BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

OAKWOOD LUTHERAN HOMES ASSOCIATION, INC.

Case ID: 440.0001
Case Type: A

AWARD NO. 7930

(Subcontracting Grievance)

Appearances:

Nicholas Fairweather, Attorney, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of SEIU Healthcare Wisconsin.

Michael Westcott, Attorney, Axley Bryneslon, LLP, 2 E. Mifflin Street, Suite 200, P.O. Box 1767, Madison, Wisconsin, appearing on behalf of Oakwood Lutheran Homes Association, Inc.

ARBITRATION AWARD

SEIU Healthcare Wisconsin (hereinafter referred to as the Union) and Oakwood Lutheran Homes Association, Inc. (hereinafter referred to as the Employer) were parties to a collective bargaining agreement that provided for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held in Madison, Wisconsin, on January 7, 2016. The hearing was transcribed. The parties filed briefs whereupon the record was closed on May 2, 2016. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Employer breach the collective bargaining agreement when it subcontracted work completed at the Hebron Oaks first floor Clinic in November, 2014? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2013 – 2015 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 5 – MANAGEMENT RIGHTS

> **Section 5.1 – Scope**. The parties recognize that this Agreement addresses the Employer-Staff member relationship existing between the Employer and its Staff members in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of Employer and Staff member. It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Employer and the direction of the work force, including, by way of example and not by way of limitation, the right to select, hire and assign Staff members, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Employer, direct and assign work, determine work schedules, transfer Staff members between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Employer's goals and objectives are to be attained, and to discharge Staff members for just cause or relieve Staff members from duty for lack of work or other legitimate reasons are vested and not to violate other provisions of this Agreement. It is further understood that all functions of management not specifically relinquished or limited in this Agreement shall remain vested in the Employer.

* * *

ARTICLE 13 – SUBCONTRACTING

> The Employer and the Union agree that quality care demands continuity of care. Therefore, the Employer will not contract out work performed by the bargaining unit unless there are no available qualified Staff members, or not enough available qualified Staff members, within the bargaining unit to perform the work.
>
> Examples of work that would normally be contracted out include special work that requires tools or equipment the Employer does not possess at the time(s) it is needed.

BACKGROUND

The Employer is a continuing care retirement community. It provides services to older residents in the form of independent living apartments, assisted living, memory care, and skilled nursing facilities. The Employer has two campuses. There is a West Campus referred to as University Woods and an East Campus. The factual scenario giving rise to the present grievance occurred on the West Campus. The West Campus is comprised of eight buildings. Hebron is the building in which skilled nursing care is provided. Tabor is assisted living, while Covenant is for memory care. Additionally, there are buildings which provide independent living apartments. Those buildings are Heritage, The Oaks, The Tower, and The Gallery. The remaining building on the West Campus is a common space which is referred to as The Village Inn.

The Union represents the service and maintenance employees employed by the Employer at its East and West Campuses in Madison, Wisconsin. There are about thirty job classifications in the bargaining unit. These classifications are referenced in Appendix A of the collective bargaining agreement. One of the classifications listed therein is Environmental Services Assistant. A while back, this classification had its name changed, and those employees are now referred to as Facilities Services Technicians (hereinafter referred to as FSTs). The FST job description identifies the "Basic Function" of that job as follows:

> The Facilities Services Technician position is responsible performing routine building maintenance tasks. Includes but not limited to tasks in the areas of building and equipment repairs, painting, carpentry, electrical, heating, ventilation, air conditioning, and plumbing.

> The ideal candidate possesses good mechanical abilities, willingness to perform routine tasks and work with minimal supervision. Preferable candidate has general building maintenance experience or specialized training in HVAC, plumbing, carpentry, electrical, and painting.
>
> This position reports to Facilities Services Director/Supervisor.

There are typically nine FSTs who work at the University Woods Campus. The FSTs are frequently pulled off one job to deal with another job that is considered higher priority.

