

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
IOLA-SCANDINAVIA SCHOOL DISTRICT
and
IOLA-SCANDINAVIA AUXILIARY ASSOCIATION

Case 26
No. 68422
MA-14235

(Subcontracting Grievance)

Appearances:

Richard F. Verstegen, Attorney, Lathrop & Clark, LLP, 740 Regent Street, Suite 400, Madison, Wisconsin 53701-1507 appeared on behalf of the Iola-Scandinavia School District.

Timothy E. Smith, Attorney, Central Wisconsin Uniserv Council, 370 Orbiting Drive, Mosinee, Wisconsin 54455-0158 and **Michael J. Burke**, Negotiations Specialist, WEAC, 2004 Highland Avenue, Eau Claire, Wisconsin 54701 appeared on behalf of the Iola-Scandinavia Auxiliary Association.

ARBITRATION AWARD

The Iola-Scandinavia School District, herein the District, and the Iola-Scandinavia Auxiliary Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning the subcontracting of certain custodial services. Commissioner Paul Gordon was designated as the arbitrator. Hearing was held in the matter on February 17, 2009 at Iola, Wisconsin. A transcript of proceedings was prepared. The parties filed written briefs and reply briefs and the record was closed on May 15, 2009.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the District violate the collective bargaining agreement when it permanently filled the vacant middle school and high school janitorial position with a contracted cleaning service?

If so, what is the appropriate remedy?

The District states the issues as:

Did the District violate the 2006-2008 collective bargaining agreement when it contracted for service upon the retirement of Bob Schmoldt?

The case is essentially about subcontracting and requires, among other things, determining whether there is a contractual difference between permanent and temporary, and whether there was a vacancy. The Association's statement of the issues can be read to assume the permanency matter is contractually significant and that there was a vacancy. The District's statement refers to the 2006-2008 agreement, while salient facts occurred after the expiration of that agreement and the adoption of the 2008-2010 agreement. There were no changes to the relevant contract provisions between the two agreements. The work that was contracted for was work formerly performed by a bargaining unit member. The undersigned states the issues as:

Did the District violate the collective bargaining agreement when it contracted for service with a private company owned and operated by the person who resigned from the position doing the work formerly done by a bargaining unit member?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I- RECOGNITION

The Iola-Scandinavia School District hereby recognizes the Iola-Scandinavia Auxiliary Association as the exclusive bargaining representative for all regular full-time and regular part-time nonprofessional employees of the School district of Iola-Scandinavia, but excluding supervisory, managerial and confidential employees, and specifically excluding teachers, administrators, the director of Transportation, the Head Bookkeeper, and Secretary to the District Administrator, as certified by the Wisconsin Employment Relations Commission in Case II, No 2592, ME-1811, Decision No. 17772.

It shall be understood that throughout this Agreement, "he" and "his" refer and include both sexes.

ARTICLE II - ASSOCIATION SECURITY

. . .

- F. Bargaining Unit Work: Bargaining unit work is defined as any and all work normally and regularly performed by bargaining unit members. The Board agrees that no bargaining unit members will be reduced in hours or laid off because of the temporary employment of non-bargaining unit members to perform bargaining unit work.

ARTICLE III – MANAGEMENT RIGHTS

- A. The Board on its own behalf and on behalf of the electors of the District hereby retains all powers, rights, duties, authorities, and responsibilities conferred upon it and vested in it by the law and the Constitution of the State of Wisconsin and the United States, unless said powers, rights, duties, authorities, and responsibilities are modified by the terms of this agreement. The rights of the Board unless modified elsewhere in this agreement shall include the following:
1. To direct the operations of the school district
 2. To hire, promote, transfer, schedule, and assign employees in positions within the school district.
 3. To take disciplinary action against employees for just cause.
 4. To take necessary action to comply with state or federal law.
 5. To introduce new or improved methods or facilities.
 6. To change existing methods or facilities.
 7. To determine the kinds and amounts of services to be performed as pertains to school district operations and the number and kinds of classifications of employees who will perform such services.
 8. To take necessary action to carry out the functions of the school district in situations of emergency.
- B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States. It is understood that this provision is not a waiver of the Association's right to bargain the effects upon wages, hours or conditions of employment of management decisions made during the term of the contract where the effects are not specifically referred to herein.
- C. Nothing in this Article is to be interpreted as limiting the negotiability of any items mentioned herein in subsequent negotiations.

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ARTICLE VI – PERFORMANCE, TRANSFERS AND JOB POSTING

- A. Posting: When a vacancy in a bargaining unit position is to be filled or a new position is created within the bargaining unit, the district agrees to notify bargaining unit members by mail. The vacancy will not be filled for at least five (5) days after the notification. Current staff members who are qualified for the position will be given first consideration. If more than one current staff member wants the position, and qualifications are equal, the selection will be made based on seniority.

