BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 953

and

MEDFORD ELECTRIC UTILITY, CITY OF MEDFORD

Case 27
No. 52591
MA-9035

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Ms. Marianne Goldstein Robbins, for the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, by Mr. Jeffrey T. Jones and by Ms. Cari L. Hoida, for the City Utility and the City.

ARBITRATION AWARD

International Brotherhood of Electrical Workers, Local 953 (the Union) and Medford Electric Utility, City of Medford (the City Utility), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 19, 1995 appointed James W. Engmann, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Due to the resignation of Arbitrator Engmann, the Commission, by September 1, 1995, appointed Jane B. Buffett, another member of its staff, to serve as Arbitrator in the above noted matter and also as Hearing Examiner in a related Complaint of Prohibited Practices (Case 26, No. 52399, MP-3013). The parties agreed to consolidate evidentiary hearing on the arbitration and the related complaint. The consolidated evidentiary hearing was held in Medford, Wisconsin on September 13 and 14, 1995, then completed in Madison, Wisconsin on October 2, 1995. A transcript of each day of hearing was received by November 14, 1995. The parties filed briefs and reply briefs, the last of which was received February 1, 1996. On October 8, 1996, the parties stipulated certain additional facts to be considered part of the evidentiary record.

ISSUES

The parties did not stipulate the issues. The arbitrator frames the issues as follows:

> Was either grievance timely filed?
>
> If so, did the City Utility violate the collective bargaining agreement by reducing Grievant's hours?
>
> If so, what is the appropriate remedy?

BACKGROUND

Grievant Catherine Jackson has been employed by the City Utility as a Cashier since February of 1990. In a letter from the "City of Medford - Personnel Committee" dated March 8, 1995, Grievant was advised of a reduction in her work hours. That letter states:

> The Common Council of the City of Medford has directed that the hours of one clerical employee at the City of Medford Electric Utility be reduced to half-time. The Council's directive was in accord with a recommendation received from an outside consulting agency.
>
> Of the Utility's clerical employees, you possess the least seniority. By this memorandum, your are advised that your work hours will be reduced to half-time effective April 1, 1995 . . .

Grievant is a member of the bargaining unit represented by the Union.

The Union filed a grievance challenging Grievant's loss of hours. The Union's Business Manager, Richard D. Haley, submitted the written grievance in a letter dated March 13, 1995 (the March grievance). His letter, headed "Re: Grievance/Reduction of Work Hours for Cathi Jackson-Transfer of Work Outside Bargaining Unit," states:

> This letter shall serve as the Step 2 written grievance concerning the reduction of work hours for Cathi Jackson . . . effective April 1, 1995 and the transfer of work outside the bargaining unit which is responsible for that work hour reduction. The grievance has been previously presented at the first step to the Utility Manager, March 1, 1995, and denied on March 1, 1995.
>
> On March 9, 1995, the Union was informed for the first time that

> Cathi Jackson's hours of work would be reduced from fulltime to part-time work. It now appears that this reduction in hours is the delayed result of the City's transfer of work previously performed by the Utility clerical staff to other city positions and the subcontracting of payroll work to Anderson Tackman. The transfer of bargaining unit work outside the bargaining unit to other city employees and to a subcontractor violated the parties' collective bargaining agreement, including Article I, Recognition And Coverage; Article IV, Management Prerogatives Subsection 10; Article VI, Classification and Wages; Article VII, Schedule of Hours; Article VII, Seniority and all other relevant contract provisions.
>
> The Union demands that Cathi Jackson be retained in fulltime status, that all work transferred out of the bargaining unit to City employees and to any subcontractor be returned to the unit and that Cathi Jackson be made whole for all losses as a result of the City's contract violation.

As this correspondence indicates, the roots of this dispute stretch beyond 1995.

An overview of the roots of this dispute must cover bargaining history as well as the history of the City's partial merger of City Hall and City Utility accounting functions. To state this overview as a chronology, it is necessary to start with some background on the history of the bargaining unit. The Commission certified the bargaining unit represented by the Union on June 16, 1964. The original certification (Dec. No. 6734) excluded "office clerical employees." That certification was, however, amended on November 26, 1995, based on the parties' stipulation "requesting that the description of the appropriate collective bargaining unit contained in the original certification be amended to include . . . employes employed as office clerical employes" (Dec. No. 6734-A). The first labor agreement reflecting this amendment was in effect, by its terms, from January 1, 1966 through October 31, 1966. At all times relevant to this overview, the Union has represented three clerical employes, Grievant, Cynthia and Debra Pernsteiner, in the classifications of Cashier and Computer Operator.

What appears as Article IV, Section A, 10 (Subsection A, 10) of the 1995-97 labor agreement first appeared as Article III, Section 6 in the 1964-65 agreement. The parties did not include a separate management rights provision through the 1980-81 agreement. In the bargaining for an agreement to succeed the 1980-81 agreement, the City Utility proposed a separate article headed "MANAGEMENT PREROGATIVES," which included the following provision:

> The management and operations of the Employer's facilities and the direction of its workforce shall be vested exclusively in management

including, without limitation, as follows:

. . .

C. Contract out for goods or services . . .

The Union opposed this proposal. After several collective bargaining sessions, the parties agreed to include a separate article entitled "Management Prerogatives." This article did not, however, include Section C of the City Utility's proposal. Rather, the parties agreed to move the terms of Article III, Section 6 into the Management Prerogatives article.

The reduction in hours implemented in March of 1995 traces back, at least in part, to a study requested by the Mayor and Common Council of the Wisconsin Taxpayers Alliance (WTA). The WTA study, entitled "Classification, Compensation and Job Descriptions of Nonrepresented Employe Positions in the City of Medford," contained the following recommendations:

> Abolish the electric utility commission and provide for general oversight by the city council, operating through a council 'utilities' committee (electric, water, sewer).
>
> Study the clerical and financial operations of the clerk-treasurer's and electric utility offices, with the goal of merging them.

The explanatory text to the second recommendation reads thus:

> The question is not *whether* they should be combined, but *how*. Planning efforts, and their implementation, should be directed toward the eventual goal of a combined operation. The electric utility would then be an integral part of city government, rather than separate from it, as in the past.
>
> The merging of services into one operating system would require some time and technical adjustments (for example, the computer system). In finance and accounting, there are many similar features in utility accounting, so financial management relating to utility matters can be incorporated within those already applicable for water and sewer operations . . .
>
> As part of the study, the existing staffing level and job assignments should be reviewed.

The WTA issued its report in January of 1991.

Sometime early in 1992, the City contacted the accounting firm of Anderson, Tackman & Company (AT) to study combining clerical and financial operations of the City and its Utility. In April of 1992, AT started to accumulate data on these operations. Included in the data collected by AT were job descriptions for City Hall and Utility employes, a copy of the WTA study and a four week time utilization study. For the period from April 15 through May 15 of 1992, City Hall and Utility employes completed forms documenting the tasks performed during the work day. The then incumbent City Administrator/Clerk/Treasurer, William Mattson, submitted the completed time utilization forms to AT in a letter dated May 18, 1992. Mattson stated, in that letter, the following:

> The Electric Utility forms, with the exception of Manager Frey's, do not seem to breakdown their work adequately. Please let me know if you will need new surveys from these E.U. employees that are broken down more comprehensively.

In a letter to Michael Frey, the City Utility's Manager, dated June 10, 1992, Mattson stated that AT wished to produce "an amended time study for a period of two weeks." Mattson stated the basis for the amended study thus:

> The reason for the auditors request for additional time study documentation from said employees is due to their previous time study documentation having been too non-specific in nature with more similarities to a general job description than to specific documentation of how actual time is being spent each day . . .

Frey received an unsigned memo objecting to this amended time study. That memo provoked, on June 17, 1992, a written response from Mattson to City Utility employes which mandated a prompt response to the amended time utilization study, and concluded:

> There will be no negotiation on this matter as the requested task is neither hazardous, unethical nor illegal and is required in order to receive a valid benefit from this study which resulted from a specific recommendation of the Wisconsin Taxpayer's Alliance approved by the Common Council.

On June 22, 1992, Mattson sent the amended time utilization survey forms to AT. After receiving these forms, AT conducted an on-site audit of eight positions involved in the bookkeeping and financial operations of the City Utility and the City Hall. The four Utility positions were those occupied by Frey, Grievant and the Pernsteiners. The four City Hall positions were occupied by Mattson, Virginia Brost, Donna Goodman and Samy Abadeer. Brost was, in June of 1992, an Executive Secretary. Goodman was, at that time, Deputy City Clerk and Abadeer was the Staff Accountant.

