

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LOCAL 2398, STAFF AND CLERICAL FEDERATION AFT,  
AFT-WISCONSIN, AFL-CIO**  
and  
**CHIPPEWA VALLEY TECHNICAL COLLEGE**

Case 202  
No. 69613  
MA-14675

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**Appearances:**

**Mr. James Mangan**, Staff Representative, AFT-Wisconsin, 1125 3<sup>rd</sup> Street, Hudson, Wisconsin 54016, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Victoria L. Seltun**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 on behalf of the District.

**ARBITRATION AWARD**

At all times pertinent hereto, Local 2398, Staff and Clerical Federation AFT (herein the Union) and the Chippewa Valley Technical College (herein the College) were parties to a collective bargaining agreement covering the period from July 1, 2008 through June 30, 2010. On February 22, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning the hiring by the College of an LTE Program Assistant from a temporary agency rather than filling the position with a member of the bargaining unit. The undersigned was selected to hear the dispute from a panel of WERC staff. A hearing was conducted on May 3, 2010. The proceedings were not transcribed. The parties filed their briefs by June 4, 2010, whereupon the record was closed.

**ISSUES**

The parties stipulated to the following statement of the issues:

Did the College violate the collective bargaining agreement when it filled the position of Program Assistant with an employee from an outside agency instead of awarding the position to Brenda Meinen?

If so, what is the appropriate remedy?

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE III – SENIORITY**

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- D. A limited-term position is defined as a position for a duration of not exceeding twelve (12) months of employment which does not have a substantial expectancy of continuation as a permanent position beyond said twelve (12) month period. Such position shall be considered a probationary bargaining unit position. Limited-term employees shall not accrue seniority, may not appeal termination of employment, nor may they utilize the job promotional procedures set forth in Article VI (Transfer Procedures/Job Postings) of this Agreement; however, they may apply for unfilled vacancies by making application with the Board. Limited-term positions will not be posted; provided, however, if said positions become permanent, the Board will consult with the Federation and the positions will be posted. Limited-term employees shall not be eligible for benefits under Article X (Leaves of Absence), Article XI (Holidays), Article XII (Vacations), Article XIV (Insurance), or Article XV (Retirement) of this contract unless such benefits are required to be provided by law. If a limited-term employee, without a break in service, is employed in a permanent position, his/her seniority shall date back to his/her original date of employment.

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**ARTICLE VI – TRANSFER PROCEDURES/JOB POSTINGS**

- A. When a vacancy occurs, or a new position is created in the bargaining unit, a notice thereof shall be posted internally for five (5) working days via the College email system. Employees who are gone for an extended period of time may contact the Human Resources Department to arrange for an alternate method of receiving the notice. Alternate methods should be agreed upon in writing. The five (5) day internal posting period may run concurrently with the external posting.
- B. Requests from bargaining unit members to transfer into a vacant position must be received by the Human Resources Department within five (5) working days of the original posting.

- C. The Board shall make transfers to open positions and shall fill new jobs on the basis of the following criteria, in the order listed:
1. Training experience, and ability of the employee in relation to the position to be filled; and
  2. Seniority in the district; provided, however, that in cases of tied seniority, the immediate supervisor of the position to be filled shall make the appointment.
- D. Internal applicants will be considered prior to external applicants. If it is determined that employees applying for a transfer do not have the training, experience, and ability in relation to the position to be filled, the College will consider outside applicants.

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#### **ARTICLE IX – MANAGEMENT RIGHTS**

- A. Except to the extent explicitly abridged by specific provisions of this Agreement, the Board reserves and retains solely and exclusively all of its (common law, statutory and inherent) rights to manage its own affairs (as such rights existed prior to the execution of this Agreement). The sole and exclusive rights of management which are not abridged by this Agreement shall include, but are not limited to, its right: to determine the existence or nonexistence of facts which are the basis of a management decision; to determine the services and level of services to be offered by the Board free of liabilities of this Agreement; to establish or continue reasonable policies, practices, and procedures for the conduct of school and from time to time, following notice to the Federation, to change or abolish such policies, practices, or procedures; to determine and from time to time re-determine the types of operations, methods, and processes to be employed; to discontinue processes or operations or to discontinue their performance by employees of the Board; to determine the number and types of employees required; to assign work to such employees in accordance with reasonable requirements determined by the Board; to establish and change work schedules and assignments; to transfer, promote, or demote employees, or lay off, terminate, or otherwise relieve employees from lack of work; to suspend or discipline for cause; and otherwise to take such measures as the Board may determine to be necessary for orderly and efficient operation of the public service. The Board agrees that none of the foregoing rights shall be exercised in such a manner as to violate any of the terms of this Agreement.