ARTICLE IX – GRIEVANCE PROCEDURE

...
C. Initiation and Processing:
...

(c) The arbitrator so selected will confer with the Board and the grievant and hold hearings promptly and will issue his decision on a timely basis. The arbitrator's decision will be in writing and will set forth his findings of fact, reasoning, and conclusion of the issue submitted. The arbitrator will be without power or authority to state penalties or to make any decision which requires of the Commission an act prohibited by law or which is in violation of the terms of this Agreement. The arbitrator shall not modify, add to, subtract from, or amend any terms of this Agreement. This decision of the arbitrator will be final and binding on the parties.
...

ARTICLE XIV – HOURS OF WORK

A. Work Week – Work day: The work week shall be Monday through Friday. The normal work day for all full-time employees shall consist of eight (8) consecutive hours excluding a lunch period of one-half (½) hours at or as near as possible to the mid-point of the work day. Work hours, lunch periods, and coffee breaks for each employee will be scheduled and posted by the District Administrator or his designee.
...

BACKGROUND AND FACTS

Robert Schmoldt was a night custodian for the District and a member of the bargaining unit working full time. In June, 2008 he submitted a letter to the District by which he was retiring effective August 29, 2008. The District solicited bids to contract out the work of the evening custodian in July, 2008, and in July received one bid from a private cleaning business. No bid was accepted by the District at that time. On August 7, 2008 the District posted a custodial position with the following Memorandum:

To: Iola-Scandinavia Auxiliary Association members
From: Joe Price
Date: 8/7/2008
Re: Job Posting

The Iola-Scandinavia School District is currently seeking a full time custodian. Hours and assignment to be determined.

If interested in this position please apply in writing by August 14, 2008. Negotiations for a 2008-2010 contract are still ongoing. Until a settlement is reached, the terms of your 2007-2008 contract will be in effect.

Bargaining unit member Linda Krusa then applied for the position. She withdrew her application on August 13, 2008.

After Krusa withdrew her application the District hired Dave Engle to do the night custodial work that Schmoldt had done in the High School and Middle School. The Buildings and Grounds Supervisor, Larry Fechter, had Engle's name in a file of applications of people who have applied for work at the School District over the years. He had also supplied carpet cleaning services to the District on an occasional basis. Engle and his wife had a cleaning service company that was experiencing a decrease of business at the time. He was hired by the District as an employee to do the type of work Schmoldt had done. Engle had not previously been a District employee. He worked about two weeks when his private cleaning business increased, and he then resigned from the District on August 29, 2008 without having joined the Association. The District did not post the position again to the Association members.

Fechter then contacted Building Service Group, a private company that had submitted earlier bids that were not accepted by the District, about contracting for the work Engle had been doing. Building Service Group would need about a month to screen potential employees for the job, and the District needed someone within five or six days. Therefore, Fechter decided to contact Engle again about Engle's private cleaning service making a proposal to do the work.

Engle and his wife owned a cleaning service company that had other business accounts. Fechter spoke with him about whether he could continue to provide services, and Engle mentioned that his wife, Pam and other employees of his cleaning service were available. Engle then submitted a proposal dated August 29, 2008 and the District contracted the work for nine months to Engle's Service King, Inc. The company would be providing one full time person and one half time person to do the work, with additional help as needed. Under the terms of the proposal, those two persons were Dave and Pam Engle. The duties contracted to be performed under Engle's Service King, Inc.'s proposal of August 29, 2008, included the type of custodial work at the High School that had been included in the work previously performed by Schmoldt. The proposal accepted by the District was for a nine month period. Engle's Service King, Inc. then began providing the cleaning services contracted for. The overall number of hours worked by bargaining unit members then decreased by eight hours per day, due to the contracting of services formerly done by Schmoldt and then Engle as employees. No other individual bargaining unit members had their hours reduced. None were laid off.

The District's janitorial/custodian and maintenance employees have crossed duties from time to time, depending on project needs of the District. This occurs more often in the summer and holiday breaks than during the rest of the school year. As a group, any employee in either position has done things like painting, carpeting and tile flooring installation, lighting, irrigation system, bleacher construction, snow removal and similar things.

In March 2007 a custodian employee in the bargaining unit resigned and the District considered contracting with an outside company for that work, receiving a proposal from Building Services Group, Inc., for cleaning services. The services were not contracted for at that time and a new employee was eventually hired into the bargaining unit to do the work. In February 2008 another custodian in the bargaining unit resigned. The District did not post the position. It moved two other bargaining unit members from their normal cleaning work job site at the Aquatic Center to the elementary school, and accepted a March 18, 2008 contract proposal from Building Services Group, Inc. to perform the cleaning services at the Aquatic Center. That included weekend hours. The overall number of hours worked by the bargaining unit decreased at that time due to the retirement of the employee, whose hours were not made up for by other bargaining unit members or new hires. No individual bargaining unit member's hours were reduced after the jobs were reassigned. The Association did not file any grievances over the 2008 Building Services Group, Inc. cleaning contract. Schmoldt retired later that year.