* * *

The parties' first collective bargaining agreement was for the time period 2003 through 2005. The subcontracting language contained in that agreement is identical to the subcontracting language contained in the current collective bargaining agreement. Thus, the subcontracting language has not changed since it was originally included in the parties' first collective bargaining agreement.

The Employer has been subcontracting all kinds of work – including painting work – to outside contractors as far back as anybody who testified at the hearing remembers. Further details about this subcontracting follow.

According to the testimony of FST Kraig Kahl, prior to 2012 when the Employer contracted out painting work, the Employer did not first offer any of this subcontracted painting work to the FSTs to perform as overtime. That situation grated on the FSTs who felt they should have the opportunity to perform that painting work as overtime before it was contracted out. Consequently, they talked to Union Representative Andy Harris about it who, in turn, talked to some management representatives about it. Whatever they discussed and / or agreed upon was not memorialized in writing or placed in a subsequent collective bargaining agreement. While Kahl was not present at the meeting just mentioned, he testified that it was his understanding that the parties reached an oral agreement at that meeting. According to Kahl, the oral agreement was this: henceforth, before the Employer subcontracted painting work, it would post the painting work to the FSTs as an overtime opportunity; if a FST signed up to perform that work, he / she got it; however, if not enough FSTs signed up to cover / complete the entire painting job involved, then the painting work would be subcontracted out and the FSTs lost the opportunity to perform it (i.e. the painting work) as overtime.

The Employer elaborates as follows on Kahl's testimony to give it additional context. According to the Employer, some renovation projects are not as time sensitive as others and do not involve multiple trades whose work has to be performed in a time sequence. The Employer contends that in those situations, it schedules such work into the regular hours of the FSTs

because there is a longer window for the work to be performed. The Employer also contends that other times, when the work cannot be performed by the FSTs during their regularly scheduled hours, or when there are not enough FSTs to perform the work, it will offer the work to the FSTs as overtime. According to the Employer, it does that via the following process. It notifies the FSTs of the overtime opportunity (specifically the number of hours of overtime needed or available on a particular project). The FSTs then contact the Employer to let it know how many of the overtime hours they are interested in picking up. If all of the overtime hours are signed up for, then the project is not subcontracted out but rather performed as overtime by the FSTs. If all of the overtime hours are not signed up for, then the project is subcontracted.

The Employer emphasizes that the process just described only deals with those projects where the Employer decides that overtime is available for the FSTs.

In all of the projects referenced below though, the Employer decided that overtime was not available to the FSTs and it subcontracted the work. In each of these projects, none of the work was assigned to the FSTs to perform or offered to them as overtime. The Union did not grieve the Employer's subcontracting of any of this work.

In March of 2012, the Employer subcontracted work to Vogel Brothers Building Company (hereinafter referred to as Vogel) for a project known as an interior finish upgrade. The scope of work on that project was improvements to a number of facilities in the building along what is known as the Main Street corridor. This was a $200,000 project that took about eight weeks to perform. The work included wall preparation and painting in the Tower, Tabor, Covenant, and Hebron. None of this work was performed by bargaining unit employees. Numerous trades worked on the project and there was a tight timeline requiring everything to be performed in a sequential order to maximize the work being done. In deciding to subcontract this work, David Bertsch - the Employer's Director of Facilities and Property Management - decided that there was not sufficient staff available to perform it.

In April of 2012, the Employer subcontracted work to Vogel for a renovation project in Tower Unit 1111. This was a $14,000 project that took about eleven days to perform. The work involved wall preparation, painting, and installation of hardware and accessories. None of this work was performed by bargaining unit employees. There was a resident moving into the apartment, so there was a specific timeline that needed to be met. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

In June of 2012, the Employer subcontracted work to Vogel for a renovation project in Tower Unit 900. This was a $20,000 project that took about two weeks to perform. The work involved wall preparation, painting, and installation of accessories. None of this work was performed by bargaining unit employees. There was a resident moving into the apartment, so

there was a specific timeline that needed to be met. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