The AT employe with primary responsibility for the on-site audit was Duane Zaborowski. His field notes made during the on-site audit process indicate that among the options he considered for making the City and Utility accounting functions more efficient were merging "payroll to one department head, either City or utility," and hiring "additional staff to ease workloads." At one point in the onsite audit process, Zaborowski's review of the accounting cycle convinced him that combining City Hall and City Utility staff would not cut overall costs. Sometime in September or October Zaborowski completed the on-site observation process.

Sometime after completing his on-site audit, probably in September or October of 1992, Zaborowski discussed the audit process with Frey and with Cynthia Pernsteiner. Zaborowski indicated to them that he thought certain accounting work might flow from the City Hall to the City Utility because employes at the City Utility were performing certain functions well with which other departments were having difficulty. Part of the reason for Zaborowski's opinion was that the City had installed a new computer system at both the City Hall and the City Utility. The City Utility had, however, installed the new system before City Hall, and the City Utility in the fall of 1992, was more adept at handling the new system than the City Hall was.

Difficulties within City Hall also came to impact on the ability of City Hall employes to assume additional work. In September of 1992, the City terminated Mattson's employment, and the resulting vacancy complicated the performance of City Hall accounting functions. To cover for Mattson's absence, Goodman continued to cover her own duties and those Clerk/Treasurer duties formerly assumed by Mattson. The City did not fill the position vacated by Mattson.

On January 15, 1993, AT submitted its completed study to the City. Its study includes the following provisions:

CITY OF MEDFORD
APPROACH TO MERGING THE ELECTRIC UTILITY AND CITY OFFICES

> We have been engaged by the City of Medford to study the clerical and financial operations of the Clerk/Treasurer's and Electric Utility's offices for the purpose of recommending the best way to merge the two offices totally or in part. The issue developed out of a study of the organization and administration of the Medford City Government by the Wisconsin Taxpayer's Alliance in September 1990 . . .

OPTIONS AVAILABLE

> As information was gathered related to the various job positions and the organizational structure of other city electric utilities, the

following three alternatives to the merger process were identified:

* No merger attempted - continue operations as in the past.
  *Perform a partial merger of selected activities.
* Completely merge all accounting work into one location.

. . .

OTHER CONSIDERATIONS

STAFFING: Staffing needs may change based upon the action taken by the City's common council. At the present time, the Utility is very adequately staffed, having excess staffing of approximately a half-time position. In addition, implementation of automated remote meter reading should substantially reduce the time requirements of the Cashiers during the billing process. This could easily amount to a half-time position. On the other hand, City Hall is currently understaffed with the administrator position being vacant. We anticipate that it will be necessary to hire another individual at City Hall. This could be another administrator, but more likely it should be a data entry person, or an entry level secretary/receptionist. Adoption of either merger options two or three would require that a reorganization of staff positions be performed. The reorganized staffing needs of City Hall could be met through the use of the existing staff of both City Hall and the Electric Utility . . .

FINAL RECOMMENDATIONS BASED ON OUR STUDY

1. We recommend that the City initially implement option two, a partial merger of City Hall and Electric Utility. The merger should include the following processes: payroll, vendor accounts payable disbursements, general ledger, bank reconciliation and financial statement preparation.

   The payroll responsibilities should be shifted from the Electric Utility Bookkeeper to City Hall staff, with the Electric Utility payroll becoming a part of the City payroll instead of being a separate payroll . . .

The transfer of the vendor accounts payable disbursements, general ledger, bank reconciliation and financial statement preparation would require transferring the Electric Utility operating account to the City's records. The next step would be to create the Electric Utility's chart of accounts on the City's computerized financial system. The purchasing, receiving, invoice processing would be handled in the same fashion as for other City Departments.

. . .

The actual transfer of general ledger processing is relatively simple after the payroll and disbursement processing has been completed by the City Hall staff. The only portion of the cash activities of the utility not transferred under the partial merger is actual collection of utility billings and subsequent deposit into the bank accounts . . .

We recommend that the Electric Utility fixed asset detail records and related work order and retirement processing continue to be maintained by the Electric Utility Manager, Mike Frey. These records are very detailed and very accurate. We feel that current City Hall staff does not have sufficient time or the expertise necessary to handle these aspects of the Electric Utility plant and work order accounting process . . .

2. We recommend that the City not hire a replacement administrator. The benefits to the City outweigh the costs . . .

3. A review of the Electric Utility billing process should be performed. Although our time study results indicated minimal slack periods in the Electric Utility Cashier positions, this information is not consistent with the anticipated reductions in staff hours projected if the remote reading system is implemented. The projected reduction is only thirty hours per month, or a ten percent reduction in the Cashier's time. We anticipate that the reduction in staff hours will be substantially greater based on the results of the time sheet analysis. Implementation of the remote meter reading process and the resulting reduction in both the data inputting and verification process should reduce the need for two Cashiers. In addition, many of the utilities we contacted and those we have audited in the past had a smaller staff even without automated reading. This would require a reallocation or reduction of one of the Cashier's positions .

. .

4. We recommend that ultimately, the City should totally merge the Electric Utility accounting staff into the City's finance department. The overall goal would be to save time and money and improve financial reporting. We believe that a complete merger should require a total staff of six individuals in the combined City Clerk's and Finance department compared to the current seven positions in the separate departments. The utilization of remote meter reading, including electronic transfer of readings from the meter reader to the computer system, a process that requires no physical input time and no input errors, could reduce staff requirements by another one-half position.

   Under the full merger the Electric Utility's remaining bookkeeping, billing and cashier functions will be moved under the control of the Finance department. The utility billing and collection function should be in the same location as the City's Finance department and City Clerk's office. The Finance department would be responsible for the manual data entry/automated remote entry of meter readings, calculation of bills and reports and mailing of the bills. A common cashier function would be provided for both City and Utility cash collections. The cashier function would be staffed by the City Clerk's office. Actual posting of Utility cash collections to customer accounts would be performed by the Finance department.

. . .

CONCLUSION

We feel the implementation of the above merger and other recommendations, partially or fully, will benefit the entire City through time and cost savings, elimination of duplication and inconsistency among City policies, more effective administration and improved financial reporting. Some of the recommendations will be easy to implement, whereas, some recommendations will require additional analysis by the City and may take two to three years to implement. Our experience and study has shown that the City Hall and Utility department administrative and accounting operations are most effective when they are one unit.

AT's report and recommendations became a subject of some controversy. The study was

addressed in local newspaper articles and at common council meetings.

The controversy surrounding the study prompted Frey to issue a letter, dated February 5, 1993, to Dolores Meyer, Medford's then-incumbent Mayor. Frey included in this letter the following:

. . .

1. Why weren't the employees who contributed to the study allowed to review a draft of the study before the final draft was presented to the City? Duane had emphasized to me that this was important . . .

2. Why does the study differ substantially from what Duane had expressed to me and others? In discussions with Duane he indicated he would be recommending that, other than payroll, which would be transferred to the City, most operations would remain basically the same and staffing at the Electric Utility would probably be increased along with transferring some work to the Utility from the City. The final report is a complete turnaround from this.

3. Why does the study suggest that current staff at the City is qualified to fill the positions recommended in the study, namely that of Finance Director? In my discussions with Duane the competency of city staff to fill such a position was questioned . . .

   While changes can be expected in the final draft of a study such as this, one questions the complete turnaround on these issues. What outside influences caused these changes or was I intentionally mislead (sic) while the study was being prepared?

. . .

The existing atmosphere of suspicion and mistrust needs to change.

. . .

On February 17, 1993, the Union and the City reached tentative agreement on a successor to their 1990-92 labor agreement. The Union had initiated the bargaining for that agreement with a letter dated August 28, 1992, which notified the City Utility of its intent to amend the terms of the 1990-92 labor agreement. The February 17, 1993 tentative agreement was not executed as a complete collective bargaining agreement until August 31, 1993. The successor was in effect, by its terms, from November 1, 1992 through October 31, 1994. The parties did not specifically

address, in their bargaining for the 1992-94 labor agreement, the issue of work transfer between the City Utility and the City Hall.

In March of 1993 the City Council approved the transfer of City Utility payroll to the City Hall effective the following April 1. The actual transfer was not implemented until August 1, 1993. Throughout the remainder of 1993, the City undertook efforts to move general ledger work from the Utility to City Hall in the hope of implementing the transfer in January of 1994. Sometime in the Spring of 1993, the City hired Rita Tischendorf to serve as a City Hall Receptionist. Sometime in August of 1993, the City hired Debbie Schaefer to serve as Abadeer's assistant.

