

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**CITY OF GREENFIELD**

and

**LOCAL 2, AFSCME, AFL-CIO AFFILIATED WITH  
MILWAUKEE DISTRICT COUNCIL 48**

Case 137

No. 69188

MA-14520

(Subcontracting During Furlough Grievance)

---

**Appearances:**

**Nancy L. Pirkey**, Attorney, Davis & Kuelthau, S.C., 111 East Kilbourne Avenue, Suite 1400 Milwaukee, WI 53202 appeared on behalf of the City of Greenfield.

**Craig R. Johnson**, Attorney, Sweet and Associates, LLC, 705 East Silver Spring Drive, Milwaukee, WI 53212 appeared on behalf of Local 2, AFSCME, AFL-CIO Affiliated with Milwaukee District Council 48.

**ARBITRATION AWARD**

The City of Greenfield, herein the City, and Local 2, AFSCME, AFL-CIO Affiliated with Milwaukee District Council 48, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission concerning the furlough of bargaining unit members while certain City services were provided through subcontracting. The parties jointly requested that Paul Gordon, Commissioner, be designated as the arbitrator. Hearing on the matter was held in Greenfield on November 4, 2009. No transcript was prepared. A briefing schedule was set and the parties filed briefs and reply briefs, with the record being closed on December 29, 2009.

**ISSUES**

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

Whether the grievance was timely filed?

Whether the furlough of bargaining unit employees announced on June 17, 2009, and implemented on each of several days thereafter, violated the collective bargaining agreement?

If so, what is the appropriate make whole remedy?

The City states the issues as

Was the grievance filed within the time limits specified in Article 8 of the collective bargaining agreement?

Did the City violate Article 5 of the collective bargaining agreement when it continued to subcontract out work while DPW employees were on short-term layoff (i.e. furloughs)?

If not, what is the appropriate remedy?

The arbitrator frames the issues as best reflected by the record as

Was the grievance filed within the time limits specified in Article 8 of the collective bargaining agreement?

If so, whether the furlough of bargaining unit employees announced on June 17, 2009, and implemented on each of several days thereafter, violated the collective bargaining agreement?

If so, what is the appropriate remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5 – MANAGEMENT RIGHTS**

It is agreed herewith that the City possesses the sole right to unilaterally operate the City government by its duly authorized officials, and all such rights repose in it unless expressly waived in writing. The Common Council shall be the only authority to approve any abridgment of these rights; however, it is understood the exercise of said right of management shall conform with the rights set for the herein wherever practical in the determination of the Common Council. The rights of the City, which are generally exercised by the Director of Public Works and/or the immediate supervisors of the employees in the bargaining unit, include, but shall not in any manner or construction of this Agreement be limited to, the following unilateral rights:

\* \* \*

- G. To contract out for goods or services based upon economic expediency, efficiency or other valid justification it may determine, provided such subcontracting does not result in a lay off of employees during the term of this Agreement.

\* \* \*

ARTICLE 7 – SENIORITY

A. Definitions: Seniority shall be defined as the continuous length of full-time service in the department for which payment has been received by the employee. Seniority shall commence upon the successful completion of the six (6) months probationary period of employment and shall then be retroactive to the original date of hire.

B. Seniority Roster: The City shall prepare and post a seniority roster each year in January. Employees with seniority within classification shall be assigned work in the morning by seniority, except in emergency situations.

\* \* \*

E. Layoff and Recall: In the event the City decides to reduce the work force for any reason, the City shall have the sole right to select which job classifications shall be subject to a reduction. Within that classification, the reduction will be made by departmental seniority. Employees affected by the reduction shall have the right to replace the most junior employee in a lower classification within the department for which they can establish qualifications. At least two (2) calendar weeks prior to the effective date of the layoff, the City shall give the Union notice of the layoff and a current seniority list of the Department.

1. If a vacancy occurs within one year after a layoff, the most senior employee of the department who accepted a lower classification to avoid a layoff, if qualified to fill the vacancy, shall have the first right to the vacant position.
2. If the vacancy is not filled in accordance with (1) above, then the vacancy will be filled by the promotion procedure, as established in Section H of this Article.
3. Any vacancy created by the implementation of (1) or (2) above, shall be filled by recall of laid off employees. Any recall of laid off employees shall be in the inverse order of layoff, so long as the recalled employee is qualified to perform the required work.
4. If the classification is not filled as a result of the implementation of (1) or (2) or (3) above, the job will be filled in accordance with the regular hiring procedures of the City.

5. Employees on layoff must return to their full-time position when recalled, or they shall be considered as having voluntarily terminated their employment with the City.

\* \* \*

#### ARTICLE 8 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, specific section of the agreement alleged to have been violated, and the signature of the grievant and the date.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

\* \* \*

F. Steps in Procedure:

Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to the Director of Public Works no later than five (5) work days after he/she knew, or should have known the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, unless the task assigned presents a danger to the safety of the employee involved. The Director of Public Works shall, within five (5) workdays after the presentation of the grievance, orally inform the employee and the representative, where applicable, of his decision.

