BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 587, DISTRICT COUNCIL 48, AFSCME, AFL-CIO	
and	Case 417 No. 45935
MILWAUKEE AREA DISTRICT BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION	MA-6808

Appearances:
Podell, Ugent & Cross, S.C., by Ms. Nola J. Hitchcock Cross and Ms. Monica Murphy, appearing on behalf of the Union.
Quarles and Brady, Attorneys, by Mr. David B. Kern, appearing on behalf of the

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the subcontracting grievance of Tony Kotnick.

The undersigned was appointed and held a hearing on March 16, 1992 in Milwaukee, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on May 1, 1992.

ISSUES:

The Union proposes the following:

> 1. Did MATC violate the collective bargaining agreement when it hired persons to perform architectural drafting work in the Construction Services Department and failed to include them in the bargaining unit and to compensate them in accordance with the contractual wages and benefits?
>
> 2. If so, what should be the remedy?

The Employer proposes the following:

> 1. Did MATC violate the collective bargaining agreement when it subcontracted architectural drafting work in the Construction Services Department?
>
> 2. If so, what should be the remedy?

RELEVANT CONTRACTUAL PROVISIONS:

Article 1 - Recognition

Section 1 - Bargaining Unit Definition

The Board recognizes the Union as the exclusive bargaining representative for all employees of the Board as described in the Wisconsin Employment Relations Commission certification submitted under date of December 2, 1968, Case 3, Number 12399, ME-407, Decision 8736 and as later modified to include but not limited the 10/30/84 decision No. 8736-E. The classifications included are listed in Appendix A.

Section 2 - Non-Discrimination

The Board and Union recognize that it is the established policy of both parties that they will not discriminate against any employee because of race, creed, religious belief, sex, age, color, national origin, union activity, handicap, or sexual preference.

Section 3 - Representation

The provisions of this Agreement shall apply to employees who are scheduled to work 1,040 or more hours within twenty-six (26) consecutive payroll periods, or Food Service Workers and other employees who are regularly scheduled to work twenty (20) hours or more per week on a school year basis and to employees who meet the minimum hours test as follows:

Employees who exceed 250 hours of work performed by bargaining unit employees in any thirteen (13) consecutive payroll periods shall be accreted into the bargaining unit and shall remain in the bargaining unit thereafter. The thirteen (13) consecutive payroll periods shall not be limited to a calendar year.

. . .

Article 111 - Management Rights

The Board retains and reserves the sole right to manage its affairs in accordance with all applicable laws and legal requirements, except as limited by the specific provisions of this Agreement. Included in this responsibility, but not limited thereto, is the right to:

a. Determine the number, structure, and location of departments and divisions.
b. Determine the kinds and number of services performed.
c. Determine the number of positions and classifications thereof, to perform such services.
d. Direct the work force.
e. Establish qualifications for hire.
f. Test and to hire.
g. Promote and retain employees.
h. Transfer and assign employees.
i. For just cause, suspend, discharge, demote, or take other disciplinary action.
j. Release employees from duties because of a lack

of work or funds.

k. Maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

l. Make reasonable work rules.

The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union

Further, the Union recognizes that the Board has statutory obligations in contracting for matters relating to college operations and that various forms of subcontracting have been the regular past practice. The right of contracting or subcontracting is vested in the Board. The right to contract or subcontract shall not be used for the purpose of intention of undermining the Union or to discriminate against any of its members.

No subcontracting shall conflict with specific rights of employees under the Agreement, or shall result in layoff, termination, or discharge of any employee on the payroll as of the date of this Agreement.

Regular subcontracting practices, in connection with evening college registration, may be continued but there shall be no additional subcontracting of evening college registration work which eliminates overtime work

normally performed by bargaining unit personnel in the past.

. . .

