

**In the Matter of Arbitration
Between**

AFSCME, Council # 65, Minnesota

Union

and

County of Mower, Minnesota

Employer

BMS Case # 07-PA-0917
Subcontracting

Arbitrator:
Arbitration Assistant

Bernardine Bryant
Faith Latimer

Date and Place of Hearing:

November 2, 2007
Austin, Minnesota

Date of Post Hearing Briefs:

November 13, 2007

Appearances

For the Union:

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Penra Grimley, Social Worker/Steward
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Susan Wagner, Social Worker/Steward

For the Employer:

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Bruce Henricks, Director Human
Services
Brent Gunderson, Supervisor
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INTRODUCTION

This is a grievance arbitration between American Federation of State County and Municipal Employees Council 65, Local 2566 (Union) and Mower County (Employer or County). The grievance arose in January, 2007 when the Mower County Board of Commissioners entered into an agreement for a social services vendor, Cedar House, Inc to provide child welfare case management services for the County. The Union filed a grievance on January 25, 2007. The grievance went through the contractual grievance procedure and was appealed to Arbitration. The hearing was held on November 2, 2007 in Austin Minnesota. There were no jurisdictional disputes. Both parties had full opportunity to examine witnesses and submit documents. Post hearing briefs were submitted on November 13, 2007 and the record was closed. **STATEMENT OF THE ISSUE** Did the Employer violate the collective bargaining agreement when it subcontracted bargaining unit work of child protection/child welfare case management? If so, what remedy shall apply?

RELEVANT CONTRACT PROVISIONS

From the 2007-2009 agreement between the parties:

Article IV Recognition, Section B: The Employer agrees to a policy whereby during and for the duration of this Agreement, it will not enter into, establish or promulgate any resolution, agreement or contract with or affecting such employees either individually or collectively which in any way conflicts with the terms or conditions of this Agreement or with the role of the Union as the exclusive collective bargaining agent for such employees.

Article XII Seniority Section D The Employer may separate any employee without prejudice because of lack of funds or curtailment of work. No regular employee, however, shall be separated while there are emergency, provisional, limited term, or probationary employees serving in the same class of positions. The order of separations due to reduction of force shall be based upon seniority.

Section E When any position in the agency becomes vacant or when a new position is created within the bargaining unit, such position shall be posted on employee's (sic) bulletin boards for five (5) working days for current positions, and ten (10) working days for new positions. It shall be the prerogative of qualified employees to make application for posted positions, and employees will be given an opportunity to make a confidential "blanket" posting on an ongoing basis...It shall also be mandatory that such qualified employee be given prior consideration for said positions before it is considered to be filled from outside the agency...

Section H The Employer at its discretion shall determine whether layoffs are necessary. Although not limited to the following, layoffs shall ordinarily be for lack of work and/or lack of funds. If it is determined that layoffs are necessary, employees will be laid off by classification in the following order:

- 1) Temporary employees; seasonal employees; provisional employees;
- 2) Probationary employees; and
- 3) In the event of further reductions in force, employees will be laid off from the affected classification in accordance with their seniority and their ability to perform the remaining work available...

Employees who are laid off shall be placed on a recall list for a period of twenty-four (24) months. If there is a recall, employees who are still on the recall list shall be recalled in the inverse order of their layoff, provided they are presently qualified to perform the work...The Employer shall not hire new employees in bargaining unit positions as long as there are still employees on the recall list who are presently qualified to perform the work in the affected job classification...

Article XIX Part Time Employees—Special Provisions

Section B The Employer may use temporary help to fill any existing vacant position for up to thirty (30) days....

UNION POSITION

The Union argues that Mower County improperly subcontracted bargaining unit work, specifically child protection case management duties normally performed by Social Workers employed by the County. Instead of posting and filling vacant Social Worker positions in compliance with the contract, the Employer contracted this work to an outside vendor. The Union alleges this action violates at least the following provisions of the contract:

Section B of the recognition clause, which prohibits the Employer entering into any agreement which conflicts with the terms and conditions of this contract;

Section D of the seniority article, which states that no regular employee shall be separated from employment while there are emergency, provisional, limited term or probationary employees serving in the same class;

Section E which requires that vacant positions be posted, and that qualified employees be given consideration before the vacancy is filled from outside;

Section H of the same article which sets forth the order of layoff and recall; and prohibits hiring new employees to bargaining unit positions when there are employees on the recall list; and

Section B of Article XIX which allows for the temporary filling of vacancies, for a period of no more than 30 days.

