BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARINETTE CITY EMPLOYEES UNION, LOCAL 260, AFSCME, AFL-CIO

and

CITY OF MARINETTE

Case 95
No. 63652
MA-12658

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54401, on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney John A. Haase,** 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the City.

ARBITRATION AWARD

Marinette City Employees Union, Local 260, AFSCME, AFL-CIO (herein the Union) and the City of Marinette (herein the City) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein, the collective bargaining agreement in effect until December 31, 2002, had expired and the parties were negotiating a successor agreement. On May 10, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning an allegation that the City had subcontracted bargaining unit work in violation of the contract and past practice. The Undersigned was appointed to hear the dispute and a hearing was conducted on October 13, 2004. The proceedings were transcribed and the transcript was filed on November 29, 2004. The City filed its initial brief on February 9, 2005, and the Union filed its initial brief on February 11, 2005. The City filed its reply brief on March 4, 2005, and the Union filed its reply brief on March 7, 2005, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues. The Union did not submit a proposal for the framing of the issues.

The City would frame the issues as follows:

> Did the City violate the collective bargaining agreement by subcontracting the work of the Mechanic 4 position?
>
> If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

> Was the grievance timely?
>
> If so, did the City violate the collective bargaining agreement or past practice when it subcontracted the work of the Mechanic 4 position while bargaining unit members were on layoff status?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2
RIGHTS OF MANAGEMENT

Except as herein otherwise provided, the management of the work and direction of the working forces, including the right to hire, promote, demote, suspend, or discharge for proper cause, or transfer, and the right to determine the Table of Organization, the number of employees to be assigned to any job classification, and the job classifications needed to operate the Employer's public jurisdiction, is vested exclusively in the Employer. The Employer agrees, however, to notify the Union prior to the effective date of any change in the Table of Organization.

ARTICLE 4
MAINTENANCE OF STANDARDS

The Employer agrees to maintain in substantially the same manner, such present benefits not specifically referred to in this Agreement.

ARTICLE 8
SENIORITY

The Employer agrees to the seniority principle. Seniority shall be established for each employee and shall consist of a total calendar time elapsed since the date of this permanent employment. Seniority rights terminate upon discharge or quitting. A seniority list shall be posted in each department section of the seniority of the employees in each section.

In the event of lack of work or lack of funds, employees shall be laid off in inverse order to their length of service and the last employee laid off shall be the first to be called back from such layoff. Recall rights shall be limited to eighteen (18) months.

The Employer will notify laid off employees of recall by certified mail addressed to the last known place of residence. It is the employee's responsibility to inform the Employer of any address change.

Permanent employees shall not be subject to layoff until all temporary and probationary employees in the section are first laid off.

Seventy-five percent (75%) of the employees (based upon the average number of employees for the preceding year) shall be guaranteed forty (40) hours of employment for fifty-two (52) weeks per year, and such seventy-five percent (75%) starting with the most senior employee and counting down to the employees with lessor seniority.

A temporary layoff is hereby defined as a reduction in personnel because of legitimate reasons which shall not exceed two (2) working days; however, should a temporary layoff exceed such limit, it shall then be considered a reduction in force layoff.

If a layoff under consideration is to be a reduction in force layoff, the Employer shall give the Union reasonable advance notice of the layoff.

Temporary layoffs, considering the job classification needs of the department section, shall be made on a department section basis only, but in the event of a reduction in force layoff, the laid off employee shall have the right of transfer to other department sections by "bumping" of the exercise of his greater overall or total service seniority. The bumping employee shall be required to demonstrate his ability to perform the job to which he has been transferred within a period of thirty (30) calendar days and if deemed qualified after such period, the transfer shall be made permanent.

Employees may be temporarily transferred from one (1) section to another without loss of seniority or other rights in their section of origin.

Employees on layoff status shall have the right to refuse recall for temporary employment without losing the right to permanent recall. Any employee not recalled from layoff shall be entitled to pay from the date any other person was hired in this stead. Any employee recalled on a permanent recall shall have the right to return to duty status within the period of notice required by his then Employer. If any employee fails to return to his job upon being recalled, his employment shall be terminated. Notice of such permanent recall and/or terms of employment shall be furnished to the Union.

Temporary layoffs shall be on a voluntary basis, according to seniority, with older employees having first choice. If there are not volunteers, layoff shall be in accordance with the regular layoff procedure.

ARTICLE 9
NEW JOBS – VACANCIES

A "vacancy" shall be defined as a new job not previously existing in the Table of Organization, or an opening created by the termination, promotion, or transfer of personnel in an existing job in the Table of Organization.