The issue of potential overstaffing at the Utility was considered by the Common Council throughout 1993. The Union learned of these deliberations, and communicated its concern to the City. William R. Lewis, the Union's Assistant Business Manager, in a letter to City Mayor Dolores Meyer dated July 15, 1993, voiced the Union's concerns thus:

> It has come to the Union's attention that it may be the City's intention to transfer some of the present duties normally performed by the IBEW Union Office Employees at the City Electric Utility to some other City Department.
>
> Please either verify these rumors or deny them . . .

The City's labor counsel, Jeffrey T. Jones, responded to this letter in a letter dated July 19, 1993. Jones stated:

. . .

> The City is considering transferring the payment of Utility bills to the City Office. Such action would be in accord with a recommendation from the City's accountants to increase efficiency. Such action would also be in accord with . . . Article IV, Management Prerogatives . . . (and) Article VI, Classifications and Wages . . .

Lewis, in a letter to Jones dated August 13, 1993, stated: "The Union would like to remind the City that anything involving the Terms and Conditions of employment are negotiable issues . . ." Jones responded to Lewis in a letter dated August 16, 1993, and stated: "(T)he Wisconsin Employment Relations Commission has recognized that the duty to bargain on mandatory subjects does not extend to matters already addressed in a Labor Agreement . . . " Lewis responded with a letter to Meyer, dated September 27, 1993, which stated:

> It is the Union's position that any transfer of work from the Medford Electric Utility Office employees to other City Departments is a violation of our present Labor agreement.
>
> Therefore, we request the City to stop any transfer of work. If the City does transfer work, the Union will file a grievance.

On October 13, 1993, the City called a meeting to address certain issues arising from the ongoing partial merger process, including the impact of the recommendations on current staff. Jones, Meyer, various City Council members, Frey, Richard Haley, the Union's Business Manager, and certain Utility employes attended this meeting. City Council minutes from that meeting state:

. . .

> Mayor Meyer then asked Jeff Jones of Ruder, Ware & Michler, S.C. to speak to the issue of possible jobs lost. Mr. Jones stated that the IBEW has stated they will file a grievance if the City proceed with the transfer. He stated that we have the right under the management rights clause of the union contract to transfer duties to effect the most efficient operation of the City. There is no prohibition in the contract. It would be a different situation if the City were contemplating subcontracting the work out to another firm.
>
> Mr. Haley of the IBEW said the problem is that the City would be taking bargaining unit work away from union employees. He feels this would be a violation of the contract. Mr. Jones asked him under what provision this would be a violation, and Mr. Haley replied because of past history (who did the work in the past). Mr. Jones then replied that just because the City have (sic) not exercised our management rights in the past does not mean that the City has waived them. Mr. Haley then stated that the union's position and the City's position differ greatly. The union employees have done this work in the past and will continue to do it until it is negotiated differently.
>
> Mr. Haley then asked if the work goes to City Hall, would any of the Utility workers be transferred. Mr. Jones stated that issue has not been addressed. Mr. Zaborowski stated that if the remote meter reading had done what it was supposed to do, some time would have been eliminated from the staff time at the Utility. He further

> stated that if all the duties were transferred to City Hall (including billing and collections), then it might be prudent to offer the jobs to the Utility staff. However, that is not what is being proposed.
>
> Ms. Pernsteiner stated that what she found upsetting about the merger study is that she feels no one knows exactly what the Utility staff does and how hard they work. The Utility is now moving to Demand Side Management, and that will take even more time. There followed some discussion on how the original study was handled, ending in Ms. Pernsteiner stating that she wanted it known that she and her staff are cooperative and do all the work that is assigned them . . .

Effective January 1, 1994, general ledger duties, and certain billing and bookkeeping functions formerly performed at the Utility were moved to the City Hall. During January problems surfaced regarding Abadeer's job performance. By February of 1994, Abadeer's and Schaefer's employment with the City had been terminated.

On January 12, 1994, the Union filed the following grievance (the January grievance):

> In accordance with the present Labor Agreement the Union presents the following grievance into the 2nd Step of the grievance procedure:
>
> a) Cynthia S. Pernsteiner, Debbie A. Pernsteiner, Catherine J. Jackson positions of Computer Operator, and Cashiers.
> b) Transfer of Bargaining Unit work to non-bargaining employees.
> c) Transfers of bookkeeping and billing duties.
> d) January 1, 1994.
> e) Article I, Article IV, and any other articles which may be applicable
>
> We stand ready to meet on the above matter at a mutually agreeable time and date.

On February 17, 1994, the Personnel Committee denied the grievance. Jones advised Lewis of this denial in a letter dated February 22, 1994. He also advised Lewis that the City Utility saw "an issue as to the timeliness of the grievance," and that the City Utility would agree to proceed directly to arbitration of the grievance. In a letter to Jones dated March 2, 1994, Haley stated:

> In an effort to settle the above referenced grievance prior to

> continuing on to arbitration, the Union, without precedence or prejudice to its position, would consider the matter resolved if the City of Medford would reassure the Union that the transfer of work from the Medford Electric Utility will not result in the loss of employment or a change in the condition of employment of any of the current employees.
>
> If the above resolution is not agreeable to the City, then the Union and the City would ask for an agreeable member of the Wisconsin Employment Relations Commission to be selected to preside over the arbitration. If the City cannot agree to the aforementioned selection process, then the Union will ask for a panel of arbitrators, as per the present Labor Agreement.

Jones advised Haley, in a letter dated March 11, 1994, that the "Personnel Committee voted to reject the proposed settlement . . . " In a letter dated March 23, 1994, the Union filed a request for grievance arbitration with the WERC, and requested "a panel of seven WERC Staff Members for the parties to choose from." Marshall L. Gratz, an Attorney/Team Leader for the WERC, stated, in a letter to Haley and to Jones dated March 29, 1994, the following:

> . . . I explained to Mr. Haley when I called him yesterday, that the Commission provides only panels of outside ad hoc arbitrators, but not of WERC staff members. Mr. Haley stated (and the parties' correspondence confirmed) that Local 953 and the Utility have agreed to utilize a WERC staff arbitrator. I told him that the Commission attempts where possible to honor joint requests of the parties for assignment of a particular staff arbitrator and that I could provide a list of the entire staff of the Commission to facilitate joint request discussions between the parties. He asked that I provide such a list and that the case be held in abeyance pending the results of the parties' efforts to develop a joint request concerning the staff arbitrator . . .
>
> As requested we will hold this case in abeyance in order to allow the parties to determine whether they can mutually agree to make a joint request concerning the staff arbitrator to be assigned in this case. If the parties are unable to reach an agreement in that regard, our agency will designate the arbitrator from among its staff members . . .

Haley did not contact Jones to set up a procedure to select a WERC staff arbitrator. Haley testified that he phoned Jones sometime in April of 1994, and asked Jones if the City Utility was

contemplating laying off any employes during the remaining term of the 1992-94 labor agreement. He testified that Jones responded in the negative, and that the two of them discussed holding the grievance in abeyance so the matter could be addressed in collective bargaining for a successor to the 1992-94 labor agreement. Jones denies ever receiving such a phone call.

On July 25, 1994, the City Council's Personnel/Finance committee met. At that meeting a number of items regarding the ongoing merger of City Hall and City Utility bookkeeping functions were discussed. At this meeting, the committee voted on a number of proposals relating to the ongoing merger. The Committee voted unanimously to make the following recommendations to the Council at its meeting the following evening: to have AT provide additional data entry and supervisory services in order to complete the changeover to the new computer system; to continue on-site processing of vendor disbursements and posting of receipts by the City, but under AT supervision for a period of up to six months; and to engage AT to assist with monthly ledger activities for up to six months. The Committee also voted, with alderman Fred Gelhaus the sole dissenting vote, to make the following recommendations to the Council: to engage AT to provide payroll processing services from October 1, 1994 through December 31, 1995; and to engage AT to perform a cost analysis to determine the most cost-effective method to do utility billings. During the discussion of these items the possibility of layoffs at the City Utility was addressed. During that discussion, or possibly during discussion of these items at the following evening's Council meeting, Alderperson Arlynne Parent asked if a layoff of two of the three clerical employes would break the Union. Chairperson May Bix responded that the Union included both clerical and electrical employes, so that a layoff of two clerical employes would not destroy the Union.