DISCUSSION:

The facts are essentially undisputed. The grievant has been employed by MATC as an Architectural Draftsman for eight years. During that time, MATC has also retained other Architectural Draftsmen and various other classifications in the Construction Services Department; not all of these, however, were considered employes by MATC. Steven Shevey, for instance, was employed as an Architectural Draftsman until 1985, after which he was temporarily promoted to Construction Specialist [out of the bargaining unit] till 1989. Shevey then left MATC's employ, and in the ensuing year qualified as an architect. He returned to work on a daily basis at MATC on September 4, 1990, but was not considered an employe by MATC, which contracted with him for his services on an hourly basis, but without benefits. Shevey did some architectural drafting, but it is clear that he performed substantial quantities of work which were not normally performed by Architectural Draftsmen, and the Union does not base its case on Shevey's employ. Rather, similar contracts issued to Rick Mitchell and Noel Johnson are the focus of the case. Both have performed as Architectural Draftsmen and have worked regular hours on regular work days since late 1990. The record as a whole supports the Union's contention that Mitchell and Johnson work under the close supervision of MATC managers, do not employ any employes of their own, work regularly scheduled days in MATC's construction services offices, and do similar work side by side with the grievant. Mitchell's 1990-91 consulting contract is typical of the terms under which each of the three agreed to work for MATC:

AGREEMENT FOR PROFESSIONAL CONSULTING SERVICES

This agreement, made this 1st day of July, 1990, by and between the Milwaukee Area Technical College, hereinafter referred to as MATC, and Geopassive, Development Corp. hereinafter referred to as the ARCHITECTURAL DRAFTSMAN.

Whereas, MATC intends to continue development and/or renovation of its facilities throughout the VTAE District, the ARCHITECTURAL DRAFTSMAN agrees to provide the various services described as follows for the period from July 1, 1990 to June 30, 1991 and in accordance with the following terms:

A. Services required:

1. Project programming.
2. Construction document preparation and coordination.
3. Assistance in project bidding.
4. Contract administration.
5. Coordination of MATC staff work.

B. Terms:

1. Services to be provided at District locations.
2. Daily hours: 7:30 a.m. to 4:00 p.m. (may vary).
3. 40 hours of service per week.
4. Additional hours beyond 40 per week to be

approved in advance.

5. MATC shall not be responsible for providing benefits of any kind to the ARCHITECTURAL DRAFTSMAN. The ARCHITECTURAL DRAFTSMAN shall include in his hour rate the cost of any benefits for himself or his employees such as:
   a. Unemployment Compensation.
   b. Workman's Compensation Insurance.
   c. Taxes.
   d. Health Insurance.
   e. Professional Liability Insurance (when required).
   f. Vacation.
   g. Sick days.
   h. Any other benefits.

IT IS FURTHER AGREED that MATC shall pay the ARCHITECTURAL DRAFTSMAN at the rate of $20.00 per hour of service provided. Payments shall be made to the ARCHITECTURAL DRAFTSMAN 10-15 days following the last day of each month based upon the submittal of invoices (itemized by project number) for each month.

. . .

The rate payable varied sharply between $8.00 per hour without benefits for Johnson [initially] to $32.00 an hour for Shevey [recently].

Several witnesses testified without contradiction that similar arrangements have existed in this particular department for many years, sometimes continuously for years at a time. Al Evinrude, coordinator of construction services, testified for example that he worked as a "contract consultant" for MATC from 1974 to 1981, and that contractors and employes have worked side by side ever since he had been at MATC.

The grievant and draftsman Steve Socha testified that on several occasions the former manager of Construction Services, Jim Pauers, had made derogatory statements about the Union. Kotnick testified that Pauers once told him "I'd get rid of you if I could", and that Pauers routinely gave him low-grade work to do. Socha testified that he once approached Pauers, discussed the fact that he had been given some architect work to do, and requested that he be given a raise or a reclassification. He said Pauers replied that if he wasn't in the Union Pauers could help him out. Socha also stated that on another occasion Pauers said he liked having consultants over Union people because it was a lot easier to get rid of them. Kotnick, meanwhile, testified that after he filed the grievance Pauers refused to speak to him at all, and changed the order of supervision so that Kotnick reported to Shevey rather than to Pauers directly. Shevey testified that Pauers was unhappy with Kotnick's work performance, but that he had a very good relationship with Kotnick and considered the one item he cited that Kotnick had done improperly, thus incurring Pauers' displeasure, to be "a minor item".

It is clear from the record as a whole that if contractors had not been employed in the department, more overtime would have been available to the bargaining unit employes. Kotnick admitted, however, that he had sometimes turned down overtime opportunities [only when he had previous engagements], and Evinrude testified that one reason why contractors were employed was that it was easier to order them to work overtime, since the Union had taken the position that no employe could be ordered to work overtime. Procurement Director Lester Ingram testified that another reason for the use of consultants

was that the District is at its maximum taxing rate, and that "fund 5" money available for renovation, remodeling and small construction projects is earmarked for paying outside contractors, not regular employes. Ingram testified that a 1990 referendum provided some $43,000,000 for construction work, but that funding requirements specified that this not be used for operating purposes and that the employes in the Construction Services Department were considered an operating expense. Kotnick testified, by contrast, that he had worked quite regularly on "fund 5" projects. Kotnick admitted, however, that he was not always knowledgeable as to the source of the funds used to pay him. He conceded that he had never been ordered to work overtime.