All vacancies shall be posted on the bulletin boards of each Department covered by this Agreement within five (5) working days after the vacancy first exists. Employees in the departments covered by this agreement wishing to apply for a posted job, shall sign the posted notice. Notices shall be posted for a period of three (3) working days and a copy of said notice shall be give to the Union. Notice of job discontinuance shall also be posted within five (5) working days. Vacancies shall be filled within five (5) working days after posting procedure is completed. The employee oldest in point of service in that department whose name is signed as above shall be give the opportunity to qualify for that job. Said employee shall demonstrate his ability to perform the job posted within thirty (30) calendar days and if deemed qualified by the Employer, shall be permanently assigned to the job.

Should said employee not qualify or desire to return to the former job within said thirty (30) calendar day period, he shall be reassigned to the former job without loss of seniority. In such event, the signing employee with the next greatest amount of service shall be given that job for a thirty (30) calendar day period, and this procedure shall continue until the job is filled by an employee signing the posted notice. If no signed employees fills the position, the Employer shall fill the position after advertisement, or otherwise, as it sees fit.

ARTICLE 18
GRIEVANCE PROCEDURE

If an employee or the Union has a grievance pertaining to the employee's work or working conditions, or pertaining to the meaning or application of this agreement, the grievance shall be handled in the following manner:

Step 1. The aggrieved employee shall present to the Mayor and Department Head a written copy of the grievance, signed by the employee or an authorized Union official. This shall be done within ten (10) days of the Employer's action by which the employee was allegedly aggrieved or when the employee should have known of such action, whichever is earlier.

The Department Head shall furnish the employee and the Union with a written answer to the grievance within five (5) days.

. . .

BACKGROUND

The Marinette City Employees Union is comprised of ". . . all employees of the Employer (City of Marinette) employed in the departments of Public Works, Parks, Cemetery, and Wastewater, excluding only the Department of Public Works Superintendent, Wastewater Administrator, Clerical and Office employees, Recreation Department employees, Director and Assistant Director of Parks and Recreation, Parks Superintendent, the Cemetery Superintendent, and any management employees hired in the future." (Jt. Ex. 1, p. 1) According to the Table of Organization contained in Appendix A of the collective bargaining agreement, one of the Class 4 bargaining unit positions within the Department of Public Works is that of Mechanic. The duties of the Mechanic 4 position were to perform general maintenance and upkeep on Department equipment and vehicles, including lubrication, changing belts and light bulbs, preventive maintenance, making minor repairs and troubleshooting problems. When more significant mechanical work was needed, the work was usually subcontracted.

In January, 2001, the City employed one Mechanic 4, who at that time, transferred to a position in the Wastewater Treatment Plant. The City posted the vacant Mechanic 4 position, but no bargaining unit member signed the posting, so the City increased the amount of subcontracting of mechanic work and spread the remaining duties among the other Department employees. On July 9, 2001, the City Council decided not to fill the Mechanic 4 position in the future. On July 12, the Union Representative sent a letter to the Mayor protesting the decision to not a hire a Mechanic and threatening to file a prohibited practice complaint if the parties could not come to some agreement about the issue. Subsequently, a meeting took place

on July 26 between the Mayor and representatives of the bargaining unit to discuss the Mechanic position. The Mayor indicated that there wasn't sufficient money in the City's budget to fill the position and pointed out that no one presently in the bargaining unit was qualified to do the mechanic work, nor were any bargaining unit members currently on layoff. As a result of the meeting, the Union agreed to not grieve or file a complaint over the issue as long as no bargaining unit members were laid off. Although Union Steward Warren Howard kept notes of the meeting, no formal account of the discussion or any understanding between the parties was ever reduced to writing.

On January 1, 2004, due to a budget crisis, the City laid off four members of the bargaining unit, while it continued to subcontract the work previously performed by the Mechanic 4 position. On January 8, 2004, the Union filed the instant grievance, alleging that the layoffs were in violation of the agreement reached between the parties in January, 2001. The City denied the grievance on its merits and further maintained that it was not timely. The grievance then proceeded through the contractual steps to arbitration, which was held on Wednesday, October 13, 2004.

On Friday, October 8, 2004, Union Representative Dennis O'Brien gave a letter to Mayor Douglas Oitzinger, as follows:

. . .

> The union requests the following information relevant to the above grievance.
>
> 1.) The names of any Local 260 employees who requested class 4 or class 5 pay from 1-1-01 through 10-1-04
>
> 2.) The number of hours and the dates that class 4 or class 5 was paid to said individuals.
>
> 3.) Any subcontracts with Marinette city or its Department of Public Works entered into for the performance of mechanical work on any vehicle or equipment of any department of the city including: Parks, Police, Forestry, Fire, Street and Water or Wastewater Utility.
>
> This request is made without prejudice to the union's right to file subsequent requests. Please provide the information by October 12, 2004. If any part of this letter is denied or if any material is unavailable, please provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information called for in the request.

Mayor Oitzinger faxed the letter to the City's counsel later the same day. On Monday, October 11, the City's counsel responded to the Union request, as follows:

. . .