The Union points out the absence of contract language allowing the Employer to subcontract, and argues the right to subcontract would have to be bargained. (Union opening statement and brief)

The Union asserts the Employer failed to give notice to the Union regarding plans to subcontract. This deprived the Union of the opportunity to bargain the issue. The County had a long-standing practice of subcontracting only specific services. The core duties of child welfare case management have always been performed by County Social Workers. If the County intended to change this consistent practice, it was obligated to bargain the issue with the Union.

Chief Steward and Social Worker Ms. Penra Grimley testified she and fellow Social Worker/Union Officer Jodi Krueger met with Human Services Director Bruce Henricks and Human Resources Director Allan Cordes in October 2006. They discussed plans for filling a position in the Child

Protection unit. Mr. Henricks stated his intent to move a Social Worker, Sandy Jarvis, then serving as a “Family Facilitator” in another unit, into the Child Protection unit. Ms. Grimley testified she assumed this was “a done deal”. She further stated that when bargaining began for the new contract in late 2006, there were no proposals from management regarding subcontracting, nor was the issue of subcontracting discussed at bargaining. (Union Exhibit 2)

Ms. Grimley and Social Workers Ms. Amber Miller and Ms. Susan Wagner all testified they were given no forewarning about the subcontracting at issue. Soon after the County Board action on January 23, 2007, they were told by their supervisor Brent Gunderson that some of their caseload would be contracted to Cedar House, and were asked to identify less difficult cases of theirs to assign to Cedar House.

The Union argues the County acted in bad faith when it reneged on its plan in October, 2006 that it presented to the Union to add a social worker position. (Union Ex. 1) Instead, the County contracted with Cedar House for services the following January.

The Union acknowledges that the County has contracted with outside vendors for various services in the past. These services include chemical dependency assessments, childcare licensing, screening services, and mental health services. Cedar House had been contracted in the past to provide training in independent living skills for adolescents. However Union witnesses describe the recent subcontracting as very different from what the County has done in the past, because it is contracting out the ‘core services’ of case management to an outside vendor. Case management duties involve assessing and monitoring a variety of client needs including mental health services, school based services, transportation, advocating for assistance the

clients may qualify for, involvement in the court system, out of home placement for children, and others. Vendors are sometimes used to provide these services. However Union witnesses assert case management is the job of a County Social Worker.

Further, the Union believes the Child Protection Unit is down at least two and a half social worker positions, including the elimination of Lead Social Worker Jill Weikum's position. Union witness Susan Wagner stated that subcontracting has never been used in the past as a substitute for filling vacant staff positions.

The Union argues there was no compelling reason for the subcontracting at issue. No emergency need existed and the evidence shows there was no cost saving for the County. (Union Ex. 1) The Union further argues a potential conflict of interest exists when an outside vendor handles case management for a given client, and also delivers some of the same services for which the client is referred.

Thus, the Union asserts the effect of the Employer's action was to displace bargaining unit employees and deprive them of their rights under the contract. Further it undermines the integrity of the bargaining relationship and the bargaining unit.

As remedy for this grievance the Union asks that the contract with Cedar House be cancelled, and that the resulting vacancy be filled in compliance with the contract.

EMPLOYER POSITION

The Employer argues that the contract is silent on the issue of subcontracting. Since it is silent, the decision to contract out work should be judged based on commonly accepted standards found in arbitration case law.

These standards include the following: was the bargaining unit seriously weakened by the contracting out; did the Employer make its decision for legitimate business reasons; and did the Employer act in good faith.

