BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE COUNTY OF KENOSHA

and

KENOSHA COUNTY LOCAL 990, AFSCME, AFL-CIO (COURTHOUSE AND SOCIAL SERVICES CLERICAL)

Case 212
No. 62234
MA-12207

Appearances:

Frank Volpintesta, Kenosha County Corporation Counsel, Courthouse, 912 – 56th Street, Kenosha, Wisconsin 53140-3747, appearing on behalf of the County.

Shneidman, Hawks & Ehlke, S.C., 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, by **Aaron N. Halstead**, appearing on behalf of the Union.

ARBITRATION AWARD

Kenosha County, hereafter County or Employer, and Kenosha County Local 990, AFSCME, AFL-CIO (Courthouse and Social Services Clerical), hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint Coleen A. Burns, a member of its staff, to hear and decide the instant grievance. The appointment was on April 3, 2003 and the hearing was held in Kenosha, Wisconsin on October 23, 2003. The hearing was not transcribed. The record was closed on December 27, 2003, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issue. The Union frames the issue as follows:

Whether the County has violated the collective bargaining agreement as interpreted by various arbitration awards or the parties' 1982 settlement agreement by assigning bargaining unit work to employees of an outside agency, Goodwill?

The Employer frames the issue as follows:

1) Whether the grievance is timely in accordance with the provisions of the collective bargaining agreement?

2) Whether the County had violated the collective bargaining agreement?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

Section 1.1. Bargaining Unit. The County hereby recognizes the Union as the exclusive bargaining agent for Kenosha County Courthouse employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2 Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

SETTLEMENT AGREEMENT

It is hereby agreed by and between the County of Kenosha and Local 990, Clerical, AFSCME, AFL-CIO, that the grievance filed in the above-noted matter is hereby withdrawn with prejudice and that the grievances under the jurisdiction of Arbitrator Gundermann relating to the layoffs of personnel in the clerical unit is also withdrawn with prejudice upon the following terms and conditions, and upon the conditions listed in Appendix "A."

1. That the parties will incorporate into their collective bargaining agreement, the language set forth in Appendix "A", Section III;

2. That the Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency; and

. . .

Dated this 7th day of December, 1982, Kenosha, Wisconsin

BACKGROUND

On or about August 1990, the County contracted with Goodwill Industries of Southeastern Wisconsin, Inc. to be the "Lease Holder" and "Host Agency" of the Kenosha County Job Center (KCJC). The County did not own the building that housed the KCJC and this building housed tenants other than the KCJC. The offices and agencies comprising the KCJC included one County service provider, *i.e.*, the Income Maintenance Program of the Department of Social Services, and a number of non-County service providers.

The County's contract with Goodwill required Goodwill to provide "host services", *i.e.*, administrative support services that were utilized by all KCJC service providers. These "host services" included General Reception Services, Answering and Message services, Mail Collection and Distribution, and Wayfinding. General Reception Services included greeting persons entering the facility, logging in clients, notifying all staff of scheduled and unscheduled appointments, and referring clients, visitors and inquiries to the appropriate agency/staff. Answering and Message Services included receiving incoming calls, referring calls to the staff requested, referring question calls to the appropriate agency/staff, and taking general written messages when staff was not available. Mail Collection and Distribution included on-site collection and distribution of the mail for all agency staff located in the Job Center and mail transport services to obtain off-site metering services. Wayfinding included

referring and directing clients, visitors, and telephone calls to the appropriate agency and staff persons. In 1990, there were six or seven Goodwill workers performing these "host services."

On or about August 31, 1990, the Union filed a grievance alleging that the County was violating the contract and grievance settlements by "utilizing CWEPS, contracted and other types of non-union clerical support in bargaining unit functions and positions located throughout Kenosha County." Union statements relating to this grievance establish that the allegations involved "non-bargaining unit personnel performing bargaining functions at the Kenosha County Department of Social Services, Job Center."