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### Letter of Agreement Concerning Flex Scheduling

- A. The Union and the College agree to enter into a pilot project regarding flex scheduling for the Customer Service Center, as spelled out in this Letter of Agreement, added as an appendix to the contract.
- B. Both parties agree to the following points in establishing the pilot project:
  - 1. The Center will **be staffed by CVTC bargaining unit employees** and have at least two full-time regular bargaining unit employees.
  - 2. “Flex” employees will work at least 910 hours per year, but their hours may vary week-by-week.
  - 3. “Flex” employees will not have any bumping rights outside the pool of “Flex” employees within the Customer Service Center. Within that pool, if there’s a need to reduce the number of “Flex” employees, the most junior “Flex” employees shall be laid off first, unless a more junior “Flex” employee within that pool has skills that are required and that more senior “Flex” employees do not have.
  - 4. If there’s a need for overtime work within the Customer Service Center, the overtime shall be offered to the full-time employees, in order of seniority, before it’s offered to “Flex” employees, unless a more junior “Flex” employee within that pool has skills that are required and that more senior “Flex” employees do not have.
  - 5. The College will not hire more than five (5) “Flex” employees in the Customer Service Center.
  - 6. “Flex” employees shall be considered part of the bargaining unit for benefit purposes, and shall be eligible for pro-rated benefits as part-time employees now are.
  - 7. Both parties agree that the implementation of the pilot project will not result in layoffs of any current bargaining unit employees.
- C. The College agrees that for the duration of the pilot project it shall not sub-contract bargaining unit work if such sub-contracting would result in a layoff or reduction in hours to bargaining unit members, or if such sub-

contracting would prevent a return from layoff or leave or prevent the hiring or transferring into an open position within the bargaining unit.

- D. Any of the above provisions may be modified by mutual agreement of the parties.
- E. All of the above provisions shall expire at the end of the current Collective Bargaining Agreement, unless both parties agree to extend them.

### **BACKGROUND**

The parties in this matter, Local 2398, Staff and Clerical Federation - AFT, and the Chippewa Valley Technical College have been in a collective bargaining relationship for many years. As part of the negotiations over their 2008-2010 contract, the parties entered into a Letter of Agreement establishing a pilot project for flex scheduling of the bargaining unit employees in the College's Customer Service Center. Section C. of that Letter of Agreement provides:

“The College agrees that for the duration of the pilot project it shall not sub-contract bargaining unit work if such sub-contracting would result in a layoff or reduction in hours to bargaining unit members, or if such sub-contracting would prevent a return from layoff or leave or prevent the hiring or transferring into an open position within the bargaining unit.”

In August 2009, a vacancy occurred in a bargaining unit Program Assistant position. A meeting was held on August 4 to discuss filling the vacancy and also whether to establish a Lead Program Assistant position. Present at the meeting were College Dean Beth Heron, Vice President of Education Joe Hegge, Human Resources Director Mary Casey, Union President Lisa Storms and the Program Assistants. During the meeting it was decided to post and fill the vacant Program Assistant position. Shortly thereafter, the position was posted within the College.

On August 9, 2009, Marketing Assistant Brenda Meinen, a member of the bargaining unit, applied for a transfer to the vacant Program Assistant position. She was tested and interviewed for the position on September 11, 2009. She was the senior bargaining unit member to apply for the position and there is no evidence that she was not qualified to do the work. The posted hourly wage for the Program Assistant position was \$1.43 per hour more than she was making in her current position.

At around the same time, Local 2398 and the Chippewa Valley Technical College Education Association, which represents the faculty members, were jointly pursuing the addition of certain non-represented positions into their respective bargaining units. To that end, on September 3, Lisa Storms and Cathy Peck, President of the CVTC-EA, sent a letter to Tom Huffcutt, Vice President of Operations of CVTC, as follows:

Dear Tom:

The leadership of CVTC-EA and AFT-WI Local 2398 have been jointly reviewing a number of unrepresented CVTC positions to determine if they should possibly be included in one or the other of our bargaining units. We believe that a number of these positions properly belong in the CVTC-EA or in AFT-WI Local 2398.

