

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**KENOSHA COUNTY**

and

**KENOSHA COUNTY LOCAL 990,  
AMERICAN FEDERATION OF STATE, COUNTY  
AND MUNICIPAL EMPLOYEES, AFL-CIO  
COURTHOUSE AND SOCIAL SERVICES CLERICAL**

Case 235  
No. 64307  
MA-12863

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**Appearances:**

**Mr. Thomas G. Berger**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of the Union.

**Attorney Frank Volpintesta**, Corporation Counsel, Kenosha County Courthouse, 1010 56<sup>th</sup> Street, Kenosha, Wisconsin 53140-3738, appearing on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein “Union” and “County” or “Employer,” are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on January 11, 2005. Hearing was held on March 14 and June 9, 2005, in Kenosha, Wisconsin. The hearing was not transcribed and the parties completed their briefing schedule by July 5, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

**ISSUES**

The parties were unable to stipulate to the issues. The Union poses the following issues:

1. Did the County violate the collective bargaining agreement when it took bargaining unit work of ordering office supplies and maintaining office equipment for their departments from County employees and reassigned the duties to subcontracted workers?
2. If so, what is the appropriate remedy?

The County suggests the following issues for determination:

1. Was this grievance timely filed within ten working days after the date of the event or occurrence as required by Section 3.4 of the collective bargaining agreement?
2. Did the County contract out bargaining unit work?
3. If so, has there been a sufficient change in circumstances over the past 23 years so as to allow for a revisiting of the 1982 voluntary settlement that is relied upon by the Union as a prohibition on such contracting out?

Based on the entire record, the Arbitrator frames the issues as follows:

1. Was the grievance timely filed within ten working days after the date of the event or occurrence as required by Section 3.4 of the collective bargaining agreement?
2. If so, did the County contract out bargaining unit work in violation of the collective bargaining agreement?
3. If so, what is the appropriate remedy?

### **DISCUSSION**

Prior to 1990, the delivery of social services by the County was accomplished by numerous public and private agencies located at various sites throughout the county. These included, but were not limited to, the Department of Social Services, the Comprehensive Mental Health Board, the Aging Department, Veterans' Services, as well as other state (e.g., Unemployment Compensation Office) and private agencies (e.g., Goodwill Industries).

After 1990, the County developed a "Job Center" concept which called for the housing of many of the major social service providers in one central location.

The Department of Workforce Development including Economic Support and Child Support moved into the Job Center in 1990.

After buying the Job Center building from Goodwill Industries in 1999, the County began the process of moving additional County departments into the facility.

In October, 2003, five additional divisions were relocated into the Job Center.

As these divisions moved into the Job Center building, the County took ordering of supplies work formerly performed by Union employees in these divisions and subcontracted the work to Goodwill Industries employees. This meant that unlike prior to the move when Union employees at the Aging Division, for example, filled out the requisition form (either through E-Way or the special goldenrod order form) and sent it on to Central Purchasing, now the E-way or the goldenrod form is filled out by a Goodwill employee the way its been done for the past fifteen years for the Division of Workforce Development at the Job Center. The order, after supervisory approval, is forwarded to the County Purchasing Division.

The threshold issue in this case is whether the grievance is procedurally defective.

The County asserts that the Union did not comply with the contractual grievance procedure when it failed to timely file a grievance.

Section 3.4 of the collective bargaining agreement provides that “Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred.” The County claims that the changes complained about were made in 1990 with respect to the Division of Workforce Development and in 2003 with respect to the five remaining divisions and that the grievance was filed more than ten days later, on February 9, 2004.

The County is correct that the work in question has been performed by Goodwill employees with respect to the Division of Workforce Development since 1990. The County also began taking this work away from the instant bargaining unit employees shortly after the move of the five divisions in October, 2003. However, the transfer of this work to Goodwill employees was not completed until sometime in late January or early February, 2004. In addition, the grievance involves more of a complaint of “continuing” violations of the agreement in the sense that the act complained of (subcontracting of unit work) may be said to be repeated from day to day, with each day treated as a new “occurrence.” ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, (BNA, 6<sup>TH</sup> ED., 2003), PP. 218-219. Based on the foregoing, the Arbitrator rejects the County’s procedural objection and finds that the answer to the question framed by the undersigned is YES, the grievance was timely filed within ten days after the date of the event or occurrence as required by Section 3.4 of the collective bargaining agreement.

The County next argues that this grievance is controlled by the decision in a prior grievance arbitration award issued by Coleen A. Burns. KENOSHA COUNTY, CASE 212, No. 62234, MA-12207 (06/04).

