of the Board's trustees were Milwaukee City officials, unlike the Zoological Society where only two out of 23 directors are Racine City officials. Moreover, state law recognized that a portion of the City's operation could be carried on by a private corporation operating jointly with the City of Milwaukee. No such law controls the Zoological Society's operations. All the stock of the corporation (the Auditorium Board) was to be transferred to the City of Milwaukee. The organization of the Auditorium Board and the statutory authority for it resulted in a finding of a joint employer. No such circumstances control here.

The Union has also cited Deaton Truck Lines, Inc. v. NLRB, 337 F.2d 697 (5th Cir., 1964), as supporting its assertion that the City is a joint employer with the Society. The NLRB applied the "right of control" test, which means that an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching that end. The NLRB then found that owner-drivers and multiple owner-drivers were employees of Deaton, due to the degree of control exercised by Deaton over those individuals, and that as a matter of law and as a matter of economic reality, those individuals were entitled to the rights guaranteed by the NLRA. However, in Deaton, the company kept the ultimate rights of hiring, discipline, and discharge. The City has kept no such comparable right of control over employees employed by the Society.

In fact, the City has separated itself from any control over employees employed by the Society. The Society controls hiring, firing, discipline, wages, benefits, insurance, etc. Kozina had never seen the Society's personnel manual until the hearing in this matter. The City made no attempt to impose any of its procedures regarding employees on the Society. The City has neither retained control over employees at the Zoo nor control over day-to-day operations or methods.

There is no evidence on the record that the management contract between the City and the Society or the negotiations leading up to it were a "sweetheart deal." In the May 4, 1988, meetings between the City and Society members, the City Finance Director had to assure Society members that the City was not trying to "waylay" the Society's takeover of the Zoo, after the Society expressed its concern over hiring an executive director and wanted assurances from the City that it had a chance at getting a management contract to run the Zoo. Money -- the amount to be contributed by the City -- was always a source of contention between the City and the Society. The parties started out with a large difference in money -- with the Society asked for more than $120,000 over what it eventually got. In November of 1988, Glazier was concerned enough about the status of the negotiations to write all the City Aldermen urging them to support the concept of transferring the management of the Zoo to the Society.

While the Union claims the City entered into a contract with the Society for the sole purpose of evading its collectively bargained obligations, the record reflects otherwise. The City was contracting out in an attempt to save money, a legitimate concern for a city. The City was aware at all times of its collectively bargained responsibilities, and there is no evidence that the City sought to subvert those responsibilities. At one point, the City thought it might take three years to absorb all the Union positions into other City positions. The City did nothing to hide its intent from the Union.

The fact that the Society is not like other entrepreneurial entities established to serve more than one client does not mean that the Society is

under the control of the City to the extent that the City stands in the shoes of the Society. Other entrepreneurial entities could be established solely for the purpose of gaining the City's business and making contracts to do certain work. The Society can get out of the management contract with the City, just as the custodial services or golf course management company could stop contracting with the City for its business. The Society is not held captive to the City's business. The Society has existed for the purpose of providing support for the operation of the Zoo, and the addition of the management of the Zoo to its functions expanded its interest and support for the Zoo. The Society does not have to exist for the purpose of supporting other zoos as well as the Racine Zoo in order to form a legitimate contract with the City.

The Union argues that the only purpose for the existence of the Society is to serve the City and that it is therefore captive to the City's interest. That's not quite the case -- the Society exists to serve the Zoo, not the City, and the City has competing interests for its tax dollars. Thus, the City's interests and the Society's interests are not one and the same. The only interest they have in common is to maintain a zoo in the City of Racine. At what price, at what level of service, at what level of exhibits, animals, may be differing interests. Zoological societies typically exist to improve the qualities of zoos, while municipalities more typically have varying interests and commitments for amenities such as zoos.

Under any analysis of agency principles, political subdivision entities, independent contractors, alter ego employers, or joint employers, the principle of the right to control resurfaces time and again. The City has no right to control the employees employed at the Zoo, the labor relations involving those employees, the supervision or work assignments of employees, the executive director or the board of directors of the Society, the day-to-day operations, or anything that leads to a suspicion of an improper arrangement between the Society and the City.

Conclusion:

At the risk of redundancy, the Arbitrator stresses that the analysis of employer status is not for the purpose of a final determination of such status, but rather for the purpose of determining whether to apply the theory of a continuing violation to this case. The Arbitrator has found no evidence of an ongoing scam or some improper relationship or arrangement between the City and the Society in order to disregard the time for filing a grievance and apply a continuing violation to this case.

Based on all nine factors listed previously, I conclude that the contracting out of the Zoo operations to the Racine Zoological Society is not a continuing violation. Accordingly, the grievance is untimely.

AWARD

The grievance is not arbitrable and is denied.

Dated at Madison, Wisconsin this 20th day of August, 1991.

By _____
Karen J. Mawhinney, Arbitrator

KJM/ms
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