Attached are our lists of positions: those we think belong in AFT-WI Local 2398 and those we think belong in the CVTC-EA.

Prior to taking any type of formal action, we propose a joint meeting with you, and whoever else you wish to include, to share our rationale and to hear CVTC's views regarding inclusion of these positions in the bargaining units indicated.

We suggest scheduling such a meeting for the week of September 21 or the week of September 28<sup>th</sup>. We look forward to working collaboratively with you on this important issue.

Attached to the letter were lists of positions being sought for inclusion in the bargaining units. Local 2398 had indentified 14 positions which it felt were properly included in that unit. The letter was not well received by the administration and, in a subsequent meeting with College President Bruce Barker, Storms was told that if Local 2398 pursued a unit clarification the College would challenge certain positions it felt were inappropriately in the bargaining unit.

Subsequent to her interview, Meinen contacted the Human Resources Department about the status of the Program Assistant position. Human Resources Specialist Julie Neuhaus emailed Meinen on September 24 and told her that the filling of the position was on hold pending the resolution of the unit clarification matter. Meinen shared this information with Storms, who sent an email to HR Director Casey on September 25, as follows:

Mary,

I am deeply disappointed with this decision by Administration. I am even more disappointed by the reasoning. If this is an attempt to blaim [sic] the Union, we will not stand for it.

I was under the impression that Bruce wanted to improve relations with the support staff. I find it hard to believe he was ever sincere in is [sic] efforts. There has not been so much as an offer to meet with us by either Tom or Bruce to discuss this.

As I stated to you yesterday, the Unit Clarification was not done with any ulterior [sic] motive. All we want is the work that we feel belongs in our unit. If Administration wants to waste their time wondering what we're up to, rather than call a meeting to talk to us, then so be it. I was really hoping we could sit down like rational human beings and discuss this. I'm not feeling very confident in that ever happening.

The next day, Huffcutt had a meeting with Union Labor Relations Chair Kathleen Goodman about the unit clarification matter and Storms' email to Casey. Huffcutt told her that Barker was upset about the September 3 letter from Storms and Peck and was taking it personally. Goodman responded that she felt the decision to put the Program Assistant position on hold was in retaliation for the Union's raising the unit clarification issue. Huffcutt told her that if the unit clarification matter was dropped the position would be filled. Goodman responded that the Union considered the issues to be unrelated and that the Unit clarification matter would not be dropped, whereupon the meeting ended.

In October, 2009, Storms was informed by Casey that CVTC would be hiring a Limited Term Employee (LTE) from a temporary staffing agency to fill the vacant Program Assistant position while it was on hold, which was, in fact, done. On October 22, the Union filed a grievance, alleging that the filling of a vacant bargaining unit position with an LTE violated the parties' Letter of Agreement regarding subcontracting and requested that the position be awarded to the most qualified senior bargaining unit member who interviewed for the position. The grievance was denied and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

### POSITIONS OF THE PARTIES

#### The Union

The Union asserts that the evidence supports its contention that the College agreed not to subcontract bargaining unit positions during the term of the 2008-2010 contract, but violated the agreement by subcontracting with an outside agency to fill a Program Assistant position in October 2009. During bargaining over the 2008-2010 contract, the parties entered into a Letter of Agreement Concerning Flex Scheduling. This agreement addressed the desire of the College to have the ability to "flex" the hours of the employees working in the Customer Service Center. In return, as a *quid pro quo* for the ability to flex hours, the College agreed it would not subcontract bargaining unit work during the term of the agreement, which was a concern of the Union. Testimony of Raeann Hutchinson establishes that the subcontracting language was intended to apply unit wide.

Several exhibits offered at the hearing support the Union's position, as well. The Union summary of the Tentative Agreement (U. Ex. #2) indicates there was to be **no subcontracting of bargaining unit work**. This is supported by the notes of Tracy Drier, a member of the College's bargaining team (U. Ex. #3), which state: "Agree to not outsource any clerical union

position for the life of the contract.” Finally, Hutchinson’s notes from the November 5 bargaining session (U. Ex. #5) reveal the agreement of the College’s Chief Negotiator, Tom Huffcutt, that the subcontracting language “would pertain to all clerical – not just those in the Customer Service Center.” Huffcutt testified that he could not recall the exchange with Hutchinson, but did not deny it occurred and agreed that Hutchinson’s notes were consistent with Drier’s. The Union has always maintained that protection of bargaining unit work was a Union priority throughout the negotiations. The Letter of Agreement is clear on its face on the subject of subcontracting and, with the additional support of the documents establishing the bargaining history, there is no question that all bargaining unit positions were to be included in the agreement, including that of the Program Assistant, which is the subject of the grievance here.