Step 2: If the grievance is not settled at the first step, the employee and/or his/her representative shall prepare a written grievance on forms supplied by the city and present it to the Mayor or his/her designed within five (5) work days after the receipt of the oral answer in Step 1. The Mayor or his/her designed shall discuss the grievance with the employee, and with a representative of the Union, within five (5) workdays after receipt of the written grievance. The Mayor or his/her designee will then submit his decision to the employee, in writing, with a copy to the steward and the Union, within five (5) work days after said conference.

Step 3: If the grievance is not settled at the second step, the employee or his/her representative may appeal the written decision of the Mayor or his/her designee to the Finance and Human Resources Committee, with a

copy of the said appeal to the Director of Public Works, Mayor or his/her designee to the City's Labor Negotiator within five (5) work days after receipt of the written decision of the Mayor or his/her designee. The Finance and Human Resources Committee shall discuss the grievance with the employee and with their Union representative. The Finance and Human Resources Committee shall schedule the discussion of the grievance within thirty (30) calendar days after receipt of the grievance appeal (or such sooner date as a regularly scheduled Finance and Human Resources Committee meeting is scheduled), and the Finance and Human Resources Committee shall respond in writing within ten (10) work days after said conference, a copy of said response to be forwarded to the grievant, Steward and Union. It is understood that the Council must affirm or reject the Finance and Human Resources Committee's action.

#### ARTICLE 9 – ARBITRATION

\* \* \*

E. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the Agreement in the area where the alleged breach occurred. The Arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

\* \* \*

#### BACKGROUND AND FACTS

Facing unanticipated budget deficits in early 2009, the City of Greenfield decided that it would implement four furlough days in 2009 as a cost savings measure. All employees of the City, except for those in certain emergency services, were subject to this furlough. Among those subject to the furloughs were the members of the Union, which has approximately 26 members, 24 being in the Department of Public Works, one in Parks and Recreation and one in building maintenance. At the same time, several projects being done by and for the City through subcontracting were continued and not affected by the furloughs.

The furloughs were first announced to City employees on June 17, 2009 by a memorandum from the Office of the Mayor, which provided:

SUBJECT: ECONOMIC CONDITIONS

The current economic conditions have had a significant adverse impact upon our city and our State.

The severe reductions on city revenues due to contraction of business development, housing developments, home improvements and extremely low interest on city deposits require the city to take action. In addition to the loss of

revenue noted above, the proposed state budget has placed all municipalities on notice of major revenue reductions on mandated services, revenue sharing and other revenue reductions due to imposing new requirements on the city previously covered by the state.

The city needs to continue to provide exceptional service, particularly in police and fire protection, while taking necessary pro-active action to realign our resources, both financial and personnel, to meet our obligations to the Greenfield taxpayers.

To realign our resources requires eliminating some positions and requiring non-protective employees (excluding generally police and fire personnel) to take unpaid days off between July 1<sup>st</sup> and December 31<sup>st</sup>, 2009. Similar actions will be required in year 2010. Every effort will be made to limit the adverse impact as next year's city budget is developed.

I wish to assure everyone all efforts have been made by the City Council in conjunction with myself and all managers to realign our rapidly declining financial resources to meet our city obligations, while limiting the adverse impact on our employees this year. My staff will hold meetings with their personnel this week and inform each individual of their status.

Again, I regret the necessary actions to be taken due to our economic conditions, but I assure everyone that implementation will be handled with great compassion for all our employees.

The City did not discuss or negotiate the proposed furloughs or position eliminations with the various Unions that represent the bargaining units of City employees, including those in the Department of Public Works, before it issued the memorandum.

Also on June 17, 2009 the Director of Human Resources for the City issued a memorandum to all employees that provided:

**SUBJECT**    FURLOUGH DAYS 2009

In association with the Mayor's letter regarding the financial condition of our city, the following days have been indentified as non-paid furlough days for city employees (excluding designated employees in the Police and Fiore Departments, as defined by Wisconsin Statutes or emergency response personnel.)

Also, it is essential the city meets the requirements under the Fair Labor Standards Act as it pertains to public employment and necessary income reductions due to a "budget required furlough". Therefore, it is essential that both hourly and salaried and/or non-exempt and exempt personnel do not

perform any work-related duties during the furlough days. Of course, the city does not expect exempt employees in any manner to meet the routine work expectations on a normal work week.

The defined dates are aligned with scheduled holidays in an effort to reduce adverse impact on city services to our citizens.

Monday, July 6<sup>th</sup>  
Tuesday, September 8<sup>th</sup>  
Monday, November 30<sup>th</sup>  
Wednesday, December 23<sup>rd</sup>

The City will continue to closely monitor its financial position. If additional furlough days are necessary in 2009, you will be notified as soon as possible.