The City Council met on July 26, 1994. Grievant and Debra Pernsteiner attended this meeting. After completion of the discussion on the recommendations of the Personnel/Finance Committee, Grievant was permitted to speak. She stated she understood the recommendation to send work to AT turned at least in part on the inability of City Hall personnel to complete those duties. She then suggested to the Council that if the City Hall needed assistance, payroll work should be sent back to the Utility, where Cynthia Pernsteiner had once performed it. Bix reacted in anger, asserting that Pernsteiner drew overtime for doing payroll work. Grievant denied this. The exchange between Bix and Grievant became sufficiently animated that the Mayor had to intervene to call the meeting back to order. The City Council voted to accept the recommendations of the Personnel/Finance Committee.

In August of 1994, the Union notified the City Utility of its intent to amend the terms of the 1992-94 labor agreement. Included among the Union's initial proposals was the following:

2. Article IV, (A) 10.

> The Utility will not contract out any work normally performed by the employees covered by this agreement which would result in

> unemployment of regular employees, or if any regular employee is unemployed.

The parties' initial collective bargaining session took place on October 5, 1994. The City Utility's initial proposal did not contain any provision concerning the issue of subcontracting. The Union stated at that session that Proposal 2 was designed to clarify its reading of Subsection A, 10. The City Utility responded that subcontracting was within its management rights, and the parties agreed that this issue could itself cause an impasse. The City Utility suggested that the parties seek arbitration, but the Union suggested that mediation would be appropriate. The City Utility agreed, and on December 8, 1994, the parties participated in mediation with a WERC staff member serving as Mediator.

At the start of the December 8 mediation, the City Utility made the following proposal concerning subcontracting:

> K. To subcontract for goods or services. However, in the event subcontracting would directly result in the layoff of bargaining unit employees and is work regularly performed by bargaining unit employees, the City will notify the Union and bargain with the Union regarding the decision to implement such subcontracting, if requested.

The City drew this proposal from its labor agreement covering Department of Public Works employes. Neither party would agree to the other's subcontracting proposal as the mediation progressed. At one point in the mediation, the Union asked the Mediator to ask the City Utility representatives if they contemplated laying off or reducing the hours of any Utility employes. The City Utility representatives responded to the Mediator. Jones testified that the Mediator was informed that no layoffs were currently being considered, but that there could be no guarantees made for the entire duration of the agreement. The Mediator communicated the City Utility's response to the Union. The Union understood the response to their question to be that the City Utility had no present intent to layoff, and withdrew its subcontracting proposal. When the City learned the Union's subcontracting proposal had been withdrawn, it dropped its subcontracting proposal. With this issue off the table, the parties were able to reach a tentative agreement.

The Mediator conducted a joint session between the parties to confirm the terms of the tentative agreement. Neither party raised any question regarding the subcontracting proposals or regarding the layoff of any Utility employe. The Union neither sought nor received a guarantee against a layoff or a reduction in hours. Neither party sought any written statement from the other on this issue. The Union ratified the tentative agreement that evening.

On February 13, 1995, AT issued its report regarding the most cost effective method to perform Utility billing. Its report states, among other points, the following:

. . .

AVAILABLE METHODS TO ACCOMPLISH THE BILLING

The first step involved determining the potential methods available to accomplish the utility billing process. The available alternatives are:

* Maintain the current status quo
* Make the utility billing function a part of the City Hall finance function
* have the utility bills generated via a service bureau approach utilizing the same software currently utilized by the utility . . .
* Have the utility bills generated via a service bureau approach utilizing a different utility billing software package.

Each above option has its strengths and weaknesses . . .

The second option will not be covered in detail since current union contract provisions may prohibit this type of work transfer. In addition, the current physical layout of the City Hall facility is not conducive to this alternative . . .

THE CITY'S NEXT STEP

Based on the information provided by our analysis, the City must decide how it chooses to restructure the utility billing process within the City. The choices are:

* Modify the current status quo method to consider and implement our observations. Significant potential exists for reduction of needed staff time and reallocation of that time for other City purposes. We conservatively estimate at least 660 hours. A potential goal would be the reallocation of an entire staff position. We do not know if this would be possible though. Ultimately, we feel that the City would be best served if the utility office and city hall offices could be in the same building. This would allow easier reallocation of staff time made available by making better use of the utility billing software . . .

In February of 1995, the City published a "Notice of Public Meeting" of the Public Utilities Committee to be held on February 20, 1995. Included on the notice was the following:

> 4. DISCUSSION: Electric Utility Cost-Effective Report prepared by Anderson, Tackman & Company

The three Utility clerical employes learned of this meeting and attended it. The Committee voted to go into closed session before discussing Item 4.

In a letter to Bix dated February 23, 1995, Haley stated:

> It has come to our attention that the City of Medford may be contemplating changes in the work hours of clerical employees represented by IBEW, Local 953 or other changes in the terms and conditions of their employment. It is further our understanding that the City has consulted with Anderson Tackman & Company concerning these contemplated changes. These contemplated - changes in employment may violate the terms and conditions of the collective bargaining agreement now in effect between IBEW, Local 953 and the City of Medford.
>
> In order to carry out our obligation as bargaining representative of City of Medford Electrical Utility employees and to investigate possible violations of the Union's contract with the City of Medford, we hereby request a copy of the report prepared by Anderson Tackman & Company referred to in the Notice of Public Meeting for February 20, 1995. We also request any correspondence, proposals, reports or other documents between the City of Medford and Anderson Tackman & Company which concern changes in the terms and conditions of employment of employees whom we represent at the Electric Utility or concerning charges which may impact on their terms and conditions of employment.
>
> Please provide the information within the next week, that is on or before March 2, 1995.
>
> We would further like to set up a meeting with the City to discuss the proposed changes after we have had an opportunity to review the Anderson Tackman Report. I am available March 6, 7, or 10,

> 1995. Please let me know which of these dates and times are best for you.

The Public Utilities Committee met on February 28, 1995. Haley and the three Utility clerical employes appeared at this meeting. Shortly after opening the meeting, however, the Committee voted to go into closed session to consider AT's February 13, 1995 report on City Utility billing. Haley asked the committee if he could attend the closed session. He was informed he could not. Haley and the clerical employees then left. Committee minutes from this closed session state that the Committee unanimously agreed to recommend that the Council accept and implement the AT report of February 13, 1995. The minutes further detail the following:

> Parent moved, Thielke seconded a motion to recommend to Council to lay-off one half-time cashier effective April 1, 1995 (the effect of the motion is to reduce one full-time cashier to half-time status effective April 1, 1995); and on or before May 15, 1995, the Public Utilities Committee and the Electric Utility Manager will re-evaluate the situation with a view to possibly laying-off the entire cashier. Roll Call Vote: Unanimously Aye. MOTION CARRIED.

These recommendations were to be placed before the Council at a meeting on March 7, 1995.

In a letter to Haley dated February 28, 1995, Jones stated:

> . . . We are responding on behalf of the City . . . to your February 23, 1995 letter . . .
>
> We are presently reviewing your request and will shortly be responding to that request. We are unaware, however, of any charges which may impact upon the employees' terms and conditions of employment.
>
> You had also requested to meet with City officials to discuss the proposed changes after you have had an opportunity to review the Anderson Tackman report. You had proposed the dates of March 6, 7 or 10, 1995. The undersigned has a conflict with the March 6 and March 10 dates and the March 7th date is the Common Council meeting date. We would propose March 9, 22, 23, or 29, 1995 . . .

On March 1, 1995, the City mailed the following items to Jones: (1) the January 15, 1993 AT report; (2) the February 13, 1995 AT report; (3) the minutes of the February 20, 1995 closed session of the Public Utilities Committee; and (4) the minutes of the open and closed portions of

the February 28, 1995 Public Utilities Committee meeting.

On March 2, 1995, the Union's labor counsel, Marianne Goldstein Robbins, responded to Jones' letter of February 28, 1995. That letter states:

. . .

> Given the developments of Tuesday, February 28, 1995, we find your response, on behalf of the City of Medford, totally inadequate . . . Your response . . . did not provide a copy of the report and stated "we are unaware . . . of any charges (sic) which may impact on employees terms and conditions of employment." On the very same date, the City met in closed session and thereafter announced adoption of the Anderson Tackman report and, on that basis, announced that an employee within the bargaining unit . . . would be place on part-time status effective April 1, 1995. It further appears this employee may lose all employment in the future. Given the foregoing, a claim that the City is unaware of any changes which may impact on employees terms and conditions of employment appears disingenuous at best.
>
> In your letter, you declined to meet with the Union . . . before the next meeting of the Common Council. This is particularly unfortunate where the Union has appeared at two recent meetings of the Utility Committee . . . (and the) Union's requests to (be) heard at these meetings have been flatly refused . . .
>
> Given the foregoing, the Union requests that the City of Medford provide the Anderson Tackman report and all correspondence or other documents between Anderson Tackman and the City which, in any way, refer to the potential layoff or reduction in hours of employees within the bargaining unit or any changes in operations which could lead to such action, no later than Monday, March 6, 1995. Additionally, the Union demands to meet with City representatives on March 7, 1995, before the Common Council meeting . . . Lastly, the Union requires reassurance from the City that it will not implement any change in job status of employees represented by the Union until the Union has had an opportunity to review the documents requested and then explore with the City whether a mutually agreeable resolution of the issues concerning any possible change in job status can be reached by the parties . . .