The College’s decision to not permanently fill the Program Assistant position, but instead to fill it with and LTE obtained from an outside agency, was made in retaliation for the Union’s raising certain unit clarification issues. The Union does not base its grievance on retaliatory motive, however, but on the clear understanding that there would be no subcontracting of bargaining unit work if such “would prevent a return from layoff or leave or prevent the hiring or transferring into an open position within the bargaining unit.” It is clear, from the posting of the position in August 2009, that there was an open Program Assistant position at that time. Brenda Meinen applied for, and was interviewed and tested for, the position and could have filled it in October but for the College’s hiring of a subcontracted employee to fill the position. Ultimately, in February 2010, Meinen did fill the position after the College ended the subcontracting. The only contemporaneous documentary evidence of the College’s reason for subcontracting was the email of Human Resource Specialist Julie Newhaus to the effect that the filling of the position was delayed by the unit clarification dispute. Further, Union Grievance Chair Kathleen Goodman testified that she was told by Huffcutt on September 25, 2009 that the position would be filled if the Union dropped the unit clarification matter. It is undisputed that College administration was unhappy about the unit clarification request and that College President Bruce Barker took the request as a personal affront. While the Union is not basing the grievance on the retaliation element, it is relevant to show that the College’s later explanations for its decision were pretextual.

The College attempted to resolve the dispute on January 12, 2010 by informing the Union that it had ended the subcontracting arrangement with the staffing agency and hiring the subcontracted employee directly as an LTE to work as a Program Assistant. This, however, also violated the contract because under Article III, Section D, LTEs are only to be hired for positions that are expected to last for less than twelve months. The posting of the Program Assistant position made it clear that it was intended to be a permanent position.

There is no merit to the College’s argument that in hiring the subcontracted LTE the College was merely following established past practice. The College produced an exhibit listing a number of occasions where subcontracted employees had been used to fill LTE positions (C. Ex #1). The Program Assistant was not an LTE position, however, but was posted as permanent. None of the positions listed on College Exhibit #1 was previously posted.



Further, the issue is not the College's use of outside agencies to fill LTE positions, but its use of a subcontractor in a way that denied a bargaining unit member the ability to transfer. None of the other positions listed on College Exhibit #1 were instances where bargaining unit members were denied an opportunity to transfer. The Forde position, further, which is in dispute here, was based, not on the fact that the position had not been finalized, but on the College's retaliatory motive to get the Union to drop its unit clarification request. The College clearly delayed the process of resolving this grievance in order to leverage the Union into dropping its unit clarification requests. In recognition thereof, the grievance should be sustained and the Grievant should be awarded backpay dating from October 2009.

### **The Employer**

.The College asserts that the use of temporary employees to fill LTE assignments at CVTC does not constitute outsourcing and is within its management rights. The Union's assertion that LTE positions are bargaining unit work is not supported by the contract language or past practice. For the past ten years, CVTC has routinely used temporary employment agencies to fill LTE positions where the duties of a permanent position are under review. This usually occurs after a retirement, during leaves of absence, or when the structure of a position is being revised. After the questions are resolved, the position is usually posted and filled. Here, the Vice President of Education was retiring and the College was considering creating a Lead Program Assistant position, which was discussed with the Union. This information is contained in the College's Step 4 grievance response (Jt. Ex. #6).

Article III and Article IX give the College the right to fill LTE positions of up to twelve months in length. These are treated as probationary positions and are not required to be posted until the position becomes permanent. The position in question here was filled by a temporary employee from October 5, 2009 until January 12, 2010. From January 12, 2010 until February 2, 2010, the position was filled by an LTE, at which point it was awarded to the Grievant. This was all in accordance with Article III and the College's management rights. Human Resources Director Mary Casey testified that numerous times over the past decade the College has used LTEs for positions lasting as little as two weeks, and as long as two years (two twelve month assignments). Some of these situations occurred after the Letter of Agreement in issue here was signed, yet the Union did not file grievances over any of the hirings.