Again, the city regrets the need to take this action. However, given the current economic conditions in our community, state, and country, this action is necessary. We appreciate your understanding and continued support.

The content of this memorandum was not negotiated between the City and any Union representing City employees.

On July 2, 2009 the City, through the Director of Human Resources, issued a memorandum changing one of the furlough dates:

**SUBJECT: FURLOUGH DATE CHANGE**

The city has changed the December 23, 2009 furlough date to then new furlough date of *Friday, October 23, 2009*, due to business operational needs.

Managers, please be certain all your employees are made aware of this change as soon as possible.

The Mayor and elected officials appreciate the continued cooperation of all employees.

The content of this memorandum was not negotiated between the City and any Union representing City employees.

Similar to previous years, in 2009 the City had several subcontracts to have certain work performed for the City. In 2009 the Department of Pubic Works used subcontractors, as

in the past, for work outside that which the Department normally does. The subcontractors and type of goods and services provided were as follows:

1. Gibb Building Maintenance  
Cleaning services
2. Dnesco Electric In.  
Electrical and streetlights
3. Dan Larsen Landscaping  
Tree Planting
4. Bluemel's Garden Service  
Play ground equipment
5. Lakeside International Trucks  
Fire Truck service
6. Stano Landscaping  
Private donor for Library

In addition to these, there was also subcontracting of some sign making work, street reconstruction, sewer construction, and concrete work. The cleaning work done by Gibb Building Maintenance has been performed for many years and is not currently bargaining unit work. Gibb did not work on the furlough days. Dnesco Electric Inc. provides electrical services performed by licensed electricians. The bargaining unit does not have electricians, and the work done by Dnesco is not bargaining unit work, although Denesco and the bargaining unit members do work on projects at the same time if the bargaining unit members are working. Dnesco did not perform work on the furlough days. Some time in the spring of 2009 James Cleary, the Union Steward, noticed Dan Larson Landscaping planting trees at the City Police Department. The City puts this bid out each year for scheduled tree planting. Cleary was not aware of Bluemel's Garden Service providing goods and services, including the provision and installation of playground equipment, until after the instant grievance was filed. He saw Stano Landscaping performing service in the summer of 2009. Stano is doing landscaping for a children's garden by the City Library. A private donor paid for this landscaping and some behind the building, and this work was not bid out or contracted out by the City. A donation was made to the City for that purpose with that subcontractor. Lakeside International Trucks started performing maintenance and repair service for City fire trucks in February. For seven years before that bargaining unit members had done that work. The City Fire Department made the decision to make this change. That change did not result in the layoff of any Department of Public Works mechanics or other employees. A City ambulance had its air conditioner fixed by Lakeside on a furlough day. The City does not have the equipment to perform the air conditioner work that was performed in that instance.



The City Department of Public Works has in the past performed many, but not all, of the types of work and services provided by some of these subcontractors. Bargaining unit members were capable of doing some, but not all, of these types of work. Some of the projects, such as street reconstruction, are generally too large of a project for the bargaining members do alone, though they could do smaller parts of that type of work. The subcontracting was agreed to between the City and the subcontractors before the announcement of the furloughs on June 17<sup>th</sup>. At the time and dates of the furloughs, however, the subcontracted work is not work that was being performed by Union members prior to the furloughs. None of the City subcontractors were hired to do bargaining unit work specifically on the days that the Union members were furloughed. The City had enough work for the bargaining unit members to do as part of their regular duties so that if the bargaining unit members had worked on the furlough days they would have had their regular work to do instead of doing work performed by the subcontractors.

The first furlough day was July 6, 2009. On that day the Department of Public Works, as well as City Hall, was not open and no employees of the City worked except those in emergency services. All the bargaining unit members of the Union were furloughed.<sup>1</sup> Also on that day there was work performed by at least some of the subcontractors. The work being done by subcontractors was not work done by Union bargaining unit members prior to the furloughs.

On July 29, 2009 Cleary first became aware that subcontractors were being sought by the City to bid to do street light and sewer line locates. Cleary then discussed the matter with Dan Ewert, the Superintendent of Public Works, as to the City's intent to get bids from subcontractors and the subcontractors that the City was presently using. The discussion included the topic of how the City could furlough when it was having other people do subcontracted work for the City, and whether the City should get rid of the subcontractors before City Employees were furloughed.

The Union viewed the circumstances then as they were being laid off while the City was subcontracting. On July 31, 2009 the Union filed a grievance (dated July 29, 2009) as a class action. The Union did not raise or include street repair work in its grievance. The alleged violation of the contract was:

The City of Greenfield has subcontracted services for landscaping, tree planting and fire equipment maintenance. This has resulted in layoffs/furloughs on 7/6, 9/4, 10/23 and 11/30.