In August of 2012, the Employer subcontracted work to Vogel for a renovation project in Tower Unit 1409. This was a $16,000 project that took about three weeks to perform. The work involved wall preparation, painting, and installation of accessories. None of this work was performed by bargaining unit employees. There was a resident moving into the apartment, so there was a specific timeline that needed to be met. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

Also in August of 2012, the Employer subcontracted work to Vogel for a renovation project in Tower Unit 410. This was a $15,000 project that took about three weeks to perform. The work involved wall preparation, painting, and installation of accessories. None of this work was performed by bargaining unit employees. There was a resident moving into the apartment, so there was a specific timeline that needed to be met. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

Also in August of 2012, the Employer subcontracted work to Vogel for a renovation project in Tower Unit 601. This was a $15,000 project. The work involved wall preparation, painting, and installation of accessories. None of this work was performed by bargaining unit employees. There was a resident moving into the apartment, so there was a specific timeline that needed to be met. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

In 2013, the Employer subcontracted work to Vogel for a major renovation in Hebron Oaks (the skilled nursing facility). This was a million and a half dollar project that took place over six months. More than 80 rooms were renovated. Each week, about four resident rooms were impacted. The work began on Monday and finished on Friday afternoon of the same week. The residents were moved out of their rooms before the work began on Monday, and they would be moved back into their rooms at the end of the day the following Friday. While the residents were out of their room, the walls were repaired, there was some caulking performed, and the walls were repainted. Sprinkler and fire management systems were installed. Carpeting, flooring and wall protection were installed. Toilets were reinstalled, blinds were hung, and accessories such as towel holders, dispensers, mirrors, etc. were installed. This work was repeated in each room. In effect, it was the same weekly project repeated week after week in room after room. None of the work just mentioned was performed by the FSTs. That said, the FSTs were involved in the project to the following extent: they moved the furniture items in each resident room such as beds, armoires, side tables, etc., out of the room at the beginning of each week and then, after the work was completed, moved the furniture back into the rooms. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

In the summer of 2013, the Employer subcontracted work to Vogel for the Village Inn renovations. This was a $50,000 project that took four weeks to perform. The work involved drywall patching, painting, demolition (removal) of flooring, installation of new flooring, installation of wall protection, and installation of some casework, cabinets and countertops. None of this work was performed by bargaining unit employees. In deciding to subcontract this work, Bertsch decided that there was not sufficient staff available to perform it.

In September of 2014, the Employer subcontracted work to Vogel to adjust 32 fire doors at the Heritage facility. This was a $6,400 project that took five days to perform. The work involved adjusting fire doors that were not closing and latching which was required by code. None of this work was performed by bargaining unit employees. The reason it was not performed by bargaining unit employees was because Bertsch decided the work was outside of the skill sets of its staff. While bargaining unit employees perform some adjustments on individual apartment doors so that they will close and latch by, for example, installing a shim, Bertsch concluded that this was a more challenging task and decided to subcontract the work.

As previously noted, in each of the projects noted above, none of the work was assigned to the FSTs to perform or offered to them as overtime. The Union did not grieve the Employer's subcontracting of any of this work.

It is set against this factual background that the following occurred.

FACTS

The Geriatric Clinic is an onsite clinic in the Hebron facility of the University Woods Campus. This clinic is where the residents go to receive different forms of healthcare treatment. This includes services such as dentistry, podiatry, psychology, psychiatry, and audiology.

The healthcare providers that operate in the Geriatric Clinic rent space from the Employer. There is a lease agreement between the Employer and the healthcare providers where the Employer is essentially the landlord for the clinic area.

In 2014, the Employer made the decision to upgrade and renovate the Geriatric Clinic. The scope of the project involved wall preparation, painting, flooring, door finishing, and installation of accessories. The flooring work involved removing the existing carpet and installing new carpet and sheet vinyl. There was also some demolition involved in the project, meaning things were removed off the walls such as mirrors and towel dispensers and later reassembled. With the exception of the door finishing work, the renovation work performed on the Geriatric Clinic was very similar to the work performed in Tower 1111, Tower 900, Tower 1409, Tower 410, as well as the work performed in Hebron that was broken up into the one week chunks.