The Union asserts that this situation is different because the College initially posted the position, initiated the hiring process and then withdrew the posting. Testimony of Casey and Vice President Tom Huffcutt, however, reveals that on numerous occasions positions were posted and the hiring process was begun, only to have the posting withdrawn due to budget cuts without grievances being filed. The Union's position in fact conflicts with the clear language of the contract which permits the College to hire LTE employees to fill limited term positions. At the time the Grievant applied for the position it was posted as a permanent position, but the structuring was still up in the air. The College felt the new Vice President of Education, who was hired in late October/early November 2009, should have input into the

decision. The College assumed the time necessary to make the decision would be less than a year, so did not violate the contract by withdrawing the posting and hiring an LTE to fill the position while it was under review. Even if the College's actions could be considered "outsourcing," however, by failing to object to any of the previous instances where this was done the Union tacitly agreed to the practice. CHIPPEWA COUNTY (HIGHWAY), Case 212, No. 58108, MA-10843 (Greco, 7/31/00)

The College also maintains that arbitrators have held that, in the absence of a specific contractual restriction, it has an inherent right to use temp agency employees to fill LTE positions as long as it acted in good faith. (citations omitted) Here, the contract contains only one provision which appears to restrict management's ability to subcontract work. That language is contained in Paragraph C. of the Letter of Agreement. The College maintains, however, that this language is specifically restricted to positions in the Customer Service Center. The Union's argument that it applies to all bargaining unit positions cannot be sustained.

Huffcutt testified that the Letter of Agreement was intended to address the College's desire for more flexibility in scheduling, as well as the Union's concerns over outsourcing of clerical work in the Customer Service Center. The only departments in the College that currently have flexible scheduling are the Customer Service Center and Admissions. The Letter of Agreement was the result of negotiations between the parties wherein it was agreed to institute an 18-month pilot project for flex scheduling in the Customer Service Center. The subcontracting language is contained within the Letter of Agreement, set to expire on June 30, 2010. The College asserts that the entire Letter of Agreement was limited to the pilot project in the Customer Service Center. Had it been intended to apply to all departments, it would have been inserted into the main body of the contract.

The Union relies for its position on Union Ex. #3, a document prepared by the College's confidential secretary after negotiations, but this contradicts the summary of the tentative agreements prepared by its own member, Raeann Hutchinson, which makes it clear that the subcontracting language was part of the pilot project. Huffcutt testified that he did not recall any agreement to apply the subcontracting language to all bargaining unit positions and that he did not review Ms. Drier's document before it was shared with the Union. He further denied having conversations with the Union about the applicability of the language, as set forth in Union Ex. #5.

The decision to use a temporary employee to fill a temporary position was a reasonable business decision, made in good faith, and was not intended to subvert the Union. This has been a practice of the College for a number of years. The Union asserts that this case is different because it prevented a bargaining unit employee from transferring into an open position. The College maintains, however, that there was no open position until the review process was completed, at which time the Grievant was awarded the position. The WERC's standard of review on subcontracting issues has been whether the employer's decision was a reasonable decision made in good faith, or whether it was an arbitrary and capricious decision,

or made in bad faith. WOOD COUNTY (COURTHOUSE), Case 128, No. 52231, MA-8881 (Gallagher, 6/24/96) There is no evidence here of any bad faith or ulterior motive in the College's decision to staff the Program Assistant position with a temporary employee, or that the College harbored any animus toward, or discriminated against, any bargaining unit member. The Union attempted to assert that the College's action was in retaliation for its raising the possibility of a unit clarification petition at around the same time. The record reveals, however, that during this entire period the Program Assistant position was under review, which supports the College's position. This information was provided to the Union on November 23, 2009. None of the reasons set forth in Huffcutt's letter were arbitrary, capricious, or discriminatory. Arbitrators have held that where subcontracting occurs after the retirement or resignation of an employee, no violation has occurred because no employees were laid off or had their hours reduced. The same rational establishes that the College committed no violation here. The records supports the College's position that the grievance should be denied.

