BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF MADISON

and

BUILDING & CONSTRUCTION TRADES COUNCIL OF SOUTH CENTRAL WISCONSIN AND ITS AFFILIATED LOCALS

Case 256
No. 65452
MA-13226

Appearances:

Mr. Larry O'Brien, Esq., Assistant City Attorney, City of Madison, 210 Martin Luther King, Jr. Blvd, Room 401, Madison, WI 53703-3345, on behalf of the City.

Mr. Matthew Robbins, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law,1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of the Council and its affiliates.

ARBITRATION AWARD

Pursuant to the captioned parties' joint request, (without a prior WERC panel being issued), WERC Arbitrator Sharon A. Gallagher was selected to hear and resolve a dispute between them regarding the status of retired City Painter/Leadworker John Ring. A full and fair hearing was scheduled and held at Madison, Wisconsin on June 28, 2006. A stenographic transcript of the proceedings was made and received by July 17, 2006. The parties submitted their initial briefs by August 31, 2006 which were exchanged by the Arbitrator. The parties reserved the right to file reply briefs and they did so by September 18, 2006, whereupon the record herein was closed.

ISSUES

The parties were unable to stipulate to the issues for determination herein. However, they agreed to allow the Arbitrator to frame the issues based upon the parties' suggested issues and the relevant evidence and argument in this case. The Union suggested the following issues:

1) Did the Employer violate the labor agreement by hiring John Ring as an independent contractor not covered by the labor agreement?

2) If so, what is the appropriate remedy?

The City suggested the following issues for decision:

3) Does the labor agreement cover non-employees?

Based upon the relevant evidence and argument herein and having considered the parties' suggestions, the Undersigned concludes that the Union's issues more reasonably and accurately state the dispute between the parties.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 3

RECOGNITION AND UNIT OF REPRESENTATION

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B. Work Assignments. In the event a dispute arises concerning the assignment of work, the Union may notify the Employer, in writing, of that fact. The parties shall meet within seven (7) working days of such notification for the purpose of attempting to resolve such dispute through the collective bargaining process.

If such dispute is not resolved within five (5) working days of the commencement of the collective bargaining process, the Union may submit the dispute to the grievance/arbitration procedure set forth in Article 6, hereof, at Step 3.

Supervisors, and others not in the bargaining unit, shall not perform bargaining unit work, except in cases of genuine emergency or situations mutually agreed upon by the Union and the Employer.

Employees shall not be assigned work outside of their classification without prior mutual agreement between the Union and the Employer, except in cases of genuine emergency.

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ARTICLE 5
MANAGEMENT RIGHTS

5.1 MANAGEMENT RIGHTS

The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibility and the powers or authority which the City has not officially abridged, delegated, or modified by this Agreement and such powers or authority are retained by the City.

These Managements Rights include, but are not limited to, the following

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible; to manage and direct the employees of the City; to hire, schedule, promote, transfer, assign, train, or retain employees in positions within the City to suspend, demote, discharge, or take other appropriate action against the employees for just cause. The Employer agrees to furnish the Union with a copy of any written suspension or discharge action taken by the City against any permanent employee within seven (7) calendar days of said action. The Union agrees that the Employer's failure to provide said copy shall not constitute failure to have disciplined for just cause.

B. To determine the size and composition of the work force, to eliminate or discontinue any job or classification and to lay off employees.

C. To determine the mission of the City and the methods and means necessary to efficiently fulfill that mission including the transfer, alteration, curtailment, or discontinuance of any goods or services; the establishment of acceptable standards of job performance; the purchase and utilization of equipment for the production of goods or the performance of services.

D. The City has the right to schedule overtime as required in the manner most advantageous to the City and consistent with the requirements of municipal employment in public interest.

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F. It is understood by the parties that every incidental duty connected with operations enumerated in job description is not always specifically described. Nevertheless, it is intended that all such duties shall be performed by the employee. Supervisory personnel outside of the bargaining unit shall be precluded from performing bargaining unit work, except in emergency situations, or, in those instances, where the job description requires the supervisor to perform such work as a minor portion of his/her work time.

G. Contracting and Subcontracting The Union recognizes that the City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The rights of contracting or subcontracting is vested in the City including the exercise of said contracting and subcontracting rights. When it becomes necessary to determine when, or what to subcontract, it is, and will be the policy of the Employer to consider the impact on the employment security of its craft employees, as referenced in Addendum A of this Agreement, and to notify the Union of said contracting or subcontracting within the respective divisions to which they are assigned.

H. Should the City find it desirable to transfer the operation of any department or division to another governmental agency, the City shall consider the impact of such transfer on its employees and shall notify the Union of such contemplated action. The parties shall meet and confer regarding the impact of such transfers on employees.

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ARTICLE 6
GRIEVANCE AND ARBITRATION PROCEDURE

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6.2 FINAL AND BINDING ARBITRATION

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B. The arbitrator shall be authorized to resolve the grievance(s), and, where involved, to determine discharge, discipline, suspension, and/or layoff for just cause. The arbitrator shall be authorized to make an award of the appropriate remedy, including pay for lost time and/or in other ways making the grievant whole.

C. The arbitrator shall not be authorized to alter, amend, change or modify any terms of this Agreement, or to limit or impair any rights provided by any section of the Agreement.

D. The arbitrator shall have the authority to determine whether or not a dispute is arbitrable if arbitrability becomes an issue. The arbitrator's award shall be final and binding upon the parties and the parties agree to observe promptly such award.

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ARTICLE 8
EMPLOYEES, DEFINED, RIGHTS, PROBATION

8.1 DEFINITION OF EMPLOYEES

A. Regular full-time and regular part-time employees are those who are employed in budgeted positions on a probationary or permanent basis or who acquire such status through the application of the provisions of this Agreement.

B. Limited Term employees are those who are employed in a budgeted part-time or full-time position which requires continuous employment for at least fifty percent (50%) of the regularly established full-time work week for the duration of a project or projects which is/are anticipated to last less than four (4) years.

Hourly employees are those who are employed on a temporary basis. The Employer agrees that hourly employees will be kept to the lowest number consistent with the Employer's needs and that hourly employees will not be used to avoid filling regular full-time or regular part-time positions.

8.2 RIGHT OF EMPLOYEES

Regular full-time and regular part-time employees shall have all of the rights and benefits as provided in this Agreement. Regular part-time employees shall receive benefits on a prorated basis.

8.3 TEMPORARY/HOURLY EMPLOYEES

All employees hired by the City on a temporary basis, i.e., for a season or limited period of time and not through the civil service procedure, to perform bargaining unit work, are defined as "hourly employees". The selection of hourly employees shall be accomplished through the hiring hall of the craft unions involved from bench lists maintained by said unions.

The City agrees that hourlies will be kept at the lowest number consistent with the City's needs and the hourlies will not be used to avoid filling regular full-time or regular part-time positions through the civil service procedure.

Hourlies shall be limited to 1200 hours of continuous or regularly scheduled work in a payroll year. In keeping with the above intent, the City shall not serialize or rotate the hourlies in to the same continuous work assignments (i.e., can not rotate hourlies in or out of a job to provide a continuously filled position).

Hourlies shall be paid the Area Standard Wage Rate for the craft involved as from time to time reported to the City by the Union, but shall receive none of the fringe benefits set forth the herein. Hourlies shall be paid overtime rates of pay in accordance with the Collective Bargaining Agreement.

ARTICLE 14
HOURS OF WORK

14.1 Work schedules are defined as an employee's assigned hours of the day, days of the week and days off. The normal work schedule shall consist of five (5) eight (8) hour days during the period Monday through Friday.

The parties recognize that operational requirement may make it necessary for the Employer to change the regular work schedules of individual employees as well as the schedules of entire work units, however, the Employer will attempt to keep such work schedule changes to a minimum.

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ARTICLE 17
MISCELLANEOUS

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17.2 EXISTING BENEFITS

The Employer intends to continue other authorized existing employee benefits not specifically referred to or modified in this Agreement. It is agreed by the Union that bad or unreasonable habits that may develop among employees do not constitute "past practice" rights or employee benefits. The existing employee benefits referred to in this section are those that are mandatory subjects of bargaining primarily related to wages, hours and other conditions of employment.

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RELEVANT PROVISIONS OF CITY PROCUREMENT POLICY:

II. PROCUREMENT AUTHORITY AND ADMINISTRATION

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C. This statement and any later changes shall be submitted to the CDA Board for approval. The Board appoints and delegates procurement authority to the Executive Director and is responsible for ensuring that any procurement policies adopted are appropriate for the CDA. Specific authority is delegated as follows: The Executive Director is authorized to enter into contracts not to exceed $25,000. Any contracts in excess of $25,000 must be presented to the board for prior approval. The Housing Operations Unit Director is authorized to approve payments in an amount not to exceed $25,000. The following are each authorized to enter into contracts in an amount not to exceed $5000 except when the Operations Unit Director has left one of the positions in charge in the Operations Unit Director=s absence: the Operations Analyst, the Housing Maintenance Supervisor, the Modernization Grants Administrator, the East Site Manager, the West Site Manager, and the Triangle Site Manager.

III. PROCUREMENT METHODS

A. SELECTION OF METHOD

If it has been decided that the CDA will directly purchase the required items, one of the following procurement methods shall be chosen, based on the nature and anticipated dollar value of the total requirement.

B. SMALL PURCHASE PROCEDURES

1. General. Any contract not exceeding $10,000 may be made in accordance with the small purchase procedures authorized in this section. Contract requirements shall not be artificially divided so as to constitute a small purchase under this section (except as may be reasonably necessary to comply with Section VII of this Statement).

2. Petty Cash Purchases. Small purchases less than $40.00 (forty and 00/00 dollars) which can be satisfied by local sources may be processed through the use of the petty cash account. The Contracting Officer shall ensure that: the account is established at $500.00, to cover small purchases made during a reasonable

period (e.g., one week). Security is maintained and only authorized individuals have access to the account; the account is periodically reconciled and replenished by submission of a voucher to the CDA finance officer; and, the account is periodically audited by the finance officer or designee to validate proper use and to verify that the account total equals cash on hand plus the total of accumulated vouchers.

3. Purchases less than $5,000.00. For purchases less than $5,000.00 only one quotation need be solicited if the price received is considered reasonable. Such purchases must be distributed equitably among qualified sources. If practicable, a quotation shall be solicited from other than the previous source before placing to repeat order.

4. Purchases more than $5,000.00. For purchases in excess of $5,000.00 but not exceeding $25,000, no less than three offerors shall be solicited to submit price quotations, which may be obtained orally, by telephone, or in writing as allowed by State or local law. Award shall be made to the offeror providing the lowest acceptable quotation, unless justified in writing based on price and other specified factors, such as for architect-engineer contracts. If non-price factors are used, they shall be disclosed to all those solicited. The names, addresses, and/or telephone numbers of the offerors and persons contacted, and the date and amount of each quotation shall be recorded and maintained as a public record.

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D. SEALED BIDS

1. Conditions for Use. Contracts shall be awarded based on competitive sealed bidding if the following conditions are present: a complete, adequate, and realistic specification or purchase description is available; two or more responsible bidders are willing and able to compete effectively for the work; the procurement lends itself to a firm fixed price contract; and the selection of the successful bidder can be made principally on the basis of price. Sealed bidding is the preferred method for construction-procurement. For procurement under the Comprehensive Grant Program, sealed bidding shall be used for all construction and equipment contracts exceeding the small purchase limitation. For professional services contracts, sealed bidding should not be used.

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BACKGROUND

The Community Development Authority (CDA) provides housing to eligible low income individuals/families in several buildings located in Madison, Wisconsin. CDA has 876 units, 16 to 19 of which become vacant each month due to evictions and voluntary move-outs. The average turn-around time for CDA apartments is 30 days due to a Federal Housing and Urban Development (HUD) requirement (to maintain federal funding of CDA) that low income apartments can remain vacant for only 30 days to complete painting, cleaning and repairs before they must be re-occupied. Notably, the City contributes only $30,000 toward the CDA annual budget and the rest comes from other government funding. CDA pays the City more than $30,000 in Payment in Lieu of Taxes (PILOT) fees.

The Union and the City have had a collective bargaining relationship for a number of years. Prior to 2003, the CDA employed four full-time painters, including John Ring, Myron Czerwonka, James McKinley and John Fleming. Since 1984, John Ring was employed by the City. Before his retirement on April 29, 2005, Ring's position was "Painter/Leadworker" At all times relevant, Ring's duties as Painter/Leadworker were as follows:

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> General Responsibilities:
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> This is skilled leadership work in coordinating and participating in the preparation and painting of public facilities. This class is distinguished by leadership responsibility associated with the planning, coordination and oversight of assigned painting projects involving subordinate journey level painters. Under general supervision, the employee exercises considerable judgment in meeting program objectives.
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> Examples of Duties and Responsibilities:
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> Plan, schedule and lay-out painting work consistent with work order and program objectives. Assign subordinate painters (and others as assigned). Review work for conformance with established standards. Develop and maintain an appropriate supply and equipment inventory. Maintain a variety of work records. Monitor for and report violations of work rules and/or performance problems. Operate vehicle to perform or monitor work at remote sites.
>
> Wash, scrape, patch, sand and prepare surfaces preparatory to painting public buildings, housing units, equipment, and facilities. Putty defects.

Patch and tape dry-wall. Mix and apply paint (using brush, roller and spray painting equipment). Prepare and refinish various wood surfaces (using stains, sealers, varnish, etc.) Maintain related work area(s), equipment and materials. Assemble and work from scaffolding, ladders, etc.

Prepare surfaces and apply wall-paper, paper murals, and trim graffics.

Review plans and make recommendations regarding painting work performed by contract. Inspect painting work performed by contract for conformance with construction plans, specifications and accepted trades practices.

Perform work as required.

QUALIFICATIONS

Knowledges, Skills and Abilities:

Thorough knowledge of the methods, materials, tools and practices of the painting trade. Thorough knowledge of the occupational safety requirements. Ability to work from ladders and scaffolding. Thorough knowledge of related building construction principles, codes, practices, and nomenclature. Skill in the use and care of paint brushes, spray guns and other tools of the painting trade. Ability to plan, schedule, and layout paining/(sic) projects. Ability to assign and monitor painter work performance. Ability to estimate required time and materials to complete painting projects. Skill in mixing paints and in matching and blending colors. Skill in the application of paints and other finishes with brush, roller or spray gun. Ability to maintain effective working relationships. Ability to apply wallpaper and similar wall coverings. Ability to operate a motor vehicles (sic).

Training and Experience:

Three years of journey level painting experience. Such experience would normally be gained after completion of a recognized apprenticeship program and graduation from high school. Other combinations of training and/or experience which can be demonstrated to result in the possession of the knowledges, skills, and abilities necessary to perform the duties of these positions will also be considered.

Necessary Special Qualifications:

Possession of a valid driver's license.

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Myron Czerwonka retired in 2003 and he was not replaced by CDA. Prior to Czerwonka's retirement, Ring and Czerwonka worked as partners and McKinley and Fleming worked as partners.[1]

As Leadworker, Ring stated herein that he did not actually perform some of the work listed in the above-quoted job description: that because the other CDA Painters were experienced journeymen, Ring only rarely had to review their work when a complaint about the work was lodged; and that he never reported that any Painters under him had violated any work rules. Ring also stated that the majority of the time he worked painting CDA apartments along with the other CDA Painters, but as Leadwork, Ring was authorized and regularly bought/ordered all of the paint, equipment and supplies necessary to complete the work assigned by the Housing Branch Director of CDA, Kelley Simonds.

It is undisputed that as Leadworker Ring had keys to all CDA storage and shop areas and to all CDA apartment buildings and that he could use vehicles in his CDA work.[2] As a general rule, prior to his April 20, 2005 retirement, Ring received assignments from Simonds by fax/spreadsheets sent by the CDA Work Order Clerk on mornings when vacant CDA apartments became available for repairs and painting or occupied apartments needed painting/repairs; Ring would then split up the work among himself and the remaining Painters.

For at least the last 6 years, the CDA has contracted with private painting contractors to complete necessary CDA painting which could not be performed by Ring and the other Painters. Those various contractors used included the following: Dale Connery, Shelby, La Buena Vista, Ward and Sons, TC Carpets and Rohr Painting.[3]

The Union did not file any grievances over the use of the above-listed prior contractors. None of these contractors, except Rohr, had worked for the City prior to being used as a CDA contractor. Prior to Ring's retirement, the CDA/City had used the Union's out-of-work list to get needed painters. No unit Painters had had their hours reduced or were on layoff when Ring retired.

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[1] After Czerwonka's retirement, Ring worked without a partner for CDA..

[2] Retired Painter McKinley stated that prior to his retirement in 2006,he had a full set of CDA keys and access to CDA vehicles for his use.

[3] John Rohr had been a City Painter who then became a Painters' Union Business Agent. After Rohr lost a Union election he went into business for himself and then did some painting for the CDA. After Ring's retirement Simonds has used only Ring, Dale Connery and TC Carpet Care to paint CDA apartments. Since May, 2005 after he began using Ring, Simonds stopped using Connery.

FACTS

Effective Friday, April 29, 2005, Ring retired from his City position as Painter Leadworker. The following Tuesday, May 3, 2005 Ring spoke to Simonds at Simonds' CDA office. During this conversation, Ring told Simonds that he would like to do some work for the CDA if it had any for him. Simonds responded that if Ring was willing to get the same payment for painting as the other contractors,[4] the CDA had 40 apartments that needed to be repaired/painted (due to record-high recent evictions) and he (Simonds) could use Ring as another painting contractor. Simonds also asked Ring if he knew of any other contractors who would be interested in working at CDA. Simonds told Ring that he would have to get insurance/bonding before he (Simonds) would give Ring any work.

Ring contacted his insurance agent that day and the agent faxed proof of insurance to Simonds either that day or the next day. Simonds then gave Ring back the same set of CDA keys he had used while a City employee (which would give him access to all CDA work and storage areas and apartments) and Ring began painting CDA apartments that week.[5]

Within a week after Ring's retirement date, but after he resumed painting CDA apartments, a retirement lunch was held for Ring at the Country Buffet which was attended by Ring, McKinley and Simonds among others. At this luncheon, Simonds asked Ring whether anyone "had given him any shit" since he came back to work for the City. Ring responded, "No and I don't care. After Ring's retirement, he was not replaced. Simonds admitted herein that it would have cost the CDA more to replace Ring than it did to pay him as an alleged independent contractor.

On May 13, 2005, Simonds signed a "Limited Purchase Order (LPO) in the amount of $1,008.10 in payment for apartments Ring painted in early May, 2005 after he retired (U. Exh 3). The vendor listed on the LPO to be paid was "John Ring" and the address listed on the LPO was Ring's home address. On June 1, 2005, Simonds signed another LPO for Vendor "John Ring Painting Co." with the address Ring's residence as on the May, 2005 LPO.

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[4] After his retirement, Ring stated he was paid an hourly rate of $18.00 per hour for patching walls and a per square foot rate of between $1.00 and $1.50 to paint apartments and that the City paid for paint and materials for the work. It is undisputed that a truly independent painting contractor, Larry Statz, would have charged less than $1.00 per square foot including the cost of all paint and materials to paint the CDA apartments Ring painted in 2005 and 2006 (Tr. 77-79 and U. Exh.4).

[5] Ring never filed any application, pre-qualification papers or any other paperwork with the City or CDA to qualify him to work as a painting contractor. John Ring Painting Co., (JRPC) is not incorporated and John Ring is the only employee of JRPC. JRPC has no written agreement or contract with CDA or the City.

City LPO documents for 2005-06 showed the following amounts were paid to "John Ring Painting Co.", by the month, from June, 2005 through June, 2006:

CITY OF MADISON PURCHASE ORDERS
RE: JOHN RING PAINTNIG CO.
AMOUNTS BILLED BY MONTH FOR 2005-2006

MONTH/YEAR	AMOUNT OF ORDER	TOTALS
JUNE 2005	$ 1,326.85	
JULY 2005	$3,871.00	
AUGUST 2005	$ 3,585.00	
OCTOBER 2005	$ 7,639.00	
NOVEMBER 2005	$ 5,629.00	
	2005 SUBTOTAL	**$ 22,050.85**
JANUARY 2006	$ 7,159.00	
FEBRUARY 2006	$ 3,243.00	
APRIL 2006	$ 3,763.70	
MAY 2006	$ 4,237.50	
JUNE 2006	$ 1,011.00	
	2006 SUBTOTAL	**$ 19,413.50**
	2005-2006	**$ 41,464.35**[6]

In fact, Ring billed the City $ 31,709.85 for painting CDA apartments from May, 2005 through December, 2005 and $16,670.20 from January, 2006 through July, 2006, for a total of $48,380.05. Ring billed the City every month for painting services; Ring worked regular Monday through Friday hours during the 2005-06 period above.

Prior to his retirement, Ring was hourly paid, making $1,719.24 per bi-weekly pay period ($ 21.49 per hour), or $44,700.24 annually (not including longevity pay). In 2005, Ring performed painting services for only two customers other than the City/CDA, but he failed to declare the income from those jobs on his 2005 Tax returns. Simonds at first asserted that he contacted other current CDA contractors before hiring Ring, but he later admitted that he never contacted any other CDA contractors concerning the work he gave Ring and that he never sought any bids for the painting work he gave to John Ring in 2005 and 2006. (Compare Tr. 64 to Tr. 66)[7]

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[6] This total des not include the LPO for "John Ring" for $1,008.10.

[7] Simonds stated that in 2005-06, CDA contractors painted more than 50% of CDA apartments.

Ring stated that the only changes in his terms and conditions of work at CDA after his retirement were as follows: Ring was paid per square foot, he received no Union contact benefits, he was no long subject to discipline, he had no access to the contractual grievance arbitration procedure, he had no required hours of work and he did not direct the work of any CDA Painters.

POSITIONS OF THE PARTIES

Union:

The Union argued that John Ring's work at CDA after his retirement had insufficient indicia to prove he was hired by CDA as a true independent contractor after April 29, 2005. In this regard, the Union noted that the City exerts control over Ring as he does not have a significant investment in equipment, he has little or no reimbursable expenses and he rarely provides painting services to other customers/entities. The fact that Ring has no written contract with CDA, made no application for contractor status, has never had to bid on any CDA jobs and the timing of his resumption of work at CDA – four days after his retirement – show a lack of true independence.

In addition, the Union pointed out that on his 2005 Tax returns, Ring reported $29,571 is income from the City to "John Ring Painting Co;" an unincorporated entity with no employees which he operates out of his home and for which he uses his individual Social Security number; that Ring reported no advertising, no equipment expenses and no legal or professional fees in 2005, and he reported less than $1,000 in business expenses in 2005 if depreciation on his truck was excluded. Also, Ring reported no income from any source other than the City on his 2005 Tax returns and two of the four small jobs Ring performed for third parties in 2006 were suspiciously completed/receipted just prior to the instant hearing.

In the Union's view, the fact that Ring and Czerwonka were not replaced after their retirements leaving only two Union Painters, that Simonds admitted herein that he let all but one painting contractor (TC Carpet Care) go in May, 2005, choosing to use only Ring and that using Ring cost CDA less than hiring another Union painter, all support a conclusion that Simonds' hire of Ring as an "independent contractor" was a bold attempt to circumvent the labor agreement with impunity. The Union urged that this Arbitrator should therefore analyze the extent of the City's behavioral and financial control over Ring as well as the tenor of the relationship between Ring and the CDA to determine whether Ring was a true independent contractor as of May, 2005. In the Union's view, such an inquiry should include an analysis whether Ring was engaged in a distinct business or was performing the same duties in the same locations and for the

same supervisor he had prior to his retirement, the extent of Ring's investment in the business, his opportunity for profit or loss, whether his services were available to other customers, whether he had unreimbursed expenses and the method of payment for Ring's services by the City. In addition, based on the record of evidence, the Union found it "highly improbable" that Ring would retire and four days later return to work at CDA without a prior arrangement being made between he and Simonds given Ring's notice of retirement in late March, 2005.

In these circumstances, the Union urged that a remedy whereby the City is ordered to cease and desist and to pay painters on the Union's work list wages and benefits for all the hours Ring worked and to make the Union whole for all lost Union dues is reasonable and appropriate given the City's use of painters on the Union's work list when it needed temporary painters in the past.

City:

The City argued that the Union's actions in this case are a transparent attempt to single out John Ring, to prevent him from working as a contractor for CDA despite the clear language of Section 5.1(G) to the contrary. The City noted that Section 5.1(G) reserves broad authority to the City to contract and subcontract for services covered by the labor agreement and it does not limit with whom the City may contract, nor does it limit the dollar amount of such contracts or require the CDA to bid jobs. In addition, the City observed that the contract does not require the City to fill vacant positions, that Section 5.1(G) merely requires the City to consider the impact of contracting/subcontracting on unit employees. Furthermore, the City urged that Section 6.2 prohibits the Arbitrator from altering, amending, changing or modifying the terms of the labor agreement by her Award.

The City speculated that Section 5.1 must have been in the parties' labor agreement for some time.[8] In any event, Union Representatives Vaughn and Carey confirmed that the Union is bound by Section 5.1 and that no grievances had ever been filed before the instant one regarding the City's use of contractors. Union witness McKinley stated herein that he knew the City was using non-Union contractors for some time prior to his own retirement in April of 2006, and that he knew the City had used former City employee and Union representative John Rohr to paint at CDA. Vaughn acknowledged the City's use of contractors to paint at CDA. Therefore, the City urged that the Union must be held to have agreed with the City's interpretation of Section 5.1(G) or acquiesced in the City's practice of using independent painting contractors at CDA.

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[8] The City offered no evidence on this point at hearing.

The City argued that John Ring is an independent contractor based upon the legal and precedential definition thereof, citing the Black's Law Dictionary and one WERC case, Wisconsin Electric Power Co., Case 48, No. 50720 A-5197 (Gratz, 12/22/94). The City noted that no pressure was put on Ring to retire and no conversations occurred between Ring and Simonds prior to Ring's retirement regarding the possibility of Ring painting at CDA after his retirement.

The City argued that the facts showed Ring was truly independent in 2005-06. After his retirement, Ring asked Simonds for work and agreed to work for the same amount Dale Connery charged; no formal contract was entered into but Ring agreed to get his own liability insurance and send proof thereof to Simonds; and Ring agreed that he would not receive any contract benefits. Ring received no City assistance in setting up John Ring Painting Co., an unincorporated entity.

The City contended that the fact that after April 29, 2005 Ring has provided services similar to those he provided as a City employee, the timing of his hire as an independent contractor and the lack of bidding of the work ultimately done by Ring and the City's payment to Ring sometimes in excess of $5,000 per month do not prove the City had a true "right of control" over Ring in his CDA work after his retirement as required in a master-servant relationship. In this regard, the City emphasized that Ring has no set hours/schedule, he can decline work, he has negotiated a piece work (not salaried) rate of pay, he supplies his own tools and no longer does lead work for the City.

In all of these circumstances, the City urged the Arbitrator to deny the grievance in its entirety.

REPLY BRIEFS

Union:

The Union argued that the grievance is arbitrable as Ring is an employee of the City and that the City failed to meet its burden of proving it otherwise herein, there generally being a strong presumption favoring arbitrabililty. The Union urged that the affidavits of Ring and Dieters in support of the City's Motion to Dismiss on the ground that Ring is an independent contractor were conclusory and essentially an issue for the Arbitrator to decide.

The Union contended that it has not asserted/argued the applicability of Section 5.1(G) as this is not a case about subcontracting. Rather, in the Union's view, this case concerns Section 3.1, the Recognition Clause. In addition, the Union asserted that the Wisconsin Electric Power Co. case cited by the City actually supports the Union's assertions in this case and it argued on Reply as follows:

> In Wisconsin Elec. Power Co., Arbitrator Gratz highlighted several indicia that tended to show that a retiree was, in fact, an employee: (1) the employment contracts were entered into shortly after the retiree's retirement; (2) each contract involved only work that the retiree performed for many years as an employee prior to his retirement; (3) the work was done entirely on premises owned and controlled by the Company; (4) the Company provided all the materials and other tools and equipment as needed; (5) the retiree did not appear to hold himself out to perform work for entities other than the Company; (6) the retiree's earnings from post-retirement work for the Company were unrelated to any investment he made in equipment and materials; and (7) the extent to which the Company had actually exercised supervision over the details of the retiree's work had not been shown to be any different from the retiree's last years as a veteran bargaining unit employee.
>
> Here, the indicia found to support an employer-employee relationship in Wisconsin Elec. Power Co. are present in this case: (1) Ring retired on Friday, April 29, 2005 and immediately thereafter, on Tuesday, May 3, 2005, returned to work for the City painting Community Development Authority ("CDA") apartments; (2) prior to Ring's retirement, most of his time, 95 percent, was spent painting CDA apartments; likewise, after his retirement, Ring's time was spent painting CDA apartments; (3) the work Ring performed before and after retirement was done entirely on premises owned and controlled by the City; (4) the City continued to provide Ring with painting supplies and Ring continued to have access to the supplies and equipment storage areas post-retirement; (5) Ring did not hold himself out to perform work for entities other than the City has indicated by (a) his lack of advertising cots in 2005, (b) his lack of reporting income other than his income from the City on his 2005 tax return, and (c) his decision to locate his business in his home; (6) Ring's earnings from post-retirement work for the City was unrelated to any investment he has made in equipment and materials as highlighted by his relatively little unreimbursed expenses. Indeed, excluding his truck expense and depreciation, Ring's business expenses for 2005 were under $1,000.00; and (7) the degree of actual supervision of Ring before his retirement has not changed since his retirement.

Finally, the Union noted that unlike the individual found to be an independent contractor in, WEPC, Ring had no written contract with the City, he did not negotiate his compensation with the City, Ring's post-retirement work for the City was essentially the same as his work before retirement and Ring did not have to supply his own tools and equipment as he had access to CDA storage and shop areas.

The Union asserted that the City's arguments that Ring is an independent contractor based upon Ring's opinion that he is not an employee, the fact that the Union had not sought Union dues from Ring until just before the instant hearing and the fact that Ring has not received any contract benefits is either insufficient evidence of Ring's true status or are factors irrelevant to the inquiry in this case. Contrary to the City, the Union found the timing of Ring's "hire" to be "suspicious" and part of a "bold attempt to evade . . . obligations under the parties' contract."

City:

The City argued that the language of Section 5.1(G) allows broadly for contracting out, not just subcontracting. The City asserted that the record evidence supports a conclusion that Ring became a contractor in May, 2005, but that it fails to support the Union's view of this case as follows:

- Ring did not tell Simonds' about retiring a month or so before Ring retired (union brief, page 3). Ring told Olvera and "assumed" Olvera told Simonds. Transcript 147: 10-12. There is no evidence at all that Olvera said anything to Simonds about Ring's upcoming retirement. Ring and Simonds had no discussion about Ring's retirement. Transcript 175: 5-6.

- The overheard comment referred to at union brief, page 4-5, is irrelevant and is tossed in for no apparent reason other than an attempt to prejudice the arbitrator again Simonds. In point of fact, Ring testified that no union member had given him "shit". So what was the point of putting it in?

- There is no requirement anywhere that a single person business be incorporated or have an EIN so long as the social security number is provided, and taxes are paid, or that a business have an address different from a residence. There is no requirement that a business have advertising, legal or professional expenses in addition to other acknowledged expenses. None of the union's purported concerns in this regard have any bearing on John Ring's status as an independent contractor.

- John Ring did not need to purchase equipment for his business. The unrefuted evidence is that he already had enough equipment to conduct his business. Transcript 160: 24-161:10.

- The lack of a written contract is not a factor. Verbal agreements in Wisconsin suffice.

- The unrefuted evidence established that because Housing Operations is an enterprise agency not funded by the City, Simonds was not required to use a bid process; the ordinance Dieters wrote about does not apply. Transcript 178: 3-19.

- Whether a bid process might result in a lower price has no bearing on the issue. In any event, John Ring is paid by Simonds at the same rate Simonds' pays all painting contractors.

- How many others John Ring painted for is irrelevant. The fact is that he could and did paint for others.

- Simonds gives assignments to Ring and all the other painting contractors. Obviously, that's the only way for them to know what to do. The giving of assignments is simply not a relevant factor in determining John Ring's employment status.

- Without any supporting evidence, and clearly contrary to the evidence of record, the union asserts, at its brief, page 9, that it is "highly improbable" that John Ring did not have a pre-retirement arrangement to work after retirement. Speculation, wishful thinking, and innuendo cannot change the fact that there was no inducement or threat made to John Ring to encourage him to retire, that John Ring brought up the issue of work to Simonds <u>after</u> Ring retired, and that Simonds was surprised to learn John Ring wanted to work after retirement. See City first brief, page 9.

- "Behavioral control" is not an issue in this case. John Ring paints if, when, and how he alone determines, and retains the right to decline work. The union provided absolutely no evidence to refute any of those points. As seen, Simonds can no longer exert any "behavioral control" over Ring through discipline as he could when Ring was an employee.

- Ring's opportunity for loss is great: if he does not perform to Simonds' satisfaction, he gets no more business from Simonds. To suggest that John Ring has no chance for loss is disingenuous and ignores the reality of the case.

The City reiterated its contentions made in its initial brief that Wisconsin Electric Power Co., supra, is precisely on point and should be relied upon by the Arbitrator in analyzing the facts of this case, and in denying and dismissing the grievance.

DISCUSSION

Initially, this Arbitrator notes that the Union's grievance herein described the alleged violation in this case as follows:

> Please consider this a general grievance filed pursuant to Step 2 of Section 6.1 of our labor agreement.
>
> The employer is in violation of the Recognition, Wage, Seniority and other provisions of the collective bargaining agreement by failing to apply the collective bargaining agreement to an individual employed in the bargaining unit as a painter, but rather characterizing the person as an "independent contractor."
>
> As a remedy, we seek to have all provisions of the collective bargaining agreement applied to this position and to make any bargaining unit employee whole for all losses, as well as the Union.

The effective agreement contains several relevant provisions which address contracting, subcontracting, definitions of employees and assignment of unit work. The City has cited Section 5.1(G) as support for its argument that no violation of the contract occurred herein because Section 5.1(G) constitutes a broad contracting/subcontracting which reserves to the City the right to contract and to subcontract for services virtually without limitation. This Arbitrator agrees with the City that Section 5.1(G) constitutes a very broad reservation of the right to contract "for matters relating to municipal operations." In addition, Section 5.1(G) also broadly allows for subcontracting. It is significant that Section 5.1(G) requires the City "…to notify the Union of said contracting or subcontracting…" and that it "…will be the policy of the Employer to consider the impact on the employment security of its craft employees…" of its decision to contract/subcontract.

Significantly, in this case, the City/CDA never notified the Union that it was considering contracting/subcontracting with John Ring to perform unit painting services after Ring's retirement. Nor did the City provide any evidence to show that it considered the impact of its decision to contract with Ring on the employment security of remaining unit employees. Therefore, the City clearly violated the notice and consideration provisions of Section 5.1(G) and by its own admissions.

However, Section 5.1(G) is not the only provision of the contract dealing with contracting, subcontracting and the performance of unit work. In particular, Article 3 contains a broad provision requiring the City to meet with the Union "[i]n the event of [sic] a dispute arises concerning the assignment of work" and if the dispute is not resolved it can be submitted as a grievance. In addition, Article 8 contains extremely specific and limiting definitions of regular employees and of "hourly employees." Section 8.1(B), paragraph 2, states that hourly employees "are employed on a temporary basis" and the City agreed that the number of hourlies "will be kept to the lowest number and will not be used to avoid filling regular full-time or regular part-time positions."[9] It is significant that Section 8.3, paragraph 1, states unequivocally that "[*a*]*ll* employees hired on a temporary basis, i.e. for a season or limited period of time and not through the civil service procedure, to perform bargaining unit work, are defined as 'hourly employees'" (emphasis supplied). Section 8.3 also requires that hourly employees must be hired through the Union hiring hall for the craft involved and that their use "shall be limited to 1200 hours of continuous or regularly scheduled hours in a payroll year" and that they "shall be paid the area Standard Wage Rate for the craft involved and overtime rates of pay in accordance with the Collective Bargaining Agreement." Thus, the provisions of the labor agreement clearly and expressly limit and prescribe the City's right to contract/subcontract under Section 5.1(G).

In all the circumstances here, Simonds' employment of and decision to "hire" Ring within a few days of his retirement from the CDA not only violated the notice and consideration provisions of Section 5.1(G), but the facts herein also demonstrated that Ring was not hired as a true independent contractor.[10] In this regard, it is significant that the great majority of Ring's work for the CDA before his retirement was the same as the services he provided to the CDA after his retirement; Ring's work for the CDA, starting in May, 2005, was routine in nature, requiring little if any supervision and very little independent judgment by Ring; although Simonds did not guarantee Ring any level of work after Ring's retirement, the level of Ring's post-retirement work was regular and substantial, occurring every month and in an annual dollar amount virtually equal to the wages Ring had been paid as a full-time Painter/Leadworker prior to his retirement.[11] The record evidence also showed that Simonds set Ring's post-retirement compensation: Ring merely accepted Simonds' offer that he be paid the same as Dale Connery. As there was no written agreement between Ring and the City, and because

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[9] This language is repeated in Section 8.3.

[10] Application of the Wisconsin Electric Power Company case cited by the City tends to support the Union's assertions herein, not the City's.

[11] Ring earned slightly less annually as a Painter/Leadworker in 2005 than he billed the City for contracted work from May, 2005 to June, 2006. As of May 12, 2005 Ring was the only "painting contractor" Simonds was using; Simonds admitted that he stopped using Dale Connery in May, 2005. Although Simonds stated that he continued to use TC Carpet Care as a painting contractor, no documentary or other evidence was submitted to corroborate Simonds on this point.

Ring retired and then returned to work for the City less than one week after his retirement, it is reasonable to conclude that Ring understood he would be subject to the same expectations regarding quality and quantity of work as he had been prior to his retirement. After his retirement, Ring continued to receive his work assignments from Simonds; he used the same keys and had the same access to CDA facilities (storage, work areas, shop and apartments) and supplies; Ring continued to charge paint and disposable supplies for his use at CDA on the City's account after his retirement just as he had done before he retired. In addition, Union Exhibit 3 showed that on May 13, 2005 the CDA paid $1008.10 to "John Ring" at his residence and that Ring submitted the bill therefor on May 9, 2005 in his own name and from his residence, not as John Ring Painting Co. (U. Exh. 2). Although Ring stated he was free to take other work, he did not do so except for two small jobs in 2005 (not reported on his 2005 Tax returns), and three jobs he allegedly performed just before the instant hearing in 2006. And the City presented no evidence to show that Ring ever turned down any work Simonds offered him.

The above analysis shows that Ring was not a true independent contractor. The City argued here that the Union has singled out Ring for punishment when at least one former employee (John Rohr) and other third parties were also used over the years as painting contractors without drawing a grievance from the Union. This Arbitrator agrees, with the Union, that the CDA's "hire" and use of Ring was different from the hire and employment of prior independent painting contractors, none of whom had been City employees immediately prior to their hire by the CDA as independent contractors. Also, evidence submitted by the Union (undisputed by the City) showed that prior to 2005, the City had hired off the Union's out-of-work list for temporary help. In addition, no evidence was submitted to show that Union agents harbored any unlawful animosity against Ring after his resumption of work for the CDA in May, 2005, although they credibly admitted the Union objected to Ring and the CDA diverting unit work from unit employees.

It is also important to note that there is no evidence to otherwise support the propriety of the CDA's use of Ring as a contractor/subcontractor to do unit work. In this regard, I note that the work performed by Ring post-retirement was primarily performed by unit employees previously and there were no technological or other charges in the character of the work that had occurred; and the work that Ring performed starting in May, 2005 was not experimental, it was not related to an emergency or special project, nor was it time-sensitive or managerial work.

Here, unit employees were available to perform the work; yet the quantity of work Ring performed amounted to at least one-fourth of the remaining unit work, given the fact that the CDA never replaced Ring, one of four remaining unit painters (as of April, 2005); and there was no evidence to show that the CDA ever contracted so regularly and for such a substantial amount of painting work before it engaged Ring for

his services. Although no CDA unit painters were laid off due to CDA contracting, the Undersigned notes that the City has not hired anyone to replace either Czerwonka or Ring.

Simonds' question of Ring, whether anyone had given him any "s***" about working at the CDA after the latter's retirement, as well as Simonds' failure to notify the Union and to consider the affect on the unit of his use of Ring demonstrated Simonds' cavalier, indeed his bad-faith attitude toward the Union.[12] Although the evidence failed to prove that prior to Ring's retirement in April, 2005, Simonds and Ring conspired or planned that Ring would continue to work for the CDA after his retirement, the evidence showed the arrangement between Simonds and Ring was far from arm's length. In this regard, I note that apartment turn-arounds were up 50% in 2005, an all-time high and that HUD continued to require the CDA to clean, paint and re-rent vacant apartments in 30 days while cutting HUD funding to the CDA. And yet, Simonds failed to advertise for new painting contractors in the Spring of 2005, although he admittedly had had "issues" with Dale Connery for some time.

Here, Simonds had complete authority to contract with Ring repeatedly without seeking any competitive bids pursuant to the City's Procurement Policy, even though the City's checks to Ring in aggregate for the months of October and November of 2005 and January of 2006 exceeded $5000. Indeed, Simonds chose to continue to contract with Ring despite the following Procurement Policy statement: "[i]f practicable, a quotation shall be solicited from other than the previous source before placing a repeat order." In this case, the City proffered no evidence to show it was not "practicable" for Simonds to seek quotations from other contractors. In addition, the Union offered the testimony of a private painting contractor, Mr. Larry Stalz, which tended to support a conclusion that the amounts paid to Ring were substantially greater than the CDA would have paid a private painting contractor such as Stalz, who would have charged a flat rate which would have included all paint, equipment and supplies. These circumstances tend to support the Union's arguments herein that Ring was not hired as a true independent painting contractor and that CDA's actions in "contracting" with Ring were not taken in good faith.

The City argued that Section 6.1 prohibits this Arbitrator from altering, amending, changing or modifying this agreement. This is technically correct. However, were the Undersigned to rule in favor of the Union in this case she would not be altering, etc., the labor agreement in any way. Merely enforcing or giving full effect to all of the provisions of the agreement, not just Section 5.1(G), is in accord with long-accepted rules of contract construction, that the contract should be construed as a whole.

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[12] This Arbitrator notes that Simonds also admittedly failed or refused to produce documents properly subpoenaed by the Union herein.

The remaining question is what remedy is appropriate to impose in this case for the violations of the agreement committed herein. The Union has requested that Union employees on the Union's out-of-work list be paid wages and benefits for the equivalent of the amount paid to Ring from May, 2005 forward. This Arbitrator agrees. As the parties' contract, at Article 8, specifically employs this type of remedy where the City has utilized hourly employees, it is clear that the parties contemplated application of such a remedy in a similar situation. The difficulty here is that Ring was paid by the project, not by the hour, so that the parties will have to agree upon a method/means of translating Ring's work for CDA from early May, 2005 forward and for this reason, this Arbitrator shall retain jurisdiction of this case regarding the remedy only for sixty (60) working days after the issuance of this Award.

AWARD[13]

The City violated the labor agreement by hiring John Ring as an independent contractor not covered by the labor agreement without properly notifying the Union and without considering the impact thereof on the employment security of unit employees.

Therefore, the City is ordered to make whole painters on the Union's work list and to abide by the labor agreement in the future.

Dated at Oshkosh, Wisconsin, this 19th day of January, 2007.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

[13] The Union sought lost dues as part of a remedy herein. As there is no basis on this record or in the labor agreement for the Union's request for lost dues, that remedy is not being ordered herein.

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