This work involved a significant time constraint. It had to begin on a Monday morning and be completed by the end of the day on the Friday of that same week. In other words, it had to be completed in five business days. It was ultimately decided that the project was to begin on Monday, November 3, 2014 and end on Friday, November 7, 2014.

The time constraints for the project were driven by the physicians who were offering the services in the particular space. Those providers typically have appointments scheduled out months in advance. The providers that lease the space from the Employer came to the Employer and stated they wanted the shortest window possible to ensure that there wasn't any additional interruption to their service levels for the residents. This was due to the fact that none of the residents were able to be treated at the clinic during the course of the project. In addition to the work having to be performed Monday through Friday in a one-week period, the work also could only be performed between 7:00 AM and 5:00 PM, Monday through Friday. This was dictated by the service providers that leased the space because they kept supplies, medications, and those sorts of things in the clinic area and asked that the scope of work be done during daytime hours so there would be some level of oversight over the work being performed.

The Employer decided that the sequential order of the project would be as follows: the painting had to be performed on Monday and Tuesday with the remainder to be finished Wednesday morning. All painting had to be completed within that window to ensure that the flooring could be installed after the painting had been completed.

Creative Business Interiors (hereinafter referred to as CBI) is a company that the Employer has worked with and purchased furnishings from in the past. It is in the interior design business and provides remodeling and light construction services, as well as the sale of furniture and amenities such as accessories and artwork. The Employer subcontracted the Geriatric Clinic renovation project to CBI and purchased certain items from them.

The items which the Employer purchased from CBI included artwork, reframing of a mirror, coat hooks, cork board, chairs, benches, end tables, a business card display, and some signage. CBI delivered and installed all those items. The delivery and installation charge for those items was built into the purchase price.

CBI performed some of the work on the Geriatric Clinic and contracted out part of it. CBI performed the demolition work on the project (i.e. removal of items from walls such as mirrors, towel holders, etc., as well as removal of the carpeting and the base). It is unclear from the record who installed the new carpet and sheet vinyl. CBI contracted with a painting company to perform all of the painting, as well as the finish work on the doors. The latter work (i.e. the door finishing work) involved removing seven wood doors, taking them off site and stripping, sanding, and refinishing them and rehanging them. The painting company that performed this work was not identified at the hearing.

The record reflects that the painting company selected by CBI spent a combined 73 hours painting on the Geriatric Clinic project. The record does not identify the number of employees that the painting company had on the job between Monday and Wednesday morning. The Employer posits that if it had used FSTs to perform this painting, it would have had to use three of its FSTs at the University Woods Campus to do it. It further posits that this would have taken them away from their normal duties.

The Employer's decision to subcontract the Geriatric Clinic renovation work to CBI was made by David Bertsch, the same person who made the decision to subcontract all of the projects noted in the BACKGROUND section. Bertsch testified that in making his decision to subcontract the work to CBI, he considered the scope of the project and decided that there were not sufficient available bargaining unit employees to perform the work. Additionally, he concluded that the work involved in the Geriatric Clinic renovation project was similar to the work involved in the large Hebron renovation project that involved the Monday through Friday repetition of working on four rooms each week for six months.

The record reflects that no bargaining unit employee lost any regular work hours as a result of the Geriatric Clinic project being subcontracted. Said another way, the subcontracting did not impact any employee's straight time pay.

* * *

The Union subsequently filed a grievance which contended that by subcontracting the Hebron Geriatric Clinic renovation work, the Employer had violated the collective bargaining agreement. The grievance alleged that the renovation project involved work that in the past had been posted as overtime for bargaining unit employees to pick up. The grievance was appealed to arbitration.

DISCUSSION

At issue here is whether the Employer violated the collective bargaining agreement when it subcontracted work completed at the Hebron Oaks' first floor clinic in November, 2014. Based on the rationale which follows, I answer that question in the negative, meaning I find no contract violation.