Jones responded in a letter dated March 3, 1995, stating that his letter "was apparently misread," and stating:

> In our letter of February 28, 1995, we advised Mr. Haley that we were reviewing his request and would be shortly responding to that request. That statement was in response to Mr. Haley's first two requests. As noted in your March 2, 1995 letter, we also advised Mr. Haley that we were unaware of any charges which may impact on the employees' terms and conditions of employment. That statement was in direct response to Mr. Haley's third request. The statement was not in response, as stated in your letter, to Mr. Haley's request for the Anderson Tackman report, or a claim that the City was unaware of any changes which may impact on the employees' terms and conditions of employment.

Jones' letter also challenges the Union's view that its representatives had been "flatly refused" access to the Public Utilities Committee, and notes the impossibility of arranging a meeting of the City with the Union on March 7, 1995. The letter continues:

> The action with respect to the reduction of the employee's work hours is not to take effect until April 1, 1995. Thus, there is ample time for City officials to meet with Union representatives to discuss the matter. We would propose the following dates for a meeting: March 9, 20, 22 or 23 . . .
>
> In response to Mr. Haley's request, enclosed please find the Anderson Tackman report of February 13, 1995, and a second report from the same firm dated January 15, 1993. These are the only written documents between Anderson, Tackman and the City of Medford that we are aware of which fall under Mr. Haley's request . . .

Goldstein Robbins responded in a letter dated March 6, 1995. That letter confirmed the March 20 meeting date and states:

> . . . (W)e believe it is the Common Council's obligation to take no action on the Anderson Tackman report nor to take any action which will alter the terms and conditions of employees represented by the Union at the March 7, 1995 meeting . . . We further request that the Common Council take no action to implement the Anderson Tackman report . . . until after the parties meet on March 20, 1995

and have an opportunity to fully explore the matter.

In a letter to Goldstein Robbins and to Haley dated March 7, 1995, Jones noted that the Common Council would be "reviewing and possibly acting" upon the reduction in Jackson's hours, and that Haley had been granted fifteen minutes of time "to speak to the Council prior to the Council rendering a decision on the matter." The letter also states:

> In speaking with Mr. Haley with regard to this matter, we understand that he will not be raising any legal or contractual issues with the Council at tonight's meeting with respect to the proposed reduction in work hours. Rather, he will be asking the Council to consider alternatives to a reduction in hours. Any legal and/or contractual issues are to be discussed at the March 20, 1995 meeting . . .

The minutes of the March 7, 1995 Common Council meeting summarize its deliberations on the reduction in hours issue thus:

> Chairman Parent moved to accept the Committee on Public Utilities' unanimous recommendation (therefore no second necessary) to reduce one full-time cashier to half-time status effective April 1, 1995; and on or before May 15, 1995,, the Public Utilities Committee and the Electric Utility Manager will re-evaluate the situation with a view to possibly laying off this cashier.
>
> Mayor Meyer recognized Bruce Michalke, the Assistant Business Manager for Local #953 of the International Brotherhood of Electrical Workers representing the clerical employees through the WRC. Mr. Michalke was respectfully requesting that the City not take action on this item at this time. He went on to state that his office had tried to schedule meetings with the Personnel Committee. He noted that a meeting has now been scheduled for March 20, 1995 and thus is requesting that no action be taken until said meeting has been held. He is hopeful the Personnel Committee and Union can come to a mutually agreeable solution to the problem at that time.
>
> Mayor Meyer responded that the City would like to implement this by April 1, 1995 and that 15 days' notice needs to be given prior to the lay-off. She noted that the original Anderson Tackman & Company report has been discussed for two years. Although not recently, the City has met with the employees regarding this issue.

> She added that the Public Utilities Committee has looked at this long and hard and has now made a recommendation to the Council.
>
> Alderperson Gelhaus stated that he would like to hear all the facts and points of view before voting on this important issue.
>
> With that explanation, Gelhaus moved to table.

Gelhaus' motion failed, and the Council voted to accept the recommendation of the Public Utilities Committee.

As noted above, the Personnel Committee issued Grievant a notice of the reduction in hours the following day. The parties were unable, during or after the March 20, 1995 meeting, to resolve the grievance. The payroll work authorized by the City Council to be contracted to AT during the July 26, 1994 meeting is still being performed by AT, which has been authorized to perform such work through January 1, 1997.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE I - RECOGNITION AND COVERAGE

A. Pursuant to and in conformity with Section 111.70, Wisconsin Statutes, the Utility recognizes the Union as the bargaining agency for all regular employees (exclusive of clerical employees and superintendent) of the Medford Electric Utility covered by Wisconsin Employment Relations Board Certification No. 6734, and amended by Decision No. 6734A to include the classification of office clerical employees to whom this Agreement applies.

B. The Utility and the Local Union agree to negotiate and deal with each other through the duly accredited officers and committee representing the parties hereto, exclusively, for the employees of the Utility covered hereunder on matters relating to hours, wages and other definite conditions of employment, included within the application and interpretation of this Agreement affecting said employees.

. . .

ARTICLE IV - MANAGEMENT PREROGATIVES

A. The management and operation of the Employer's facilities and the direction of its workforce shall be vested exclusively in management except as modified by this Agreement and including, without limitations, as follows:

1. The right to plan, direct and control operations;

2. Establish new jobs, abolish or change existing jobs;

3. Increase or decrease the number of jobs, specify and select materials, supplies and equipment, or change or vary materials, processes, products, equipment or operations;

4. To determine the methods, means and personnel by which the Employer's operations are to be conducted;

5. To introduce new or improved methods or facilities and to

change existing methods or facilities . . .

7. The right to schedule and assign work, hire, rehire, promote, transfer, layoff and recall employees . . .

10. The Utility will not contract out maintenance and conversion work normally performed by the employees covered by this agreement which would result in unemployment of regular employees, or if any regular employee is unemployed.

ARTICLE V - GRIEVANCE PROCEDURE-ARBITRATION

A. Grievance - Definition and Procedure: A grievance is defined as a dispute between the Utility and an employee (or employees), or the Local Union concerning the interpretation or application of this Agreement.

1. A grievance shall not be in existence until a request by an employee to the City's Personnel Committee Chair or Utility Manager on a matter constituting a grievance has been denied, or ignored for one (1) week after it is presented.

2. First Step: The Steward (who shall be an employee of the Utility) may attempt to settle the grievance of any employee directly with the Manager.

3. Second Step: If the grievance is not adjusted by the Manager to the employee's satisfaction within the one (1) week after it is presented in the First Step, the Union Business Agent may present the grievance in the Second Step by reducing the grievance to writing and mailing it to the Personnel Committee within ten (10) working days after the decision of the Manager . . .

7. If the grievance is not called to the Utility's attention at the Second Step of the grievance procedure within thirty (30) calendar days after the cause for such grievance develops, it shall be deemed not to exist.

B. Arbitration:

. . .

2. . . . Upon one party notifying the other in writing of an election to refer a matter to arbitration, the parties shall meet within ten (10) days to select an Arbitrator from said panel. Each party shall strike two names alternately, with the party requesting arbitration striking first and the remaining person shall be the Arbitrator . . .

ARTICLE VI - CLASSIFICATION AND WAGES

A. . . . Nothing herein contained shall prevent the Utility from changing operating and production methods or adopting new methods or creating new occupational classifications or new or changed methods . . .

ARTICLE VII - SCHEDULE OF HOURS

A. Eight (8) hours shall constitute a regular days work and five (5) days, beginning Monday morning and terminating Friday evening, shall constitute a weeks work, except as mutually agreed otherwise.

. . .

ARTICLE VIII - SENIORITY

A. The seniority of an employee is defined as the length of the employee's employment starting with the employee's date of hire, or rehire after loss of seniority, and shall be given due consideration in connection with layoffs, re-employment, promotions and demotions.

. . .

F. An employee shall cease to have any seniority if the employee:

. . .

3. Following a layoff due to lack of work, the employee does

not acknowledge within five (5) days the Utility's request that the employee return to work . . .