The Union contends that the District did not actually employ subcontractors, contending that Johnson, Mitchell and Shevey were in fact employes of MATC under the commonly accepted standard known as the "right of control" test. The Union argues further that even if the contracts issued to Johnson, Mitchell and Shevey are valid outside contracts, the motivation for their issuance was largely Pauers' hostility towards the Union, and that there is no basis for a business distinction between the work given the outside contractors and the work given to the grievant. The Union contends that the recognition clause includes the Architectural Draftsman, and that the hours requirements in the contract clearly demonstrate that Johnson, Mitchell and Shevey [to the extent Shevey was not working as an architect] show that these three workers meet the contractual standard for inclusion in the unit, citing Article 1, Section 4 and Section 3 as determining what person constitutes a regular employe. With respect to Pauers' conduct, the Union contends that the raise from $8.00 an hour to $13.00 given Johnson shortly after the grievance was filed, together with the pattern of work assignments to Kotnick, demonstrates that Pauers was "taking care of" those who were outside the bargaining unit and punishing Kotnick for being a Union member and filing a grievance.

The District cites several prior arbitration awards as relevant to this case, but the one which I find pertinent is the Greco award of October 25, 1979. Arbitrator Greco found, in that case, that the language of the Agreement clearly allowed the Employer substantial discretion in subcontracting, more than would be the case if the contract were silent as to subcontracting. He rejected arguments similar to those raised herein that the Employer was undermining the Union or discriminating against its members by giving consultants work rather than giving employes overtime.

I agree with Arbitrator Greco that the specific reference in Article 3 to a prohibition on additional subcontracting in evening school registration if it would eliminate normal overtime work clearly implies that in other departments and operations of MATC subcontracting may be used to avoid overtime. I find the arguments that Pauers' personal animus concerning the Union motivated the employment of contractors to be insubstantial, in view of the extensive history of such contracting in this department and also in view of the business justifications given by the District. In particular, Kotnick's attempt to undercut Ingram's testimony that fund 5 money could not be used to pay regular employes is not entitled to much weight, because he clearly indicated a lack of knowledge as to the financing of the District and the requirements placed on it by the referendum; Ingram's testimony thus stands without effective challenge.

As the Union recognized during the course of the case, its better argument is that by virtue of their long and virtually unbroken working record, together with other factors customarily recognized as casting doubt on the independence of an alleged contractor, Shevey, Johnson and Mitchell might actually be considered employes and not subcontractors at all. In this context, it is noteworthy that no conspicuous difference in working conditions,

independence of judgment, or the ability to control the way the work was performed is visible between at least Mitchell and Johnson on the one hand, and the grievant on the other. All are essentially performing the same work, in the same office, with the same supervision.

Yet in this particular department, the evidence is that such arrangements have continued on a repeated basis for at least 20 years, sometimes for years at a time. I note also the evidence submitted by the Employer to the effect that in numerous rounds of collective bargaining the Union has attempted to obtain restrictions on subcontracting, as well as broader definitions of who constitutes an employe, always without success in the final bargain. While the virtually continuous employment for long periods of time of contractors under these circumstances is troubling, I therefore find that on balance the bargaining history and the well-known past practice of such use of contractors in this department are a more persuasive guide to the interpretation of the subcontracting and employe definition clauses than is the "right of control" test, which as a legal concept does not show the same evidence of mutual past acceptance by these parties. My conclusion is limited to this particular fact situation in this department. I am persuaded, however, that as an arbitrator bound to interpret the meaning of an agreement between the parties, such evidence of a mutually understood and accepted [if grudgingly] past practice is a more reliable guide to the meaning of this Agreement than is even a commonly-accepted principle of legal interpretation.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That MATC did not violate the collective bargaining agreement when it retained persons identified as subcontractors to perform architectural drafting work in the Construction Services Department, and refused to include them in the bargaining unit.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 23rd day of July, 1992.

By _____
Christopher Honeyman, Arbitrator