Over the approximately nine previous years the District has contracted with various service providers to perform certain temporary, short term work or projects, including the cleaning of widows, carpet cleaning, carpet installation, tiling, gym floor sanding and refinishing, bleacher bracket reinforcement, sound system installation, exterior signage, plumbing, replacing light fixtures, landscaping, locker installation, fencing, removal of snow piles, painting, fire extinguisher certification, etc. Often the members of the bargaining unit did the same or similar work as part of their normal duties. Occasionally the members of the bargaining unit worked along side those who were working on a contracted basis for the various short term projects. Some services, like widow and carpet cleaning, are done several times a year. Some are only for a very specific project, like hooking up plumbing in the concessions stand at the athletic field. These short term contracted work projects were not done due to the separation of employment of any bargaining unit members, retirements, resignations or vacancies existing in bargaining unit positions. There is no evidence in the record that any bargaining unit members had their hours reduced or were laid off because of the work done by non-bargaining unit members or contracted services providers in performing the work on the above projects. The Association has not filed any grievances concerning the contacting in these instances.

After Schmoldt retired, Fechter made the decision to pursue contracting for the services without really giving a lot of thought to the collective bargaining agreement because of the other contracting done in the maintenance department as set out immediately above, and he has seen the District Superintendent contract out for food service in basically eliminating a retiree position. In 2001 the District's Head Cook, who was in the bargaining unit, retired. The Head Cook had basically run the District's food service operation. Upon the retirement the District contracted with Taher Food Service Company to run the food service operation for one year. The Association did not grieve the matter. Fechter discussed with Superintendent Joe Price Engle's resignation and August 29th proposal as part of the process whereby the contracting decision was made.

Since at least 2000 there have not been any collective bargaining proposals from either party to limit the District's rights concerning contracting out for services.

The Association filed a grievance over the Engle's contract, contending a janitorial vacancy was not filled by a bargaining unit member but instead by a cleaning service, who happened to be the former employee that caused the vacancy. The Grievance contended this was a violation of Article II – Association Security, and Article VII – Promotions, Transfers, and Job Posting. The District denied the grievance contending no current bargaining unit members were reduced in hours or laid off due to hiring a cleaning service, and that the District did post the position and the bargaining unit member's application was withdrawn and an attempt to fill the position did not work out before the decision was made to go with a cleaning service.

Further facts appear as are set out in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that the contract limits the District's authority to subcontract bargaining unit work. Subcontracting bargaining unit work is a mandatory subject of bargaining and the parties have addressed the issue in Article II – Association Security, Section F. The Association contends this clause prohibits the District from permanently subcontracting bargaining unit work. Applying the principle that to express one thing is to exclude the other, this allows the Board to temporarily subcontract provided there is no layoff or reduction in hours involved. The clause does not specifically address permanent subcontracting. It is clear the parties bargained over the issue and the failure to include a reference to permanent subcontracting requires the conclusion that such action is not allowed. There is no question that the clause seeks to protect bargaining unit work. There is no real evidence of bargaining history to aide in ascertaining the parties' intent. Given the limits of temporary subcontracting, it is absurd to think the parties intended the District would have unlimited authority to permanently subcontract bargaining unit work, citing arbitral authority. Rather than excising any language, the conclusion must be that the parties' silence on permanent subcontracting prohibits such action. The District reliance on the Management Rights clause is not compelling compared to the more specific language in Article II.

The Association argues that the District's reliance on past practice is without merit. Of the District's many examples of subcontracting, all but two were temporary positions which are allowed by contract language. The examples of the Aquatic Fitness Center and Food Service management positions are easily distinguishable. The Aquatic Fitness Center subcontract included weekend hours. Weekend hours are not in the collective bargaining agreement so the Association decided not to contest that action as weekend hours are not bargaining unit work as defined in Article II Section F. As to food service, the District did not present evidence that the Taher company performed bargaining unit work. The billing included management and consulting fees. Taher ran the food service operation for one year and was used to manage the program. The remaining cooks continued to be represented by the Association. As such, in neither case was bargaining unit work subcontracted.

In reply to the District's arguments, the Association argues that Article II, Section F is a job security provision and both sentences are critical. The first sentence defined janitorial work as that performed by bargaining unit members. That sentence, in the Association Security clause, is there to preserve custodial work as belonging to the members. Ignoring that sentence renders a key provision meaningless, citing arbitral authority. The second sentence grants the District the right to temporarily employ non-bargaining unit members provided there are no layoffs or reduced hours as a result. This is a narrow exception to the first sentence. In light of the context and maxim of *Noscitur a Sociis*, the second sentence provides an exception to the general rule against subcontracting set forth in the first sentence.