> As you know, this Firm represents the City of Marinette with respect to the above-reference matter. I am in receipt of your request for information dated October 8, 2004 which you faxed to the City at approximately 1:451 p.m.
>
> In your letter, you are requesting that the City compile a significant amount of information and produce many documents by October 12, 2004. Please be advised that the City is not able to comply with your request.
>
> First, your request is untimely. The timing of your request leaves the City with only one and one-half business days to assemble the information and get it to you. Such a late request is neither professional nor appropriate.
>
> Second, in the context of a grievance arbitration, the City has no obligation to assemble information requested by the Union. Likewise, although the City may have a limited obligation to produce documents that may allow the Union to represent the grievant, your request in no way articulates the relevance of the information requested. Plus, you are asking the City to compile data, which is something the City is not required to do.
>
> Your request requires City officials to scour time cards and payroll records of all Local 260 employees and then assemble the information in the format you have requested. In addition, your third request demands the production of all invoices and payment records for every incident of mechanical work the City has subcontracted from the beginning of time. Obviously, it would take the City many hours to even begin to comply with your request.
>
> Accordingly, the City will not be in a position to produce the records before the grievance hearing scheduled for October 13, 2004. If you think you can specify your request more narrowly or if you would like to discuss this matter, please do not hesitate to contact me.

. . .

Nonetheless, at the hearing the City provided the Union with 1,750 pages of photocopied documents pursuant to its request. In addition to dismissal of the grievance, the City seeks reimbursement for the cost of copying the documents.

POSITIONS OF THE PARTIES

The Union

The Union first asserts that the grievance was timely. In 2001, the Union agreed to forego filing a grievance over subcontracting the Mechanic work as long as there were no lay offs. There were no layoffs until January 1, 2004. The Union filed its grievance on January 8, 2004, within the 10-day time limit set forth in Step 1 of the grievance procedure. Thereafter, the grievance proceeded through the contractual steps until February 5, 2004, at which time the City refused to submit the grievance to the Personnel and Licenses Committee due to an objection that the Union had missed the contractual deadline under Step 2. Step 2 requires that the grievance be advanced within 10 days after the City's Step 1 response. The City mailed its Step 1 response on Wednesday, January 21, 2004. The Union's 10-day time limit began to run on Thursday, January 22. Exclusive of weekends and holidays, the 10-day period ran until February 4, the day the Union President delivered the Step 2 request to the City.

The City attempts to argue that the time period began to run once its response was postmarked. While the postmark date might satisfy the City's obligation to reply by a certain time, it does not constitute notice to the Union on that date. Where a response is sent by regular mail without confirmation of delivery, the Arbitrator should include an additional two days for receipt of the document before tolling the reply deadline.

The Union also argues that the City's reimbursement for photocopying should be limited to reasonable charges. The Union initially asked for information about hours worked by certain employees and subcontracting, to which the City objected. The Union made the request in good faith and assumed it could be easily complied with, based on previous requests for the same information in earlier years. The provision of payroll records should be a simple matter, although the Union conceded that the initial request for subcontracting information was overbroad and subsequently narrowed its request. The previous three years of information amounted to approximately 100 total pages and the Union merely asked for the same information for a fourth year. It is inexplicable why the City needed to produce 1,750 pages to meet the request. Further, while the Union asked for the information, it did not specify the means by which the City provided it. The Union asserts that under the circumstances 100 additional pages should have been sufficient and argues that copying charges should not exceed $25.

On the merits, the Union asserts that based on the agreement reached in 2001, past practice, the contractual maintenance of standards clause and arbitral precedent regarding subcontracting, it should prevail on the grievance. There is a dispute about what was agreed at the July 26, 2001 meeting, however, the meeting did take place and included City and Union officials. After the meeting, there were no layoffs until 2004 and Union members continued to perform mechanic duties thereafter except as to mechanic work that had always been subcontracted. The Union believed it had an agreement that the City would not further reduce the bargaining unit and subcontract out the remaining mechanic work.

The Union does not dispute the City's right to subcontract work, or its right to layoff employees. It does, however, deny the City's claimed authority to layoff employees and then subcontract the bargaining unit work they were performing to a third party. Arbitral authority looks with disfavor on using subcontracting to reduce the bargaining unit or as a substitute for recalling employees on lay off. Here, the City laid off four employees and then increased the subcontracting of mechanic work.

The City claimed an economic need for its action, but at the hearing was unable to substantiate it claims of financial hardship. Rather, it appears that the City was simply trying to save money because it felt subcontracting was cheaper. Arbitrators have held that an employer cannot contract out bargaining unit work merely to save money because it would give the employer to effectively abolish the negotiated wage rate, which it could not do directly. Thus, arbitrators look at the impact of subcontracting on the bargaining unit. The evidence here shows a profound effect. Subcontracting bargaining unit work while employees are laid off clearly harms the unit. That is what happened here. Some of the subcontracted mechanic work could have been done by laid off employees.