This is a contract interpretation case. That being so, I've decided to begin with the following introductory comments about how I go about interpreting contract language. In a contract interpretation case, my interpretive task is to determine if the meaning of contract language is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is fairly susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is fairly susceptible to more than one

interpretation/meaning. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts.

Before I address the contract language, I'm going to comment on the following for the purpose of context. First, the contract language being reviewed here is the same now as it was when it was placed in the parties' first collective bargaining agreement in 2003. Thus, the contract language has not changed. Insofar as the record shows, this contract language has not been the subject of previous grievances or been interpreted by an arbitrator. Second, while I'll obviously address this point in more detail below, it is noted that this is a subcontracting case. The subcontracting involved here was not the Employer's first subcontracting though. To the contrary, the Employer has long subcontracted work. However, until this case, the Union had not challenged the Employer's subcontracting of any work. Thus, in this case, the undersigned is tasked with supplying an arbitral interpretation to contract language that has existed since 2003 and has not required arbitral interpretation till now.

The focus now turns to that task. The contract language at issue here is found in Article 13. It provides thus:

> The Employer and the Union agree that quality care demands continuity of care. Therefore, the Employer will not contract out work performed by the bargaining unit unless there are no available qualified Staff members, or not enough available qualified Staff members, within the bargaining unit to perform the work.
>
> Examples of work that would normally be contracted out include special work that requires tools or equipment the Employer does not possess at the time(s) it is needed.

This article contains just three sentences. In the discussion which follows, I'll review them in detail.

While Article 13 is entitled "Subcontracting," the first sentence in that article doesn't say anything about subcontracting, *per se*. Instead, the first sentence is simply a statement of agreement on the principle that "quality care demands continuity of care." In this case though, we are not dealing with anything related to resident care. Instead, we are trying to discern the parameters of subcontracting under Article 13. The first sentence of Article 13 is of no assistance whatsoever in discerning what those parameters are.

The second sentence in Article 13 does deal with subcontracting. It starts out by saying: "Therefore, the Employer will not contract out work performed by the bargaining unit …."

While there is more to the sentence which will be addressed, I'm going to stop right there and comment on the language just quoted. This first part of the sentence (i.e. the part that states "the Employer will not contract out work performed by the bargaining unit …") seems to provide strong protection to the Union against subcontracting. Indeed, if the sentence had ended at that point – and there was a period after the phrase "bargaining unit" – it would mean that the Employer was prohibited from contracting out (i.e. subcontracting) "work performed by the bargaining unit." Said another way, it would have meant that the Employer could not contract out that work. However, the sentence does not end at that point and there is not a period after the phrase "bargaining unit." Instead, more verbiage follows. What comes next in the sentence (after the phrase just quoted) is the word "unless." The word "unless" gives a tip to the reader that what they have just read is about to be modified or qualified. Thus, in this sentence, the word "unless" modifies and/or qualifies the first part of the sentence. Here, the sentence continues: "unless there are no available qualified Staff members, or not enough available qualified Staff members, within the bargaining unit to perform the work." This second part of the sentence clearly creates some exceptions to the general principle set at the beginning of the sentence that the Employer will not subcontract work. One exception is when there are no or not enough staff members "available." Another exception is when there are no or not enough staff members who are "qualified." Neither of those words (i.e. "available" and "qualified") is defined in the agreement. While the sentence does not explicitly say what happens if any of those situations occur, I think it's implicit that it means that if any of those situations occur (and there are no or not enough staff members "available" or there are no or not enough staff members who are "qualified"), then the Employer does not have to offer the work to bargaining unit employees and can instead subcontract the "bargaining unit" work.

The third sentence in Article 13 buttresses that conclusion. That sentence starts out with the phrase: "Examples of work that would normally be contracted out …." Before we look at the examples which follow, what's important about this phrase is that it explicitly acknowledges that the Employer can "**normally**" contract out work. That word (i.e. "normally") envisions that subcontracting can permissibly occur. Building on the premise that subcontracting can permissibly occur, this last sentence goes on to say that "[e]xamples of work that would normally be contracted out include special work that requires tools or equipment the Employer does not possess …."