The Association also argues that as to the District past practice examples, the food service company did much more than just replace the head cook. Given the management services provided, this was not bargaining unit work. And the prioritization of the work at the Aquatic Center had shifts including weekend hours, which were not allowed under the collective bargaining agreement at Article XIV – Hours of Work. The Association had no reason to challenge that as it did not involve Monday through Friday bargaining work. And past practice is not relevant in this case. Article II, Section F controls in that janitorial work is to be performed by bargaining unit members only, subject to the narrow exception.

District

In summary, the District argues that the Association has not met its burden to show that the District violated the contract when it contracted with Service King. The District acted pursuant to the rights in the Article III Management Rights clause. The District has the right to direct the operations of the school district and the right to determine the kinds and amounts of services to be performed. The language must be interpreted consistent with this clear language. Clear and unambiguous language is to be applied since the intent of clear language is obvious, while ambiguous language is to be interpreted to determine the intent of the parties, citing arbitral authorities. Article III, Section A, subsections 1 and 7 are clear and unambiguous, and provide the District with the right to decide the kind and amount of services to be performed by the District, which must include the right to decide that certain services will be performed by outside contractors. The District applied these provisions appropriately after Mr. Engle resigned. It considered, as in past resignations or retirements, its rights and options under the contract as to whether to contract. Mr. Fechter contacted Building Services Group, which could not meet the District's needs. Fechter then asked Engle if his company was interested, and the company submitted a proposal. The District's decision to contract with Service King was consistent with the clear and unambiguous language in Article III.

The District argues that even if the arbitrator finds the contract does not clearly set forth the right to contract for services, the District has retained this right. The parties have agreed under Article III that the District retains all rights, duties, authorities, and responsibilities conferred upon it and vested by law unless those are modified by the terms of the agreement. The right to contract, as a result, is reserved to the District. This reservation of rights doctrine is a sound and well entrenched arbitral principal, citing arbitral authority.

These rights are limited only by specific and express terms of the agreement, are inherent to management and may not be denied unless they constitute a violation of the contract or are clearly arbitrary and capricious as to reflect an intent to derogate the relationship, citing arbitral authority. Article III reserves those rights to the District, even if the contract does not specifically set forth the right for the District to contract for services. This right has not been clearly limited by specific and express terms of the contract and may not be denied. The District acted on this retained right.

The District also argues that the past practice in the District has been to permit the District to contract services, especially upon the resignation or retirement of an employee. In February 2008 when Ms. Melum resigned from her position the District contracted with Building Services Group for cleaning services. Similar to the circumstances following Engle's resignation, when Melum resigned the District considered its options under the contract, including whether to contract for these services. The District got a proposal and decided to contract with Building Services Group. The Association did not grieve that decision. The Association president negotiates and chairs the grievance committee, knew about the contracting, and the Association did not file a grievance. In 2001 the District contracted with Taher Food Service Company following the retirement of the head cook, who had been in the bargaining unit. The head cook ran the operations from 1975 to 2001. Taher ran it by contract for a year. The Association did not file a grievance relating to the contracting with Taher even though the Association president knew of the contracting. Both applications of the contract language lend support to the conclusion that the District had the right to contract for services with Service King under Article III. Accordingly, the arbitrator must conclude the District acted consistent with the practice. The District had contracted under similar circumstances in the past without objection of the Association, showing the parties have recognized the District has the right to contract for such services.

The District argues it acted in good faith when it contracted with Service King upon the resignation of Mr. Engle. When a collective bargaining agreement is silent on the right to contract, arbitrators in some cases look at the decision in terms of good faith, reasonableness and justification for it, citing arbitral authority. There are typically eleven factors considered, but not all apply in each case. Applying them here, it is clear the Association cannot meet its burden to show the District violated the contract. The District has an extensive history of contracting out for services which reflects an accepted culture of contracting, including services already performed by bargaining unit members. The Association has never filed a grievance or introduced language during bargaining to limit this right. This has been known by Association members and they have worked side by side with contractors. The Association has thus recognized and acknowledged the District right. The District also has a culture of training its employees in many different areas and utilizing employees whenever it can do so. But the District always carefully assessed its options and makes decisions to contract out in good faith. The example of past practice most similar is the 2008 contract for cleaning the Aquatic Center. Similar to the contract with Service King, it involves cleaning, was entered into immediately after a resignation of an employee, and existed in the District since 2008. No grievance was filed. Because of the similarities in the contracts, this shows the District acted in good faith. Another good example is the 2001 retirement of the head cook. Upon retirement the District looked at options and contracted with Taher to run the food service operation for a year. No grievance was filed.

Other examples of doing work similar to that done by employees, most with working side by side with employees without objection, include: contracting for window cleaning services for eight years; carpet cleaning and finishing floors with various contractors; carpeting and flooring; construction and maintenance of bleachers; installation of sound system; sign construction and repair; plumbing; electrical; landscaping; painting; locker installation and security fencing; snow removal; and fire inspection. Certainly some of these are for short periods of time. The frequency of contracting shows it is done with great regularity and the Association has never objected. As a result, when it contracted with Service King it did so under circumstances where there has been an accepted past practice of contracting. As a result the District acted in good faith.