On September 20, 1990, Jim Kennedy provided the County's Step Two response to this grievance. This response, which was quite detailed, summarized the Union and County positions with respect to this grievance. All aspects of the grievance were denied, with the following exception:

> 5. The Union's stated positions (Items 7 & 8 under Union Position above) is that certain functions performed for non-County Job Center agencies (specifically the transport and metering of non-County mail) is not appropriate to include as a required part of the KCDSS Mail Clerk's job duties, but rather these functions should be performed by Goodwill Industries as part of its host agency responsibility. It is the decision of this Hearing Officer that the Union's position is sustained.
>
> It was clear from the Step 2 meeting that the Union in this grievance is not objecting to the Job Center concept, the coallocation of multiple agencies at the Center, or the basic concept of "host" agency administrative support services (currently provided by Goodwill Industries). On the host agency issue, the Union's concern was that the host agency system not infringe on the legitimate domain of Local 990 clerical duties or unfairly place upon Local 990 staff the added burden of carrying out other agencies' work. In this grievance, Union objections pertaining to the former concern (items 1-4 under Union Position) are not sustainable because in every instance the domain of work involved basic Job Center services for multiple participating organizations. However, Union objections pertaining to the latter concern (items 7 & 8 under Union Position) are sustainable, because a Local 990 clerical staff person is currently being required to perform tasks on a regular and ongoing basis for multiple non-County Job Center organizations (specifically transport and metering of non-County mail – i.e., mail which is neither to nor from KCDSS or another County department). These tasks, which exclusively service non-County Job Center

organizations, are more properly the responsibility of the Job Center's "host" agency or another outside organization hired to perform such work. Job Center tasks which are performed exclusively for non-County organizations are not within the domain of the Local 990 clerical bargaining unit and thus should not be a required part of any Local 990 County employee on a regular or continuous basis.

Pursuant to this decision, KCDSS Management should eliminate the practice of requiring the KCDSS Mail Clerk to carry out the following tasks on a regular or continuous basis:

1. Transporting "non-County" mail items between KCDSS and the Job Center. In this context, "mail" refers to all types of documents, correspondence or materials which are posted/stamped for US Postal Service delivery, packaged for any form of courier or delivery service, or appropriately labeled for direct "inter-office" or hand delivery to an identified recipient individual or organization. "County mail" refers to all mail items which are either:

    a) addressed to a County department or to an individual who works at a County department location (e.g. the Social Services Building, the KCDSS Western County office, etc); or

    b) sent by a County department or an individual who works at a County department location.

"Non-County" mail, therefore, involves items which are neither addressed to nor sent by County departments or individuals working in those departments.

2. Metering of "non-County" mail items. (Note: Definitions apply as in task #1 above.)

The above "non-County" tasks are therefore determined to be outside of the Local 990 bargaining unit domain and therefore should not be required duties for the KCDSS Mail Clerk or any other Local 990 clerical employee at KCDSS on a regular or continuous basis. There are two major exceptions to the prohibition created by this decision, however:

1. Such "non-County" mail transport or metering duties may be required of a Local 990 clerical employee on an aperiodic or short-term basis in order to preserve KCDSS and/or Job Center operational effectiveness in response to unusual or special circumstances (e.g. in covering for temporary staff shortages, unusual workload increases, etc.);

2. Such "non-County" mail transport or metering duties may be required of a Local 990 clerical employee on a regular or continuous basis if KCDSS entered into a contractual, financial or otherwise formal arrangement to become a provider of such services to one or more non-County organizations. Under such circumstances, transport and/or metering of "non-County" mail would formally become part of the required KCDSS work domain and could legitimately be assigned to a CKDSS clerical (Local 990) employee.

After receipt of the above Step 2 response, Step 3 was waived and the grievance was submitted to Arbitrator Dan Nielsen.

On February 2, 1994, the parties reached a tentative agreement before Arbitrator Nielsen, who prepared the following summary of the tentative agreement:

> In an effort to resolve the CWEP issue, as described in the Kerkman Arbitration/File #85-990-003, the following uniform approach to CWEP's will govern their usage in regards to all work within the jurisdiction of Local 990-C, 990-P, and 990-J:
>
> 1. CWEP usage will be restricted to Management functions, common workload functions, and non-bargaining unit functions. The term "common workload functions" refers to such activities as typing, answering the phone, making photocopies, and the like, which are common to bargaining unit personnel and non-bargaining unit personnel. CWEP's will perform common workload functions in the performance of tasks or work which have not traditionally been performed by members of Local 990.
>
> 2. CWEP usage will not supplant any bargaining unit person.

3. CWEP's may perform bargaining unit work where, on a case by case basis, there has been prior written agreement between the leadership of Local 990 and management.

4. Kenosha County departments will adhere to the following CWEP process steps:

   a. Create a position description of the CWEP assignments.
   b. Notify the Union in writing of the CWEP assignment location and start date.
   c. Adhere to the established confidentiality guidelines.
   d. Be placed through the CWEP Coordinator at the Job Center.
   e. The CWEP will receive written guidelines and a sign off form.
   f. CWEP assignments be reviewed for appropriateness by the CWEP Coordinator.

5. This Agreement shall be in force for a trial period from the date of signing through September 11, 1995, at which time it will be reviewed by the parties.

6. Daniel Nielsen will retain jurisdiction over this dispute for the purpose of assisting the parties in voluntarily resolving any disagreements and/or acting as the arbitrator of the dispute.

The parties subsequently adopted this tentative agreement, but it was not renewed after September 11, 1995. Prior to and after this tentative agreement, Goodwill workers performed "host services" at the KCJC.

In October of 1999, the County finalized its purchase of the KCJC building. At the time of this purchase, approximately six Goodwill workers performed "host" services. In a labor management meeting in October of 1999, Union representatives raised the claim that "host services" work was bargaining unit work and, in December 1999, Union Representative Theresa Hannes prepared a grievance. At that time, Department Head Dennis Schultz asked that she hold off on filing the grievance because he believed that further discussions would resolve the matter.

During ensuing labor/management discussions, a County Representative advised the Union that the County could not transition "host services" work to the Union's bargaining unit at that time, because the lease with Goodwill continued until April 30, 2000 and that, after the lease expired, the County would meet with the Union to discuss this issue. On March 15, 2000, Union representatives were advised that the County was extending the Goodwill contract and the Union expressed its disappointment.

At some point in time, Department Head Schultz indicated that two of the disputed Goodwill positions would be transitioned into Union bargaining unit positions in each of the next three years in order to accommodate budget concerns. The Union's representatives considered this to be a reasonable plan. The Union's representatives were aware that only the County Board could approve new positions, but considered the County to have made a commitment when, in December of 2001, the County posted two "Office Associate" positions for the KCJC. The two positions were "information point" positions, *i.e.*, front desk positions responsible for greeting clients and visitors, responding to their inquiries, directing them to the appropriate service provider and e-mailing the appropriate service provider to confirm that their appointment had arrived.

In June of 2002, the Union began seeking information on how Goodwill positions would be transitioned in 2003, but the County was noncommittal. When the Union learned that the County had passed the budget for 2003, without funding the two KCJC bargaining unit positions expected by the Union, the Union filed a policy grievance on or about November 19, 2002.

This second Job Center grievance alleges as follows:

> Contracting out work/services that is 990 Clerical bargaining unit work. Work being performed by the contracted employees falling under the duties listed in the job description for the Office Associate classification. This is in violation of the Labor Management Agreement, Article 1, Section 1.1, Section 1.2; Article XXI, Section 21.2 and any other sections that may apply along with any arbitration awards.

The remedy requested was "Cease and desist contractual services. Post positions and award to successful 990 bidders. Punitive damages to be awarded to the Union." The grievance was denied at all steps and, thereafter, submitted to arbitration.

After the County purchased the KCJC building, all of the non-Job Center tenants left the building and County offices that previously had not been housed at the Job Center began moving into the building. After a transition period, the County notified Goodwill that the maintenance and custodial duties that had been performed by Goodwill employees would now be performed by employees of the County's Public Works Department.

The County leases a building that houses the Aging and Disability Resource Center. This Center houses County service providers, as well as non-County service providers. Since the inception of this Center, the main telephone number for the Center is answered by one of two Office Associates, positions represented by the Union. These two bargaining unit employees order supplies, receive and distribute mail, and route calls to Center workers, the vast majority of which are not County employees.

POSITIONS OF THE PARTIES

Union

Union witnesses confirm that the duties performed by the four Goodwill employees fall squarely within the Office Associate, Senior Office Associate or Office Support Worker classifications. If the work being performed by the four remaining Goodwill employees at KCJC were being performed at other County work locations, the Union's bargaining unit employees would perform it. They, or previous Goodwill employees, have performed these duties on a continuous basis for over a decade.

In 1990, the County argued that the Goodwill employees' performance of the work in question (answering telephones, supply ordering, mail delivery) was not bargaining unit work because Goodwill was the "host agency," with control over the administrative functions common to the various independent organizations that comprised the KCJC. This rationale, which was the basis for denying the 1990 grievance, evaporated in late 1999, when the County purchased the KCJC building, thereby eliminating Goodwill's status as a "host agency".

The fact that the work in question also assists non-County agencies doing business at KCJC does not diminish the Union's claim to that work under the settlement agreement. A very analogous situation exists at the Aging and Disability Resource Center. That facility is owned by an entity known as KYDS, houses a variety of agencies – most of which are non-County agencies – and there are two bargaining unit clerical employees to provide clerical support to that entire facility – i.e. Arlene Badtke (Office Support Worker) and Judy Schoor (Office Associate). Those two employees answer incoming telephone calls, provide incoming and outgoing mail service, and order supplies, for the entire facility, not simply in support of the County agencies housed there. This is particularly noteworthy given that the number of non-County agencies and personnel greatly outnumber their County counterpart.

The 1982 settlement agreement contemplated that the County would not assign bargaining unit work to "non-bargaining unit persons and/or agencies". The County's services contract with Goodwill constitutes assignment of bargaining unit work to an agency and, consequently, to the non-bargaining unit persons employed by Goodwill. Such assignment constitutes a violation of that settlement agreement as interpreted by both the Krinsky and Kerkman awards.

The arbitrator should rule that the County's conduct violates the settlement agreement and the relevant collective bargaining agreement. The arbitrator should grant the Union any and all relief to which it is entitled as a result of that violation including, but not limited to, an order requiring that the County immediately cease assigning bargaining unit work to the Goodwill employees in question and that it post the positions vacated as bargaining unit positions.

The County's claim that the grievance was not timely must be rejected. The Union did not proceed with the 1990 grievance because it relied on the County's "host agency" argument. When the situation changed in late 1999, as a result of the County's purchase of the building, the Union promptly raised the issue of assignment of bargaining unit to non-bargaining unit personnel. Thereafter, the County requested that the Union not pursue a grievance at that time, but rather, engage in discussions with the County regarding possible resolution of that issue. In these discussions, the County promised the Union that it would gradually phase out the service contract with Goodwill relevant to the functions in question, and post the positions as bargaining unit positions. The County did so as to two positions, in December of 2001, but never posted the other four. The Union grievance that is the subject of these proceedings was filed when the Union determined that the County did not intend to fulfill its commitment to post the remaining four positions.

County

The collective bargaining agreement, Section 1.2, disallows for contracting out Union work only where such contracting out of work or services result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees. Neither of these conditions has been shown to exist in the present case.

The Kerkman decision stated that "It is clear to the undersigned that the parties have recognized the right of the Employer to contract out for services, provided that the contracting out does not result in layoff of employees, result in reduction of regular hours worked by bargaining unit employees." Kerkman went on to say that the agreement specifically recognizes the right of the Employer to enter into the type of contract that the Union alleges violates Section 1.2 of the collective bargaining agreement.