In its brief, the Union opines that Article 13 means that "bargaining unit work must not be contracted out if there are qualified and enough staff members to do the work." Even if that overall interpretation of Article 13 were adopted by the arbitrator as his own, that interpretation would not preclude the Employer from subcontracting work if they decided that their existing staff was not "available" and/or "qualified" to do the work in question. That's noteworthy, of course, because that's exactly what the Employer decided here.

As the Union sees it though, the Employer does not get to make that decision "unilaterally." Implicit in the Union's contention is that there are limits on the Employer's ability to make that call. In addressing this contention, I'm first going to look at whether there

is any express contractual limitation on the Employer's right to decide on its own volition whether its staff is "available" and/or "qualified" (within the meaning of the second sentence of Article 13) to do the work in question. There is not (meaning there is no express limitation on the Employer's right to make this call in either Article 13 or anywhere else in the agreement).

In the absence of any contractual definition of the terms "available" and "qualified," and no express language limiting the Employer's right to decide whether its staff members are "available" and/or "qualified," I'm going to do what arbitrators normally do when they encounter contract language which can fairly be deemed ambiguous when applied to a given set of facts. What arbitrators routinely do under those circumstances, of course, is look at the parties' past practice to help them interpret the contract language. Their rationale for doing so is that past practice can provide reliable evidence of what ambiguous language means. In this case, what I'm looking for is evidence showing an implied limitation on the Employer's right to decide whether its staff is "available" and/or "qualified" to do the work in question.

The record evidence shows that there has been substantial subcontracting in the past. As was stated in the BACKGROUND section, the Employer has been "subcontracting all kinds of work … to outside contractors as far back as anybody who testified at the hearing remembers." In 2012 and 2013 for example, there were nine projects which the Employer subcontracted to outside contractors. Some were small projects which lasted just a couple of weeks while others were big projects which took months to complete. What all these projects had in common is that the Employer decided in each one that its existing staff was not "available" and/or "qualified" to do the work in question, so it subcontracted the work. Also, in each instance, the work was not offered to bargaining unit employees to perform during their regular work hours, nor was it offered to them as overtime. Finally, it is noted that the Union did not grieve the subcontracting of any of this work. This subcontracting history shows how the subcontracting language in Article 13 has been applied by the Employer over the years, to wit: that if the Employer unilaterally decided that their existing staff was not "available" and/or "qualified" to do the work in question, then it subcontracted that work.

Building on that premise, I find that what happened previously when subcontracting occurred – with the Employer unilaterally deciding that their staff was not "available" and/or "qualified" to do the work in question – constitutes a past practice within the conventional meaning of that term. I'm further satisfied that the Union knew of, and acquiesced to, that practice. Finally, I find that since the Employer's past practice in unilaterally making that decision is not contrary to any express terms of the agreement, it fell within the rights retained by management under Article 5 (the Management Rights clause).

I'm now going to pivot away from the contract language and an applicable past practice over to the subcontracting that precipitated the instant grievance. In November 2014, the Employer subcontracted the renovation of the Geriatric Clinic. As previously noted, that renovation project involved demolition, wall preparation, painting, flooring, door finishing and

installation of accessories. The Employer decided to subcontract this work after it decided that its existing FST staff was not "available" and/or "qualified" to perform that work.

In deciding whether this subcontracting violated Article 13, it is first noted that the renovation work done at the Geriatric Clinic was the same kind of renovation work that has been done at the facility over the last several years. All that previous renovation work was subcontracted without being challenged by the Union. One would think that given the Employer's extensive past subcontracting of renovation work – which was done with the Union's knowledge and tacit approval – the Union would try to show that the renovation work in the Geriatric Clinic was somehow different, say in size or scope, from the other renovation work that was previously subcontracted. That didn't happen. Consequently, no discernible difference was shown between the size or scope of the Geriatric Clinic renovation project from other renovation projects that were previously subcontracted without being challenged. Additionally, the Union offered no explanation of why it chose to challenge this particular subcontracting job. These facts collectively undercut the Union's contention that the subcontracting involved here was a contract violation.