The District argues that in light of the circumstances surrounding the contract with Service King, the District was justified in contracting for cleaning services and acted in good faith. In this case Engle resigned and the District was placed in a difficult position because the resignation occurred immediately before the school year started. The District needed to act quickly and considered its options. Fechter contacted Building Services Group, which would need a month to screen employees. Fechter then spoke with Engle about Service King, which immediately submitted a proposal. Fechter then met with Price to discuss options, including hiring someone, and the District contracted with Service King. Service King was able to start immediately which was necessary for the District. Engle already knew the routine associated with cleaning the District considering he had worked there a few weeks. The District trusted Engle around children. Engle did exceptional work. It was cost effective to contract with Service King. In light of these circumstances, the District was justified in contracting with Service King when Engle abruptly resigned and the District acted in good faith in response.

The District further argues there was no effect on the unit employees as a result of the decision by the District to contract with Service King. The employees who worked 2008-2009 and 2007-2008 had the same number of hours. The District only contracted the hours previously worked by Engle. It timed the contracting for when there was a resignation and contracted services without affecting existing staff members. This is consistent with contracting with Building Services Group when Melum resigned in 2008, employees employed prior to the resignation had the same number of hours after the resignation. No grievance was filed, recognizing the District's rights to contract out for services when there is a resignation in the District and the remaining employees' hours are not affected. Because the District's actions did not affect any current employees, it is clear that it acted in good faith when it contracted with Service King following Engle's resignation.

The District argues the Association has never introduced language to limit the District's right to contract. This is significant because the history has been to contract work on a number of different occasions. With no attempt to negotiate a limit on the District's right to contract, the District certainly acted in good faith when it concluded contracting was an accepted practice and contracted with Service King. Further, there is no evidence to show the current employees are available to take on the amount of work associated with the cleaning undertaken by Service King, which is about thirteen hours per day. As a result, the District acted in good faith. Applying these factors, it is clear the Association cannot meet its burden to show the District violated the contract by a preponderance of credible evidence.

The District argues that Article II, Section F does not limit any right of the District to contract for services. The first sentence defines bargaining unit work. The second sentence is the only sentence in the contract that applies that definition. The second sentence in no way limited the District from contracting with Service King. First, the sentence does not pertain to situations where the District contracts for services. It only applies when the District temporarily employs non-bargaining unit members to perform bargaining unit work, such as a supervisor. The District did not employ anyone after Engle resigned. Instead it contracted with an outside company. As a result, this section does not apply at all. The language specifically used employment, not contract. If the parties had intended to restrict contracting they would have negotiated other language. They did not use contract and they must be held to the clear and unambiguous language. The Association is essentially asking the arbitrator to modify the language, which the arbitrator has no authority to and the contract forbids. The second reason why the second sentence is Article II, Section F does not restrict the right to contract is because there is absolutely no evidence that bargaining unit members were reduced in hours or laid off because of any contract with Service King. None of the employees had their hours reduced or were laid off. The employees employed in 2008-2009 had the same number of hours in 2007-2008. The District only contracted out the services previously being worked by Engle; no other employees were affected. The District's actions were consistent with those following the Melum resignation. Then it did not post the position, but contracted for services and no employees had their hours reduced or were laid off. No grievance was filed. As a result it is reasonable to conclude the District did not violate Article II when it contracted with Service King after Engle resigned. The District cites several arbitral authorities in similar situations where no violation was found.

The District further argues that it was not required to follow Article VII, Section A before contracting with Service King after Engle resigned. The Association cannot meet its burden of proof that the District violated this provision. In order for this section to be triggered there must be a vacancy or new position in the bargaining unit. In this case there was neither following Engle's resignation, so the provision does not apply. In the absence of a contract provision limiting management's rights to fill vacancies, such as a requirement to maintain a certain number of employees on a particular job, it is management's right to determine whether a vacancy exists and when it should be filled, citing arbitral authorities. In this case there is no contract provision limiting the District's right to fill vacancies. There is no requirement to maintain a certain number of positions overall or in each classification. No language restricts the District's right to determine whether a vacancy exists. Article III states the District has the right to hire and assign employees and determine the kinds and amounts of services to be performed. This included the right to determine whether a vacancy exists. The District had no obligation to declare a vacancy following the resignation of Engle. Article VII, Section A does not apply. There are no facts to determine that a vacancy existed and needed to be filled after Engle resigned. Simply because the District decided to declare a vacancy following Schmoldt's retirement did not obligate the District to declare a vacancy following Engle's resignation. There is no contract language requiring the District to declare a vacancy. When Melum resigned the District did not declare a vacancy, but contracted with Building Services Group. No grievances were filed, showing the District is not obligated to declare a vacancy where an employee resigns or retires. The Association is asking the arbitrator to modify Article VII to state that the District is required to declare a vacancy when someone from the unit retires or resigns. The arbitrator does not have that authority and is prohibited from adding language to reach this result.

In reply to the Association arguments, the District argues the initial brief presented by the Association shows an abandonment of several arguments and perhaps an attempt to argue its case through its reply brief. That initial brief argues only a permanent contracting of services. It does not argue, as the Association argued at the hearing, a deficiency in the posting and alleged failure to declare a vacancy, an alleged unlawful treatment related to the Krusa application, and any alleged violation relating to contracting on a temporary basis causing layoffs or reductions in hours for bargaining unit members. The Association has abandoned these arguments. The Association has pushed this case to realize the weaknesses in their case are too many to overcome. The Association's one argument it can now make is also without merit. The short brief of the Association and lack of citations may indicate the weakness of their case. Any extensive arguments that may be in the Association reply brief should be disregarded because the District would not and did not have an opportunity to reply to them.

The District argues that the Association has failed to meet its burden of proof to show that the District violated any implicit prohibition in the 2006-2008 contract against permanent contracting. The Association has argued that because the contract allows temporary subcontracting but does not mention permanent subcontracting that the parties intended to prohibit permanent subcontracting. But it is not clear whether there is such a thing as permanent contracting of services. There is no evidence Article II related to contracting or that the parties even discussed contracting at the bargaining table. Such an implicit prohibition should be rejected. And, the Association has not presented any evidence that the contract with Service King is permanent in nature. There was no evidence or testimony that the contract is permanent. The evidence shows the contract is only for nine months. There is no evidence to show Article II Section F even related to contracting. The arbitrator must look to the plain language and only if unclear will use other tools to determine the parties' intent. The language uses employment rather than contracting. The Association ignores the reserved rights doctrine. Other than the limitation of layoff or reduction in hours, the District retained all rights. The Association reliance on a maxim is without merit. Indeed, the contract with Service King was temporary in nature because of its nine month duration. There is no evidence of a contract violation.

The District argues the Association cannot seriously assert that the contract with Building Services Group and Taher did not involve bargaining unit work. The District contracted to clean the Aquatic Center following Melum's resignation. Before that two bargaining unit members performed the exact same work. The Association's assertion, that it did not challenge that because the contract included weekend work, is not supported by the record at all. The relevant testimony of Ms. Skowen does not relate to that contracting at all. It relates to why the Association did not challenge the transfer of two employees to the elementary school, or why the Association did not want to accept a proposal in 2003-2005 to require employees to work on the weekend. In fact the evidence was that the work at the Aquatic Center was bargaining unit work and was for the exact same hours as the transferred employees. And the District contracted with Taher following the retirement of the former head cook. Price specifically testified that Taher performed the same duties as the former head cook,

who was a bargaining unit employee. Taher was intended to replace the former head cook, to run the food service operation just as the head cook had run the food service operation. The testimony and contract shows that the head cook was a bargaining unit position. Skowen seemed to forget that. The Association cannot now contend these duties were managerial. Further, the Association provides no citations to the record at all showing that all but two of the examples of past practice were temporary in nature. The Association seems to suggest that the two examples that the District provided were permanent in nature, rather than temporary, which is unsustainable as an absurd argument.

DISCUSSION

There is little, if any, dispute that the work contracted out by the District with Engle's Service King is the type of work normally and regularly done by bargaining unit members. The record amply supports this conclusion. The issue requires determining if the District violated the provisions of Article II – Association Security, or Article VII – Promotions, Transfers and Job Posting as claimed by the Association. The District denied it has violated those provisions and also points out the rights it has under Article III – Management Rights, and under the Reservation of Rights concept to argue that it properly contracted for cleaning services. The parties disagree on whether the contracting at issue is permanent, as the Association contends, or is temporary, as the District contends.

Article II, Section F states in relevant part:

Bargaining Unit Work: Bargaining unit work is defined as any and all work normally and regularly performed by bargaining unit members. The Board agrees that no bargaining unit members will be reduced in hours or laid off because of the temporary employment of non-bargaining unit members to perform bargaining unit work.

As indicated in the title of the Article, this is a union, or Association, security clause. Such clauses are intended to protect certain amounts of work for bargaining unit members depending on the particular phrasing and content of the language. They frequently address contracting or subcontracting in that regard, though not always. The security interests of a union or Association as affected by contracting, whether or not reflected in a collective bargaining agreement, is occasionally explicated in arbitral decisions. An example is CITY OF MARINETTE, Case 95, No. 63652, MA-12658 (WERC, Emery, June 6, 2005), stating in part:

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

The power to subcontract is the power to destroy. Obviously the Company cannot recognize the Union as exclusive agent for its unit employees, agree upon terms of employment, and then proceed arbitrarily to reduce the scope of the unit or to undercut the terms of the Agreement.

Thus contracting out cannot be used as a *device* for undermining the status of the recognized exclusive agent by farming the unit jobs out to contractors. Nor can contracting out be used (even unwittingly) as a device for securing better prices than those agreed upon, and thereby indirectly undermine the status of the recognized exclusive agent by placing it in the position of having to agree to cut contract terms in order to persuade the Company not to subcontract the jobs of the represented employees. (Emphasis added).

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

Id. pp. 16-17.

On the other side of the case are the interests of the Employer. Often, as is the case here, an employer will have a management right to contract or subcontract for services as it determines the kind, nature and amount of services it will provide. Such are reserved to the District here in Article III. And, as the District argues, even if those rights are not specifically mentioned, management rights that remain with the employer unless limited by the collective bargaining agreement generally include contracting. See, Elkouri & Elkouri, HOW ARBITRATION WORKS, 6th Ed. pp. 743-746. But, whether the District has a Management Right under Article III to contract or has that ability under the reservation of rights doctrine, the ability to contract must be exercised in good faith and in compliance with any limitations set out elsewhere in the collective bargaining agreement. The Association points to Articles II and VII as such limitations.

The District argues that Article II does not apply because it specifically used the word "employment", as opposed to "contract", in limiting its management rights. According to the District, because Engle's Service King Inc. (or Dave or Pam Engle) is not an employee of the District, the provision does not apply and can't have been violated. However, that argument ignores that this is an Association Security provision. It is not likely that the parties would have intended to bargain certain protections of bargaining unit work into the agreement only to have them threatened, if not violated, by contracting as opposed to employing supervisors or

other non-bargaining unit members to perform the work. The implication to the Association is the same. To ignore this would be, as argued by the Association, to render meaningless the definition of bargaining unit work in the first sentence of Article II, Section F. The question then becomes if the procedural or operational aspect contained in the second sentence has been violated.

The Association argues that the Engle's Service King, Inc. contract is the permanent employment of non-bargaining unit members, and that this permanent matter should also be covered by the Article II provision concerning the temporary employment of non-bargaining unit members. However, as the District argues, this is a temporary contract. Its terms are for nine months, and there are no automatic renewal clauses in it. There is nothing in it or the surrounding circumstances that indicate this is intended by the District to be a permanent contract or arrangement with either Engle's Service King, Inc., or any other contractor. The undersigned is persuaded that this is temporary employment, via contracting, used to perform what is otherwise bargaining unit work. There is no need to read into or interpret Article II and the facts here to implicate a permanent situation. That would be a different case than the one presented by the evidence and decided here.

Applying the remainder of the second sentence in Article II, Section F, here there has been no bargaining unit member who has had their hours reduced or who has been laid off because of the contracting. Such a reduction or layoff would violate the provision, but that has not happened. While the work formerly done by a bargaining unit member is now, temporarily, being contracted for, this is a result of a retirement followed closely by a resignation. The retirement and the resignation was not the doing of the District. The District did not cause the situation, even though the fact that Engle himself, along with his wife, are performing the same work that Engle did as an employee of the District. This may have indeed temporarily reduced the overall amount of time and work available to the bargaining unit as a whole generally, but that does not violate the specific provisions of the agreement. The agreement does not have provisions, as found in some agreements, that further protect or define a certain amount of bargaining unit work overall, as opposed to work available to existing members. Thus, even though bargaining unit work is being done temporarily by non-bargaining unit members, because no member has lost hours or been laid off, and because the District did not cause the retirement or resignation, Article II Section F has not been violated.

The undersigned is also persuaded that the District acted in good faith in obtaining the Engle's Service King, Inc. contract. It was initially addressing a resignation and did post the position in compliance with Article VII. When the bargaining unit applicant for the position withdrew, the District then obtained a new employee, Engle, to do the work. The collective bargaining agreement does not require the District to post more than once, or how it is to obtain new employees if a bargaining unit member does not post into a vacant position. There is nothing to indicate that Engle was then in any other capacity than an employee who would be considered in the bargaining unit, as he was doing the bargaining unit work that Schmoldt had done, even if he had not yet joined the Association. When Engle resigned, the District needed the work to be done within a few days as school was starting. Posting had not worked. It contacted a different private company that could not meet the time demands. Engle and his business had performed satisfactory work for the District before, both as an individual and as a

company doing carpet cleaning. While the financial savings mentioned by the District might also have been considered, those alone would probably not pass muster as a reasonable use of its management rights. See, CITY OF MARINETTE, Supra. But here, there were several valid reasons for the District to seek the temporary use of a cleaning service. It may have recognized that it was achieving a financially favorable result, but that was not the motivating factor in contracting. The need to have cleaning service on short notice was, and that is reasonable. There is nothing to indicate that the District was motivated to undermine the status of Association or decrease the number of hours and amount of work available to bargaining unit members¹.