### DISCUSSION

The issue in this case is whether the College violated the parties' Letter of Agreement Concerning Flex Scheduling, dated March 3, 2009, when it posted a position for a Program Assistant, for which bargaining unit member Brenda Meinen applied and was interviewed, but then initially filled it with a limited-term employee hired from a temporary employment agency. The Union asserts that this action was a direct violation of Section C. of the Letter of Agreement, which prohibits subcontracting of bargaining unit work when to do so would prevent a transfer within the bargaining unit. The College asserts that the Letter of Agreement only applied to positions within the Customer Service Center, which did not apply to the Program Assistant position and, in the alternative, that there is a long standing practice of hiring limited-term employees (LTEs) from temporary agencies to fill positions which are under review and that such does not constitute subcontracting.

Subcontracting occurs when an employer contracts with an outside vendor to provide goods and/or services, rather than using its own employees and resources to do so. In the context of a collective bargaining relationship, this can become problematic when an employer uses outside vendors to do bargaining unit work. If such a situation results in a grievance, the arbitrator is called upon to determine whether such subcontracting violates the collective bargaining agreement. First, the arbitrator must look at the language of the contract to determine if there is an express limitation on management's right to contract out for goods and services. If there is, the arbitrator must determine if the specific circumstances of the grievance are covered by the contract language. Where there is no specific applicable contract language, the arbitrator must look to see whether there are implied restrictions based on past practice, bargaining history, or the contractual duty to act reasonably and in good faith. In the absence of contract language, arbitrators typically find that management has a right to contract out for goods and services, but this right is not considered to be unfettered. Thus, for instance, where subcontracting is used for the purpose of undermining the bargaining unit it may be prohibited even where the contract is silent.

Here, the Letter of Agreement specifically purports to limit management's right to subcontract during the term of the contract. The first question, therefore, is whether the Letter of Agreement applies to the position for which Meinen applied. I find that it does. The LOA is identified as an agreement intended to address flex scheduling in the Customer Service Center, an issue of importance to the College in the 2008-2010 bargain. The College argues persuasively, therefore, that the LOA was intended to be limited in its application to only positions in the Customer Service Center, which the Program Assistant position was not. The Union points out, however, that the terms of the Customer Service Center pilot project are spelled out in Section B of the LOA and that Section C, limiting subcontracting, does not limit itself to the CSC, but states that during the term of the pilot project the College "shall not subcontract bargaining unit work..." which it asserts should be given unit wide application.

In my view, the key to assessing the intended scope of this language is the bargaining history underlying the LOA. In support of its position, the Union points to the testimony of Negotiations Chair Raeann Hutchinson to the effect that subcontracting of bargaining unit work generally was a concern of the Union in the 2008-2010 bargain. Thus, she testified that obtaining a restriction on subcontracting of any bargaining unit work was a *quid pro quo* for the Union's agreement to enter into the pilot project in the CSC. This testimony is supported by Hutchinson's summary of the Tentative Agreements for the 2008-2010 contract (U. Ex. #2), which specifies "No subcontracting of bargaining unit work during pilot project (term of this contract)." Hutchinson's recollection is further supported by the summary of Tentative Agreements prepared by Secretary Tracy Drier for the management negotiations team (U. Ex. #3), which states "Agree to not outsource any clerical union position for the life of the contract." (emphasis added) Hutchinson's testimony is further supported by her meeting minutes of the November 5, 2008 bargaining session, which state, "Clarify with Tom: subcontracting language would pertain to all clerical - not just those in customer service center. Per Tom yes." This was in reference to a conversation between Hutchinson and College Operations Vice President Tom Huffcutt clarifying the scope of the subcontracting language.

Huffcutt testified that he did not recall the conversation with Hutchinson, but he did not deny that it occurred. He further testified that he did not review Drier's summary of the TAs before they were sent out, but he agreed that her notes were consistent with Hutchinson's. Taken as a whole, it is clear that the Union was under the impression that the subcontracting language was intended to apply unit-wide. It is also clear that the College was, or should have been, aware of the Union's understanding and facilitated it by sharing Drier's summary. Nevertheless, the College took no steps to correct any misapprehension on the Union's part, but signed off on the LOA knowing that the Union believed it applied to all bargaining unit positions. Viewed one way, the parties had a clear understanding that all bargaining unit positions were subject to the restriction on subcontracting. Viewed another way, the parties had different understandings, but the College facilitated the misunderstanding by submitting a summary of the TAs essentially in accord with the Union's understanding. In either event, the College cannot now claim that the language should be interpreted otherwise than according to its terms, as amplified by the bargaining history evidence offered by the Union. I find,

therefore, that Section C of the LOA applies to all bargaining unit work, not just the positions in the CSC.

The second question is whether the hire of an employee from a temporary employment agency to fill the Program Assistant position for which Meinen applied constituted subcontracting of bargaining unit work. I find that it did. The College posted a permanent position for a Program Assistant working under the Education Director in August 2009. There is no dispute that the position was a bargaining unit position. The deadline for applications was August 17, 2009. Meinen applied to transfer into the position on August 17, 2009 and was interviewed and tested for the position on September 11, 2009. There is no evidence in the record that she was deemed to be unqualified for the position or that she was not the senior applicant, which are the applicable criteria for successfully posting for a vacancy per Article VI, Section C. of the contract. There is also no evidence that the posting was ever withdrawn. Rather, Meinen was informed on September 24, 2009 by Human Resources Specialist Julie Newhaus that the filling of the position was “put on hold” pending resolution of a unit clarification issue raised by the Union concerning several unrelated positions (U. Ex. #10). The College then hired Carol Forde from Flex-Staff Employment Services to fill the position pending resolution of the unit clarification matter. Ultimately, the College hired Forde directly as a Limited Term Employee, but the position was eventually permanently awarded to Meinen on January 20, 2010.

The College asserts that it has used temporary employees as LTEs extensively over the years to fill positions while a permanent hire is pending due to resignations or retirements, when a position is under review, or when a permanent employee is on leave of absence, and the record reflects that this is true. The College further asserts that in this instance the position was under review because the Director of Education had resigned and it was waiting to replace that position before it filled the Program Assistant position. It also points out that it was in a process of determining whether to create a Lead Program Assistant position and this also influenced its decision to postpone filling the position until after the hire of the new Education Director. I find these arguments unpersuasive.

At the time Forde was hired the time for applications had passed and Meinen had already applied and interviewed for the position. There is no evidence that other candidates were being considered for the position. The Union contends that the decision to hire a temporary employee in October 2009 was in retaliation for its action in seeking to have several non-union positions accreted to the bargaining unit, set forth in a letter to Vice President Huffcutt on September 3, 2009 (U. Ex. #12 & #13) . The College asserts that its action was taken because it was reviewing the position due to the resignation of the Education Director and the exploration of the possibility of creating a Lead Program Assistant position.. In my view, the weight of the evidence on this point favors the Union, but, as will be seen below, the College’s actual rationale does not affect the outcome in this case.

The College’s defenses include its contention that the LOA did not cover subcontracting outside the CSC, that hiring temporary employees as LTEs under these circumstances does not

constitute subcontracting and that the Union has not grieved similar actions in the past and thereby has acquiesced in the practice. The first contention has been addressed above. I now turn to the others.

As to whether the hiring of temporary employees as LTEs to do bargaining work in these circumstances constitutes subcontracting, I find that it does. The Program Assistant position is unquestionably a bargaining unit position and, thus, the work of the position is bargaining unit work. The hire of an outside employee through a temporary agency to do the work, therefore, was subcontracting of bargaining unit work. Further, the position had been posted and a qualified bargaining unit employee had applied for a transfer into the position. Thus, the subcontracting prevented her transfer into the position and thereby violated Subsection C. of the LOA. The language of the provision makes no exceptions for the hire of temporary employees under these circumstances, so there is no meaningful distinction to be found in the fact that Forde was only hired to perform the work for the short term. In fact, however, there is no evidence that at the time of her hire the College had determined the intended length of her employment. The College points out that LTE positions, by contract, are limited to twelve months, but there is also evidence that, at least in one instance, an LTE position was extended for two years through the device of hiring LTEs for back-to-back one year terms to fill the same position. Thus, it is not clear that the use of an LTE to fill a position necessarily means that the hire is only short term.

To the College's contention that the Union has acquiesced in the use of temporary employees in the past there are two answers. First, it appears that many of the cited instances of this practice occurred prior to the adoption of the LOA. At that time, therefore, there was no contract language restricting subcontracting. In the absence of such language it was apparently deemed to be a management right to contract out for services. The question of whether such subcontracting was permissible is not before this arbitrator and it is sufficient to say here that such subcontracting occurred under different circumstances and so the Union's alleged acquiescence is irrelevant to this case. It is noteworthy, however, that the Union apparently was concerned about the practice, which led it to seek protection against it as part of the LOA.