Having noted that, the focus now shifts to applying the second sentence of Article 13 to the subcontracting involved here. As previously noted, the Employer decided that the FSTs did not have either "the time" or "in some circumstances the know-how" to perform all the work involved in the Geriatric Clinic renovation project. Using the words in the second sentence of Article 13, the Employer concluded that FSTs were not "available" and/or "qualified" to do the work in the Geriatric Clinic renovation job, so it could subcontract that work. As previously noted, the Employer had the right to make that call. Additionally, the record shows that the Employer's determination in that regard had the following substantive basis. First, the work in question involved a significant time constraint in that it had to begin on a Monday morning and be completed by the end of the day on Friday of that week. Thus, this was a time sensitive project with a short window for the work to be performed. It's important to note that these time constraints were not of the Employer's own making, but rather driven by the healthcare providers who provide their services in the Geriatric Clinic. They (i.e. these healthcare providers) wanted the renovation work performed during the hours of 7:00 AM to 5:00 PM that week. That's significant because during that time period, all the FSTs were doing other assigned duties. While theoretically the Employer could have pulled them away from their regular duties to work on the Geriatric Clinic renovation project, there was no contractual requirement that obligated the Employer to do that. Even if the FSTs wanted to work on the Geriatric Clinic renovation project after their regular shift ended, that was not feasible because that work in the Geriatric Clinic ended each day at 5:00 PM. Once again, the reason that the work ended at that time and could not continue into the evening was because the healthcare providers did not want renovation work performed in the evening hours. Second, the work in the Geriatric Clinic had to be done in a certain sequence, with the painting work done first. As a result, the painting work had to be done by Wednesday morning in order to allow time for the flooring work to be done after the painting work was completed. The record reflects that about 73 hours of painting work was done on the Geriatric Clinic project. The Employer

estimated that if it had used the FSTs to perform this task, it would have taken three of them to do that much painting. The Employer decided it did not want to take that many FSTs away from their regular work duties to do painting. As previously noted, that was the Employer's call to make. Third, the record shows that some of the work done in the Geriatric Clinic renovation project was not the type of work normally performed by the FSTs. For example, the FSTs don't normally remove carpet, install carpet, or refinish doors. That was work though that was part of the Geriatric Clinic renovation project. When considered collectively, the foregoing facts persuade me that the Employer had a reasonable basis for concluding that the FSTs were not "available" and/or "qualified" within the meaning of the second sentence of Article 13 to do the work on the Geriatric Clinic renovation project. It follows from that finding that the Employer could contractually subcontract that work.

While I just found that the Employer could contractually subcontract the Geriatric Clinic renovation work after it concluded that the FSTs were not "available" and/or "qualified" to perform that work, I'm now going to address the separate (and final) question of whether the Employer was obligated to offer some of that work – namely the painting work - to the FSTs to perform as overtime. I find the Employer was not obligated to do so. Even if the parties have an oral agreement which somehow modifies Article 13 and requires the Employer to offer painting work to the FSTs before it subcontracts same, it has already been noted that none of the painting work on the Geriatric Clinic renovation project could have been performed after 5:00 PM. That's because the healthcare providers that operate in the Geriatric Clinic determined the renovation project's timetable and work hours. They decided that each workday had to end at 5:00 PM. As a practical matter, that consideration meant that no painting work on the Geriatric Clinic renovation project could have been performed after 5:00 PM by the FSTs as overtime. It follows from that consideration that the Employer did not have to offer the painting work to the FSTs to perform as overtime.

In light of the above, it is my

AWARD

That the Employer did not breach the collective bargaining agreement when it subcontracted work completed at the Hebron Oaks' first floor clinic in November, 2014. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 18th day of July 2016.

Raleigh Jones, Arbitrator