In KENOSHA COUNTY, *SUPRA*, p. 15, Arbitrator Burns concluded, in material part, that the performance of the “host services” work in dispute by Goodwill workers did not violate the express terms of the parties’ collective bargaining agreement because the conduct of the parties in processing a 1990 grievance evidenced a mutual understanding that the County had the right to contract with Goodwill to perform the disputed “host services” work at the Job Center. The work in dispute in the aforesaid case involved certain “host services” work performed by Goodwill workers at the Job Center which were clerical in nature. These “host services” included, general reception services, answering and message services, mail collection and distribution and wayfinding.

Beginning with the initial move to the Job Center by the Division of Workforce Development in 1990, the one remaining purchasing function, i.e., the filling out of the requisition form, that remained with the Division of Workforce Development after the creation of the Purchasing Department, became, along with building maintenance, part of the “host services” provided by Goodwill Industries as the lessor. Goodwill employees continue to requisition/order materials or supplies from County Purchasing for the Division of Workforce Development to this date. When the five new divisions moved to the Job Center in 2003, they were similarly provided access to the same requisitioning “host services” provided by Goodwill to Workforce Development including the requisition and ordering of supplies. Like the “host services” addressed by Arbitrator Burns addressed in the aforesaid case, the requisition and ordering of supplies is primarily a clerical function.

As noted above, the parties by their conduct in processing an earlier grievance have evidenced a mutual understanding that the County has the right to contract with Goodwill to perform certain clerical “host services” work at the Job Center. The ordering and requisition of supplies and materials is another “host service” provided by Goodwill employees to the County at the Job Center. The parties by their conduct over the past fifteen years in allowing Goodwill employees to order and requisition supplies at the Job Center have evidenced a mutual understanding that the County has the right to contract with Goodwill to perform this disputed “host service” work at the Job Center. As such, these purchasing and ordering duties performed at the Job Center are not protected bargaining unit work. *ID.* Consequently, the parties’ agreement does not restrict the County’s right to contract with Goodwill to perform the work in dispute. *ID.*

The Union argues, however, that KENOSHA COUNTY, *SUPRA*, is distinguishable from the instant dispute. In this regard, the Union claims that the Burn’s decision was predicated on the fact that the work in question was not routinely performed by a bargaining unit employee and where no job classification or description outlined the responsibility to perform work for a private agency. In this instant case, the Union points out that “this work was routinely and

continuously performed by and in many locations still is performed today by bargaining unit members” and further “the work is outlined in job classifications.”

The Union is correct in pointing out that the ordering of office supplies and the preparation of purchase requisitions is work that routinely was performed by bargaining unit members prior to the move to the Job Center building in October 2003. (Union Exhibit Nos. 4 and 5). But it is not work that has been performed by bargaining unit members at the Job Center building for at least fifteen (15) years. Instead, the work was performed by Goodwill employees as part of the “host services” provided by those workers at the Job Center. As such, this is not protected bargaining unit work when it is performed at the Job Center. *KENOSHA COUNTY, SUPRA*, pp. 15-16.

The Union also claims that Arbitrator Burns made her decision relying on the fact that the Union filed a grievance in the matter and then failed to pursue it. The Union states that did not happen here. “The Union filed the grievance in this case as soon as John Jansen notified staff that the work was to be taken from them and given to subcontractors.”

The Union is correct in pointing out that Arbitrator Burns relied in part on the Union’s failure to pursue a grievance challenging the County’s contract with Goodwill to perform “host services” work because the work was Union bargaining unit work for her conclusion that the conduct of the parties in processing the grievance evidenced “a mutual understanding that the County has the right to contract with Goodwill to perform the disputed ‘host services’ work at the KCJC.” *KENOSHA COUNTY, SUPRA*, p. 15. The Union chose not to pursue its grievance on Goodwill employees performing “host services” at the Job Center “because the Union was not sure that it could win the grievance and it did not want to set a precedent for the future. *ID.* The Union’s active pursuit of this grievance, however, does not lead to a different outcome. The Union here for fifteen years has allowed the performance of the work in question to be performed at the Job Center as a “host service” by Goodwill employees. As such, the Union has abandoned its claim to this type of work at the Job Center.

Based on the above, the Arbitrator agrees with the County that this grievance is controlled by the decision of Arbitrator Burns in *KENOSHA COUNTY, SUPRA*.

In view of the foregoing, the Arbitrator finds that the answer to the issue as framed by the Arbitrator is NO, the County did not contract out bargaining unit work in violation of the collective bargaining agreement.

Having reached the above conclusion, it is not necessary to address any other arguments of the parties in support of their positions.

Based on all of the above, and the record as a whole, it is my

**AWARD**

That the grievance is denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 19th day of December, 2005.

Dennis P. McGilligan /s/

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Dennis P. McGilligan, Arbitrator

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