It is true that there have been instances of the College using temporary employees to do bargain unit work after the adoption of the LOA, but here, again, these occurrences are distinguishable from the current dispute. The specific instances involve Michelle Klumpf, who was retained from Manpower Employment Services in March 2009 to cover an Office Assistant position in Neillsville until a permanent replacement for the position was hired, Thane Close, who was retained from Flex-Staff Employment Services in August 2009 to cover for an employee on medical leave and Lynne Przybylski, who was retained from Manpower in November 2009 to fill a position in the Admissions Office after an internal transfer until the position was permanently filled. In the case of Close, the incumbent was only on a leave of absence and so the College was justified in using a temporary replacement until the incumbent's return. In the cases of Klumpf and Przybylski, the College was, as here, in the hiring process, but there is no evidence that qualified bargaining unit members had been denied

a transfer as a result of their hires, or that permanent replacements had been identified and the award of the positions were delayed while the temporary employees held the positions. Thus, it does not appear on this record that those hires were necessarily grievable events.

The College points out that in the past it has withdrawn postings after the interview process was completed as a result of budget cuts without grievances having been filed, but those instances are, likewise, distinguishable. The management rights clause does give the College the right to determine its staffing needs and to fill positions, or not, based on its determination of those needs and its economic realities. Thus, if a position is posted and then the College determines that it has no need of the position or cannot afford it, it has the right to withdraw the posting at any point, but that is not what occurred here. Here, the posting was not withdrawn and the ultimately successful candidate was identified, but the College, for other reasons, determined to delay the hire of a permanent employee and, instead, used a temporary employee to fill the position until it decided to award the position to a bargaining unit employee, thereby delaying her rightful transfer.

As noted above, it makes no difference in this regard whether the College's motive was to try to use the position to leverage the unit clarification dispute, or whether it merely wanted to wait until an Education Director was hired or until it determined whether to create a Lead Program Assistant position. In either event, Meinen was apparently the qualified applicant and was entitled to the position once that was determined. Contractually, the identity of the Education Director and that person's agreement to the hire are not criteria upon which the determination of a candidate's acceptability are to be based. Likewise, whether or not the College eventually decided to create a Lead Program Assistant position, Meinen was apparently qualified for the position for which she applied. Subsequently, the College could have decided to create a Lead Program Assistant position, regardless of Meinen's transfer, and could have pursued a process of determining whether Meinen, another Program Assistant, or an additional employee, was the appropriate candidate for that role. Neither, of these considerations, therefore, should necessarily have delayed Meinen's transfer. As previously stated, however, I am persuaded that the Union's suspicion that the delay was based on the unit clarification dispute is the more likely explanation. This is based upon the conversation between Huffcutt and Union Labor Relations Chair Kathleen Goodman on September 25, 2009, which Huffcutt did not dispute, wherein he advised Goodman that the Program Assistant position would be filled if the Union dropped its unit clarification request. It is also noteworthy in this regard that Human Resources Specialist Julie Newhaus informed Meinen on September 24, 2009 that the filling of the position was put on hold indefinitely pending resolution of the unit clarification issue, whereas the College did not identify the hire of a new Education Director or the possible restructuring of the position as considerations until November 23, 2009, two months later, in the Step 4 grievance response of President Bruce Barker. This persuades me that the College's unhappiness over the unit clarification request was the more likely reason for the delay and that it hoped to induce the Union to drop the request by holding the Program Assistant position in abeyance pending a satisfactory resolution. In that event, the delay was wholly inappropriate.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

**AWARD**

The College violated the collective bargaining agreement when it filled the position of Program Assistant with an employee from an outside agency instead of awarding the position to Brenda Meinen. As and for a remedy, the College shall pay the Grievant backpay in the amount of \$1.43 per hour for all regular hours she would have worked as a Program Assistant from October 5, 2009 until January 20, 2010.

The Arbitrator will retain jurisdiction of this matter for a period of thirty days after the issuance of this award to resolve any disputes over the implementation of the remedy.

Dated at Fond du Lac, Wisconsin, this 16th day of July, 2010.

John R. Emery /s/

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John R. Emery, Arbitrator