The Kerkman decision went a step further than Krinsky, who sought to define "continuous" by a subjective test, and instead defined "continuous" as meaning "uninterrupted for a period of more than ninety (90) days." In the County's view, the Kerkman decision stands for the proposition that one arbitrator may clearly and definitively clarify, expand and modify the decision of a prior arbitrator, where the prior arbitrator was not in a position to address every conceivable scenario.

Krinsky noted, and Kerkman adopted, the following definition of bargaining unit work: "Work that was routinely done by job classifications contained in the wage appendix of the Agreement." The County maintains that the work being performed by the Goodwill employees are central service functions provided to non-County entities in a building that houses many different agencies, some of which are governmental agencies and some of whom are not. These responsibilities have never been performed at the job center by bargaining unit members.

Bargaining unit work not only requires an examination of a job classification and/or description, but also an analysis of the ability of the County to control, supervise, direct and manage the work being performed and to discipline employees. Conversely, such an analysis also must look at the ability of a non-governmental agency to do likewise. The County cannot control how a non-governmental agency wants to handle the reception of clients and phone communication. Does the Union maintain that if Goodwill Industries wants Saturday service that it must be performed by a bargaining unit employee at overtime rates, even if there are no other County agencies open at that time?

The County suggests that the taxpayers, especially in these tight budgetary times, have no obligation to provide such service to a non-governmental agency. The scene and manner of doing business has changed since the time of the Krinsky and Kerkman decisions. Krinsky was primarily addressing the issue of County assignment of work to general relief recipients for whom there was no contract. Thus, the December 7, 1982 stipulation references the word "assign" and not "contract".

Krinsky and Kerkman clearly recognized that contracting out was allowed for in the bargaining agreement. To the extent that it has the operational and fiscal capability to bring central service-type activity into the realm of County employment, the County has done so. There is, however, no obligation to make these County positions. Nor has there been any formal commitment from the one entity that is in a position to ultimately do so, the County Board of Supervisors.

A contract to provide certain central services to many agencies, most of which are non-governmental, should not be viewed as an assignment of bargaining unit work where it was never routinely performed by a bargaining unit employee and where there is no job classification or description outlining the responsibility to perform work for a private agency.

Just as Kerkman revisited Krinsky, the arbitrator may revisit the Kerkman and Krinsky Awards with an eye toward further refinement and interpolation. Neither Krinsky, nor Kerkman, encountered or addressed the issue of whether bargaining unit work includes work for a non-County agency. This cannot be bargaining unit work, *per se*, because the concept of a "one stop shop" was not even in existence at the time of the Krinsky decision and, at best, was a new concept at the time of the Kerkman decision.

DISCUSSION

Issues

The parties did not stipulate to a statement of the issues. Although the County raised the issue of timeliness at the start of the hearing, it did not address this issue in its post-hearing

written argument. Accordingly, the undersigned considers the County to have abandoned this issue.

The Union's statement of the issue, unlike the County's statement of the issue, appropriately recognizes that there are prior Arbitration Awards and a 1982 Settlement Agreement that address the Union's right to have work performed by bargaining unit members. The Union's statement of the issue, unlike the County's statement of the issue, also appropriately recognizes that, in determining the parties' respective rights, the Arbitrator must consider these Awards and/or Settlement Agreement. However, the Union's statement of the issue is not appropriate in that it presupposes a disputed fact, *i.e.*, that the work being performed by the Goodwill workers is bargaining unit work.

Upon a review of the grievance, as filed and processed by the parties, the Arbitrator is persuaded that the issues before the Arbitrator are most appropriately stated as follows:

1. Are the Goodwill workers in dispute performing work that is required to be performed by Union bargaining unit members?

2. If so, what is the appropriate remedy?

Merits

The Goodwill workers at issue occupy positions at the KCJC. Although the Union argues that there are four positions, the testimony of Union witness Theresa Hannes demonstrates that, at the time of hearing, there were three positions in dispute, *i.e.*, one mail/supply position and two phone console positions.

Since the inception of the KCJC, duties of the mail/supply position and phone counsel positions have been performed by Goodwill workers, *i.e.*, individuals under the direction and control of Goodwill. Since the inception of the KCJC, the County has contracted with Goodwill to provide the services performed by the Goodwill workers in the disputed mail/supply and phone counsel positions, which services are a/k/a "host services."

The Union maintains that the duties of the disputed Goodwill positions fall within the scope of job classifications represented by the Union and, thus, under the 1982 Settlement Agreement, cannot be assigned to "non-bargaining unit persons and/or agencies." The County responds that Section 1.2 of the parties' collective bargaining agreement provides the County with the right to contract with Goodwill to provide the "host services" that are in dispute.

Section 1.2 provides the County with the right "to contract for work, services or materials" subject to the limitation that "The County will not contract out for work or services

where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees." The Union does not argue, and the record does not establish, that the County's contract with Goodwill has resulted in the layoff of employees or the reduction of regular hours worked by bargaining unit employees. Thus, if this language of Section 1.2 stood alone, the County's contract with Goodwill would not violate the express provisions of the parties' collective bargaining agreement.

However, Section 1.2 does not stand alone. The parties have entered into a December 7, 1982 Settlement Agreement that provides the Union with certain rights to perform work. This 1982 Settlement Agreement has been interpreted and applied by Arbitrator Krinsky in his Award of November 13, 1984 and Arbitrator Kerkman in his Award of September 13, 1988, hereafter Kerkman I. On August 12, 1985, Circuit Court Judge Bruce E. Schroeder confirmed Arbitrator Krinsky's Award. On June 25, 1990, Circuit Court Judge Robert J. Kennedy confirmed Kerkman I and ordered the County to cease and desist "from violating the Collective Bargaining Agreement and Settlement Agreement by assigning bargaining unit work to non-bargaining unit personnel on a continuous basis as found in the discussion section of said Arbitration Award issued by Arbitrator Joseph B. Kerkman dated September 13, 1988." (Kerkman Award I) On June 17, 1992, Arbitrator Kerkman clarified his Award of September 13, 1998, hereafter Kerkman II. Until the parties mutually agree otherwise, the 1982 Settlement Agreement, as interpreted by Arbitrator Krinsky and Kerkman, is entitled to be given effect.

The 1982 Settlement Agreement, in relevant part, states:

> That the Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency; and
>
> . . .

Arbitrator Krinsky, who found this to be the "critical language," states, in relevant part:

> This language, which is not clear and unambiguous, does not define what is meant by "bargaining unit work", or "continuous" or "agency." Also, . . . the Settlement Agreement is not limited to situations involving layoff and is not limited to situations involving contracting. It is a braoder (sic) statement, agreed to in December 1982, which deals with assignments of bargaining unit work. Thus any assignments are affected, be they to contractors, G.R.s, managerial employees, or anyone else if the assignments are "bargaining unit work on a continuous basis."

In Kerkman I, the Arbitrator concluded that Arbitrator Krinsky had declined to define the term "continuous basis." Further concluding that it was necessary to define this term, Arbitrator Kerkman stated ". . . it would seem that 90 days should be the time standard to determine if any assignment is continuous. The Arbitrator finds that 90 days is the maximum amount of time that an assignment of bargaining unit work may be made to nonbargaining unit personnel before it becomes an assignment on a continuous basis."