---

<sup>1</sup> The remaining furlough days were implemented by the City after the grievance in the instant matter was filed.

The specific provision of the contract alleged to be violated was:

Article 5 – Section G. Pg. 4

The corrective action that should be taken to resolve the grievance was stated as:

Either subcontracting must stop or layoffs/furloughs stop.

The City denied the grievance, contending that all furlough days have not happened yet, that the Management rights clause of the contract allowed for contracting out, that this was not a layoff but was a furlough, that there was a severe budget shortfall and that expedience applied.

The Union then filed a Step 2 appeal of the grievance. That was denied by the City, which then contended that the furlough notification letter was June 17, 2009 and the grievance was not timely, that the furlough was the result of significant economic decline, that there is no significant direct relationship between the decision to furlough and the routine subcontracting of work.

The Union then filed a Step 3 appeal, responding that it was timely with 7/29 first notice of the City using subcontractors during furloughs, and discussions with the City about that on 7/30 with the grievance filed on 7/31. It also contended that the furlough/layoffs are in part a result of subcontracting. The City denied that appeal largely on the same basis as its previous denial and on the added position that the decision to furlough was made for a completely different reason that was not in anyway related to the subcontracting of work.

This arbitration followed. Further facts appear as are in the Discussion.

### **POSITIONS OF THE PARTIES**

#### **Union**

In summary, the Union argues that the grievance is timely. This is a continuing violation, citing arbitral authority. The grievance was filed within the five day time limits because the Union did not know that subcontracted was continuing during furloughs until July 29<sup>th</sup>, and started the grievance process the next day. And, the City initial response to the grievance was to deny it in part because the furlough days had not yet occurred, showing confusion even by the City. Doubts as to time limits should be resolved against forfeiture of the right to process a grievance, and the circumstances here have a good faith interpretation that the violation was presented when it was found out.

As to the contract violation, the Union argues that the collective bargaining agreement must be interpreted in its entirety, consistent with MERA, though the Union does not ask for a finding of a MERA violation. The City subcontracted for some services that in the past were done by bargaining unit members and some subcontracted work possibly could have been done

by bargaining unit members. While subcontracts were in place, the City furloughed all bargaining unit members. This was not done according to seniority. The layoff language in the collective bargaining agreement must be given meaning, as must the seniority provisions on the contract. By deciding unilaterally that a furlough of all employees was preferable to a layoff beginning with the least senior employee, the City took the labor contract and turned it on its head. The arbitrator should restore the plain meaning to the negotiated terms of the agreement. A make whole remedy must include a cease and desist order, pay that the employees lost, and pay for the value of the subcontracts since the date of the announced furloughs. Conceding that the work in question has not been performed by bargaining unit members recently, in the past furloughs/layoffs have not been implemented while subcontracting has occurred. The furloughs cannot be shown to be unrelated to the subcontracting. There is no evidence that the alleged financial crises could not have been eased by discontinuing subcontracting and instead using bargaining unit members to do work they had performed in the past. City funds were spent on subcontracting and some of that work had previously been performed by the Union. The City claims it must furlough due to lack of funds. In that sense, the furloughs resulted from subcontracting by the City.

The Union also argues that the contract must be interpreted in light of the City obligations under MERA. MERA forbids unilateral implementation of mandatory subjects of bargaining, such as furloughs. If consulted, the Union may or may not have agreed to replace the contractual method necessary for labor cost savings under the contract (layoff of the least senior employee) with a furlough. The Union was not consulted and not given the opportunity to bargain the impact of the furloughs.

The Union argues that the furloughs violated the seniority clause of the agreement. Article 7, Section E makes clear that if layoffs occur for any reason they shall be by seniority. There is no exception for severe budget shortfall or significant economic decline in our economy. There is no provision for emergency or temporary layoffs. The contract cannot be avoided by use of the term furlough. Arbitrators have ruled that the term layoff includes any suspension from employment arising out of a reduction in the workforce. There was a clear violation of the contract with regard to furloughs without regard to seniority, regardless of whether subcontracting continued during the furlough period.

The Union also argues that while the subcontracts were in place the City responded to a budget shortfall not by discontinuing the subcontracting to save money, but by the furloughs. The furloughs violated the contract because they were, in that sense, caused by subcontracting.

### City

In summary, the City argues that the grievance is not arbitrable because it was not timely filed at the first step of the grievance procedure. According to the collective bargaining agreement a grievance must be presented within five work days after he/she knew or should have known the cause of such grievance. The Union failed to do this regardless of which statement of the issues is accepted. The City announced the furloughs on June 17, 2009. The grievance was filed July 31, 2009, six weeks later. An amended notice of furlough dates was

issued by the Human Resources Director on July 2, 2009. The grievance was filed 20 work days later, in excess of the five work days permitted in the collective bargaining agreement. Even if the first furlough day is counted, July 6, 2009, the grievance was filed 19 days later, in excess of the 5 day timeline. The City statement of the issue is based on the actual allegations raised in the grievance. All of the subcontracting work which is raised in the grievance – landscaping, tree planting, and fire equipment maintenance - is work contracted out before the decision was made to furlough employees. Based on the Steward's open observations of landscaping work subcontracted and done in the spring and summer, he was well aware that subcontracting work could have been done by bargaining unit members before the furloughs took place. By the time of the first furlough day, July 6, the Union knew or should have known that the City was subcontracting work that could potentially have been done by DPW employees. The grievance is untimely. The grievance procedure requires filing within 5 working days of when the employee knew or should have known about the events giving rise to the grievance. The Union knew that landscaping and vehicle maintenance work was being subcontracted out by June 17, 2009, and certainly knew that by July 6<sup>th</sup>. An untimely grievance is not arbitrable, citing arbitral authorities.

The City also argues that the City's decision to subcontract work did not result in the furlough days and thus, the grievance must be dismissed. The grievance cites Article 5, Section G as the only provision of the contract which has been violated. That section recognizes the City has the management right to contract out for goods or services based upon economic expediency, efficiency or other valid justification it may determine, provided such subcontracting does not result in a lay off of employees. The remedy sought by the grievance is to stop subcontracting or layoffs/furloughs. Thus, the only issue in this arbitration is if the City can continue to subcontract after announcing the need to furlough employees. The Union has not challenged the City right to engage in short-term layoffs or whether seniority provisions have been complied with in selecting the order of lay offs. The only issue is if the City may subcontract work if it directly results in the layoff of bargaining unit employees. The Union failed to meet its burden. The Union failed to offer evidence that the City's decision to furlough was in any way the result of the ongoing subcontracting of certain work in the DPW. The work by Dnesco and Lakeside is not bargaining unit work, since DPW does not have the proper equipment or qualified personnel to perform the work. The only issue is landscaping and custodial. The one limitation on the management right to subcontract work is if it would directly result in the lay off of bargaining unit employees. That did not happen. Subcontracting was not used to facilitate a lay off. The decision was not due to lack of work; it was due to lack of funding. The DPW employees were not furloughed because their job duties were assigned to an outside contractor. The furloughs were implemented to offset a budget deficit and not due to lack of work. The landscaping and custodial contracts pre-dated the City decision to furlough, and the decision was unrelated to subcontracting landscaping and custodial work. Had that work been done by bargaining unit employees there would still have been four furlough days due to the unanticipated budget shortfall.

The City argues that the Union's argument is that the work traditionally contracted out is work that could have been done by bargaining unit employees and thus, that work should have been given to the members to avoid a lay off rather than a furlough. The City counters

that this is creative, but not mandated or permitted by the contract language. The Management Rights clause recognizes the right to contract out work as long as that decision does not directly result in the lay off of bargaining unit members. Here, the decision to subcontract landscaping and custodial work did not result in the lay off of any DPW employee. And five of six contractors did not perform any work on furlough days. The one who did was Lakeside whose subcontract was done after DPW did not have the necessary equipment to do the work. If the subcontractors were not performing any work on any of the furlough days, then the decision to subcontract work could not have resulted in the lay off of DPW employees on the furlough days.

### **Union Reply**

In summary, the Union replies that the City cannot limit the nature of the contract violations or arguments of the Union to avoid seniority provisions and layoff language in the agreement. The Union emphasized those arguments at the hearing. The Union asks the arbitrator to interpret the collective bargaining agreement in its entirety and find the City violated the agreement with respect to implementation of the furloughs. The Union notes that it reserves all its rights under the Municipal Employment Relations Act.

The Union requests that the City be order to make the bargaining unit members whole for pay lost while furloughed, a cease and desist order for the subcontracting, and pay to the bargaining unit members of the value of the subcontracts since the date of the announced furloughs.

### **City Reply**

In summary, the City replies that the Union has misrepresented the issue raised in this grievance in an attempt to make their grievance timely. The grievance filed on July 31, 2009 does not cite the layoff and recall procedure in Article 7. Instead it cites Section G of the Management Rights clause. The remedy it requests was to stop subcontracting or layoffs/furloughs. The grievance does not address the City right to issue short-term layoff notices to all employees. The furlough plan was issued June 17, 2009 and the grievance procedure has a five work day period to file a grievance. The grievance is late if either June 17<sup>th</sup> or July 6<sup>th</sup> is counted. This is not a continuing violation. They are discrete, individual acts. The Union did not file a grievance within five work days of any furlough day. Regardless of the date used, the Union has not filed any grievance, whether timely or untimely, over the City decision to furlough employees.

The City argues that the City did not violate the layoff procedure of the collective bargaining agreement when it furloughed all employees on four different days in 2009. Under the agreement the City has the right to reduce the workforce for any reason, and has the right to select which job classifications shall be subject to a reduction. Reductions of the work force must be done by seniority. The City did layoff by seniority because it laid off all members of the bargaining unit, citing arbitral authorities. The least senior employee in the unit need not be laid off rather than laying off all employees for some days, citing arbitral authority. Here,

no junior employee worked as senior employees were laid off, citing arbitral authority. Budget constraints due to a reduction in shared revenue and poor economic climate are a lawful and legitimate reason to impose furloughs under the Management Rights clause.

The City also argues that the Union has raised statutory issues on the duty to bargain that are outside the jurisdiction of the arbitrator and must be rejected. The Union raised issues concerning whether the City violated MERA when it announced the furloughs. The argument is without merit and goes beyond the jurisdiction of the arbitrator. The Union attempts to make the City look bad. The proper forum for a duty to bargaining claim is through a prohibited practice complaint, not a grievance, citing authorities. Duty to bargain and unilateral implementation issues are a pretext to avoid contract language that does not support the grievance. And the subject matter here has already been bargained over, citing authorities.

The City argues that the Union cannot receive the remedies it has requested. The request is overbroad and beyond the scope of the authority of the arbitrator to award. Back pay and pay for the value of the subcontracts since the date the furloughs were announce would be a windfall to DPW employees. If the grievance were to be sustained the only required remedy is make-whole relief only, which is limited to the four furlough days only. There is no authority to award the Grievants damages based on contracts with outside vendors. And the arbitrator has no authority to require the City to terminate contracts with outside vendors and award the work to bargaining unit members. The Union brief concedes that the current subcontracted work is not work that was performed by Union members prior to the furlough. The remedy is far beyond the scope of the grievance and contractual authority of the arbitrator to award.

The City requests that the grievance be dismissed.

### DISCUSSION

The City contends that the grievance is not arbitrable because it was not timely presented and filed. The decision to furlough was made known to City employees on June 17, 2009. Subcontracting had been happening openly in the City for several years prior to that, and continued openly in 2009. The Union Steward had seen some of this in the spring and summer of 2009. The first furlough day was July 6, 2009. The Union either knew or should have known by then that subcontracting was happening by the time the furloughs were announced and also by the time the first furlough day occurred, argues the City. The grievance was not presented to the Director of Public Works until July 30<sup>th</sup> and then not filed until July 31<sup>st</sup>, well beyond the five (5) day limit in the collective bargaining agreement for Step 1. The Union contends the grievance is timely. The Steward did not know that the City was using subcontractors during furloughs until July 29, 2009 when the subcontracting of locates came up, and it started Step 1 the very next day in compliance with the grievance procedure time requirements. The Union also contends that this is an on-going or a continuing contract violation which may be raised at any time during the violation, and it did so promptly when it became aware of the facts.

The grievance procedure in the collective bargaining agreement at Article 8 Section F, Step 1 provides that the employee, alone or with his/her representative, shall orally explain his/her grievance to the Director of Public Works no later than five (5) work days after he/she knew, or should have know the cause of such grievance. The Director of Public Works then has five (5) working days to orally inform the employee and representative of his decision. Step 2 then provides that if the grievance is not settled at the first step the employee and/or his/her representative shall prepare a written grievance on forms supplied by the City and present it to the Mayor or his/her designee within five (5) work days after the receipt of the oral answer in Step 1. A continuing violation of a collective bargaining agreement has been described in Elkouri & Elkouri, *HOW ARBITRATION WORKS*, (6<sup>th</sup> Ed.) pp. 280, 281. “Many arbitrators have held that ‘continuing’ violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence’. The concept has also been stated in Fairweather’s *PRACTICE AND PROCEDURE IN LABOR ARBITRATION*, (3<sup>rd</sup> Ed.) p.86. “If the grievant continues to suffer from the alleged contract violation the arbitrator may find that the violation is a continuing one. In such a case, the limitations period recommences each day; hence, the time for filing the grievance is extended.” Circumstances involving subcontracting are sometimes viewed as continuing violations, e.g., *MILWAUKEE AND SOUTHERN WISCONSIN CARPENTERS DISTRICT COUNCIL*, A-5164 (Crowley, October, 1994), but not always so and such determinations are fact driven, e.g., *LOCAL 67, AFL-CIO, MA-6030* (Mawhinney, August, 1991).

In this case the evidence shows that on June 17, 2009 the City announced its decision that it would implement a series of four specific furlough days on four specific dates starting July 6, 2009. At that point the City had not actually implemented the furlough days. In fact, before any of the furlough days were implemented, on July 2, 2009 the City changed at least one of the anticipated furlough dates from December 23, 2009 to October 23, 2009. As of June 17th the City had expressed its intention to take certain action<sup>2</sup>. But that action was not taken until July 6, 2009 when the first furlough day was actually implemented. July 6, 2009 would thus be the earliest date that a violation, continuing or otherwise, could have occurred. The record is clear that the City has subcontracted out work for several years, some of which had been done by bargaining unit members and some of which the members were capable of doing. Some of this work had not been done by bargaining unit members and the bargaining unit members were not capable of performing some of this work. What is new is that on this record this appears to be the first time the City has implemented a series of furlough days where the entire bargaining unit was furloughed and subcontracting continued. The record evidence is that the Union, through Steward Cleary, did not know that the City was continuing to subcontract, or seek subcontracting bids, until July 29<sup>th</sup>. The City did not previously announce to the Union or otherwise give it notice that it was going to continue to subcontract work and implement furloughs at the same time. There is no evidence that the bargaining unit members knew if any subcontractor worked or performed work for the City on July 6th or

---

<sup>2</sup> “A party sometimes announces its intention to perform a given act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations arbitrators have held that the ‘occurrence’ for purposes of applying time limits is the later date.” Elkouri & Elkouri, *How Arbitration Works*, (6<sup>th</sup> Ed.) P. 224, citations omitted.

thereafter until July 29<sup>th</sup>. The evidence is that Cleary saw landscaping and gardening work being done by the subcontractors sometime in spring and summer. But whether that was before or after July 6<sup>th</sup> was never established. There is no evidence that the bargaining unit members knew that the City was going to seek further subcontracting, for example, the locates, while furloughs were being implemented, until July 29<sup>th</sup>. It was at that point that the Union representative had the discussion with the Superintendent of Public Works about the City's intent to get bids from subcontractors and they then discussed subcontractors the City was then using. The continued use of subcontractors and the alleged resulting layoffs or furloughs on the announced layoff dates is the general nature of the Union's alleged violation of the collective bargaining agreement. The grievance alleges a course of conduct by the City that violates the agreement. This alleges continuing conduct on the City's part in that the furlough days are set out over several months time, and the subcontracted work was performed and was being performed over at least some period of time, as opposed to a single, distinct incident. The answers the City gave at the various steps of the grievance process, particularly the 1<sup>st</sup>, implies the fluid nature of this violation. The August 3<sup>rd</sup> written answer contended that the grievance was invalid because all the furlough days had not happened yet. Then the August 6<sup>th</sup> written denial contended that the furlough notification letter was dated June 17, 2009, and that timely grievance was not done by the Union. The undersigned sees this as a continuing condition or situation which the Union first knew of when it became aware on July 29<sup>th</sup> that the City was continuing to use subcontractors and continuing to seek bids for subcontracting work while a series of furloughs was being implemented by the City. The Union is justified in seeing this as a continuing violation so that the issue can properly be raised when it did. Whether it prevails on the merits of its grievance is a different question. The first step in the grievance process was taken the next day by Steward Cleary. When that was denied by the City the written grievance was filed within five work days in a timely fashion. The grievance was timely initiated and filed.

The issue then turns to whether the implementation of the furloughs violated the collective bargaining agreement. The Union contends that they violate Article 5 Section G. The City denies that, and further contends that the way the Union frames the issue is a mere device to have its grievance seen as being timely. The nature of timeliness has been discussed above, and the core of the grievance, whenever it was presented and filed, is the same. It alleges a violation of Article 5 Section G. The grievance and arguments of the Union are that Article 5 Section G is violated because furloughs or layoffs were occurring at the same time subcontracting was occurring. It contends that subcontracting caused the layoffs, the City choosing to spend its resources on subcontracting rather than having bargaining unit members perform at least some of the subcontracted work. The Union further argues that these furloughs/layoffs were not implemented in accordance with the seniority provisions of Article 7 Section E. Article 5 Section G refers to layoffs. Layoffs are the subject of Article 7 Section E, which requires that layoffs be made according to seniority. Thus, Article 5 and Article 7 are linked together. Collective bargaining agreements must be read as a whole, and no provision can be rendered meaningless in interpreting a collective bargaining agreement.



Article 5 Section G is part of the Management Rights clause of the parties' collective bargaining agreement, and provides:

G. To contract out for goods or services based upon economic expediency, efficiency or other valid justification it may determine, provided such subcontracting does not result in a lay off of employees during the term of this Agreement.

Under that provision contracting out is allowed if two conditions are met. The first is that it must be based upon economic expedience, efficiency or other valid justification. The City points out, and the June 17<sup>th</sup> Memorandum announcing the furloughs details, that the City was facing a serious decline in revenues due to state funding mechanisms and a general slowdown in the economy effecting City resources. These are not things that the City did or was responsible for having occurred, but are conditions that the City must operate in and respond to operationally. Beyond economic expedience or efficiency, adjusting the budget and operations in response to declining resources is a valid justification for the City to take action, which can be to contract out for services or other action, including a furlough or layoff. Here it is important to note that the record shows the subcontracting actually complained about by the Union in its written grievance had been entered into by the City before the furloughs were announced and implemented. Thus, it was not the subcontracting itself, but rather the implementation of the furloughs/layoff s while subcontracting was on going that is the concern of the Union. Even in that context, the continuing of subcontracting while furloughs/layoffs were implemented was for a valid justification, a stressed budget, and that condition under Article 5 Section G is met by City.

The second condition under Article 5 Section G is that such subcontracting does not result in a lay off of employees. This requires looking at the cause of the furloughs/layoffs. The parties do not argue that the furloughs were not a layoff, and that matter is discussed below. As mentioned, the cause of the City's implementation of furloughs/layoffs was the significant adverse impact on the City due to the economic conditions. The direct cause of the need to implement furloughs was declining revenue. The subcontracts had already been established. Bargaining unit members were not furloughed in order to implement subcontracting. The Union argues that the municipal funding crisis that allegedly necessitated the furloughs could have been eased by discontinuing subcontracting and instead using bargaining unit employees to do work that they had performed in the past. But that is a decision left to the City, provided it exercised that management right in compliance with the collective bargaining agreement. The Union concedes that the work being done by the subcontractors at the time of the furloughs had not been performed by bargaining unit members recently. The subcontracting did not displace bargaining unit members from their work. The record is undisputed that they had plenty of their own work to do. It would be a different matter if the City had subcontracted out the work that the bargaining unit members were actually doing in order to save money or other wise respond to the declining financial condition of the City. This subcontracting did not result in the furloughs/layoffs.

Further latitude for the City to make the decision it did is noted in the absence in the parties' collective bargaining agreement of any specific number of days of work guaranteed to the bargaining unit members. While Article 11 does define the work day, there is no definition of a work week or work month, etc. The wage scale is in terms of both bi-weekly pay and hourly rate in conjunction with that. Given that conjunction and the lack of a specific work week provision, no guarantee of a specific number of work days prevents the imposition of furlough days. The parties have not identified any provisions indicating otherwise.

The City did not violate Article 5 Section G, but that does not end the inquiry. The grievance specifically objected to furloughs/layoffs, which is a matter covered in Article 7 Section F as well as referred to in Article 5 Section G. Article 7 Section F reads in pertinent part:

E. Layoff and Recall: In the event the City decides to reduce the work force for any reason, the City shall have the sole right to select which job classifications shall be subject to a reduction. Within that classification, the reduction will be made by departmental seniority. Employees affected by the reduction shall have the right to replace the most junior employee in a lower classification within the department for which they can establish qualifications. .

. .

The Union argues that the City should have applied this provision to layoff a less senior member rather than furlough the entire bargaining unit for the four days. But again, that decision is for the City to make. The Article provides that it is if the City decides to reduce the work force for any reason it has the sole right to select which job classification shall be subject to a reduction. Reductions can be permanent or temporary, as a layoff can be permanent or temporary. As the City argues, this concept has been applied by arbitrators in finding that furloughs of an entire bargaining unit are temporary layoffs which language such as this allows an employer to do rather than layoff a less senior employee or less senior employees for a longer time period. See, e.g., LANGLADE COUNTY HIGHWAY EMPLOYEES, MA-12597 (Bielarczyk, March, 2005), JACKSON COUNTY, MA-12338 (Houlihan, March 2005). Both of those cases involved, and allowed, the furlough of all employees in an entire bargaining unit for several days to meet budget needs. While those cases did not involve the issue of subcontracting while implementing furloughs, they do address the narrow application of furloughs to layoff language, and the undersigned finds the reasoning in those cases both persuasive and applicable to the narrow question here. Due to budgetary reasons the City laid off the entire bargaining unit at once on four occasions and no less senior member worked while a more senior member didn't. There was a layoff and it did not violate the seniority provisions of Article 7 Section F.

The Union makes the point that the decision and implementation of the furloughs was done by the City unilaterally without discussing or negotiating the matter with the Union. The Union contends that this implicates the Wisconsin Municipal Employment Relations Act (MERA) and the City puts up its defenses to that. MERA is beyond the scope of the

arbitrator's jurisdiction, which is to interpret the parties' collective bargaining agreement. No consideration of MERA and the arguments raised therein will be made here.

The continuation of subcontracting while implementing furloughs did not violate the subcontracting provisions of the collective bargaining agreement, and the furloughing of the entire bargaining unit for four days while subcontracting continued did not violate the layoff and recall or seniority provisions of the collective bargaining agreement. The announcement and implementation of the furloughs did not violate the collective bargaining agreement. Accordingly, based upon the evidence and arguments presented in this case, I issue the following

**AWARD**

1. The grievance was timely initiated and filed.
2. The grievance is denied on its merits and dismissed.

Dated at Madison, Wisconsin this 26<sup>th</sup> day of March, 2010.

Paul Gordon /s/

---

Paul Gordon, Arbitrator

rb  
7553