This leads to the related argument of the Association, that the posting provisions of Article VII were not followed after Engle resigned. Article VII requires that when a vacancy is to be filled the District is to notify the bargaining unit members by mail, and the vacancy will not be filled for at least five (5) days after notification. The District had posted the position before and a bargaining unit member applied after Schmoldt's resignation. That member then withdrew, and Engle was hired. The collective bargaining agreement does not limit how the District is to obtain new hires such as Engle. When Engle then resigned, the District did not post the position as a vacant position. It did not post it at all. The collective bargaining agreement does not address when the District must declare a vacancy, but only what it must do once there is a vacancy. As the District argues, it is the right of the District to determine if and when a position is vacant. If there is a vacancy Article VII requires that it be posted. If there is no vacancy then Article VII does not apply. The District had the right to determine, firstly, that there was a vacancy after Schmoldt's resignation, and even as it hired Engle as an employee. The District also had the right to determine there was no vacancy to fill after Engle resigned because the District needed to act promptly. Just as the evidence persuasively shows that the District acted in good faith in obtaining the Engle's Service King, Inc. contract and was not acting to undermine the Association or reduce the hours of bargaining unit members, it was also acting in good faith in not determining it had a vacancy to fill after the Engle resignation.

Both parties have argued whether or not there are past practices that aid in interpreting the collective bargaining agreement provisions to find the intent of the parties. A past practice is normally not needed in interpreting language and provisions that are clear and unambiguous. Even the Association recognizes that the clause specifically allows for temporary subcontracting under certain conditions. Having determined that Article II applies in this case, it is clear that a member must have lost hours or been laid off for there to have been a

¹ The District has argued in its briefing the eleven factors sometimes used by arbitrators in determining if contracting has properly occurred, usually in the absence of collective bargaining agreement language. See, generally, Elkouri & Elkouri, HOW ARBITRATION WORKS, 6th Ed. Pp. 746-754. Those will not be analyzed at length here. The Association does not argue that the District acted in bad faith, but only that it acted in violation of the provisions of the agreement, and there is language in the parties' agreement that addresses the topic.

violation. That is clear and unambiguous language and it does not need past practice or bargaining history to aid in its application. The undersigned is also persuaded that there is no past practice established on this record which would have Article II and Article VII applied in any other way than as above, or would prevent it being applied to this case in the first place. There have been a myriad of situations over many years where outside contractors have worked in the District doing work normally done by bargaining unit members. Setting aside for the moment two of those instances involving retirements, none of the other instances involved a retirement or resignation of a bargaining unit member as in the instant case. None involved the overall reduction of the hours of work available to bargaining unit members as in the instant case. As the Association argues, those situations are readily distinguishable from the current case and the undersigned is not persuaded that they offer any indication of both parties viewing them as a binding past practice when there is a resignation or retirement prompting the contracting for services. They do not help in applying Article II or Article VII here.

As to the circumstance where the head cook resigned and a food service was contracted for a year, and the circumstance where there was a resignation of a bargaining unit member who had been at the Aquatic Fitness Center and the Aquatic Fitness Center work was then contracted out, neither one nor both together have been shown to constitute a binding past practice. While no grievances were filed in either circumstance, a decision not to file a grievance does not indicate that a party necessarily considers a practice as having been developed over a longstanding period of time so as to become binding. The first instance of the food service cannot stand alone as a practice because at that time it was only one instance. Both parties felt that the head cook “ran” the food service operation before she retired. It is not clear exactly how much bargaining unit work was done by the private company during the contracting, although it is clear from the terms of the current contract that the head position is in the bargaining unit. It is difficult to determine what actual duties were done by the head cook to “run” the food service so as to determine the scope of the work involved. The contract billing indicates both labor and management services were provided. The record was not well developed on this. The Aquatic Fitness Center, nominally the second instance, contained weekend hours that were, as noted by the Association, at variance with the provisions in Article XIV – Hours. To protect its other interests the Association made a strategic decision not to grieve or bargain about that circumstance. This does not show recognition that a practice had become frequent or longstanding enough to have become a binding practice. Moreover, even the District at first posted a vacancy after Schmoldt’s retirement. In March 2007 after a resignation the District, although considering contracting, posted the position. This does not indicate that the District recognized there was a binding past practice whereby services were to be contracted upon retirements. Indeed, if this were to become a binding past practice it would only be a matter of time when everyone in the bargaining unit would be retired or resign and the parties would be bound to contracting out all services. That cannot have been the view or understanding of the Association as to any practice, and it has not been shown to be the view of the District.

The District did not violate the collective bargaining agreement when it contracted for service with a private company owned and operated by the person who resigned from the position doing the work formerly done by a bargaining unit member. Accordingly, based on the evidence and arguments in this case, I make the following

AWARD

1. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 13th day of August, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator