BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES UNION
LOCAL #244, AFSCME, OF THE AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO**

and

**CITY OF SUPERIOR,
A MUNICIPAL CORPORATION**

Case 191
No. 63786
MA-12711

Appearances:

Jack Bernfeld, Assistant Director, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Superior City Employees Union Local #244, AFSCME, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mary Lou Andresen, Human Resources Director, City of Superior, 1316 North 14th Street, Suite 301, Superior, Wisconsin 54880, appearing on behalf of the City of Superior, a municipal corporation, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to serve as Arbitrator to resolve Grievance No. 04-244-04, concerning a maintenance agreement for the Hayes Court Complex. Hearing on the matter was held on January 20, 2005, in Superior, Wisconsin, and was not transcribed. The parties filed briefs and a waiver of a reply brief by March 22, 2004.

ISSUES

The parties were unable to stipulate the issues for decision. The Union states the issues thus:

> Did the City violate the collective bargaining agreement when it subcontracted the maintenance and operation of the Hayes Court Ballfield Complex? If so, what is the appropriate remedy?

The City states the issues thus:

> Did the City violate the AFSCME Local #244 Union Agreement when it entered into an agreement with the Superior Youth Organization to maintain and operate the Hayes Court Ballfield Complex? If yes, what is the remedy?

In my view, the record poses the following issues:

> Did the City violate Article 3 of the collective bargaining agreement by entering into a Lease, Maintenance and Operation Agreement with the Superior Youth Organization for the Hayes Court Complex?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
RECOGNITION

1.01 The City of Superior recognizes the Union as the exclusive representative of its employees in the Public Works Department who are employed in regular full-time, part-time, substitute and seasonal positions . . .

ARTICLE 2
UNION-MANAGEMENT RELATIONS

. . .

2.05 There shall be no lockout on the part of the Employer and there shall be no strike authorized, approved or engaged in by the Union against the Employer during the term of this Agreement. . . .

ARTICLE 3
MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

. . .

C) To . . . assign employees to positions with the City. . . .

H) To subcontract work presently performed by bargaining unit members provided that regular, full-time Union members will not be laid off or lose regularly scheduled straight time hours as the result of any subcontracting. The City agrees that it shall consult with the Union prior to subcontracting work presently performed by full-time bargaining unit members. . . .

ARTICLE 9
LAYOFFS AND REHIRING

9.02 In no event will any full-time employee be laid off while any part-time, seasonal, temporary or Federal of State funded employee is retained on the payroll. . . .

BACKGROUND

The grievance, dated March 19, 2004 (references to dates are to 2004, unless otherwise noted), alleges that on March 10, "Mary Morgan . . . and the Superior City Council entered into a lease, maintenance & operation agreement with the Superior Youth Organization of the Hayes Court Ballfield Complex." The grievance alleges the agreement with the Superior Youth Organization (SYO) violates Article 3, Section H) and Section 2.05.

The Hayes Court Complex includes five baseball fields for softball and hardball. The complex covers roughly sixteen acres. Four of the fields are used for youth programs, and one is used for more competitive use, including high schools and the UW - Superior.

The City and SYO have had an ongoing relationship for over twelve years. In the summer of 2003, SYO wrote a letter to the City Council seeking to take over certain aspects of the operation and maintenance of the Hayes Court complex. The Council referred the matter to the Parks & Recreation Commission, which referred the matter to Mary Morgan, the

Administrator of the City's Parks & Recreation Division. Late in 2003 or early in 2004, Morgan began serious discussions with SYO representatives regarding their role in the Hayes Court Complex. In a memo to the Mayor and City Council members dated February 13, Morgan summarized the status of her discussions with SYO, and made a series of recommendations. The memo states:

> 2. Background
> SYO is a nonprofit organization that offers baseball and softball programming to over 500 local boys and girls annually. They operate their baseball programs primarily at the four youth fields located in the Hayes Court neighborhood. They have made investments on site, as they own and operate two concession stands, and they have partnered on various projects and purchases with the City to improve field conditions there and at Wade Bowl ballfield.
>
> While they report that the fields arc maintained adequately by City crews, SYO believes it can offer users a refined (or higher) level of care, and they would like an opportunity to do so.
>
> 3. Analvsis/Discussion
> . . . our legal department prepared the agreement that is attached for your review. SYO is willing to accept the terms of the agreement, and the Parks & Recreation Commission has recommended your support.
>
> The agreement indicates that SYO will take over the maintenance and operation of the complex, and the City will pay SYO a sum of $26,000 for their services for one year. Full-time, permanent park/rec staff will not be impacted by the agreement however, two seasonal maintenance staff (planned for the 2004 season) would not be hired if you enter into the agreement.
>
> 4. Budget Source
> The City has budgeted approximately $28,000 (cash) from the Parks & Recreation Budgets for 2004 for the care of this complex and estimates another approximately $15,000 in equipment use annually at the site. I am proposing that you agree to a fund transfer from various Recreation and Parks Budget line items into the contractual services line item in order to provide the fees to SYO. Further, I am recommending that you waive the normal bidding procedure in order to facilitate this partnership.
>
> 5. Fiscal Impact
> There is not a significant fiscal impact, either negatively or positively, with this arrangement. The City budgets $28,000 for the care of the fields. The proposal is to pay SYO $26,000 for their services. The City will also forfeit approximately $2,000 in adult user fees generated from the site. The equipment

that is typically committed to this site will now be available for use elsewhere in the system, for example, other ballfields, Wisconsin Point, etc.

6. Alternatives and the Impact of Each Alternative

The City could certainly continue to care for this facility; however, SYO has proposed a daily, weekly, and annual maintenance schedule, which appears to us to improve the standard of care at the ballfield complex. Further, their commitment to the facility models stewardship and citizenship to others, including the youth they serve . . .

The attached "Lease, Maintenance and Operation Agreement" (the Subcontract) states:

2. Initial Term

The initial term of this agreement shall commence on April 1, 2004 and shall terminate on March 31, 2005, unless otherwise terminated in accordance with the terms and provisions of this agreement.

3. Renewal.

At the end of the initial term or any subsequent term, this agreement may be renewed for an additional one year term by agreement of both parties.

4. Early Termination.

Either party to this agreement shall have the right to terminate this agreement for failure to perform with cause, after providing thirty (30) days notice and a right to cure. Either party will have the right to early termination of this agreement by the written agreement of both parties. . . .

8. Maintenance.

SYO shall provide daily, weekly and annual maintenance of the ballfields as set forth in Exhibit A attached hereto. In addition, SYO shall provide general grounds maintenance at Hayes Court and ordinary repairs, including, but not limited to regular litter collection, bleacher maintenance and portable sanitation services. SYO shall at all times maintain Hayes Court in a safe and playable manner. SYO shall comply with the provisions of the pesticide code contained in the City of Superior Code of Ordinances . . . The City shall inspect Hayes court on a bi-monthly basis between May and September of each year and as needed during other months of the year. . . .

The Subcontract also included, as "Exhibit A", a "Maintenance Schedule", which identified the following nine "Daily" tasks: "Drag all 5 fields; Line all 5 fields; Water infields; Soak mounds; Mow 1 infield; Mow outer areas; Litter removal; Immediate repairs (safety); and Any item the City deems a safety issue." It identified the following nine "Weekly" duties: "Deep tine infields; Weed whack fences; Scheduled edging; Repair schedule; Bleacher repair; Grass cutting (beyond fence); Fence/backstop repairs (as needed): Any item the City deems a safety issue." It identified the following eleven "Annual" duties: "Weed & Feed; Aerate fields; Drain water system; Flail cut weeds; Disconnect phone; Disconnect power; Lighting; Waterline repairs (as needed); Electrical repairs/lightbulb replacement (as needed); Supply purchases (e.g., bases, pitching rubbers, ag lime, etc.); and Any item the City deems a safety issue." There is no dispute City seasonal or regular employees performed and would perform these duties at the Hayes Court complex but for the Subcontract.

Morgan prepared the memo for presentation to the City Council at its March 2 meeting. At that meeting, the Council approved Morgan's recommendations. Kim Krause is a Union Steward, and requested a copy of the Subcontract on March 3. The Union met to review the Subcontract on March 9. In a memo dated March 10, to Gerald Tutor, the Union's President, Mary Lou Andresen stated:

> Attached you will find the action approved by the Council at their March 2, 2004 meeting. This action provides for an agreement with (SYO) to Lease the Hayes Court Ballfield Complex . . . The result of this agreement will mean that the City will employ 3 less seasonal employees for the upcoming season. No full-time employees will be reduced by this agreement.
>
> If you have any questions or wish to meet on this matter, please contact me . . .

The Union responded by filing the grievance. SYO started work under the Subcontract on or about March 20.

Morgan had originally planned to discuss the then potential Subcontract with the Union at a DPW Labor-Management Committee (LMC) meeting set for January 9. The agenda for that meeting reads thus:

1. Approval of Minutes from Labor-Management Committee Meeting on December 18, 2003
2. Old Business
   a) #244 Job Descriptions - final discussion
   b) Budget - Cost Saving Measures
3. New Business
   a) List of new discussion topics
   b) Other

The Union did not appear at this meeting, but issued a letter noting its decision to withdraw from LMC meetings. The City did not offer to meet with the Union prior to Andresen's March 10 letter.

The City asked Morgan and other department heads to reduce their budgets in 2004 and for 2005. The City cut its 2004 budget over one million dollars, and during the processing of the grievance, informed the Union it anticipated deficits in the 2005 budget of a similar amount. Within weeks of the Council's ratification of the 2003-05 labor agreement in November of 2003, the City sought to reopen it to address health insurance. In August of 2005, the City proposed to eliminate the funding for all seasonal positions.

The balance of the background is best set forth as an overview of witness testimony.

Kim Krause

Krause has worked for the City for roughly twenty-four years, the first four as a seasonal employee. The Parks & Recreation Department has dropped from eight seasonal employees to none. Seasonal and regular employees have maintained the Hayes Court Complex considerably longer than Krause has been employed by the City. Krause has occupied a number of Union positions, and served several years ago on the LMC. Krause understood the Union's withdrawal from the LMC to reflect its belief that the LMC had become too focused on cost-cutting and had not acted to benefit employees. The LMC did address the use of non-City workers to hang Christmas decorations for one holiday season. Krause understood the Mayor's position in bargaining to be that the City should layoff all seasonal employees so that it could reduce its regular workforce.

James Mattson

Mattson has served as the Union's business representative since 1991. He thought Tutor first advised him of the Subcontract in early March. After the Subcontract, the City contracted out the operation of its golf course, eliminating thirty to forty seasonal positions, including a Mechanic. Those seasonal employees who had unit seniority but lost work at the golf course were reassigned. The Union opposed the contracting out of work on the City golf course with a public relations campaign, and sought to force a referendum on the issue. Several years prior to the City's action regarding the golf course, it contracted the operation of its animal shelter to a non-profit organization. Mattson could not recall the specific circumstances, but believed the City consulted the Union before acting. Section 3, H) requires consultation to permit the parties to discuss impact issues and to promote the exploration of alternatives to a subcontract.

The contract does not require the City to hire seasonal employees, and the City has proposed to eliminate them from the unit. The Union has consistently opposed the proposal.

Mary Morgan

Morgan has served as the Parks & Recreation Division's Administrator since June of 1993. The department was reduced between 2003 and 2004 by one non-unit position. From 2004 to 2005, the department added one seasonal employee to the seniority list, due to the employee's accumulation of hours. The department anticipates losing all funding for seasonal employees in the 2005 budget year. Over the course of years, unit positions have come to reflect maintenance duties, and the unit has seen an erosion of recreational positions such as playground and rink monitors. The department has always used a considerable number of volunteers. Since May of 1997, the City has had a formal policy governing "Contracting Out-Volunteers". The policy includes the following provision headed "Union Obligations":

> Any volunteer placement request will be reviewed by a representative of the union that may be impacted by a volunteer contract. NOTE: No placement will be made without this review process and approval, regardless of representation.

Roughly thirteen years ago, the City demolished an enclosed ice rink, and constructed an indoor ice facility, which is operated by the Superior Hockey Association.

SYO and the City have had a long-term relationship involving the Hayes Court Complex and other City ballfields. She needed Council approval on March 2 to enter the agreement with SYO, and that approval was not a given. The approval was necessary because the contract was not subject to the normal bidding procedure.

The Subcontract meant only that the City did not hire the seasonal employees it otherwise would have. Hours of regular unit positions were not affected, and regular employees continue to work at the Hayes Court Complex, typically on larger projects. They continue to perform virtually all duties at the other City ballparks. The City's Parks & Recreation Department has more than enough work for unit employees, since the Department oversees operations involving thousands of acres of recreational land and facilities.

Morgan was on the LMC, and appeared at the January 15 meeting anticipating a discussion on the SYO negotiations. The Union did not appear, but sent a letter indicating its withdrawal from the process. The Union never sought to meet with her, even after Andresen's March 10 letter.

The parties stipulated that the Parks & Recreation Department employed eleven full-time employees for 2004. The City did not lay any of these employees off, and can account for not less than 2,080 hours of work for each employee for 2004.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union contends that the grievance poses "a very important matter to the Union." The City has announced its intention "to begin laying off regular full-time workers", proposed the elimination of all seasonal employees in the Mayor's 2005 budget, and eliminated seasonal employees from City golf courses. Section 9.02 makes a layoff of full-time employees contingent on the layoff of seasonal employees, thus making seasonal employees "a buffer for regular employees."

The maintenance of ballfields has historically been performed by regular employees before, during and after the use of seasonal employees. Section 3, H) requires the City to consult with the Union before entering a subcontract. The City failed to comply with this provision. It neither notified the Union of its interest in the subcontract nor provided the Union a meaningful opportunity to "discuss the idea and to prepare and propose alternatives to contracting". To permit the March 10 notice to comply with Article 3 undercuts the purpose of the provision, which is to permit meaningful discussion of alternatives prior to subcontracting.

The Union's non-appearance at the January LMC meeting has no bearing on the grievance, since the City's "obvious pique with the Union . . . does not absolve them of their contractual obligations." Even though the Subcontract did not reduce the regular workforce, it reduced work available for unit employees. A "slap on the wrist" remedy is inappropriate. The appropriate remedy is that:

> The City should be directed to notify and consult with the Union in the future. Additionally, the City must be made to reinstate the seasonal employees affected and to make them whole . . . If such employees cannot be identified, then the arbitrator should impose a similar significant financial consequence to the City for its action and require it to employ workers in the three (3) seasonal positions eliminated at Hayes commencing Spring 2005.

The City's Brief

After a review of the evidence, the City contends that the agreement "restricts subcontracting where there is an impact to regular, full-time members" and that it "does not prevent subcontracting of unit work." The evidence shows that the City did not layoff any regular employees and did not reduce straight-time hours of any regular employee. That unit members could perform the work is irrelevant under the labor agreement. Overtime hours are outside the scope of Article 3, Section H), and Article 19 requires that overtime be kept to a minimum.

Unit members continue to perform maintenance work at City ball parks other than Hayes Court. The City has, in any event, contracted unit work in the past. The labor agreement defines the types of employees included in the unit, but does not demand that the City employ seasonal employees. That the Subcontract meant the City did not have to hire three seasonal employees for the 2004 summer season has no contractual significance.

That the City has to "consult" with the Union prior to subcontracting means only that the City consult "with them on the impact of such subcontracting." Under SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94), the City was under no legal obligation to bargain the subcontracting decision, and thus its duty under Article 3, Section H) is "consultation on the impact of the subcontracting." To permit the Union to obstruct a legitimate contract by demanding bargaining prior to implementation has neither legal nor contractual support. Prior to April 1, the City tried twice to consult with the Union. First, Morgan attended an LMC meeting to discuss the matter "under the ongoing discussion . . . regarding budgetary restrictions." The Union responded by declining to show up or to meet again. The City then followed an open process to approve the SYO agreement. On March 2, the City Council approved Morgan's recommendation. The Union requested a copy of the recommendation on March 3. The City's March 10 letter offered a meeting to discuss the impact of the Subcontract. The Union declined, but filed a grievance on March 19. While the City could "(p)erhaps" have made earlier attempts to discuss the matter with the Union, the issue posed by the grievance is not whether the City promoted "excellent employee relations" but whether it violated the contract. The Subcontract did not go into effect until April 1, and the Union made no effort to consult with the City.

Union arguments regarding the 2005 budget have no bearing on the grievance. The evidence establishes that the City met its obligations under Article 3, Section H). It "should not be penalized because the Union did not wish to meet regarding the subcontracting when offered, but rather chose to file a grievance."

DISCUSSION

The parties' statements of the issues are similarly broad. I have adopted issues to highlight that Article 3 is the grievance's focus. I use the present tense ("entering into") when referring to the Subcontract to highlight that Article 3 focuses not only on an executed subcontract but also on the process leading to it.

The grievance cites Section 2.05, but the parties focused their arguments on Article 3. The Subcontract did not impact the hours of any seasonal employee with seniority. Rather, the City did not offer any hours to seasonal workers at the Hayes Court Complex in 2004. The Union acknowledges the contract does not compel the City to offer employment to seasonal workers. The Subcontract could be viewed as a means for the City to pressure the Union. As a matter of contract, this view ignores that there was a contract in effect which grants, under Section 3, H) certain authority to subcontract. The City exercised this authority and the exercise of that authority is the contractual focus of the grievance. As a factual matter, there is

no persuasive evidence the City entered into the Subcontract to pressure the Union to adopt a City bargaining position. The Union and the City executed a labor agreement prior to serious City discussions with SYO for the Subcontract. Thus, Section 3, H) rather than Section 2.05, governs the grievance.

Section 3, H) consists of two sentences. The first sets a substantive limit on the City's authority to subcontract. More specifically, it limits that authority if the subcontract addresses "work presently performed by bargaining unit members", which would result in the layoff or reduction of "regularly scheduled straight time hours" of "regular, full-time Union members". Under Section 1.01, seasonal employees are "bargaining unit members", but the limitation on subcontracting established by the first sentence of Section 3, H) focuses on the effect of a subcontract on the hours of regular, full-time employees.

The evidence establishes that the Subcontract did not result in the layoff or reduction of hours of any regular, full-time employee. Thus, the limitation stated in that sentence does not apply to the Subcontract. This turns the examination of Section 3, H) to the next sentence.

The second sentence is procedural, requiring the City to "consult with the Union prior to subcontracting work" if the work is "presently performed by full-time bargaining unit members." Seasonal employees are unit members. The first sentence makes Section 3, H) applicable to "work . . . performed by bargaining unit members". The second sentence changes the reference of "work" to that "performed by full-time bargaining unit members." It is not evident what, if any, significance this change has. Section 1.01 separately refers to "regular full-time" and to "seasonal positions", and Section 9.02 treats these as separate categories of unit positions. However, the grievance does not call into question whether a seasonal employee can be considered a "full-time bargaining unit member" under the second sentence due to the work involved.

Appendix A identifies the work the Subcontract covers. The evidence establishes that virtually all of the work was historically performed by full-time and seasonal bargaining unit employees until the Subcontract. The City urges that the work was performed by full-time employees only when a seasonal employee was not available. Granting this point cannot, however, obscure the applicability of Section 3, H), since it acknowledges that full-time employees have historically done this work, without regard to the degree of assistance from seasonal employees. Even ignoring this, the evidence establishes that full-time employees continue to do this work at fields not covered by the Subcontract. Thus, whether or not a seasonal employee can be considered a "full-time bargaining unit member" under the second sentence, the work of Appendix A is "work presently performed by full-time bargaining unit members". If a seasonal employee can be considered a "full-time bargaining unit member", the sentence still applies.

The City argues that, as a matter of contract, it had no obligation under the second sentence, because the Subcontract did make the first sentence applicable. This point cannot,

however, be considered persuasive. The first sentence states a substantive limitation on the authority to subcontract. Reading the second sentence to be contingent on the applicability of the first renders the procedural obligation of the second sentence meaningless. If the first sentence precludes a subcontract, there is no apparent need to consult under the second.

The issue under Section 3, H) is thus factual, turning on whether the City consulted with the Union prior to the Subcontract. The evidence shows no consultation. That the Union failed to appear at the January LMC meeting does not address this point. Section 3, H) mandates that the City "shall consult with the Union". The City has not demonstrated any notice from it to the Union of the Subcontract prior to Andresen's March 10 letter. By then the Council had approved it. Prior to Council action, Morgan effectively secured SYO's agreement. Thus, the evidence affords little support for the assertion that the City met its duty under the second sentence. In the absence of notice to the Union, it is impossible to conclude the Union waived its right to consult provided in the second sentence.

At most, the City's arguments assert the Union could have consulted with it prior to the execution of the Subcontract. Section 3, H) demands the consulting take place "prior to subcontracting work". This reference is sufficiently broad to support the City's argument, since the Subcontract had not been executed at the time Andresen notified the Union of the Council's action. However, there is little to support the City's position beyond that. Mattson testified that the purpose of the provision was to afford the parties the opportunity to explore alternatives, as well as to discuss the impact of City action. This testimony is persuasive and was not contradicted. The term "consult" is less demanding of the City than the term "bargain", see, for example, *Roberts' Dictionary of Industrial Relations*, (Roberts, BNA, 1994); Donald Crawford, The Arbitration of Disputes Over Subcontracting from *Challenges to Arbitration, Proceedings of the Thirteenth Annual Meeting of the National Academy of Arbitrators*, (BNA, 1960); and Anthony Sinicropi, Revisiting An Old Battleground: The Subcontracting Dispute, from *Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the Thirty-Second Annual Meeting of the National Academy of Arbitrators*, (BNA, 1980), and *Management Rights,* (Hill & Sinicropi, BNA, 1986) at 467-469. However, the City's reading of the term renders it meaningless, since it would place on the City no duty to even notify the Union of an interest in subcontracting prior to the decision to do so.

Thus, the City's failure to consult the Union on the Subcontract prior to its implementation in March violates the second sentence of Section 3, H). The issue thus turns to remedy, which raises issues more difficult than that those posed on the merits of the grievance.

The Union asserts that the remedy must involve something beyond a "slap on the wrist", contending some financial burden must be imposed on the City. The Award states the City's violation in some detail, because the grievance poses two interpretive issues. The first is the City's contention that it was not bound to consult the Union under the second sentence of Section 3, H) because the Subcontract did not impact regular, full-time employees as the first

sentence requires. The second is the contention that consultation at any time prior to the execution of a subcontract complies with the second sentence. The Award addresses these issues, and requires the City to consult regarding the Subcontract on request by the Union.

To take the remedy further than that, however, lacks contractual and factual support. The Union's view, on this record, seeks punitive rather than make-whole relief. The Union asserts that reinstatement and/or make whole relief of seasonal employees for 2004 and 2005 is necessary to communicate the significance of the City's breach of Section 3, H). There is no contractual obligation on the City to hire seasonal employees, and the assertion seeks as a remedy a result with no evident contractual basis. This is complicated by the City's compliance with the first sentence of Section 3, H). The first sentence establishes a substantive limitation on the City's authority to subcontract. The second states a procedural duty to confer. The Union seeks a substantive remedy for a procedural violation. This overstates the evidence.

The City's conduct does not pose issues implicating bad faith or the undercutting of the Union's majority status. The evidence does not pose an issue regarding the legal duty to bargain. There is no dispute that Articles 3 and 9 address the issue of subcontracting and the attendant issue of layoff. As the City's brief notes, bargaining is waived during the term of an agreement as to items covered by the agreement.

Nor does the City's conduct manifest bad faith. No seasonal employee with seniority lost work due to the Subcontract Rather, City actions manifest a disagreement on a contractual obligation within a long-term bargaining relationship. The City's assertion that the "consult" obligation has been honored in the past by notifying the Union after Council action has some support in the evidence. Mattson was unsure whether the City notified the Union of its intent to contract the operation of the animal shelter before Council action. In any event, the term "consult" is less demanding concerning discussions than the term "bargain". The remedy asserted by the Union reads the terms as if synonymous.

The Union contends remarks made by the Mayor indicate reason to question the City's good faith, particularly concerning his desire to rid the City of seasonal employees to allow the City to layoff regular, full-time employees. The record is not clear enough on this point to warrant the Union's proposed remedy. It is evident that the City and the Union have had difficulty addressing difficult economic times. The Subcontract did not, however, bring about cost savings for the City. That the City sought to reopen the existing contract shortly after ratifying it does not, in itself, point toward bad faith. If that was the case, it is unclear why the City would have executed the agreement in the first place. Even if the Subcontract was motivated by cost considerations, there is no evidence to rebut the City's view that budgetary times are difficult and demand cost-cutting.