(Employer brief)

As background to the current dispute, Human Services Director Bruce Henricks testified that the County has experienced state funding cuts in recent years. He stated that when funding was cut in 2005, County management reduced some of their contracts with outside service providers. He stated that when funding was further reduced in 2006, a decision was made not to fill a Social Worker position which was being vacated by Colette Holmes when she resigned in early 2006. And, one Social Worker, Ms. Jill Weikum was transferred to another unit in March 2005, and demoted from 'lead worker' status. However, the County avoided laying off any employees. The Employer asserts that Ms. Weikum is not laid off, and is not subject to recall provisions in the contract. Therefore, the Cedar House subcontract is not replacing either current employees or laid off employees, and does not weaken the bargaining unit.

The Employer further argues its reasons for the subcontracting were sound, and the decision was made in good faith. Supervisor Brent Gunderson and Mr. Henricks both testified that the demands on County Social Workers have increased over the years, and that the acuity of the cases has increased. In September 2006 Mr. Henricks recommended some redeployment of staff, including adding a Social Worker to the Child Protection Unit. The Personnel Committee of the County Board approved his staffing recommendations. However, the full Board of County Commissioners denied the requests. The Board suggested, instead, that an outside provider be used to reduce Social Worker caseload levels.

Both Mr. Henricks and Mr. Gunderson testified that the use of an outside provider was not their first choice. They both stated their preference to use in house County Social Workers. They stated that the use of County employees means better communication within the unit, and better consistency and trust levels. Mr. Gunderson also stated that in house staff members provide support to each other. However, they had serious concerns about the increased strain on existing staff, as well as resulting liability. Therefore, since the Board did not agree with their staffing recommendations, an outside vendor was used as a 'last option'. Mr. Gunderson went on to describe Cedar House as handling "overflow". He stated that Cedar House was given five of the easier cases of the sixty-one total cases the department had at that time.

Finally, the Employer asserts it has a long-standing practice of contracting out social services. Mr Henricks stated that outside vendors have been used by the County since at least the 1980's. In some cases, contractors deliver services the County is unable to provide, and they are also used to help manage the heavy workloads of County employees. The County argues this practice is well known and has never been grieved by the Union. In fact, the County had a contract in place with this particular vendor for some time. Because of the County Board's action in January 2007, the contract was amended to add case management services to the services already provided by Cedar House. Mr. Henricks also testified there have been many instances when the County contracted out the core duties of Social Workers over the years. (Emp Ex 1, 2, 3)

In summary, the Employer argues there is a long-standing, consistent practice of subcontracting, which was never hidden from the Union; the subcontracting at issue has not harmed the bargaining unit, nor displaced any

bargaining unit employee; and the Employer's decision was made in good faith for sound reasons. The Employer has never bargained away its right to subcontract, and the contract is silent on the issue. Therefore the grievance must be denied.

DISCUSSION AND OPINION

Both parties to the collective bargaining agreement made compelling cases as to the rationale and impact of subcontracting on the bargaining unit. Both sides cited arbitration cases in support of their positions. The Arbitrator is aware of the importance of subcontracting disputes in general, and that the Union in this case believes subcontracting may erode the bargaining relationship. The facts show that the Employer entered into an agreement with an outside entity to perform some of its work, work that is normally assigned to bargaining unit employees.

In this case, the collective bargaining agreement does not expressly address subcontracting. When the agreement does not expressly address subcontracting, arbitrators have looked for guidance in other contract provisions and will apply benchmark standards of reasonableness. They must seek the most reasonable result consistent with the agreement and the facts presented.

The Union argued that the contract was violated and the Employer cannot subcontract because an employee was on layoff in the bargaining unit. There was much testimony regarding the issue of whether Ms. Jill Weikum was transferred to another job as the County argued, or was laid off from her job as lead worker as the Union argued. The Union argued that because Ms. Weikum is no longer a lead worker and took a voluntary demotion, the seniority provisions of Article XII of the contract have been

violated. They argue that because the recall provision should prevail, no new 'hire' can be made, including the contract with Cedar House. However, the evidence and testimony regarding the status of Ms. Weikum does not lend support to this argument that she was laid off.

Ms. Weikum, a social worker with the county since 1975, stated that in March of 2005 she agreed to a transfer from child protection to the unit serving the elderly and disabled population. Even though she would experience a loss in pay since she would no longer be a lead worker, she accepted the transfer and did not grieve the job change and her transfer to another area of human services. Ms. Weikum continued her employment as a social worker within Human Services. Director Henricks stated that while the lead worker duties were no longer assigned to Ms. Weikum, there was no reduction in overall staff, just a change in assigned duties.