4. After a layoff, is physically fit and does not return to work within fifteen (15) days after requested to do so . . .

H. When the Utility decreases the work force, employees with the least seniority in classification amongst the employees who are qualified for the work available shall be laid off first on fifteen (15) days written notice. Recall shall be in reverse order provided that employees recalled shall be physically fit and qualified to perform the available work . . .

ARTICLE IX - VACATION, SICK LEAVE, LEAVE OF ABSENCE

A. All regular employees covered by this Agreement shall be entitled to vacations with regular pay each calendar year in accordance with the following rules and schedules:

. . .

7. Part-time employees will receive vacation pro-rated as per time worked.

. . .

ARTICLE X - SAFETY AND WORKING RULES

A. When doing maintenance work on live equipment of 750 volts or over, it shall be the general practice to have at least two qualified employees working on such equipment.

. . .

ARTICLE XI - HOLIDAY CLAUSE

. . . Part time employees will receive holiday pay prorated as per hours worked the three months immediately preceding the holiday.

. . .

ARTICLE XIII - HOSPITALIZATION/SURGICAL PROGRAM

A. . . . Premium payments will be prorated for regular part-time employees . . .

POSITIONS OF THE PARTIES

The Union

The Union argues that Subsection A, 10 "specifically prohibits subcontracting when that subcontracting causes or continues during the lay off of an employee." Even though this clause is limited in its scope and was initially negotiated before the unit included clerical employes, the Union argues that the language "has continued in every contract since clerical employees became part of the bargaining unit." The language concerning "maintenance and conversion" work is broad enough to cover the transfer of work posed here and to "apply to office procedure."

The Union contends that the language cannot be read as the City Utility asserts. It does not permit the City Utility to "subcontract in all situations other than line maintenance and conversion work" since "nothing in the clause provides the City with any right to subcontract." Unsuccessful City Utility attempts, in 1982 and in 1994, to broaden the scope of its right to contract underscore this conclusion. That the spokesman for the City Utility, in October of 1993, distinguished between intra-City transfer of work and the contracting of work outside the City also underscores the limited scope of its right to subcontract.

Because the City Utility reduced Jackson from full time to part time status at a time it contracted "maintenance of its payroll and ledger work to Anderson Tackman & Co." a violation of Subsection A, 10 has been established. The Union also contends that this conduct by the City Utility "also violates the recognition, wage and job security clauses of the labor agreement."

Arbitral precedent establishes that a "recognition clause sets broad limits upon management's power to assign bargaining unit work to those outside the unit." The subcontract effectively undercut the negotiated wage rates stated in the labor agreement. City council members acknowledged that this was the reason for the subcontract. Such action, under arbitral precedent, "violates the implied covenant which underlies (the collective bargaining) agreement." Further support for this can be found in the "job security provisions of the seniority clause." These provisions are rendered meaningless if the City Utility is permitted to contract out unit work.

The representations of the City Utility during the bargaining process preclude concluding

that the Union waived any right to challenge the transfer of work. In October of 1993 the City Utility claimed the transfer of work had neither cost any unit employe any work nor could be considered a subcontract. The Union notes that it had, in any event, promptly filed a grievance when work first left the City Utility. That grievance was not dropped, but was held in abeyance until Jackson's layoff prompted a second grievance. That the 1993 AT report "claimed the Utility was half a person over-staffed" has no significance, since this contradicted the conclusions of the on-site auditor and was, in any event, contradicted by City Utility representations during bargaining.

The Union concludes that the "contract is clear subcontracting cannot occur while an employee is unemployed." The Union closes by requesting that the "subcontracted work should be returned to the bargaining unit to decrease the amount of unemployment if not remedying it completely." The Union adds that the Arbitrator should "make (Jackson) whole for all losses."

In its reply brief, the Union challenges the contention that its grievance is untimely. The event initiating the grievance was Jackson's layoff, which was not formally announced until February 20, 1995. The grievance challenging that announcement fell well within the thirty day time limit imposed by the labor agreement. Nor can the grievance be considered to belatedly challenge only the impact of the subcontracting decision. Subsection A, 10 consists of two elements, one of which is a proscription against a contracting out of work when "any regular employee is unemployed." That element was timely challenged by the second grievance. Whether or not the subcontract immediately caused the layoff, the continuation of the subcontract has been timely challenged.

That the City Utility asserts it acted upon a long-discussed study does not render the grievance untimely. The Union urges that the City Utility repeatedly assured the Union it did not contemplate any layoffs, and that this assurance precludes accepting the assertion that the grievance should have been brought at an earlier date. A review of the record establishes that the March grievance "was . . . effectively a renewal of the Union's prior grievance initiated in January of 1994."

The Union also challenges the attempt by the City Utility to restrict Subsection A, 10 to "the electrical crew." The Union argues that "(m)aintenance and conversion work can be viewed as all work which maintains present operations or is involved in converting or changing the means by which existing work is performed." That the Union sought to clarify this provision in 1995 means nothing, especially in light of the City Utility's two attempts to modify the provision. Even if this provision did not exist, the Union asserts that "there is an implied limitation on subcontracting" in light of other agreement provisions. Even if such a duty implies only an obligation of good faith, the Union contends that the evidence amply supports a conclusion that "the City acted throughout in bad faith." Since there "is also absolutely no evidence that the transfers of work and subcontracting . . . have resulted in any efficiency or cost saving" the Union concludes that the record lacks any convincing evidence of good faith on the part of the City

Utility.

The Union closes its reply brief by again emphasizing its request that the subcontracted work be returned to the unit, with Jackson being reinstated and made whole for her losses.

The City Utility

The City Utility asserts that the grievance should be summarily dismissed as untimely. The January grievance questioned the transfer of work to the City Hall, while the March grievance challenged the reduction of Jackson's hours. The City Utility argues the second grievance can only be considered timely if "the time limitation for filing a grievance begins to run when the effect of a decision is felt."

The City Utility contends that arbitral precedent and the language of the labor agreement focus the tolling of grievance time limits on the cause of the grievance, not its effect. This conclusion has ample support in arbitral law and in the language of Article V, Section A, 7, and Section B, 2. The failure of the Union to timely challenge the transfer of work has, the City Utility concludes, jurisdictional effect.

Because the Union's grievance turns on "the transfer of work outside of the bargaining unit," the City Utility concludes it "is clearly untimely and should be summarily dismissed." The challenged transfers started as early as April 1, 1993 and were completed by January 1, 1994. It necessarily follows, the City Utility concludes, that neither grievance falls within the thirty day time limit for filing a grievance. Any attempt to resurrect the first grievance must be denied, and could lead to absurd results. The City Utility concludes that the Union's arguments seek to "side step" grievance timelines to make an issue of layoff become an issue of subcontracting.

Even if the grievance could be considered timely, the City Utility argues that "the transfer of work and reduction of the Grievant's work hours was in accord with its contractual rights." Both arbitral precedent and the governing contract language establish that the City Utility "is unrestrained in its right to transfer work, and also has the right to contract out certain types of work." These rights are established, according to the City Utility, in the Management Rights clause and in Subsection A, 10.

Under the principle of *expressio unius est exclusio alterius*, Subsection A, 10 must be read to limit the right of the City Utility to subcontract only with regard to "maintenance and conversion work." The City Utility contends that Article XIII, Section B and Article X, Section A underscore the conclusion that "maintenance" refers to work performed by the electrical crew. It follows, according to the City Utility, that the protections of Subsection A, 10 do not extend to the clerical employes. That this language was added to the contract when it covered only electrical workers underscores this conclusion. The City Utility adds that "(s)ince the contracting provision did not change after the clerical employees joined the unit, it continues to have the same meaning."

Since the parties did not change the language when they inserted a management rights clause into the contract, the language of Subsection A, 10 must be considered to be that given it in 1964. The Union's unsuccessful attempt to broaden the scope of the provision also buttresses this conclusion. The City Utility concludes that the effect of Subsection A, 10 on clerical employes can be stated thus:

> (C)lerical employees may not become unemployed as a result of the contracting out of maintenance and conversion work. The City's right to contract out other types of work is not, however, restrained by the Agreement.

The City Utility contends that arbitral precedent subjects employer decisions to transfer work to various levels of scrutiny. Since Subsection A, 10 permits the City Utility some discretion to subcontract, a lesser level of scrutiny is appropriate. The appropriate standard, according to the City Utility, is whether it "acted dishonestly, or for an illegitimate purpose."