The contract is silent on the topic of subcontracting, but arbitrators have held that the right to subcontract is not unfettered, but is restricted by the recognition and seniority provisions, as well as the table of organization. Job security is at the heart of a collective bargaining agreement and subcontracting must not be permitted to undermine the protections of the contract.

The City

The City asserts that the grievance was not timely filed and should be denied. It is generally recognized that where there are clearly defined timelines, the failure to follow them will result in dismissal. Here, the contract requires grievances to be filed within 10 days of either the action upon which the grievance is based or notice of the action, whichever is earlier. The Union filed a grievance protesting the subcontracting of mechanic work in January, 2004. The City has been subcontracting mechanic work for 20 years and specifically Mechanic 4 work for three years, which the Union knew. In either event, the grievance is untimely.

On the merits, the City notes that its right to subcontract is encompassed within the "Rights of Management" set forth in Article 2 of the contract. The ability to determine the number and types of employees gives the City unlimited authority to subcontract and to layoff bargaining unit employees. Further, under Article 9, if no employee signs a posting, the City may fill the position as it sees fit. When no employee signed the Mechanic 4 posting in 2001, the City determined to subcontract most of the mechanic work, which it was permitted to do. The City complied with the contract in subcontracting the mechanic work and the Union cannot establish otherwise.

There is also a well established past practice of allowing the City to subcontract mechanic work. This practice goes back over 20 years, was clearly recognized by the parties. The practice of subcontracting Mechanic 4 work goes back three years. Further, while there is no explicit agreement to allow subcontracting, the Union's acquiescence over time without grieving the matter permits the inference that it accepted the practice. This is especially true after the City subcontracted the Mechanic 4 work in 2001 and the Union questioned the decision, but did not grieve it for three years.

The City's subcontracting rights were not restricted by a claimed verbal agreement with the Union. The Union asserts the existence of an informal agreement made in 2001, which supposedly limits the City's subcontracting authority. There is no precise, credible or concrete evidence of such an agreement. At one point, Union Steward Warren Howard testified that the Union agreed to not file a grievance as long as no bargaining unit members were laid off. Later, he testified that in the event of layoff the affected employee would be allowed to fill the Mechanic 4 position. He also was unclear as to the term of the agreement. Former Mayor Westphal testified, however, that there was never any such agreement. Further, the Mayor had no such power in light of the City Council's decision to not fill the Mechanic 4 position. The fact that there is no written record of any such agreement only further undercuts the Union's position, especially since Howard admitted that the City retained the power to layoff employees and fill positions.

The Union should also reimburse the City for its reasonable costs incurred in copying the documents requested by the Union. The Union requested a large number of records shortly before the hearing, which amounted to 1,750 pages. Under the Wisconsin Public Records Law (Sec. 19.31, Wis. Stats., *et seq*), a requester may be required to pay for copies of documents provided by an authority. In this case, the Union constitutes a "requester" and the City constitutes an "authority." The City is entitled, therefore, to charge the Union for its actual costs in producing the records.

The Union in Reply

The Union reasserts its argument that the City's action of simultaneously subcontracting and laying off bargaining unit members violates the contract. There was a clear distinction between the mechanic work that was subcontracted before January 1, 2004, and that subcontracted thereafter. The type of mechanic work done by the DPW employees (i.e., oil changes, lubrication, preventive maintenance, etc.) was never subcontracted before January, 2004. The Union had only acquiesced in the subcontracting of work beyond the skills of DPW employees.

The Union also disagrees with the City's assertion of complete authority to subcontract. Management may certainly manage the operations of the City, but its authority is subject to the provisions of the contract, including Maintenance of Standards, that exist to protect the

employees. Further, the instances in the past where the City has subcontracted work without protest are distinguishable. Where the City has determined to cease a particular type of work or change its focus, and where the changes did not result in layoffs of bargaining unit members, the Union has not objected, but that is not the case here. After Ray Stone left his Mechanic 4 position in 2001, his work continued to be done by other Department employees, with subcontractors being used only on an as needed basis. The Union believed it had reached an agreement with the City to maintain staffing levels without filling the Mechanic 4 vacancy.

It is also important to consider the effect of the subcontracting on the bargaining unit. The Union worked to defeat the current mayor in 2001 largely because of his decision to subcontract refuse collection and recycling work. There was also much disharmony between the City and the Union at that time. After Mayor Oitzinger was re-elected in 2003, the decision was made to layoff four Union employees and subcontract out the Mechanic 4 work. Thus, the Union lost four positions and the City was unable to even demonstrate that the decision generated savings, which clearly undermined the bargaining unit. The City also cannot argue that the Union acquiesced in a past practice which simultaneously permitted subcontracting and lay offs, because this did not occur prior to January, 2004.

The City incorrectly asserts its unqualified right to subcontract. The contract is silent on subcontracting. According to current arbitral thought, the contract's silence implies no right to subcontract until the employer negotiates the affirmative right to do so. This has not occurred here. Other authorities find constraints on subcontracting in the "implied obligations" theory, which prevents the employer from using subcontracting to undermine the status of the union. Using subcontracting to destabilize the union or to shift operations to cheaper labor violates the doctrine of good faith and should not be permitted.

The City in Reply

The City reasserts that the grievance is untimely. The contract clearly specifies that the grievance must be filed within 10 days of when the act giving rise to the grievance occurred. The City has been subcontracting Mechanic 4 work since 2001. The Union's belief in the existence of a January, 2001 agreement does not justify the late filing. There is no record of any such agreement and a three-year delay in filing should not be justified on an incorrect assumption. The Union was well aware that Mechanic 4 work was occasionally being done by supervisors after 2001, so it cannot argue it didn't know bargaining unit work was being done by others until 2004.

The City complied with the contract regarding subcontracting. It has been shown that there was no agreement in 2001 restricting subcontracting and the City's subcontracting rights have been established through bargaining. The Union witnesses' recollection of the agreement to restrict subcontracting, on the other hand is imprecise and contradictory, at best, and is disputed by the recall of the former Mayor, who also participated in the January, 2001

meeting. There was clearly no meeting of the minds at the meeting and the City cannot be bound by the Union's erroneous perception of an agreement having been reached. The fact is the City negotiated the right to layoff employees and fill positions as it sees fit, which remain in place.

There is no connection between the layoffs and subcontracting. Generally, where the contract is silent, there is no restriction on subcontracting, as long as it is conducted in good faith. (Citations omitted) Propriety of subcontracting is determined by looking at past practice, rationale, effect on the bargaining unit, type of work involved and the regularity of subcontracting. The Union chooses only to focus on the effect on the bargaining unit, but fails to recognize that the contract is not "silent" as to subcontracting. Article 2 allows the City to determine the numbers and types of positions and, therefore, to subcontract without restriction. Nevertheless, even were the contract silent, the action would still be justified. There is a well established practice of subcontracting mechanic work and the City had further justifiable business reasons for the move due to its economic crisis. Further, the fact that the City had been subcontracting this work for three years before the layoffs shows that there was no connection between the two events.

Even were the grievance to be sustained, the Union's proposed remedy, reinstatement of an employee, would not be appropriate. The best that could be achieved would be to require the City to post the Mechanic 4 position and then evaluate any employees applying for it. The record shows that none of the laid off employees are competent to do the work, so it would not be appropriate to recall one of them.

Finally, the Union should be required to reimburse the City's reasonable copying costs incurred in complying with its document request. A copy fee is permitted under the Wisconsin open records law. The Union requested a large number of documents and was warned that compliance with such a request would entail a significant amount of work. The Union insisted and the City complied and should now be entitled to recoup its costs.

DISCUSSION

Arbitrability

The first issue to be addressed is whether the grievance was filed in a timely manner. As the City points out, where the time limits of the contractual grievance procedure have not been complied with, and absent extenuating circumstances, there is substantial arbitral authority supporting dismissal of the grievance without reaching the merits. Any such inquiry must necessarily begin with the language of the contract.

The pertinent language of Article 18, Step 1, requires that the grievance be presented ". . . to the Mayor and Department Head . . . within ten (10) days of the Employer's action by which the employee was allegedly aggrieved or when the employee should have known of such

action, whichever is earlier." The grievance was presented on January 8, 2004. The City argues that, inasmuch as the issue is the City's ability to subcontract Mechanic 4 work, the grievance is untimely because the City had been doing so openly for three years prior to the filing of the grievance. The Union argues, however, that the precipitating event was not the subcontracting of Mechanic 4 work, but doing so while DPW employees were on layoff status. Thus, in the Union's view, the grievance did not ripen until the layoff of four bargaining unit members on January 1, 2004, well within the 10-day filing period.

For the following reasons, I conclude that the grievance was timely. It is clear from the briefs that the Union is not arguing that the City does not have the authority to subcontract, or even to subcontract Mechanic 4 work. Indeed, given the City's longstanding practice of doing so set forth in the record, it would be hard for the Union to support such an argument. There is no question that what the Union is objecting to is the subcontracting of bargaining unit work while simultaneously laying off bargaining unit members. From the record, it appears that this circumstance did not exist until the layoffs on January 1, 2004. So, from the Union's point of view, the circumstances meriting a grievance did not exist prior to that date, because subcontracting mechanic work was not a *per se* violation of the contract and no unit members were affected by the practice prior to that date.

The City argues that the timeliness issue requires consideration of the validity of the premise underlying the Union's position, which is the existence of an agreement between the parties from July 26, 2001, wherein the City supposedly would not continue to subcontract Mechanic 4 work if it became necessary to bargaining unit members, or, in the alternative, would not layoff employees while continuing to subcontract bargaining unit work. Citing the sparse evidence supporting the existence of such an agreement, the City maintains that it is an insufficient basis for excusing the Union from filing its grievance at the time the City Council originally decided to not fill the Mechanic 4 position and subcontract much of the position's work in 2001. The City's argument goes to the merits of the Union's case, however, which I see as distinct from its handling of the grievance procedurally. The merits of the parties' positions will be dealt with below, but there is no indication that the Union did not believe, in good faith, that some agreement to such effect did exist. Further, the Union's argument on the merits is not predicated solely on the existence of such an agreement, but also on general principles of labor contract law with respect to the relationship between subcontracting and job security. In either event, the conditions precedent to grieving the issue, as I have framed it, did not exist prior to the layoffs occurring on January 1, 2004.

The second point raised by the City is whether the Union advanced the grievance to Step 2 in a timely fashion after receiving the City's Step 1 response. The contract specifies that, if the grievance is not resolved at Step 1, the Union has 10 days to submit it to the Personnel and License Committee. The record indicates that the Step 1 response was mailed to the Union on January 21, 2004, and that the Union submitted its Step 2 letter on February 4, 2004. Generally speaking, for the purposes of triggering timelines, notice is not deemed to have been given until it is actually received. On the other hand, for the purposes of meeting

timelines, notice is deemed to have been given when it is posted. Further, the grievance procedure provides that "All time limits shall be exclusive of weekends and contractual holidays." Applying this language and assuming the grievance was received by the Union on January 22, the day after it was posted, February 4 fell on the ninth day, within the limit specified by the contract. The City argues that the language excluding weekends and holidays should not apply because it is found under Step 3. On the other hand, it is set off in its own paragraph and the only other reference to a time limit in Step 3 is that for filing a request to arbitrate. The language in question, by referring to "all time limits" clearly addresses more than just the one in Step 3 and must be construed to encompass all time limits in the grievance procedure, especially since one would expect more leniency with the shorter 10-day time limits contained in Steps 1 and 2. Here, two weekends passed between the time the City's response was received and the date the Union's answer was due, so 4 of the 10 days fell on days when the employees were not at work, and the 10th day fell on a Sunday, so even under a strict interpretation of the timeline, the response could have been mailed on Monday. Further, even if the intervening weekends were not included the Union's notice was sent on the 12th day, which cannot have unduly inconvenienced the City nor offended the principles of closure and promptness that underlie such timelines.

The final point raised by the City is its contention that the Union did not advance the grievance from Step 2 to arbitration in a timely fashion. The request for arbitration was sent in on May 7, 2004. Step 2 of the grievance procedure involves a meeting with the Personnel and License Committee, with the Committee's decision to be provided to the Union within 30 days. There is no provision establishing that failure to respond is deemed a denial. The City Attorney informed the Union that the grievance would be addressed by the Personnel and License Committee on March 17, 2004. (Jt. Ex 2, pp. 8-9) The record does not contain any minutes of such meeting or subsequent notice of decision to the Union. It does, however, contain a memorandum to the Committee from the City Attorney dated March 24, 2004, setting forth the City's position on a number of grievances, including this one. (Jt. Ex 2, pp. 10-12) This calls into question the date on which the Committee actually met to deliberate and at what point the Committee informed the Union of its decision. In any event, once the decision is transmitted, the Union has an additional 30 days, exclusive of weekends and holidays to file its request for arbitration. Assuming the Committee met on March 17 and informed the Union 30 days later of its denial of the grievance, a May 7 filing date is well within the additional 30 days provided by the contract. I find, therefore, that the grievance was timely and is arbitrable.

Merits of the Grievance

The Union's primary contention is that the parties had an agreement in 2001, which precluded the City from laying off DPW employees while mechanic work was being subcontracted, or, in the alternative, if employees were to be laid off, the subcontracted work of the Mechanic 4 position would be offered to a qualified employee designated for layoff.

From the Union's perspective, when the City laid off four DPW employees in January, 2004, and then not only didn't offer the subcontracted mechanic work to them, but subcontracted the remaining Mechanic 4 work instead, the City violated the agreement.

This agreement purportedly was made at a meeting on July 26, 2001, between the Mayor, the City Attorney and representatives of the Union. The agreement was not reduced to writing and the only record of the meeting consists of the handwritten notes of Union Steward Warren Howard. (Jt. Ex. 16) According to Howard's notes, the Union objected to not filling the vacant Mechanic 4 position and wanted the City to hire an employee to fill it rather than subcontract, which would reduce the size of the bargaining unit. The Mayor stated that there wasn't sufficient money in the budget to hire a new employee and that as long as no one was laid off, he didn't see the problem. Again, according to Howard's notes, the Union agreed not to file a grievance as long as no one was laid off and the Mayor and City Attorney agreed to this. Howard's testimony at the hearing more or less agreed with his notes, except that he added the additional concept that in the event of future layoffs, the City would offer to fill the Mechanic 4 position with one of the employees designated for lay off. There was no testimony or written evidence as to the duration of this agreement.

Former Mayor Westphal did not recall the meeting the same way. While he did agree that the discussion proceeded along the lines described by Howard, he indicated that there was no agreement, *per se,* but merely an acknowledgement that the City was not in a position to hire a Mechanic and since no one was currently laid off, the Union wouldn't be pursuing the matter. He also disputed any suggestion of an agreement to post the Mechanic 4 position in the event of future lay offs. (Tr. 75, 76)

I do not find this evidence to be sufficiently compelling to convince me of the existence of an agreement between the parties along the lines described by the Union. Further, were there such an agreement, the lack of clarity as to what specifically had been agreed to would make it virtually impossible to define with specificity or to enforce. Put simply, there does not appear to have been a meeting of the minds on July 26, 2001, as to what the purpose of the meeting was or what it achieved. The Union clearly believed it had obtained protections for the bargaining unit against further workforce reductions, but the City believed that the parties had merely cleared the air with respect to the reasons behind its decision to not fill the Mechanic 4 position. Because nothing more was said and no written agreement, minutes or memorandum was ever produced, the parties remained ignorant of the misunderstanding. The Union likely took the fact that there were no layoffs for three years as evidence of the agreement's effect, but in reality, there were no layoffs because the City's financial situation during that period did not require them. In any event, I do not find that the City's actions in January, 2004, were precluded by an agreement reached between he parties in 2001.

The second argument advanced by the Union is that the City's action violates general principles of arbitral law in that the City is using subcontracting to undermine the Union by replacing Union employees with subcontractors for lower cost. At the hearing, the current

Mayor, Douglas Oitzinger, testified that at the outset of 2004, the City was facing a budget crisis due to a combination of factors, including a $1 million budget deficit, a $191,000 reduction in shared revenue from the State and a 19.27 percent increase in health insurance rates. One of the steps taken by the City was to layoff four employees from the Department of Public Works. At that point, the remainder of the mechanic work in the Department, which had been performed by bargaining unit members since the Mechanic 4 vacancy wasn't filled in 2001, was subcontracted. Mayor Oitzinger further testified that the cost per hour of a bargaining unit employee was approximately $56, whereas the subcontract rate was $49 per hour. There was further testimony from the Director of the DPW, Brian Miller, that the actual amount of mechanic work to be done was between 10-15 hours per week. At the stated rates, the layoff of four employees would have generated savings of approximately $450,000 annually, whereas the additional subcontracting would have cost approximately $38,000 annually, for a net savings of $422,000.

The City asserts an unrestricted right to layoff employees and an additional unrestricted right to subcontract work under the contract language, principally Article 2, which gives the City the rights to ". . . determine the Table of Organization, the number of employees . . . and the job classifications needed . . ." Also, Article 8 allows management to layoff employees for lack of work and lack of funds. Also, Article 9, concerning filling vacancies, states that if no one posts for a vacancy the employer may ". . . fill the position after advertisement, or otherwise, as it sees fit."

Nevertheless, contrary to the City's blanket assertion, there is substantial arbitral authority recognizing that subcontracting is a right susceptible of abuse and that where it is used to undermine the Union or undo the contract it may be restricted, even where the contract is silent. In BEECHER-DUNBAR-PEMBINE, CASE 30, NO. 56866, MA-10441 (GRECO, 8/30/99), Arbitrator Greco, quoting from AMERICAN SUGAR REFINING COMPANY, 36 LA 409, 414 (CRAWFORD, 1960) stated:

> The power to subcontract is the power to destroy. Obviously the Company cannot recognize the Union as exclusive agent for its unit employees, agree upon terms of employment, and then proceed arbitrarily to reduce the scope of the unit or to undercut the terms of the Agreement.
>
> Thus contracting out cannot be used as a *device* for undermining the status of the recognized exclusive agent by farming the unit jobs out to contractors. Nor can contracting out be used (even unwittingly) as a device for securing better prices than those agreed upon, and thereby indirectly undermine the status of the recognized exclusive agent by placing it in the position of having to agree to cut contract terms in order to persuade the Company not to subcontract the jobs of the represented employees. (Emphasis added).

> Beyond this the specific facts underlying the subcontracting must demonstrate the existence of compelling logic or economies of operation (other than the wage bill) and the consideration of the Union status and the integrity of the bargaining unit. The basis for management's decision to subcontract is especially important where permanent and regular jobs are being contracted out inasmuch as the size of the bargaining unit is being reduced, and more especially if a substantial portion of the unit jobs are being farmed out.

Thus, where the employer reduces the bargaining unit and then subcontracts unit work, it must produce a rationale greater than just the desire to save money. Here, that is exactly what the City did. It reasoned that it could address part of its budget shortfall by laying off bargaining unit employees, which it had the right to do under Article 8, but it also recognized that there was bargaining unit mechanic work that still needed to be done. Reasoning that with the layoffs the bargaining unit employees would be unable to do the remaining mechanic work, as well, the City then determined to subcontract the remainder of the mechanic work.

While one can sympathize with the City's budget difficulties, the fact remains that it cannot solve them by laying off bargaining unit employees and replacing them with subcontractors. Carried to its logical extreme, this principle would allow the City to eliminate the bargaining unit altogether in the name of cutting costs and would destroy the job security for which the employees bargained. In the past, the City has subcontracted work that bargaining unit employees were not qualified to do or did not have the proper facilities for. It has also, as it did in 2001, used its power to fill positions that no bargaining unit member has posted for. In no prior instance, however, has the City reduced the bargaining unit by layoff and then transferred the unit work to an independent contractor. This is a wholly different and more aggressive utilization of subcontracting than the City has employed in the past. Moreover, given that a Mechanic 4 working 15 hours per week will cost the City slightly more than $5,000 per year more than a subcontractor, I am not persuaded that the City has provided ample justification to warrant its actions. In my view, if due to the layoffs the remaining DPW employees were unable to continue the maintenance and troubleshooting work on their equipment, and if any or all of the laid off employees were capable of doing the work, the City's proper course was to post a part-time Mechanic position and recall the laid off employees in order of seniority. If none of the laid off employees were willing or able to take the position or qualified for it, then the City could subcontract the work as it saw fit.

Copying costs

Lastly, the City seeks an order to have the Union reimburse it for actual costs of producing some 1,750 pages of documents, which the Union requested a few days prior to the hearing. The City's claim is based upon its right to recover copying costs for public records under the Wisconsin Public Records Law, Sec. 19.31, Wis. Stats., *et seq*. For its part, the Union argues that it did not seek the volume of documents provided by the City, nor did it specify the means by which the information was to be provided and that, therefore, the City's demand is unreasonable.

The request was made on October 8, 2004, five days prior to the hearing, in a letter from Union Representative Dennis O'Brien to Mayor Oitzinger. (Jt. Ex. 14) In the letter, O'Brien requests:

> 4.) The names of any Local 260 employees who requested class 4 or class 5 pay from 1-1-01 through 10-1-04
>
> 5.) The number of hours and the dates that class 4 or class 5 was paid to said individuals.
>
> 6.) Any subcontracts with Marinette city or its Department of Public Works entered into for the performance of mechanical work on any vehicle or equipment of any department of the city including: Parks, Police, Forestry, Fire, Street and Water or Wastewater Utility.

The City's initial response was a letter generated by the City's counsel on October 11, refusing the request as untimely, beyond the scope of the City's duty in arbitration and impossible to comply with in the timeframe allowed. Nevertheless, at the hearing the City produced the aforementioned 1,750 pages of photocopies, purporting to be the information requested by the Union.

This matter was not disclosed to me prior to the hearing. The Union did not request a *subpoena duces tecum* and I was not asked to, nor did I, order the production of documents. There is nothing in the contract giving the Arbitrator jurisdiction over this issue, nor does my jurisdiction extend to the enforcement of the Wisconsin Public Records Law. While the Union did not specifically challenge the Arbitrator's authority to address this question, neither can it be said to have affirmatively acknowledged it. I do not believe, therefore, that it is within my authority to order the costs requested by the City in this matter, nor do I express an opinion as to the legal position of either party. The City may seek to charge the Union for its response to a public records request according to statute and should the parties be unable to resolve the issue the City's recourse is through the courts.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

1. The grievance was timely.

2. The City violated the collective bargaining agreement when it subcontracted the work of the Mechanic 4 position while bargaining unit members were on layoff status.

As for a remedy, the City shall post a part-time position for a Mechanic 4 in the Department of Public Works to perform the maintenance and troubleshooting work that existed in the bargaining unit prior to January 1, 2004, and shall offer to recall the four laid off DPW employees to the position in order of seniority. Should any of the four employees accept the position, he shall be entitled to back pay in an amount equal to 15 hours per week from January 1, 2004, at the Mechanic 4 wage rate. In the event that none of the four employees is willing to accept the position or qualified to fill it, the City may fill the position as it sees fit according to Article 9 of the contract.

The Arbitrator will retain jurisdiction of this Award for a period of thirty (30) days to address any issues that may arise in the implementation of the Award.

Dated at Fond du Lac, Wisconsin, this 6th day of June, 2005.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/anl
6834.doc