The facts underlying the City's role in the Subcontract do not manifest an intent to undercut the Union. SYO has a longstanding relationship with the City, including the operation of concession stands at the Hayes Court Complex as well as investments in its

facilities. The Parks & Recreation Division has a history of working with citizen groups. The SYO request to maintain the Complex precedes the bargaining difficulties noted in the record. This does not excuse the City's violation of the second sentence of Section 3, H), but indicates the facts are less egregious than the Union's proposed remedy asserts.

Nor does the record afford unequivocal support for the Union's conduct. The assertion that Section 9.02 creates a buffer for the job security interests of regular, full-time employees obscures that seasonal employees are unit employees, and that the City is facing financial pressure. Money spent on seasonal employees, whether produced in bargaining or through an arbitration award, is money not available for regular, full-time employees. How to reconcile the short-term economic interests of seasonal employees with the long-term economic interests of regular, full-time employees is an issue more complex than the Union's proposed remedy acknowledges. No less troublesome is the compulsion on the City to hire seasonal employees, a result not stated in the labor agreement. The Union's proposed remedy ignores that it has shown no willingness to seek, much less participate in a face-to-face consultation with the City. The refusal to consult in March prior to the implementation of the Subcontract coupled with the assertion of a remedy seeking to overturn the Subcontract, in the absence of any Union request to "consult" with the City, seeks to gain in arbitration a result never secured in bargaining.

More specifically, the Council action of March 2 did not finalize the Subcontract. Rather, it approved Morgan's recommendation to forego the normal bidding process, thus making execution of the Subcontract possible. It is not clear when the City and SYO executed the Subcontract. It may be that the notice of March 10 came prior to the execution of the Subcontract. Ambiguity on this point does little to support the City's reading of Section 3, H). As noted above, this is insufficient evidence to warrant a conclusion that the Union waived the operation of the second sentence of Section 3, H). However, the ambiguity affords little support for the Union's remedial request. The Union made no effort to "consult" regarding the Subcontract and none to determine its status, preferring to file a grievance. City action regarding reduction of seasonal employees was not a secret. Union actions indicate less a desire to consult than a desire to have the Subcontract set aside. The second sentence, however, makes such a result achievable after consultation. The evidence indicates the lack of consultation was a mutual effort.

This creates a paradox. The remedy should produce the consultation that the second sentence of Section 3, H) puts "prior to" a subcontract. However, the Union's remedy produces a result that would remedy a violation of the first sentence of Section 3, H), even though the City complied with it. Against this background, the Award states a remedy designed to address the interpretation of Section 3, H), and to require consultation consistent with its second sentence. The Award refers to a Union request for consultation simply because it takes both parties to make consultation meaningful. The Award mentions a Union request to assure that the events of the January LMC meeting are not repeated. The Union's assertion that the City's intent to discuss the Subcontract at that meeting does not relieve it of its obligation under the second sentence of Section 3, H), is persuasive on the merits, but does little to support its remedial request.

That the Award does not restore the status quo prior to the Subcontract is not to say the Subcontract could not be set aside on appropriate facts due to a violation of the second sentence. Rather, it underscores that the grievance does not pose such facts. Restoration of the status quo prior to the Subcontract turns on meaningful consultation or clearer evidence of City violation of the purpose of the second sentence of Section 3, H), which is to permit discussion on alternatives to the Subcontract and its impact. The Union's remedial request has persuasive force in the abstract, but stretches the breach of the contract farther than the evidence warrants.

AWARD

The City did not violate the first sentence of Article 3, Section H) by entering into a Lease, Maintenance and Operation Agreement with the Superior Youth Organization for the Hayes Court Complex. The City did, however, violate the second sentence of Article 3, Section H) by entering into the Subcontract with SYO without prior consultation with the Union, even though the Subcontract complies with the first sentence of Article 3, Section H).

As the remedy appropriate to the City's violation of the second sentence of Section 3, H), the City shall consult with the Union, upon request, concerning its Subcontract with SYO.

Dated at Madison, Wisconsin, this 30th day of June, 2005.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
6851