The evidence will not, according to the City Utility, establish such a violation. Rather, the evidence establishes that it acted "with the purpose of streamlining the City's payroll and bookkeeping operations to promote efficiency." The repeated studies on the issue of merging operations support this conclusion, and evidence of individual statements by council members shows a depth of feeling, but no substantial proof of improper motivation.

The action taken against Jackson was, then, no more than a layoff, and the contract, "restrained only by the seniority and notice clauses," vests the City Utility with that right. Article IV, Section A, Subsections 1 through 5 and 7, read with Article VI, Section A and with Article VIII, Section H establish the right of the City Utility to "implement technological changes and reduce employee work hours." Nor will a review of the evidence support a conclusion that the transfer of work necessitated the layoff. Rather, the City Utility asserts that Jackson's layoff "was . . . a result of overstaffing at the outset and further overstaffing after implementation of technological improvements."

Whether viewed as untimely or on its merits, the City Utility concludes that the grievance must be denied.

In its reply brief, the City Utility asserts that the Union's view of bargaining history and the governing contract language is unreasonable. Its 1982 proposal sought not to create a right to subcontract, but to expand on an existing right. The 1994 proposal sought only to respond to the Union's proposal. The City Utility then adds that if Subsection A, 10 is read as the Union asserts, the provision becomes meaningless, for it limits a right the Union asserts does not exist.

The City Utility argues that the Union has taken statements of its counsel out of context, and has unpersuasively attempted to read "maintenance and conversion" work to mean something other than work of the electrical crew. Union assertions of "implied" rights limiting its ability to

subcontract do no more than mask the "clear contractual rights" of the City Utility. The minimal amount of transferred work make the arbitral precedent cited by the Union inapplicable to the grievance. That the work transferred was not work performed by the Grievant underscores this point, as does the fact that work contracted to AT is limited in duration and traceable to unanticipated City Hall turnover. The City Utility further argues that what evidence there is on City Council members' attitudes to the wages paid to Utility clerical employes shows no more than a concern to promote the efficiency improvements suggested in the WTA and AT studies.

The City Utility emphasizes its contention that the grievance was untimely, and argues that the Union's view of the evidence on this point is unreasonable. The first grievance was filed months after the initial transfer of work, and cannot, according to the City Utility, be considered to have been "held in abeyance" by the parties. Nor will a reasoned view of the evidence support any City Utility misrepresentation which can account for the delay in processing the January grievance. The grievance must, according to the City Utility, be denied either as untimely or on its merit.

ADDITIONAL FACTS AND DISCUSSION

The litigation of the grievances and related prohibited practice complaint poses a series of factual, contractual, and legal issues. The parties have not stipulated the issues for decision. The issues adopted above should not be read to gloss over the complexity of the underlying arguments. Rather, they serve to focus the dispute.

The issues adopted above focus the dispute on the collective bargaining agreement. The initial focus is procedural. The timeliness issue reflects the City Utility's concern that neither grievance was timely filed. As the timeliness issue is stated above, the initial determination must be which, if either, of the two grievances is timely and thus properly posed for arbitral review.

The parties' arguments on the merits of the grievances are inextricably tangled with their procedural arguments. The assertion that the January grievance was revived by the March grievance underscores the remedial request that work be returned to the City Utility with the Grievant's hours being restored. The City Utility's contention that neither grievance is timely underscores the contention that no interpretation of the contract can undo a merger with roots tracing back several years.

The close relationship of procedure and substance cannot, however, make the January grievance timely. It arose under an agreement in effect from "November 1, 1992, for a period to and including October 31, 1994." Article II of that agreement does provide that "this agreement shall remain in full force and effect until amended terms are executed," but there is no dispute that a successor agreement was executed. Whether or not the parties agreed to hold the January grievance in abeyance, it arose under an agreement long since expired and over which this

arbitrator has no jurisdiction. Thus, the parties' procedural arguments must be focused on the March grievance.

A review of the parties' arguments in light of the evidence establishes that their dispute cannot persuasively be resolved on a procedural basis. The City Utility focuses on Article V, Section A, 7, and more specifically on the interpretation of "the cause for such grievance." It notes that Utility payroll work was transferred to City Hall in August of 1993 and to AT in October of 1994. It further notes that general ledger and other bookkeeping duties were transferred to City Hall in January of 1994. Since the transfer of work was known to the employes who lost it, the City Utility concludes the "cause" for the March 1995 layoff arose well beyond 30 days before the March grievance. The most persuasive support for this view is the wording of the March grievance, which focuses on Grievant's layoff as "the delayed reaction" to the transfer of work from the Utility to City Hall and to AT. This wording supports the City Utility's assertion that the layoff is an effect or impact of the merger process rather than a cause for a grievance.

The March grievance, however, ultimately focuses on a layoff, not the merger process. To characterize a layoff as an effect, not a cause, strains the normal meaning of the term "cause." It would be a rare employe who could take a layoff as something other than "cause" for concern or a grievance. A review of the facts posed here manifests the strain of characterizing the layoff as an effect. Until March of 1995 no Utility employe had been harmed by the merger process. Different parts of the various AT reports can be read to make Utility employes as available for a reallocation of work as for a layoff. Had Grievant's work been reallocated, it is possible no grievance would have arisen. The layoff does not, then, appear to be a necessary effect flowing from the cause of the work transfer.

The City Utility's reading of "cause" would render Article V, Section A meaningless. That section defines "grievance" to mean "a dispute . . . concerning the interpretation . . . of this Agreement." The Union reads Subsection A, 10 to apply to the work at issue here and to Grievant. The City Utility disagrees on both points. Whether this provision should be read as the Union asserts or as the City Utility asserts poses "a dispute . . . concerning the . . . application of this Agreement." The City Utility's interpretation of "cause" in Article V, Section A, 7 would, however, shield this dispute from any scrutiny. Subsection A, 10 proscribes subcontracting which results in the layoff of a regular employe or which occurs while a regular employe is laid off. The former contingency is arguably subject to the City Utility's concern regarding the timeliness of the March grievance. The latter contingency is not. The City Utility's argument on Article V, Section A, 7 indiscriminately precludes any interpretation of Subsection A, 10. That the Union's view of the contract is not limited to Subsection A, 10 manifests that the City Utility's procedural argument serves more as a guide to its position on the merits of the grievance than as a guide to the interpretation of the labor agreement.

To find the March grievance untimely on these facts would unnecessarily encourage the

filing of grievances and discourage their open discussion. It would appear unproductive to encourage the filing of grievances on changes which do not have an immediate adverse impact on an employe. If, for example, the City Utility's consideration of new computer systems or software could conceivably boost productivity, it is not apparent why the Union should be encouraged to grieve such innovations. Adopting the City Utility's reading of "cause" would, however, do so if the Union wanted to shield itself from a later charge that it failed to timely grieve a change that ultimately served to reduce the need for the labor of unit employes. Beyond this, the evidence indicates the City communicated to the Union that the January grievance was denied at least in part because no employe had been harmed by the work transferred at that time. This communication is not reconcilable to the contention that the March grievance should be considered untimely because the "cause" of that harm is traceable to the events of January of 1994. To adopt this interpretation would not encourage the frank discussion of grievances. Rather, it would encourage the careful building of litigation positions.

In sum, only the March grievance can be considered timely and thus subject to arbitration.

The issue on the merits of the grievance turns on the contractual propriety of Grievant's layoff. The parties' arguments pull a considerable portion of the agreement into dispute. The issue for decision turns, however, on Grievant's layoff. An examination of the grievance must start there. Subsections 2 and 7 of Article IV coupled with Article VIII, Section H govern the City Utility's authority to select employes for layoff. Article VIII, Section H requires that the employe with the "least seniority in classification amongst the employees who are qualified for the work available" shall be the employe selected for layoff. There is no dispute that Grievant is that employe, if the layoff itself can be considered appropriate.

The Union challenges the propriety of the layoff primarily through the application of Subsection A, 10. Beyond this, the Union contends that agreement provisions read as a whole limit the City Utility's authority to reduce employe hours to avoid payment of contractually set wages and benefits.

As noted above, Subsection A, 10 proscribes subcontracting which results in either of two contingencies. Both contingencies are, however, triggered by the contracting out of "maintenance and conversion work normally performed by the employees covered by this agreement." The parties do not dispute that the reference to "employees" is broad enough to cover clerical employes who have, since the 1966 labor agreement, been included within the scope of Article I. The parties' dispute turns on whether the reference to "maintenance and conversion work" can be read to include clerical employes.

The disputed reference cannot be considered unambiguous. There is no evidence of past practice to guide an interpretation of these terms. Resolution of the contractual ambiguity must turn on other indicia of the bargaining parties' intent.