Arbitrator Krinsky stated that Appendices A and B to the collective bargaining agreement "show which job classifications the parties specifically recognized as coming within the scope of the Agreement." Arbitrator Krinsky further stated that "It is the arbitrator's view that the Appendices reflect the parties intent that work routinely done by these job classifications would be covered by the Agreement, absent language reflecting some other intent." Citing this language, Arbitrator Kerkman stated that Krinsky had "pinpointed the definition of bargaining unit work." Arbitrator Kerkman then went on to state: "The undersigned is of the opinion that Krinsky adequately defined bargaining unit work for the parties so as to give them full comprehension of the meaning of the term bargaining unit work. It is that work routinely done by job classifications contained in the wage appendix of the Agreement." (Kerkman I)

The County argues that the work in dispute is not bargaining unit work because it involves central service functions in a building that houses both County and non-County agencies and such work had not been performed by bargaining unit members at KCJC. The uncontradicted testimony of Union witness Janis Sepulveda establishes that, at the Aging and Disability Resource Center, bargaining unit employees perform "central service functions" in a building that houses both County and non-County agencies. Thus, one may reasonably conclude that the provision of "central service functions" of the type provided at the KCJC is "work routinely done by job classifications contained in the wage appendix of the Agreement" and, thus, is bargaining unit work as defined by the Krinsky and Kerkman I Awards. However, the rights provided in the 1982 Settlement Agreement, as interpreted and applied in the Kerkman and Krinsky Awards, may be limited or expanded by the subsequent conduct of the parties.

With this in view, the undersigned turns to the County's argument that the disputed work has never been performed by bargaining unit members at KCJC. The Step Two response of Jim Kennedy demonstrates that the 1990 grievance involved a variety of claims, including the claim that the "host services" duties performed by Goodwill workers at the KCJC are Union bargaining unit work. Ed Kamin, who is now a County manager, was a Union steward in 1993 and 1994. Kamin recalls that the 1990 grievance was submitted to Arbitrator Daniel Nielsen; that Nielsen mediated a settlement of this grievance; and that this settlement is set forth in Nielsen's letter of February 2, 1994. According to Kamin, the Union decided to not pursue the aspect of the grievance that dealt with the claim that the "host services" duties

performed by Goodwill workers at the KCJC are Union bargaining unit work. Kamin's testimony, which is not rebutted by any other record evidence, establishes that the Union chose not to pursue its 1990 grievance on Goodwill workers performing "host services" at the KCJC because the Union was not sure that it could win the grievance and it did not want to set a precedent for the future.

As the County argues, since the inception of the KCJC in 1990, the County has contracted with Goodwill to perform "host services," which services include the work in dispute. In 1990, the Union filed a grievance that claimed, *inter alia*, the County could not contract with Goodwill to perform such "host services" work because this work was Union bargaining unit work. In 1994, the Union abandoned this claim when Arbitrator Nielsen mediated the grievance. It is not evident that the Union's abandonment of this claim was without prejudice. Nor is it evident that the Union's abandonment of this claim was conditioned upon the continuance of any *status quo* circumstance, such as that the building that houses the KCJC continues to be owned by someone other than the County.

In summary, as discussed above, the performance of the "host services" work in dispute does not violate the express terms of the parties' collective bargaining agreement. The conduct of the parties in processing the 1990 grievance evidences a mutual understanding that the County has the right to contract with Goodwill to perform the disputed "host services" work at the KCJC. Inasmuch as this mutual understanding occurred after the parties entered into the 1982 Settlement Agreement and after Arbitrators' Kerkman (in Kerkman I) and Krinsky interpreted this Settlement Agreement, the undersigned concludes that the 1982 Settlement Agreement, as interpreted by Arbitrators' Kerkman and Krinsky, does not restrict the County's right to contract with Goodwill to perform the work in dispute.

To be sure, Kerkman II was issued after the Union abandoned the 1990 grievance. However, following Kerkman's clarification of his earlier Award in June of 1992, the County continued to contract with Goodwill to perform the disputed "host services". The evidence that the Union waited more than seven years after Kerkman II to object to the Goodwill contract confirms the conclusion that the parties, by their conduct, have demonstrated a mutual understanding that the County's contract with Goodwill to perform the work in dispute does not violate the 1982 Settlement Agreement or the Awards of Arbitrators' Kerkman and Krinsky.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Goodwill workers in dispute are not performing work that is required to be performed by Union bargaining unit members.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 2nd day of June, 2004.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
6679