There was no convincing testimony or evidence to support the argument that Ms. Weikum was, in fact, laid off. She did not experience either a temporary or an indefinite interruption of employment. While Ms. Weikum's services may no longer be in the child protection area, she continues to work in the human services department performing social work duties and suffered no interruption of work. In addition, there is nothing in the collective bargaining agreement that limits management's right to transfer employees within the department. Therefore, the Union's argument that the seniority article in Jill Weikum's case should preclude the County from subcontracting for services is not convincing.

With respect to the parties' arguments regarding past practice, it is undisputed there is a long-standing practice to subcontract some County services. The disputed point is whether doing so with case management services can be viewed as a past practice. The evidence presented on this

specific question was quite mixed, with Union witnesses testifying the practice has never occurred, while the Employer argued it has consistently occurred. The documentation on this question was somewhat unclear. The mixed testimony certainly indicated the required ‘mutuality’ regarding this practice did not exist. Therefore, the Arbitrator is not persuaded by either party’s argument that a controlling past practice has been proved.

While the unrebutted evidence presented at the hearing indicates the work subcontracted to Cedar House is bargaining unit work, there was no testimony or evidence to support the fact that the action by the County Board was punitive or discriminatory or that there was anti union animus. To the contrary, both the Union and Employer testified that the collective bargaining relationship has been harmonious and “mature” in its dealings. Director Henricks who was present at the January 2007 Board meeting said the Board recommended subcontracting services to help address the workload concerns. And, Mr. Gunderson said the contract with Cedar House would be reviewed at years end. Both the letter from the Union to Mr. Gunderson (Union Ex. 6) and the letter of Mr. Henricks to the County Commissioners (Union Ex. 1) delineate concerns of workload, safety of social workers and clients, and liability concerns. There was also no evidence that the action was a cost saving measure for the Employer; in fact, testimony concerning reimbursement rates and Union Exhibit 1 indicated this could not be substantiated.

Further, testimony at the hearing suggests this subcontracting could be construed as a short-term solution to help the department at this point in time. Because there was no testimony or evidence to suggest there was bad faith by the County Board, the Arbitrator can only assume from all the facts presented that the decision to use subcontracting was made in good faith.

Evidence indicates the decision to subcontract services in the Human Services Department has generally been made without consultation with the bargaining unit. In this instance, Union testimony that the Employer did not consult the stewards or business agent and did not negotiate any new provisions in the collective bargaining agreement was unrebutted. In fact, the recommendation of the Director of Human Services was not to subcontract work, but instead add a position to the area by transferring a Family Facilitator within the AFSCME bargaining unit to Child Protection. This recommendation was presented in October 2006 to the Union and they assumed it was going to happen. The Personnel Committee of the County Board approved the recommendations of Director Henricks. But, the full County Board overrode the recommendation of the Personnel Committee and Director Henricks, and instead approved that the work be subcontracted.

What stands out in this case is the acknowledgement by the County and the Union that the subcontracting issue can be a negotiated item in collective bargaining, and that the contract amendment with Cedar House for case management services in Child Protection can be modified or terminated at any time. As the Supreme Court found in *Fireboard Paper Products v. NLRB* in regard to subcontracting: “to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.” (*Fireboard Paper Products v. NLRB*, 379 U.S.203 (1964))

The Union has not disputed management’s right to subcontract for some human services. Yet, the issue of core services remains in contention. However, the subcontracting with Cedar House or any other outside vendor does not necessarily need to continue into perpetuity. Like any contract provision, this issue may be opened for bargaining.

The evidence leads the Arbitrator to the following conclusions. The contract is silent with regard to subcontracting. Neither the bargaining unit nor its members have suffered harm from this instance of subcontracting. While reasonable people could disagree about the wisdom of the decision, it appears to have been made in good faith. Therefore, at this time, the Employer may continue to subcontract out the specific delivery of work at issue in this arbitration proceeding.

AWARD

Based on the foregoing discussion and opinion, the grievance is denied.

December 4, 2007
Date

Bernardine Bryant, Arbitrator