BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HORICON EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

SCHOOL DISTRICT OF HORICON

Case 26
No. 65023
MA-13089

(Subcontracting Grievance)

Appearances:

Paula S. Voelker, UniServ Director, Winnebagoland UniServ, on behalf of the Horicon Educational Support Personnel Association.

Daniel Mallin, Staff Counsel, Wisconsin Association of School Boards, on behalf of the Horicon School District.

ARBITRATION AWARD

The Horicon Educational Support Personnel Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission provide a panel of Commissioner/staff arbitrators from which the parties could select an arbitrator to hear and decide the instant dispute between the Association and the Horicon School District, hereinafter the District. Thereafter, the parties selected the undersigned, David E. Shaw, to arbitrate in the dispute. A hearing was held before the undersigned on February 9, 2006 in Horicon, Wisconsin. There was no stenographic transcript made of the hearing and the parties completed submission of post-hearing briefs by April 10, 2006.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but could not agree on a statement of the substantive issue and have agreed the Arbitrator will frame the issues to be decided.

The Association would state the issues as follows:

> Has the District violated its obligations under the collective bargaining agreement when it laid off custodial/maintenance employee Michael Litterick, and continued to outsource custodial/maintenance work by employing substitutes, lawn mowing services and two individuals from Experience Works?
>
> If so, what is the remedy?

The District would state the issues as follows:

> Was the layoff of Mike Litterick the result of subcontracting?

The District stipulated the issue of remedy is also before the Arbitrator, if the Association prevails on some part of its claim.

The Arbitrator concludes that the issues to be decided may be stated as follows:

> Did the District violate the parties' collective bargaining agreement when it laid off custodial/maintenance employee Michael Litterick while continuing to subcontract lawn mowing services, to employ substitute custodial employees, and to participate in the Experience Works program?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 2004-2006 Agreement are cited, in relevant part:

ARTICLE IV – MANAGEMENT RIGHTS

> Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement. These rights include, but are not limited by enumeration to, the following rights:
>
> A. To direct all operations of the school system;
> B. To establish and require observance of reasonable work rules and schedule of work;
> C. To hire, promote, transfer, schedule and assign employees in positions within the school system;
> D. To suspend, discharge and take other disciplinary action against employees;

E. To relieve employees from their duties because of lack of work or any other which is not arbitrary or capricious;
F. To maintain efficiency of school system operations;
G. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal court or agency decisions or orders;
H. To introduce new or improved methods or facilities;
I. To select employees, establish quality standards and evaluate employee performance based upon written job descriptions;
J. To install and require use of time clock;
K. To determine the methods, means and personnel by which school system operations are to be conducted;
L. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
M. To judge to the extent to which the required work shall be performed by employees covered under this agreement;
N. To discontinue operations or services;
O. To contract out for goods or services, provided no bargaining unit member is laid off or reduced in hours as a result of the subcontracting.
P. The Management's exercise of the foregoing rights and the adoption of policies, rules and practices shall only be limited by the terms of this Agreement and then only to the extent such terms are in conformance with the constitution and laws of the State of Wisconsin and the United States.

ARTICLE V – PROBATIONARY AND EMPLOYMENT STATUS

A. All newly hired employees shall be on probation for a period of ninety (90) working days from the initial date of their employment, during which period such newly hired employee may be disciplined or discharged at the discretion of the Employer, so long as the reason is not illegal or unlawful. Just cause protections (under Article XV and anywhere else provided in this collective bargaining agreement) do not apply to the discipline or discharge of a probationary employee.

1. Temporary and casual employees are defined by Wisconsin Employment Relations Commission decisions. A temporary employee is an employee who has a fixed and limited employment term, such as an employee substituting for a regular employee on long term leave. A casual employee is an employee who may refuse to work on any particular day without ending the employment relationship. A day-to-day substitute is a casual employee. Temporary and casual employees are not members of the bargaining unit.

. . .

13. The Employer shall offer necessary overtime to qualified employees working in the building where the overtime is to be performed on a rotating basis. If an employee refuses an offer of overtime, that employee loses his or her turn in the rotation and the overtime will be offered to the next qualified employee in the rotation. If all qualified employees refuse the overtime, the overtime shall be assigned to the least senior qualified employee in the building.

. . .

ARTICLE VI – MISCELLANEOUS CONDITIONS OF EMPLOYMENT

. . .

2. Whenever an employee is required to fill in or substitute for an absent or incapacitated employee for three or more consecutive days, he/she shall be compensated at their regular rate of pay or the rate of the labor grade he/she is working in, whichever is greater. Employees will return to their regular rate of pay when they return to their regular assignment.

. . .

ARTICLE XI – REDUCTION IN STAFF/RECALL

A. In the event the Board determines to reduce, (1) the number of employee positions (full layoff) or (2) the number of hours in a position (partial layoff), the provisions set forth in this section, Reduction in Staff/Recall, shall apply. The District shall not lay off (full or partially), an employee for his/her performance or conduct except during the probationary period or where the District has complied with the requirements of Article XV Discipline and Discharge.

Once the Board has determined to eliminate positions, and it becomes necessary to lay off employees, the following procedure shall be used:

. . .

6. For purposes of the article "qualified" shall be determined by the district based on job descriptions. The District may require the employee to demonstrate his or her qualifications before allowing

the recall. The District may require the employee to take a test to measure his or her qualifications, including a test conducted by an outside agency (such as Manpower) if such test is required of all final applicants for a position.

7. Recall Employees who are laid off shall be offered recall in direct order of seniority to vacant positions which they are immediately qualified to fill. Recall rights shall exist for two years following the effective date of layoff.

. . .

B. MISCELLANEOUS PROVISIONS

1. No temporary or substitute appointments shall be made by the District while there are laid-off employees willing and available who are immediately qualified to fill the vacancies.

. . .

ARTICLE XIX – TERM OF AGREEMENT

1. The provisions of this Agreement shall be in full force and effect from July 1, 2004 through June 30, 2006.

. . .

3. This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. Any supplemental amendment to this agreement shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any further breach of this Agreement.

. . .

BACKGROUND

The District has two school buildings, the High School and the Van Brunt Elementary/Middle School, and employs employees in the classifications of K-12 Maintenance, Custodian/Maintenance, and Cleaner to maintain and clean those buildings and grounds. These employees are in the bargaining unit represented by the Association.

In the Spring of 2005, the District determined that it was necessary for budgetary reasons to reduce its custodial staff by 8 hours/day for the 2005-2006 school year, which began July 1, 2005. It did so primarily by going to a cleaning schedule of every other day at the High School from cleaning classrooms every day, as it had done in the past. Ultimately, this resulted in one less custodian/maintenance position at the High School. Mike Litterick, having been hired March 29, 2004, was the least senior Custodian/Maintenance employee and received a notice he was being laid off effective June 30, 2005.

Buildings and Grounds Supervisor Terry Mayer testified that he discussed the availability of a long-term substitute Cleaner position with Litterick in mid-June of 2005, and offered him the position at the Cleaner contractual wage rate to start July 1, 2005. According to Mayer, Litterick told him that he would be better off on Unemployment Compensation and doing some "side jobs". The position was available due to a regular employee being on a long-term leave of absence since May of 2005. James McCartney, District Administrator since 2003, testified that he asked Mayer to inquire if Litterick would be interested in the position. According to McCartney, he subsequently asked Mayer if he had talked to Litterick about the Cleaner position and that Mayer responded that Litterick felt he was better off with Unemployment Compensation and doing odd jobs. Also, by letter of June 21, 2005, McCartney offered the long-term substitute Cleaner position to Litterick. McCartney also testified that he discussed the matter with Paula Voelker, the UniServ representative for the bargaining unit, and that she had indicated that health insurance was an issue, to which he responded he could consider it. According to McCartney, Voelker advised McCartney she would check on it, but he never heard back from her in that regard. Litterick testified that he did not remember talking to Mayer at the time about a long-term substitute position.

Mayer also testified that due to the reduction in staff, he now works approximately one hour per day helping out in the cafeteria at Van Brunt over the lunch hour, and that if he cannot make it, he has a bargaining unit employee work it as overtime.

Mayer further testified that the District did not have any temporary Cleaners or substitute Custodians in the Summer of 2005, except when unit employees were on vacation or to cover the employee on medical leave, and that all of the substitutes used during that time were unit employees.

Since 1986, the District has participated in a federally-funded program to provide community services and work experience for elderly, disabled people with the goal of retraining them for re-entry into the workforce and providing them with an opportunity to interact in the community. The program was formerly known as "Green Thumb", but now is titled "Experience Works". The individuals in the program are paid the minimum hourly wage by Experience Works. The District does not pay any type of compensation to these individuals, nor does it control the number of hours they work. The District has contributed an annual donation to the program, which had been $650, but was increased to $750 in 2005-06. The District provides the work opportunity and supervision.

There are currently two individuals in the program working in the District, Mr. P. and Mr. E. Mr. P. has been working in the District since 1990, is 71 years of age with mental limitations. Mr. P. is assigned to perform repetitive daily tasks, e.g., emptying the recyclables barrel, vacuuming, dust mopping, emptying trash, and occasionally, cleaning windows. According to Mayer, it takes Mr. P. four hours to do work that a unit employee would be expected to do in one hour. Mr. E. began working in the District in 1998, is 77 years of age with serious physical ailments that require him to frequently stop and rest. He is assigned to assist a Custodian/Maintenance or Maintenance employee, or sometimes Mayer, with light maintenance tasks, e.g., light carpentry, electrical or plumbing tasks, or cleaning. Mayer testified that the tasks do not really require two people to do them and that it takes Mr. E. four hours to do what a unit employee would complete in an hour and a half. Both Mr. P. and Mr. E had been working 22-24 hours/week until mid-January of 2006, when Experience Works reduced their hours to 18 hours/week. Association President Shirley Kuhaupt testified, and Mayer agreed, that the duties performed by Mr. P. and Mr. E. are duties performed by Custodial/Maintenance employees. She also noted that there were no unit employees laid off or reduced in hours when Mr. P. and Mr. E. started working in the District.

Mayer testified that if Mr. P. and Mr. E. were no longer working in the District, the work they had been performing would be absorbed by existing employees and no position would be created to replace them. When they are absent, neither Mr. P. nor Mr. E. is replaced. When unit employees are absent, they are usually replaced after one day, unless an employee at the High School is absent on a scheduled cleaning day, in which case they are replaced immediately.

In the summer of 1999, the then-District Administrator, Dr. Ballwahn, notified the Association it was going to contract out lawn maintenance work which had previously been performed by bargaining unit employees. According to Armin Blaufuss, the UniServ Director who represented the unit at that time, Ballwahn indicated the District needed to get the new school facility up and running and needed all of its Custodian/Maintenance employees to work on that, and that the agreement was that the District would be able to contract out lawn mowing services and no employee would be affected by it. According to Blaufuss, it was the Association's understanding that this arrangement was to be temporary and not intended to exclude such work from the unit in the future. Blaufuss put this understanding in writing in a letter of August 9, 1999 to Ballwahn (Association Exhibit 4). Blaufuss further testified that the notation "8-9-99 OK" on the letter was Ballwahn's. Since 1999, the District has contracted out all of its mowing work. Since 2000, the District has sub-contracted with K-5 Services to perform all the lawn mowing and landscape work. Payment is based upon the number of times K-5 mows the grounds. K-5 provided an average of 12 hours/week of such services for the months of April to November of 2005.

In 2001, the Board considered subcontracting certain management and training functions and Blaufuss wrote the then-District Administrator listing the Association's concerns and requesting answers to a number of its questions. Ultimately, the Board decided to create Mayer's current position and promoted him to the position. Mayer was the Association's President at the time.

In 2002, the District apparently considered subcontracting some custodial work and the Association's representative again noted the Association's position that the District could not do so, if it resulted in the layoff of bargaining unit members (Joint Exhibit 18).

The Association filed a grievance regarding Litterick's being laid off while there was bargaining unit work being performed by non-bargaining unit employees. The grievance stated, in relevant part:

Initial Issues

> The Horicon Educational Support Personnel Association believes the Horicon School District has violated the collective bargaining agreement by eliminating a Custodial/Maintenance position at the Elementary/Middle School and laying-off a Custodial/Maintenance position at the High School, while subcontracting for this same work.

Articles Violated

> Article IV Management Rights
>
> Article XI Reduction in Staff/Recall
>
> And all other applicable Articles

Statement of Grievance

> The Horicon School District has violated the collective bargaining agreement by engaging in the subcontracting of Custodial/Maintenance and Cleaner work, which has resulted in the elimination of a Custodial/Maintenance position held by a bargaining unit member and the lay-off of a bargaining unit member in the same category. The Association has a right to the work being done by the non-bargaining unit members.

The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association asserts that the work being performed by K-5 Services, Experience Works employees, substitutes and Mayer is bargaining unit work and that having this work being performed by non-bargaining unit members constitutes subcontracting. Mayer conceded that the work performed by K-5 and the Experience Works employees has historically been performed by bargaining unit members.

In response to the Association's information requests, the District provided information that established the District employed substitutes in the Custodial/Maintenance and Cleaner categories for approximately 58 hours per week, or 1.45 FTE positions.

Further, the District conceded that the work Mayer performs during the lunch period at Van Brunt has historically been performed by bargaining unit members. Mayer testified that the number of overtime hours he is working have increased from the prior year. The work was thus not absorbed by bargaining unit members, but is being performed by Mayer, who is not a member of the bargaining unit.

The bargaining unit employee, Litterick, is willing and able to perform the work, but the District has chosen to eliminate Litterick's position, rather than end or modify its contracts with the subcontractors. For the District to contract with any group other than the Association to perform this work, or to assign such work to another contractor constitutes "subcontracting".

The Association cites the following from the award of Arbitrator Greco in BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT, MA-10441 (Greco, 1999) as a definition of "subcontracting":

> "Subcontracting has been defined as:
>
> making an agreement to have another person. . .do construction, perform service, or manufacture or assemble products that could be performed by payroll unit employees." This definition underscores two features of subcontracting that are most significant in labor relations and arbitration. The first is that a subcontract is an agreement that operates independently and potentially in derogation of a collective bargaining agreement. The second is that a subcontract leads to the performance by persons outside of the bargaining unit of work that might otherwise be performed by employees within the unit (footnote citations omitted).
>
> See *Labor and Employment Arbitration, Vol. 1*, Bornstein, Gosline, Greenbaum 25.01[1]pp. 25-2. (Matthew Bender, 1999)"

The circumstances in this case fit that definition. The contracts or understandings with K-5, Experience Works and the substitute employees operate independently and in derogation of the parties' Agreement, and lead to the performance by those outside the bargaining unit of work that might otherwise be performed by unit members.

Next, the Association asserts that the layoff of Litterick was the direct result of the District's decision to outsource the work. The phrase "as a result of" in Article IV, O, of the Agreement, does not imply a particular series of events. The fact that K-5 and Experience Works employees were working in the District before Litterick's position was eliminated

cannot be interpreted to mean that he was not laid off as a result of subcontracting. The District had a choice as to how it would deal with its budget concerns, between eliminating its subcontracts or a unit position, and by choosing the latter, Litterick's layoff resulted from the District's decision to maintain its subcontracting arrangements.

Blaufuss' testimony establishes that in the past, every time the Association became aware the District was considering outsourcing, it put the District on notice that it believed that any outsourcing could not be accomplished without causing a layoff or a reduction in hours of bargaining unit employees. Blaufuss also testified that the Association's understanding regarding the contracting out of lawn maintenance work in 1999 was that it was "temporary" and that the action was not intended to exclude such work from the bargaining unit. Blaufuss put the Association's understanding in writing to the District. There is no evidence in the record indicating the District disagreed with that understanding.

In 2001, the District again considered outsourcing of management and training functions, but did not outsource bargaining unit work in light of the Association's concerns and its contractual obligations.

The Association disagrees with the District's contention that the work performed by the Experience Works employees is minimal. Those individuals work a combined 36 hours per week. While Mayer testified that they work at approximately a quarter of the rate of bargaining unit members, there has been no real analysis of the rate at which these individuals work and Mayer's conclusions are speculative at best. The 36 hours per week attributed to Mr. P. and Mr. E. should go to Litterick.

The Association asserts the information it requested from the District establishes that the total hours per week of work performed by subcontractors (K-5, Experience Works, substitutes) is 106 hours from April to November of 2005. The rest of the year, the District subcontracted (Experience Works and substitutes) 94 hours per week. Mayer's 3.75 hours per week working at Van Brunt for the lunch period is in addition to these totals. Further, compared to the prior year, the overtime hours for the custodial/maintenance department increased from an average of 43 hours per month to an average of 66 hours per month. This is work being completed by bargaining unit members to which Litterick is entitled. Where the District has chosen to subcontract in lieu of recalling Litterick, the subcontracting should not be upheld. Citing Elkouri and Elkouri, *How Arbitration Works* (Sixth Edition), pp. 746-747.

The Association asserts the District has not provided any justification for subcontracting the work. The Agreement does not state that the District has the right to subcontract in light of budgetary pressures, regardless of whether bargaining unit members are laid off or reduced in hours; rather, it sets forth restrictions in order to protect the bargaining unit members' jobs. Further, the goal of providing retraining to the Experience Works employees was accomplished years ago. The program is not intended for long-term employment at a host agency.

The District also provides no basis for its claimed financial constraints. Surely, the District was aware of its financial status in 2004 when it hired Litterick.

The District's claim that it would have to purchase a new tractor, if it terminated K-5's services, is belied by Mayer's testimony that the District already owns two garden tractors with mowing decks only slightly smaller than that of the old tractor it has.

Last, the Association asserts that to find in the District's favor would establish a precedent that would permit the District to eliminate all bargaining unit members over time. The job security for unit members would be greatly diminished, if such subcontracting work were allowed while unit members are laid off. The basic premise of Article IV, O, and the recognition and seniority provisions in the Agreement, is to protect the job security of bargaining unit members. The Association cites the following in this regard:

> "Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. . .
>
> The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore one on of the contract's basic purposes."
>
> *How Arbitration Works*, Elkouri and Elkouri, (Sixth Edition) p. 760, quoting Arbitrator Wallen.

The above was cited with approval by the arbitrator in the SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE award (MA-10441) cited previously:

> "The aforementioned arbitrable authority establishes one underlying truth: unless expressly stated otherwise, a subcontracting proviso by its very nature is meant to protect bargaining unit employees from being laid off or having their hours reduced if any bargaining unit work for which they are qualified to perform is being performed by non-bargaining unit employees."

The Association concludes that to allow the District to subcontract bargaining unit work while a bargaining unit member is on layoff would change the meaning of the parties' Agreement. The District's contention that this is what the Agreement permits is disproved by the very inclusion of Article IV, O, restricting outsourcing and providing job security to the bargaining unit members.

The Association requests that the grievance be sustained and the District be ordered to reinstate Litterick and make him whole for any lost wages and benefits resulting from being laid off.

District

While Article IV – Management Rights, Section O, references "subcontracting", the Agreement does not further define that term, and there is no further explanation of what the parties intended. Here, two key questions of contract interpretation must be resolved by the Arbitrator: (1) Did the District engage in "subcontracting" within the meaning of Article IV, O, and (2) if so, was Litterick laid off "as a result of the subcontracting"?

In this case, the words of the Agreement are the only available guide to the meaning of the ambiguous language of Article IV, O, as there is no evidence regarding bargaining history or past practice from which to draw conclusions regarding the parties' intent. Without sufficient evidence to show an actual "meeting of the minds", the Arbitrator must determine the most reasonable construction of the language and whether the Association has met its burden, as the moving party in a non-discipline case, of proving the District violated the parties' Agreement.

The District asserts that while it did contract out for lawn and landscape services in 1999, none of the other alleged instances raised by the grievance call into question "subcontracting" within the meaning of Article IV, Section O. Any attempt to raise questions under Article XI, Section B, 1, concerning the use of substitute employees following June 30, 2005, would represent an improper amendment of the grievance. Such a claim is not within the legitimate scope of the instant grievance, nor does the use of substitutes constitute "subcontracting" within the meaning of Article IV, Section O.

Both the second step grievance filed on May 2, 2005 with the District Administrator, and the third step grievance filed at the Board level, raise only a claim concerning alleged "subcontracting", and that is the only claim the Board addressed. It would be unfair for the Association to attempt to assert an entirely new and separate claim under Article XI, B, 1, at this stage when the Association neither put the District on notice of its intent to raise a new claim, nor obtained the District's or Arbitrator's consent to amend the grievance in advance of the hearing. To permit the Association to raise such an untimely claim would raise numerous problems: (1) The claim would be untimely under Article XII, 4, of the grievance procedure. The Association was aware the District was employing long-term substitute employees on and after Litterick was laid off; (2) The administration and the Board would be denied the opportunity to participate in the contractually-required dialogue through the various steps of the grievance procedure; (3) after offering Litterick the opportunity to work as a long-term substitute, without a follow-up response, the District had the right to assume Litterick was voluntarily choosing not to accept the offer. Any further claims to the work were waived by Litterick's rejection of the offer and the Association's inaction; (4) the claim concerning "subcontracting" in no way embraces any claims regarding substitute employees working for the District in the summer of 2005. By definition, they are employees of the District, and some are bargaining unit members, and are not "subcontractors" to whom the District has contracted out for services. Citing DRUMMOND SCHOOL DISTRICT, MA-4458 (Arbitrator Gratz, 1987); BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT, MA-3900 (Arbitrator Burns,

1986); (5) the facts giving rise to such a claim regarding the use of substitute employees had not yet occurred at the time the grievance was filed and considered. Thus, the grievance cannot be construed to cover any such claims; and (6) the District had no opportunity to defend against such a claim prior to the hearing.

Therefore, if the Association attempts to raise a claim regarding the use of long-term substitute employees in the summer of 2005, it should be dismissed without regard to the merits. However, if it is addressed, it can be dismissed on the merits as well, as the District's own employees clearly are not "subcontractors" within the ordinary and common meaning of that term. This is further underscored by the parties' use of the term "subcontracting" as a coterminous synonym for the phrase "to contract out".

The District's participation in the Experience Works program also cannot reasonably be construed as "subcontracting". The record establishes that the District is essentially serving as a sheltered work outlet for two elderly, disabled individuals. The District has no control over the level of service they provide, and the amount of necessary tasks they perform on any given day is *de minimis*. The District must also structure each individual's placement to accommodate their unique needs. These individuals serve the District somewhat analogous to a volunteer. In most cases, a volunteer performing a *de minimis* amount of work would not be considered a "subcontractor", as the term is normally used. Further, it is implausible to think the District takes into account Mr. P's and Mr. E's work in making any substantive decisions regarding staffing or service levels.

Next, the District asserts Litterick was not laid off "as a result of" any "subcontracting." The Arbitrator must determine the most reasonable construction of this ambiguous language and then apply the provision to the facts of this case to determine whether the Association has met it burden of proving the District violated the Agreement. The key question is whether the Association can stretch the language of Article IV, Section O, to require the District to discontinue all long-standing subcontracting arrangements whenever a bargaining unit member is faced with layoff, even though the District did not expand the scope of subcontracting at any time connected with the layoff decision, the alleged subcontracting being challenged began years before the laid off employee was hired, the District had eliminated and consolidated the tasks the laid-off employee had been performing and/or the District had transferred a discrete function in its entirety to outside service providers several years prior to the layoff decision, such that the laid-off employee's position never involved any responsibilities related to that function. The District's position is that the most reasonable interpretation of Article IV, Section O, does not require the District to discontinue long-standing "subcontracting" arrangements in such circumstances.

The District offers what it feels are four arguable constructions of Article IV, Section O:

Interpretation A:
Article IV, O, addresses only a new subcontracting arrangement or the present

> expansion of an existing subcontracting arrangement which transfers the present work of a unit member resulting in laying off a unit member, but not the continuation of subcontracting.
>
> Interpretation B:
> A bargaining unit member's layoff is not the result of subcontracting where (1) the District merely continues, without expansion, long-standing subcontracting arrangements that existed prior to the laid-off employee's date of hire; or (2) under all of the facts and circumstances, it is unreasonable to infer a direct, causal connection between the District's decision to reduce hours within the affected bargaining-unit job classification and any new or ongoing subcontracting arrangement.
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> Interpretation C:
> A bargaining-unit member's layoff is not the "result of" subcontracting unless, following the effective date of the layoff, the District continues any subcontracting arrangement that (1) began or expanded at any time since the employee began working in the affected job classification, and (2) affected the duties of the job classification occupied by the employee.
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> Interpretation D:
> Before the District lays off any bargaining unit member, the District must first discontinue all existing subcontracting arrangements if, at any time in the past, any bargaining-unit employee in the affected job classification had ever performed any of the work that is included in the subcontracting arrangement. The bargaining unit forever retains such a claim on all tasks that have ever been performed by any bargaining-unit employee.
>
> . . .
>
> The District's duty to discontinue all such existing subcontracting arrangements prior to any layoff exists (1) even if discontinuing the subcontracting arrangement will not result in any additional hours of work being made available to bargaining-unit employees; (2) even if the employee identified for layoff was first hired years after the subcontracting arrangement began; and (3) regardless of any costs associated with transferring the services to a bargaining-unit employee.

While the list is not exhaustive, what is significant is that the Association cannot prevail unless it is able to show that D is the most reasonable interpretation of Article IV, O. It is the District's position that B is the most reasonable interpretation because, absent evidence showing a meeting of the minds, B allows for a fact-specific analysis to determine whether there is a nexus between the decision to subcontract and the decision to lay off.

Interpretation A covers circumstances about which there is no dispute that Article IV, O would prohibit the subcontracting out of present unit work while at the same time laying off unit members who had been performing the work. It is plausible to read Article IV, O, to apply solely to the possible future expansion of subcontracting in scenarios involving the direct and immediate transfer of work from bargaining unit members to a subcontractor and have no application whatsoever to the mere continuation of a subcontracting arrangement that predated the current collective bargaining agreement. Such a "forward looking" view is consistent with the plain wording of the provision and supported by the attempt to harmonize the provision with the management rights identified in Article IV, Sections K and M, as well as the parties' express agreement in Article XIX, Section 3 that the current agreement "supersedes all previous agreements." The latter provision signaling the parties' recognition that the body of work performed by the bargaining unit can change over time, with some work being added and some work being eliminated.

While A is reasonable, and clearly superior to D's interpretation, B recognizes that the possibility that the order and temporal proximity of the layoff and subcontracting decisions may not always be dispositive in determining whether the layoff was "as a result of the subcontracting." B recognizes that the phrase "as a result of" implies a reasonably direct causal connection between the decision to layoff and the decision to subcontract for services, and that such a direct connection is likely to be absent when the employer merely continues an existing subcontracting arrangement and a significant intervening event separates the decision to subcontract from the layoff, but that such a connection may exist even where the employer is not expanding subcontracting arrangements at the exact same time it is laying off a unit employee, and that in some circumstances it is possible the employer would make the same layoff decision regardless of whether an existing subcontracting arrangement is continued or terminated, and that if the parties had intended to create a single bright-line rule, they could have easily drafted such language.

The District cites MONROE COUNTY (Arbitrator McLaughlin, 2005), MA-12941 as a case involving language nearly identical to that in Article IV, O, where the arbitrator rejected such a bright-line rule and applied a fact-specific analysis analogous to Interpretation B, focusing on whether the subcontracting decision expanded the scope of the employer's existing subcontracting arrangements during a period of layoff, whether the subcontracting decision was consistent with the parties' rights and obligations expressed elsewhere in the contract, and whether there was any evidence of bad-faith manipulation on the employer's part. The arbitrator considered that even though the subcontracting occurred contemporaneously with the layoffs and arguably prolonged the layoffs, the layoffs were not the result of the subcontracting, as the evidence showed the decision to subcontract was consistent with the scope of pre-existing subcontracting and likely would have been the same without regard to the layoff.

Interpretation C is really just B restated as one of many possible bright-line rules. The danger of such a bright-line rule being that it could be overinclusive or underinclusive. However, this case can be decided in the District's favor by applying the plausible bright-line

rule that when the employer merely continues a subcontracting arrangement that was in place prior to the date the laid off employee's position was posted and filled, there is no reasonable connection between the prior subcontracting decision and the later layoff decision. While the employee could not reasonably expect the employer to discontinue a long-standing subcontracting arrangement for his benefit, the more important point is that the employer could have subcontracted out the work instead of hiring the employee. Here, the District's decision to fill the position, instead of subcontracting the work, was an intervening event that severed any arguable connection between the District's 2005 decision to layoff and its much earlier decision to subcontract lawn maintenance work and to participate in Experience Works.

According to the District, the Association's claims in this case rely on Article IV, O, being interpreted as in Interpretation D. Under that interpretation, to find a violation it is only necessary to determine that a bargaining unit employee has been laid off and that the District is subcontracting any work that could be shifted to the affected job classification. Such an interpretation is unreasonable, or at least far less reasonable than other interpretations. To interpret Article IV, O in that manner would require the Arbitrator to improperly rewrite Article IV, O, in a manner that is contrary to the existing language that includes "as a result of". Had the parties intended to establish such an absolute prohibition, they knew how to draft such language, e.g., Article XI, B, 1.

Further, Interpretation D relies on an implicit definition of bargaining unit work as any task that has ever been assigned to a member of the bargaining unit in the history of the union, a definition that is nowhere stated in the contract. Such a definition must be rejected as it would make Article IV, Sections E, K and M meaningless. The interpretive task is to grant meaning to all relevant terms of the contract.

Under Interpretation D, there is no limit to the point at which the bargaining unit can assert a claim over a task unit employees once performed. Here, the District transferred all lawn maintenance and landscaping services to an outside contractor in 1999. Since then, not one bargaining unit employee has performed such services, a period spanning three new labor agreements. Yet the Association now asserts the right to recapture that work on behalf of an employee who was not even hired until 2004.

Finally, Interpretation D amplifies the District's incentive to expand the scope of its contracted services by contracting out the work instead of hiring new employees to fill a position. This would obviously work to the long-term detriment of the unit.

The District asserts that interpretation B is the most reasonable construction of Article IV, O. That interpretation requires an assessment of all the facts and circumstances to determine whether it can be reasonably concluded that Litterick's layoff was the result of a subcontracting decision.

Under the facts in this case, it is clear Litterick's layoff was not the "result of" the District's decision to continue to contract out the lawn and landscape services. The District

transferred all lawn and landscape work to an outside contractor in 1999, and no bargaining unit employee has performed such services since. Thus, after 1999 and the signing of three successive labor agreements, the Association cannot now claim it as bargaining unit work. Litterick's position was not posted and filled until 2004, and the District could have contracted out the work of that position instead of hiring Litterick. At the end of the 2004-2005 school year, the District fully eliminated 8 hours of cleaning and maintenance tasks Litterick was hired to perform, and as the least senior employee in the affected classification, he was laid off. This is not a case where the total amount of the work remained static and only the identity of who performed the work changed. There was no expansion of the services contracted out at anytime during Litterick's employment or layoff. Last, a substantial new capital investment in lawn mowing equipment would be required to reassign the lawn work to a bargaining unit employee.

Under these circumstances, the most reasonable conclusion to draw is that Litterick was laid off as a result of the District's budget-driven decision to eliminate 8 hours of daily work that was normally assigned to Custodial/Maintenance employees, and that this budget-driven decision would have been the same, regardless of any alleged subcontracting. Thus, the District did not violate Article IV, Section O, by continuing the long-standing subcontracting arrangement for lawn services while employing and then laying off Litterick.

The District also asserts it did not violate Article IV, Section O, by continuing to offer placements to Mr. P. and Mr. E. as part of the Experience Works program. Assuming, *arguendo*, these individuals could be viewed as "subcontractors", the facts again show that Litterick was not laid off "as a result of" the District's decision to continue in the program after Litterick was hired and after he was laid off.

Both Mr. P. and Mr. E. were placed in the District years before Litterick was hired. The District has not expanded its participation in the program during Litterick's employment or his layoff, but it could have contracted out the work in the Spring of 2004, instead of hiring Litterick. The evidence also establishes that the amount of necessary work Mr. P. and Mr. E. accomplish is *de minimis* due to their age and disabilities and the substance of their work assignments. Further, the District has no control over the level of service provided through the program and does not pay these individuals for their services. The District eliminated 8 hours of tasks Litterick was hired to perform and he was the least senior employee in the affected classification. The decision to reduce staffing was budget-driven, and discontinuing participation in the Experience Works would not result in any meaningful revenue to fund a unit position. Rather than resulting in creating a unit position, the tasks performed by Mr. P. and Mr. E. would be absorbed by existing staff, if participation in the program was discontinued.

The most reasonable conclusion to draw from these facts is that the placements offered through Experience Works do not factor into the District's decisions regarding the long-term staffing and service level to be provided by its employees. The District's decision to layoff Litterick was budget-driven, and would have been the same whether or not the District

continued to participate in the Experience Works program. Thus, the District did not violate Article IV, O, by continuing its participation in the program while employing and then laying off Litterick.

As the Association has failed to prove a violation, no remedy is due.

Association Reply

The Association responds regarding the scope of this grievance, that it has consistently taken the position from the filing of the grievance to the filing of its briefs that "subcontracting" includes service performed by K-5 Services, Experience Works and non-bargaining unit substitutes. This is supported by Association President Kuhaupt's uncontradicted testimony. Further, the District made no objection at hearing upon "discovering" non-bargaining unit substitutes were part of the Association's case.

Contrary to the District's assertion that the grievance does not include instances of subcontracting after the grievance was filed, the "Statement of the Grievance", especially the last sentence, is sufficiently broad to cover work contracted to non-bargaining unit substitutes. Following the District's reasoning would result in the Association to have to continue to file grievances to keep the grievance current. Further, the grievance document cites Article XI – Reduction in Staff, which includes XI, B, 1.

As to the substitute positions, Litterick is willing, available and qualified to perform the work; however, Article VI, 2, entitles an employee who is substituting for another employee to the rate of pay of that other employee or his own, whichever is greater. Litterick was not offered his rate, but the lower rate of Cleaner. Nor was there a requirement stated by the District that Litterick take the long-term position; rather, he was informed that if he declined the position, it would not affect his benefits from layoff or unemployment compensation. While the parties discussed the possibility of Litterick taking the position, the Association expressed concerns about insurance, but the District did not get back to them with an offer. The burden was on the District to offer a settlement, not the Association.

The Association asserts that the District's interpretation of the grievance is therefore inaccurate and there is no obligation that it amend the grievance.

Contrary to the District's assertions, the evidence establishes that there was a "meeting of the minds" regarding an interpretation of Article IV, O, and a practice. Blaufuss' testimony and his letters to the District Administrator establish that in 1999, when they agreed to the temporary outsourcing of lawn work, there was an understanding that this was temporary and "not intended to exclude lawn maintenance work from the bargaining unit in the future." In 2001 the parties again discussed subcontracting of bargaining unit work and reached an understanding that outsourcing that would result in the layoff of bargaining unit members would violate the contract. At no time up to April of 2005 did the District evince any disagreement with that understanding. Hence, there was no reason for the parties to bargain in

that regard in their negotiations for the successor contracts. Further, the Association never entered into any agreement that the lawn and landscaping work was no longer bargaining unit work.

The Association asserts that its interpretation of Article IV, O, is the most plausible. Under the District's interpretation, there would be no circumstances under which a bargaining unit member would be laid off or reduced in hours "as a result of subcontracting". The District attempts to remove all meaning from that provision that actually protects bargaining unit work, which is the intent and purest interpretation of the language.

Regardless of an employee's hire date, each is a member of the bargaining unit and a job category. Each category encompasses duties that are normally and historically performed by members of that category. Those duties are part of that job category and not exclusive to individual members. Subcontracting occurs when bargaining unit work is performed by non-bargaining unit members, and a violation of the contract occurs when bargaining unit members are laid off or reduced in hours as a result. In regard to the latter point, the Association cites SOUTH SHORE SCHOOL DISTRICT, MA-11613 (Arbitrator Emery, 2002) where the arbitrator rejected the employer's argument that the layoff was not "a result of" the subcontracting because the subcontracting preceded the layoffs by a lengthy period of time. Citing with approval, BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT (Arbitrator Greco, 1999) *supra*. The arbitrator concluded that to determine whether the layoff was the result of subcontracting, the determinative question is whether the bargaining unit employee would be laid off if the subcontracting arrangement did not exist. In this case, the District chose to continue its subcontracting of custodial/maintenance work, rather than employing Litterick, resulting in his layoff. If the District wishes to change the meaning of Article IV, O, it is obligated to negotiate with the Association to do so.

It is not the case that this interpretation deprives other sections of Article IV of their meaning. Those management rights are given meaning, within the scope of the entire Agreement, but other provisions of the Agreement limit those rights. Those sections are given meaning beyond the scope of the Agreement. In CITY OF MARINETTE, MA-12658 (Arbitrator Emery, 2005), the arbitrator noted it is recognized that the right to subcontract is susceptible of abuse and where it is used to undermine the union or undo the contract, it may be restricted, even if the contract is silent.

The Association believes that the District's position in this case justifies its concern that the District will attempt to expand its subcontracting if it prevails in this case. It should not be allowed to undo the contract by expanding its management rights.

The Association asserts it has the right to keep the work the unit members perform or have performed, as that is how it maintains job security. If the District wants to avoid this, it can bargain with the Association regarding new work.

The District's claim that enforcing the Association's interpretation would encourage the District to increase it subcontracting is absurd and mean-spirited. While the filling of vacant positions is not before the Arbitrator, there are other positions in the Agreement that cover the filling of a vacancy, and subcontracting is not an option.

The Association reiterates that the District's claim it presently has no equipment available to do lawn mowing is false. There is no evidence in the record to support the District's claim that the lawn tractors it has are inadequate for the job.

Last, as to the work performed by the Experience Works individuals being *de mimimis*, even if Mayer's estimation of how much actual work they perform is used, the hours of custodial work the District has subcontracted (substitutes, K-5 Services, Experience Works and Mayer at Van Brunt) still ranges from 82.75 hours per week to 70.75 hours per week. Thus, there are more than sufficient hours of custodial/maintenance work available to maintain Litterick at full-time status.

To accept the District's interpretation of Article IV, O would destroy any sense of job security the members may have and would require the Arbitrator to rewrite that contract.

District Reply

The District disputes the claim that substitute and supervisory employees are "subcontractors". The Association counts all of the hours that even bargaining unit members worked in a substitute capacity and certain hours that Mayer performed custodial tasks as "subcontracting". The District again cites the awards in DRUMMOND SCHOOL DISTRICT (Arbitrator Gratz) and BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT (Arbitrator Burns), *supra*., and notes its disagreement with the award in BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT (Arbitrator Greco) cited by the Association.

The Association's claim is contradicted by a comparison of Article IV, O, to Article XI, B, 1. If the Association's claim were true that the former provision prohibits all subcontracting while any employee is on layoff and use of substitutes is covered by that provision, the latter provision expressly addressing the use of substitutes while employees are on layoff would be superfluous. It is a principle of contract interpretation that all provisions are presumed to have meaning. Thus, any interpretation of Article IV, O that renders Article XI, B, 1, superfluous is of dubious merit. Further, had the parties intended to prohibit all subcontracting while any employees are on layoff, Article XI, B, 1, demonstrates they knew how to draft such language. As the parties used substantively different language in the two provisions, they intended the provisions to have different meanings.

Also, Article V,A, 1, expressly defines "an employee substituting for an employee on a long-term leave" as a "temporary employee" and further states that "temporary and casual employees" are not members of the bargaining unit, thereby acknowledging they are employees of the District and not "subcontractors". The District also asserts that the hours

worked by substitutes that the Association challenges, primarily represent the hours of two regular employees who are on long-term medical leaves.

The District also asserts that, as the Association makes no attempt to argue a claim that involves a substantive violation of Article XI, B, 1, Litterick's decision to turn down the long-term substitute position is only relevant as to a remedy issue.

The Association also improperly applies Section VI, 2, to the District's offer of the substitute position to Litterick. However, its claim in this regard is both underdeveloped (as it fails to establish a connection between this assertion and its substantive claim under Article VI, O) and misguided (as that provision expressly deals only with the situation where the District requires an active employee with a regular assignment to perform duties outside of their assignment/labor grade). (Emphasis supplied). Litterick was not required to take the substitute position and he had no regular assignment.

Nor can the Association claim that Litterick was justified in turning down the substitute position because of the pay rate offered. The Association's representative and the District Administrator discussed the wages and benefits of the position, but the Association then dropped the matter. Further, an employee who feels he is being compensated in a manner that violates the contract may not simply refuse to work; the usual rule is that the employee performs the work and grieves. Litterick and the Association did neither. Further, any attempt to claim a violation of Article VI, 2, at this point would be improper for the same reasons the District has argued regarding any claim of a violation of Article XI, B, 1.

Next, the District asserts that the Association's interpretation of Article IV, O, is essentially the same as Interpretation D discussed in the District's initial brief, and suffers from all of the defects the District previously identified. While the Association argues that if the District's interpretation of Article IV, O, is accepted, this would allow the District to eliminate all bargaining unit members over time, the District currently has that ability. As employees terminate their employment in the District, the District may subcontract the work of the departed employee, as no bargaining unit employee would be laid off. A decision in favor of the Association would give the District the incentive to do just that. Further, the Association overstates the latitude the District would have, if it prevailed. The District does not claim, nor would its interpretation provide, the right to layoff existing custodial staff and replace them with a contracted cleaning service. Further, the analysis advocated by the District would not tolerate manipulation of a layoff and subcontracting sequence where there is evidence showing that the employer engaged in bad faith conduct intended to subvert the job security provided under Article IV, O.

The District asserts the Association's reliance on Joint Exhibits 13-17 to advance its claim that lawn mowing services are within the scope of Litterick's position is misplaced. Neither Joint Exhibit 13 (5/7/01 posting) or Joint Exhibit 14 (3/9/04 posting) mention lawn mowing and the rest of the postings predate the District's subcontracting of lawn and landscaping services in the summer of 1999. Mayer clearly testified that no District employee

has performed any of these services since that time and there is no contradictory evidence in the record. Thus, the inferences the Association attempts to draw from these documents are unreasonable.

The District also asserts that the Association's past communications to the District regarding its "concerns", "understandings" or "positions" regarding subcontracting provide no guidance in this case. These letters do not constitute bargaining history, as they do not correspond to any changes in the operative contract language. Either party may send "sabre rattling" letters reflecting its view of ambiguous contract language, but such letters do not change the meaning of that language. Further, these letters cover only ground over which there is no dispute. The parties agree Article IV, O, prohibits the District from taking work presently being performed by bargaining unit members and expanding the use of subcontractors to perform those same services and simultaneously laying off the bargaining unit members who were performing that work. However, such a scenario has nothing to do with the facts of this case.

It is unreasonable for the Association to rely on Blaufuss' 8/9/99 letter to then-District Administrator Ballwahn to show some sort of implicit agreement or understanding regarding lawn mowing work. Taking the letter at face value, the Association's original understanding at the time of the subcontracting of lawn mowing work was that the subcontracting arrangement was "temporary". However, the underlying basis for the Association's understanding soon changed, and this was readily apparent to the Association as early as the fall of 1999, and certainly no later than the spring of 2000, when the District continued to contract out the lawn mowing and landscape services. Thus, Blaufuss' letter sheds no light on the proper construction of Article IV, O.

The District asserts that the Association's claim that the District has not actually eliminated the work formerly performed by bargaining unit members is not supported by the evidence and is irrelevant since the Association has not shown that any work performed by unit members in 2004-05 has been transferred to a subcontractor in 2005-06. Mayer testified that after the shifting of personnel was complete, there were eight fewer scheduled hours being worked at the High School each day, that the total number of hours worked at Van Brunt is identical to the total hours worked there in 2004-05, and that the major change was that the rooms in the High School are being cleaned half as often as in 2004-05.

Also, the Association has misstated the record regarding Mayer's non-supervisory work and overtime hours, claiming he testified his overtime hours had increased in 2005-06. Mayer, in fact, testified that he did not know if that was the case. Association Exhibit 10 does not prove anything conclusively, as at that point in the year, Mayer had fewer overtime hours than in 2004-05. The claim that the work Mayer performs at Van Brunt over the lunch hour is all "additional" work is mere speculation, and there is no evidence that Mayer's overtime hours can be traced to Litterick's layoff. In sum, as the record shows the District eliminated the work, there is no evidence the District transferred any of these tasks to a subcontractor, and any claims regarding Mayer's work schedule is irrelevant unless he is found to be a "subcontractor".

As to the Association's attack on the credibility of Mayer's testimony regarding Experience Works participants, Mayer provided very specific testimony about the age, disability, and overall productivity of Mr. P. and Mr. E. that was based upon his first-hand observation of their work over a period of years, as well as his familiarity with the tasks they perform. As such, his testimony is entitled to be given weight, especially in the absence of any countervailing evidence.

As to remedy, the District asks that if the Association prevails on some aspect of its claim, that the Arbitrator retain jurisdiction to resolve any disputes as to remedy.

DISCUSSION

The first dispute is the scope of the grievance, as the District asserts the grievance does not address the use of substitute employees and the Association should not be permitted to now raise that issue. The Arbitrator disagrees. As the Association notes, the grievance cites Article XI, in addition to Article IV, and the "Statement of the Grievance" states the Association is claiming the right to work being done by "non-bargaining unit members". Article XI includes Section B, 1, restricting the use of temporary or substitute appointments while employees are on layoff. In addition, such temporary or substitute employees may or may not be bargaining unit members and the above-noted reference in the Statement of the Grievance is sufficiently broad as to include such substitutes. [1] It is noted, however, that neither party's proffered statement of the issues references the Building and Grounds Supervisor's (Mayer's) performing bargaining unit work. Thus, the propriety of Mayer's performing such work is not specifically addressed herein.

As to the substantive dispute, the Association claims the District violated Article IV, O, by continuing to utilize K-5 Services, Experience Works employees (Mr. P. and Mr. E.), and substitute employees to perform work that has been or is being performed by bargaining unit employees and laying off Litterick "as a result of subcontracting". The Association also claims the District violated Article XI, B, 1, by using substitutes to perform bargaining unit work while Litterick was laid off and willing and able to perform that work.

Looking first as to what constitutes "subcontracting" within the meaning of Article IV, O, the District asserts it only applies to non-District employees and not to the District's substitute employees, while the Association asserts the term covers all non-bargaining unit members performing bargaining unit work. For the reasons set forth below, the Arbitrator concludes the District's more restrictive definition is appropriate in this case. Realizing that arbitrators have disagreed as to the scope of what constitutes "subcontracting", it is noted that the arbitrator must rely on the facts in each case to make that determination.

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[1] It is noted that the District was notified of the Association's intent to include the issue of the use of substitutes by its January 18, 2006 request for information in that regard for purposes of this grievance. (Joint Exhibit 11).

First, it is a principle of contract interpretation that, absent evidence the parties intended otherwise, words the parties have used are to be given their common ordinary meaning. *Robert's Dictionary of Industrial Relations* (Fourth Edition), defines the term "subcontracting" as follows:

> **subcontracting** A procedure followed by companies to sublet certain parts of the operation to subcontractors, rather than have the company's employees perform the work, frequently on the ground that the work can be performed more efficiently and with less expense to the main company.
>
> . . .
>
> At p. 748 (Emphasis added)

In other words, "subcontracting" refers to the use of services of those not in the company's employ and would not cover non-bargaining unit employees employed by the company. More importantly, as the parties specifically address the use of temporary or substitute employees while a bargaining unit member is on layoff in Article XI, B, 1, it must be presumed they did not intend to address the use of such employees in Article IV, O. Further, as the District notes, if substitute employees are covered by Article IV, O, as the Association claims, there would be no need for Article XI, B, 1, and the latter provision would be rendered meaningless.

As to the arbitral precedent cited by the Association finding a broad prohibition on any non-bargaining unit member, employee or non-employee, performing bargaining unit work in the event of layoffs, based upon the mere presence of a subcontracting proviso in the agreement and the concept that job security is the "soul" of any labor agreement, this Arbitrator is reluctant to rely on such generalities and broad concepts in determining the parties' intent; rather, it is the words the parties have used and how they have applied them that provides the best guidance.

For these reasons, the Arbitrator reaches a different conclusion from that reached in the award cited by the Association as to the scope of what constitutes "subcontracting" in this case.

Each of the areas of dispute are addressed below.

Substitutes

As found above, the District's use of substitute employees does not fall within the definition of "subcontracting", as that term is used in Article IV, O. Thus, the basis of the grievance in this regard is limited to Article XI, B, 1, which provides:

> "No temporary or substitute appointments shall be made by the District while there are laid-off employees willing and available who are immediately qualified to fill the vacancies."

It is noted that there is no dispute that Litterick was "available" and "immediately qualified" to perform the work done by substitute employees who filled in for bargaining unit members who were temporarily absent (illness or vacations) or on long-term leaves of absence for medical reasons. There is a dispute, however, as to whether Litterick was "willing" to accept such work.

While Litterick testified he did not remember discussing the long-term substitute Cleaner position with Mayer in June of 2005, prior to his layoff, the testimony of Mayer and McCartney, as well as McCartney's letter to Litterick inquiring if he would be interested in the position, establish that the position was offered to Litterick and that he turned it down. The Association does not really dispute this, but instead argues that the District's offer of the position at the lower Cleaner rate violated Article VI, 2, which provides:

> "Whenever an employee is required to fill in or substitute for an absent or incapacitated employee for three or more consecutive days, he/she shall be compensated at their regular rate of pay or the rate of the labor grade he/she is working in, whichever is greater. Employees will return to their regular rate of pay when they return to their regular assignment."

Essentially, the Association argues that Litterick was entitled to the long-term substitute Cleaner position pursuant to Article XI, B, 1, and entitled to his regular higher rate of pay pursuant to Article VI, 2. The problem with the Association's position is, as the District points out, that Litterick was not being "required" to substitute for the absent employee who was on long-term medical leave, i.e., involuntarily assigned to the position, he was being offered the long-term substitute position, as required by Article XI, B, 1, which specifically addresses the rights of employees who are on layoff. Unlike Article VI, 2, Article XI, B, 1, does not provide that an employee on layoff who accepts a substitute position will retain the wage rate of the classification from which he/she was laid off, if it is higher.

Mayer's unrebutted testimony establishes that Litterick turned down the position because he felt he could do better on unemployment compensation and picking up side jobs. McCartney testified that he and Voelker discussed the matter and that Voelker said health insurance was an issue. According to McCartney, he told Voelker the District could consider it and she said she would check on it, but he never heard any more about it. Based on what Litterick had told Mayer and no further response from the Association after McCartney's and Voelker's discussion, the District could reasonably assume that Litterick was not interested in the position. Further, having turned down what would have constituted a substitute full-time (8 hours per day) position, the District could reasonably assume Litterick would also not be interested in substitute part-time positions that would pay less than the position he had turned down.

The Association also questions the District's good faith in laying off Litterick, asserting that when all of the hours substitutes have worked since June 30, 2005 and the overtime hours Mayer and bargaining unit employees have worked since then, it is clear the work was not

really eliminated. From this, the Association concludes there is more than enough work available to maintain Litterick in a full-time position.

Addressing only the substitute's hours at this point, the Association asserts that the hours worked by substitutes is a total average of 58 hours/week or 1.45 FTE. However, Mayer testified that the absence of two regular employees who have been off work on long-term medical leaves, whose hours have had to be covered, has largely contributed to the number of hours worked by substitutes, along with short-term absences due to vacations or illness. Further, Litterick turned down a full-time eight hours/day substitute Cleaner position accounting for 1.0 FTE and leaving the equivalent of only .45 FTE in substitute hours beyond that. Thus, it does not appear from the record that the District is attempting to expand the use of substitute employees at the expense of bargaining unit positions.

For these reasons, it is concluded that the District complied with Article XI, B, 1, and did not violate that provision by employing substitute employees while Litterick was laid off.

"Experience Works" Employees

The record establishes that the District has been participating in what was the "Green Thumb" and is now the "Experience Works" program since 1986. This is a federally-funded program to provide community services and work opportunities for elderly, disabled persons. The program controls the number of hours these individuals work and provides all of the compensation they receive (minimum wage). The only cost to the District is a voluntary annual donation, which had been $650/year and was increased to $750/year in 2005-06.

The record also establishes that the two individuals presently working in the program at the District have been doing so since 1990 (Mr. P.) and 1998 (Mr. E.), respectively, and that they are elderly gentlemen (71 and 77), with mental ability limitations in one case, and serious health issues in the other case, which affect their ability to perform work tasks. There is no dispute that the work tasks Mr. P. and Mr. E. have been performing are the same as those performed by bargaining unit employees.

While the District asserts that the work performed by these individuals is *de minimis* and more analogous to that of "volunteers", rather than "subcontractors", their circumstances (non-District employees performing work for the District) would seemingly fall within the intended scope of the term "subcontracting" as used in Article IV, O. That said, the record establishes that the parties have recognized and accepted that, at least to the extent of the work performed by the "Experience Works" participants, the work that is performed by the bargaining unit members is not exclusively the work of the bargaining unit and that, as to these individuals, the parties did not intend that the subcontracting proviso apply.

The record establishes that this bargaining unit was established in 1997, years after the District had begun participating in the then-"Green Thumb" program and years after Mr. P. had begun performing this same work in the District. There is no evidence that the

Association has objected to this arrangement at any time prior to the instant case. The Association correctly notes that no bargaining unit employee was laid off until now. The Association's point would have more force were it not for the existence of the arrangement, along with the parties' full knowledge of its existence, at the time the wording of Article IV, O was negotiated and agreed to by these parties. In other words, the Association was aware that the work being performed by bargaining unit members was also being performed by the individual in the "Experience Works" program, and was therefore not exclusively the work of the bargaining unit, yet it took no steps to object or in any way address the work these individuals were performing. In 1998, shortly after the bargaining unit was formed, Mr. E. began working in the program at the District. Again, there is no evidence of an objection by the Association until now, in spite of its concerns in 1999, 2001 and 2002 regarding outsourcing of bargaining unit work. One might take from this that perhaps the parties have viewed the amount of work these individuals perform to be, as the District claims, *de minimis*. [2] Regardless, under the circumstances, it is concluded that the parties did not intend the restriction on subcontracting to apply to the existing "Experience Works" program. [3]

K-5 Services

The District concedes that its arrangement with K-5 Services to provide lawn mowing and landscape services is "subcontracting" within the meaning of Article IV, O, but asserts Litterick's layoff was not "as a result of" this arrangement. The District asserts that use of the phrase "as a result of subcontracting" requires an analysis of the facts in a given situation to determine whether the subcontracting caused the layoffs. According to the District, as the subcontracting predates the layoff by six years, and involves work that unit employees have not performed during that time, it did not result in the layoff; rather, the layoff was the result of the District's budget problems. Conversely, the Association argues the phrase "as a result of subcontracting" should be interpreted to mean that there would be a violation of IV, O, whenever bargaining unit work is being performed by non-bargaining unit members and there are bargaining unit members who are on layoff or reduced in hours. Under the arbitral precedent cited by the Association, it would be the case that whenever work that bargaining unit employees were qualified to perform was being performed by a subcontractor instead, and there were bargaining unit employees on layoff, the layoff would by definition be considered to have occurred "as a result of" that work being contracted out, regardless of the particular circumstances in each case. Again, this Arbitrator disagrees that such a broad prohibition may be found based merely on the presence of any subcontracting proviso in the parties' Agreement. If such a prohibition is to be found, it must be based upon the meaning of the specific words the parties have used and what the parties themselves intended. Unfortunately,

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[2] While the Association objects that Mayer's estimation that these individuals take four hours to do tasks that it takes a bargaining unit member 1 – 1½ hours to perform, Mayer's testimony was based on his personal observation and first-hand knowledge and was unrebutted by any Association witnesses, including its Vice-President, Evelyn Winter, who testified she had previously observed their work.

[3] It is noted that the instant case does not involve an expansion of the existing program; rather, the program began 2005-06 the same as in 2004-05 and then had the individual's hours reduced.

the wording of Article IV, O, is ambiguous and there is no real evidence of bargaining history or past practice [4] to provide guidance as to the parties' intent.

In this case, an analysis must then be based upon the wording of Article IV, O, and other provisions of the Agreement that are brought into play, as well as, applicable principles of contract interpretation, in order to determine which interpretation of the disputed language is most reasonable. Such an interpretation must give meaning to the words the parties have used to express their intent in Article IV, O, as well as, to the words they have used in other provisions of the Agreement that are implicated.

Looking first at the Association's proffered interpretation, one wonders why the parties would not have simply stated there can be no subcontracting of work bargaining unit employees have ever performed, if there are any bargaining unit employees on layoff or who have had their hours reduced, rather than use the ambiguous phrase "as a result of the subcontracting" that is susceptible to several possible interpretations. The parties used such straightforward language in Article XI, B, 1, to prohibit the use of temporary or substitute appointments while there are employees on layoff who are willing, available and immediately qualified to do the work. As the parties did not use such wording in Article IV, O, it is presumed they intended something other than the broad prohibition argued by the Association.

The Association's interpretation would also render the District's rights under Article IV, E, K, and M, largely meaningless, [5] as the bargaining unit would be entitled to any work that had ever been performed by any bargaining unit members, regardless of the circumstances. The Association, in fact, claims just such a right.

On the other hand, the District's interpretation is less ambitious, and requires an analysis of the facts and circumstances to determine whether a layoff was "as a result of" the subcontracting in issue. Such an interpretation gives meaning not only to the words the parties used in Article IV, O, but also to Sections E, K and M of that Article. For these reasons, the District's interpretation of Article IV, O, to the extent it requires an analysis of the facts and

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[4] The letters of August 9, 1999 (Assn. Exhibit 4) and March 28, 2002 (Joint Exhibit 18) simply quote or parrot the language of Article IV, O.

[5] Article IV – Management Rights

> E. To relieve employees from their duties because of lack of work or any other (sic) which is not arbitrary or capricious;
>
> . . .
>
> K. To determine the methods, means and personnel by which school system operations are to be conducted;
>
> . . .
>
> M. To judge to the extent to which the required work shall be performed by employees covered under this Agreement.

circumstances and a determination as to whether a particular layoff was as a result of the subcontracting [6] is preferred over the Association's interpretation.

The above finding does not end the inquiry; rather, it is a starting point. It is, of course, still necessary to determine whether Litterick's layoff was the result of the District's budget problems and concomitant decision to reduce scheduled cleaning and maintenance hours, as the District claims, or the result of the District's continuing to subcontract the lawn mowing and landscape work to K-5 Services, as the Association claims.

The District notes it went from a daily cleaning schedule at the High School in 2004-05 to an every other day schedule in 2005-06. On its face, this would demonstrate a reduction in work to be performed by bargaining unit employees corresponding to a reduction in services being provided. As noted previously, the Association's claim that the number of hours substitutes are being used demonstrates the work was not really eliminated was sufficiently rebutted by Mayer's testimony that the number of hours substitutes were used was due to two unit employees having been off work on long-term medical leaves, and the fact that 40 of the 58 hours/week that substitutes have been used is due to the full-time long-term substitute position that Litterick turned down. As to the overtime hours of bargaining unit employees, there is no evidence as to what generated those hours and no assessment can be reached in that regard. Further, no contractual prohibition on overtime while an employee is on layoff is cited, nor was this issue raised in the grievance or in the parties' respective statements of the issues.

The Association also disputes the District's claim that it cut the hours in the custodial/maintenance area due to severe budget concerns. The Association produced documentation showing that the District's "Fund 10" balance had increased by 124.05% from 1993-94 to 2002-03, the second highest percentage increase among the conference schools. However, the Association's exhibit (Assn. Exhibit 5) also shows that the District went from having the lowest Fund 10 balance among these schools in 1993-94 to the second lowest in 2002-03, and that it remained well below the State average. Association Exhibit 7 also demonstrates that while the District's revenue from local sources decreased by over 25% during that period, the per capita income of citizens in Dodge County increased by over 50%. The reality, however, is that the District's Board of Education decides the level of services it can provide. Article IV, E, reserves to the District the right, "To relieve employees from their duties because of lack of work or any other (presumably, "reason") which is not arbitrary or capricious." There simply is not sufficient evidence to establish that the District's decision to reduce hours in the custodial/maintenance area was arbitrary or capricious or made in bad faith.

We come now to the nub of the issue: Was Litterick's layoff the result of the District's continuing to contract out the lawn mowing and landscaping work to K-5 Services? The District concedes that Article IV, O, would not permit it to expand the existing contracting out

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[6] This limits the District's proffered interpretation to part (2) of "Interpretation B", as part (1) simply states a conclusion the District would reach in a specific fact situation without any further analysis.

at the time it is laying off bargaining unit employees who have been performing that work, but notes that is not the case here, where it has simply maintained its existing arrangement with K-5 Services. However, the Association responds that the parties' understanding when the District originally contracted out the mowing and landscaping services was that the arrangement was temporary and the unit would not lose that work. The District's response to this is the equivalent of a shrug of the shoulders, asserting that after six years it should be apparent that the District changed its mind and the Association's understanding was no longer valid.

There is, however, a general principle that this Arbitrator is willing to apply, that is, absent a provision giving an employer absolute discretion in a matter, it is expected that an employer will exercise its contractual rights in a reasonable manner and will deal in good faith with its employees' bargaining representative. As the Association could take no formal action in response to the District's ignoring the understanding, since there were no layoffs in the unit until Litterick's, it cannot be said that the Association had acquiesced to continuing the arrangement. While such acquiescence is not required by Article IV, O, to continue the subcontracting arrangement when there have been no layoffs, as noted above, there is a requirement that the parties deal with each other in good faith. To this extent then, the fact that the District only maintained the existing subcontracting, without expanding it, is not determinative of the outcome in this case.

However, the record establishes K-5 Services provided an average of only 12 hours/week of lawn mowing and landscaping services for the months of April to November of 2005. On its face, this simple fact, coupled with the District's eliminating 8 hours/day of cleaning and custodial/maintenance work, is sufficient to establish that the elimination of a full-time 40 hours/week custodial/maintenance position was due to the elimination of the cleaning work, and not due to the District's contracting out 12 hours/week of lawn mowing and landscaping work. Further, returning the 12 hours/week of lawn mowing and landscape work to the unit would likely not have resulted in maintaining Litterick's 40 hours/week position.

It appears that what the Association is really asserting is that the District is required to create a full-time position from the various sources of hours the Association has identified. However, no provision cited requires the District to do this, nor is there evidence it would be possible in this case if there were.

Thus, it is concluded that the District did not violate Article IV, O, of the parties' Agreement by laying off Michael Litterick while continuing to contract out lawn mowing and landscape work to K-5 Services.

Based upon the foregoing, the evidence, and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 25th day of September, 2006.

David E. Shaw /s/
David E. Shaw, Arbitrator

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