Relevant bargaining history viewed in light of other agreement provisions makes the City Utility's reading of Subsection A, 10 more persuasive than the Union's. The unit certified by the Commission in Dec. No. 6734 excluded clerical employes. Article I of the parties' 1964 and 1965 labor agreements reflected this exclusion. The parties first included clerical employes in their 1966 labor agreement. Subsection A, 10 appeared as Article III, Section 6 of each of these agreements. Its placement in the contract changed in the 1982 agreement, but its terms have never been altered. At its inception, and through one other agreement, what has become Subsection A, 10 did not apply to clerical employes. The City's attempt to broaden the scope of this provision in the 1982 agreement failed. The parties' mutual attempts to alter the terms of this provision in the bargaining for a 1995-97 agreement also failed. There has been, then, no express agreement to expand Subsection A, 10 to clerical employes.

The absence of express agreement on this point cannot be ignored on the facts posed by the grievance. As noted above, the references to "regular employee," "regular employees," and to "employees covered by this agreement" are broad enough to include clerical employes through the amendment of Article I in the 1966 agreement. These references, however, govern the scope of the contingencies Subsection A, 10 applies to, but do not broaden the reference to "maintenance and conversion work." This reference cannot be persuasively expanded to include clerical employes in the absence of the parties' express agreement to do so.

What evidence there is on the point indicates "maintenance and conversion work" has a meaning in utility contracts limited to employes who work with the transmission of electricity. More significantly, other terms of the parties' 1995-97 labor agreement support this view. Article VIII, Section B refers to "maintenance crews" in a context applying to line work and not to clerical work. Article X, Section A also refers to "maintenance work on live equipment" in a context applicable only to electrical work. Significantly, each of these provisions traces its roots to the 1964 labor agreement. Against this background, the absence of mutual agreement to expand Subsection A, 10 to clerical employes cannot be ignored. To ignore the history of Subsection A, 10 would create through arbitration a provision never achieved through negotiation. Subsection A, 10 must, then, be read to limit the City Utility's authority to subcontract regarding "maintenance and conversion work" only. This type of work is not covered by the work transfer or subcontract posed here, and Subsection A, 10 does not afford Grievant the protection the Union asserts.

While the persuasive force of the Union's contentions cannot be ignored, the record will not support a conclusion that the City Utility violated the labor agreement by reducing Grievant's hours. The Union argues that the reference to "maintenance and conversion work" can "be viewed as all work which maintains present operations or is involved in converting . . . the means by which existing work is performed." This view stretches the terms broadly enough to cover the bookkeeping work at issue here, but is not well grounded in Subsection A, 10. The Union's view effectively covers duties typically performed by clerical employes, but makes the reference to

"work normally performed" in Subsection A, 10 superfluous, since the "maintenance and conversion" reference would be broad enough to cover virtually all clerical work. As read by the City Utility, each word of Subsection A, 10 has meaning, since the "normally performed" reference states the specific type of work governed by Subsection A, 10.

The Union contends that even if Subsection A, 10 is read to limit the City Utility's right to subcontract certain electrical maintenance and conversion work, it cannot be persuasively read as a general grant of the right to subcontract. If, however, the City Utility has no such right, it is unclear what meaning is to be given Subsection A, 10. This aspect of the Union's arguments cannot, however, be meaningfully addressed in isolation from the remainder of its arguments, which question whether other contract provisions limit the City Utility's authority to transfer work to City Hall or to contract work with AT.

The Union contends that a myriad of contract provisions, including Articles I, VIII, and any other provision establishing the wage and benefit package, preclude the undermining of the unit manifested by Grievant's reduction in hours. Underscoring this line of argument is, according to the Union, an implied covenant of good faith which underlies these agreement provisions. This argument has persuasive force. As a matter of contract interpretation, however, the argument points out the fundamental interpretive dilemma posed by the grievance, which is that the contract must be interpreted to give meaning to all of its provisions. The City Utility has, under Article IV, authority to control its operations and to alter the means by which work is performed. It also has, as noted above, the authority to layoff. The Union's arguments afford no guidance on how these provisions are to be given effect. As read by the Union, the wage and benefit package precludes Grievant's reduction in hours and serves effectively as a total ban on subcontracting. It is not apparent how this can be squared with the authority granted the City Utility under Articles IV and VIII, or with relevant bargaining history.

This argument serves, however, as the preface to the most troublesome point raised by the Union. That argument focuses on whether the City Utility's actions manifest a bad faith attempt to circumvent the wage and benefit provisions of the labor agreement. As the Union aptly points out, indicia of bad faith can be found in the record. The City's concerns with the efficiency of the City Utility notwithstanding, the evidence offers no persuasive indication City Utility clerical staff were inefficient. To the contrary, Zaborowski's on-site audit led him to consider the transfer of work from the City Hall to the City Utility. How this consideration fell from AT's final report is not apparent, and affords a basis to question the City's good faith in reducing the role of the Utility in its accounting functions. To underscore this, the evidence is less than convincing that the City's attempts to centralize its accounting function have yielded any efficiency enhancement. The parties' October 8, 1996 stipulation indicates that City Hall is not yet capable of absorbing the Utility payroll.

Beyond this, the Union forcefully points to evidence which appears to manifest ill will between City authorities and City Utility staff. Frey's February 5, 1993 letter eloquently states

this problem. The problem underlies subsequent events, as manifested by the absence of communication between City officials and the Utility as the merger process proceeded. The meetings leading to Grievant's layoff were closed, and Union attempts to secure information on that process met with something less than an open response. Jones' February 28, 1995 letter highlighted a typo from Haley's information request. Whatever is said of this technical response to the request, it manifests the less than open relationship between the parties. Beyond this, active ill will between City officials and Utility staff can be seen in Gelhaus' testimony and in the events of July 25 and 26, 1994.

The Union views this type of evidence to establish a type of bad faith which warrants a conclusion that the City Utility has deliberately undermined the collective bargaining agreement. While the evidence of ill will cannot be ignored, it is not of a type on which a contract violation can be based. Parent questioned, in July of 1994, whether Utility layoffs could break the Union. This comment stands alone as a question on the impact of the then-contemplated layoffs rather than as a manifestation of an anti-Union campaign. The acerbic confrontation between Bix and Grievant at the July 26, 1994 Council meeting manifests a depth of feeling, but that feeling has not been shown to be anything beyond a long-simmering distrust between certain City officials and the Utility staff.

The centralization of accounting functions at City Hall was a long-studied point, and affords a more reliable account of the City's actions than does the bad faith sketched by the Union. The Union asserts that the City deliberately sought to undermine unit employes' wages and benefits. The City's focus appears broader than that. That the City declined to replace Mattson's position underscores that its concern with wages was not limited to Union represented positions. The WTA study which initially posed the efficiencies of centralizing the City's accounting functions also highlighted that certain nonrepresented City employes earned more than comparable positions in comparable municipalities. While the Union accurately points out that the possibility of transferring work to the Utility did not find its way into the final AT report, it is no less true that the report left certain accounting functions at the Utility. The continuing contracting of Utility payroll work to AT is troublesome, but the personnel turn-over and reorganization of City Hall appear both unanticipated and disruptive to the merger process. On balance, the evidence supports the assertion that the City sought, throughout the partial merger process, to gain the efficiencies WTA and AT asserted centralization would bring.

The emphasis WTA and AT placed on the efficiency to be gained by centralizing accounting functions at the City Hall appears to have found a receptive audience among elected officials. That the City would be interested in consolidating central authority over City functions is not, standing alone, remarkable. That the Utility staff would fear such a consolidation of authority is also not, standing alone, remarkable. The evidence of personal ill will is as readily explained by the opposition City officials perceived from the Utility as by the assertion those officials deliberately set out to gut the Union's contract. The ill will came to the surface in the events preceding and following the initiation of the amended on-site audit. It is apparent Mattson and Bix

perceived and resented active resistance from the Utility at this time. There is, however, no persuasive basis in the evidence to conclude this resentment was anything more than a reflection of their desire to pursue the reorganization initially suggested by WTA. Whether the partial merger implemented by the City violates the labor agreement must turn on whether the City's focus was not the purported efficiency of the centralization, but the evisceration of the collective bargaining agreement. The evidence on this point is troublesome, but indicates the City's desire to centralize its functions motivated its actions toward the Utility.

In sum, the record will not support a conclusion that the reduction in Grievant's hours violated the collective bargaining agreement.

AWARD

The March grievance was timely filed.

The City Utility did not violate the collective bargaining agreement by reducing Grievant's hours.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 5th day of December, 1996.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator