In the Matter of Arbitration:

NATIONAL INSTITUTES OF HEALTH, DEPARTMENT OF HEALTH AND HUMAN SERVICES	FMCS Case No. 05-51839
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2419	Contracting Out Bargaining Unit Work

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Union:

Michael J. Snider, Esq.
(Snider & Associates, LLC)
Richard A. Laubach, President, AFGE Local 2419
Stephen N. Rivero, Vice-President, AFGE Local 2419
Mark G. Morine, Vice-President, AFGE Local 2419
Donald L. Mayberry, Health & Safety Officer, AFGE Local 2419

For the Agency:

Roman Lesiw, Esq.
(Senior Labor Relations Specialist)
Warren Pegram, Employee & Labor Relations Specialist
Carolyn Klym, Labor Relations Officer
Beth Chandle, Labor Relations Specialist

BACKGROUND

The issue in this case is whether the Agency, the National Institutes of Health, breached the Negotiated Agreement between it and the Union, Local 2419 of the American Federation of Government Employees ("Agreement"), and/or applicable

federal government-wide contracting rules and regulations, in contracting out certain work bargaining unit work and, if so, to determine the appropriate remedy.

Hearings in this matter were held on February 6 and March 3, 2006. A transcript was prepared of the arbitration hearings that was agreed to constitute the official record of those hearings. The Parties submitted post-hearing briefs on April 24, 2006, and waived the time limits for the issuance of this Opinion and Award.

The Union represents a consolidated bargaining unit that includes, among others, certain employees who work in the Agency's Division of Engineering Services, Maintenance Engineering Section of the Office of Research Services ("ORF"), which is responsible for the operations and maintenance of the Agency's real property.

The A-76 Study, the Hiring Freeze, and the Resulting Staffing Shortages

In about January 2002, the Agency initiated an A-76 study (i.e., a study mandated by the Office of Management and Budget's Circular A-76, prohibiting agencies from providing a commercial service if it may be procured from a more economical commercial source) of its property management services. In about August or September 2003, the Agency established a Most Efficient Organization ("MEO"), an in-house group representing a reconfigured organization for the performance of the services on a more cost-effective basis. In about October 2002, the Agency solicited bids from outside contractors and conducted a competition between the contractors and the MEO to determine, based on a cost comparison and other factors, whether one of the bidding contractors or the MEO should be awarded the work.

Richard Laubach, a Boiler Plant Operator and the President of the Union, testified that several months after the A-76 process started the Agency imposed a hiring freeze.

He stated that the Union first received written notice of the freeze in May 2004, when the Agency issued a document entitled, NIH Administrative Freeze Policy and Exception Guidelines. The document stated, in pertinent part, as follows

> . . .
>
> 2. A freeze for hires . . . will remain in effect for all positions affected by competitive sourcing in FY 2003 (. . . Real Property Management Services) until final implementation of the study decision (Most Efficient Organizations are stood up) . . .
>
> 3. . . . Critical workload can be addressed by the use of contract staff, temporary appointments, details, etc. If these alternative methods of addressing workload are not feasible, the NIH Administrative Freeze Committee will consider exceptions to this policy.

Agency witnesses testified that the freeze would be lifted once the A-76 process was completed and the MEO was stood up, and Mr. Laubach testified that the Union was so advised and that the process would take about nine months. However, the A-76 process became a protracted one, lasting more than four years. According to Mr. Laubach, in about February 2003, the work was awarded to the MEO. But one of the unsuccessful outside bidders, Johnson Controls, challenged the award. In about April or May 2003, the Agency and Johnson Controls entered into a settlement agreement requiring a reevaluation of the bids. Ed Bain, Chief of the Business Support Branch for the Division of Property Management, ORF, testified that the reevaluation process was recently completed and that the MEO won the competition, but that the competing contractor had 30 days to file some sort of challenge; further, assuming any such challenge was unsuccessful, the Agency had to await official notification before it could implement the MEO reorganization which, according to Mr. Bain, would take an additional four months. He further stated that, in anticipation that the MEO will officially

be awarded the work, the Agency began recruiting employees in January 2006 for the positions that presumably will become available.

During the pendency of the A-76 Study, including the appeal and the reevaluation process, a substantial number of bargaining unit members retired and the Agency opened several new buildings. Because of the freeze, the Agency did not hire new regular employees to replace the retirees and/or to staff the new buildings. As a result, the Agency has experienced staffing problems with respect to its maintenance operations. In this regard, Mr. Bain testified that he began to receive complaints about deteriorating maintenance at Building 35, the Porter Neuroscience Research Center ("PNRC").

Mr. Bain stated that the freeze did not prohibit the Agency from hiring temporary employees for up to one-year periods, which, according to Mr. Laubach, could be extended to two-year periods. Mr. Bain further testified that, at one point, he and Juanita Mildenberg, Acting Head of ORF, and a representative from the Human Resources Group, discussed the possibility of hiring temporary employees to meet the maintenance staffing needs, but they lacked confidence that they would be able to find individuals with the particular skills that were needed and who could perform the work immediately; he thought that only outside contractors would have that capacity. He acknowledged that this was an assumption on his part and not a determination based on any analysis or past experience that the Agency could not hire qualified, temporary employees.

The Contracting Out of Bargaining Unit Work

The Agency decided to contract out bargaining unit work in what Mr. Bain characterized as an interim solution to the staffing needs – i.e., one which would address the needs until the MEO was stood up, the freeze was lifted and the Agency could resume

hiring regular permanent employees. Mr. Laubach testified that although the Agency informed the Union of the establishment of the MEO and the hiring freeze, it failed to: provide it with advance notice of the decision to contract out; confer with about it about this decision or its effects; provide it with a Statement of Work; or afford it an opportunity to bid on the work.

The Agency entered into contracts with several private contractors for the performance of various types of work performed by bargaining unit members and the contractors' employees started doing bargaining unit work in October 2004 (except for certain work described below that was contracted out earlier). These contracts were for one-year periods, with options to renew on a year-to-year basis, for up to four additional years.

Mr. Bain testified that about 65 contractor employees, representing the equivalent of about 30 full time equivalents ("FTEs"), have worked under these contracts. He stated that the bulk of the contracting out of bargaining unit work took place at the PNRC and the new Clinical Research Center ("CRC"), a hospital that is now part of the Clinical Center where bargaining unit members are employed.

Witnesses for the Union testified about the extent of the contracting out in their respective work units and the effect of the contracting out on bargaining unit members. Mark Morine, an Electrician who works in the Clinical Center Maintenance Unit, testified about the contracting out that has taken place in that Unit, where about 42-45 bargaining unit members work. Mr. Morine testified that there are five contractor employees performing bargaining unit work, including: an Electrician who changes the ballasts (which are provided by the Agency) in the light fixtures and repairs lamp holders

and light sockets, who have worked on the Unit for about 14-15 months; a Utility System Repair Operator ("USRO"), who has worked on the Unit for about a month and a half to two months; and three "Lampers" (individuals who change light bulbs and fluorescent tubes, which are provided by the Agency) who have worked on the Unit for more than two years.

Agency witnesses testified that the work of the Lampers has been contracted out for even a longer period of time. Mr. Bain testified that the Agency started contracting out Lamper work in 1999 and Peter Themelis, formerly the Labor Relations Officer for ORF and the Agency's Chief Negotiator for the Negotiated Agreement, testified that such work was already contracted out when the Parties negotiated the Agreement and that the Union expressed concern about such contracting out in the negotiations.

Mr. Morine further testified that, for about the past twelve to fourteen months, the Agency has been using 10 contractor employees to perform maintenance work at the CRC. (Mr. Bain testified that there are 18 contractor employees working at the CRC.) Mr. Morine further indicated that the Agency told him that, once the MEO was stood up, the maintenance work for this facility would be included in the work of the bargaining unit members.

With respect to the supervision of the contractor employees in the Clinical Center Maintenance Unit, Mr. Morine testified that the Leader of the Electrical Group, an Agency employee, assigns work and directs the contractor employees, except for those contractor employees working in the CRC who report to a Project Manager employed by the contractor.

Donald Mayberry, Assistant Shift Head at the Central Utilities Plant ("CUP") (and formerly the Assistant Supervisor for the Maintenance Mechanics Shop in the CUP), and a Shop Steward, testified about the extent of the contracting in that unit. The CUP houses the various boilers, chillers and compressors that provide steam, water and chilled water via a utility tunnel system for about 90% of the buildings on the Bethesda campus. It is located in a tunnel connecting three of the Agency's buildings (Buildings 11, 34 and 58). Mr. Mayberry stated that there are about 20-30 bargaining unit members who work at the CUP serving as Boiler Operators or Journeymen and a group of High Voltage Electricians (who work throughout the campus).

Mr. Mayberry testified that there are currently four contractor employees performing maintenance and repair work in the maintenance shops of the type normally performed by the Journeymen and one contractor employee working as a High Voltage Electrician. He stated that one of the contractors has been working in the CUP since October 2005 and the others for about 15 months, and that one of the contractor's employees was an Agency retiree who returned to work as a contractor employee in the same job he had held prior to his retirement.

With respect to the training and supervision of the contractor employees working in the CUP, Mr. Mayberry testified that, during the time that he was the Leader of the Maintenance Group, he, a Shift Supervisor, and a senior Journeyman did the training and that he oversees their work for quality assurance purposes. He further stated that the foremen for the various maintenance shops assign the work directly to the contractor employees and that that they are not required to go through a project manager.

Stephen Rivero, a USRO in the Building Maintenance Unit, testified about the extent of the contracting out in that Unit, which is responsible for maintaining all of the buildings other than the three buildings maintained by the Clinical Center Maintenance Unit. The Building Maintenance Unit includes about 40 bargaining unit members who are responsible for addressing maintenance problems involving the electrical, mechanical, heating, air conditioning, electrical and plumbing systems. Mr. Rivero stated that there are seven contractor employees who have been working as Lampers in the Unit for more than three years; at least six contractor employees who have been working as Building Engineers for about a year; and at least four contractor employees who have been providing maintenance support for the Building Engineers for about the past four months.

Renard Walker, a Facility Operations Specialist in the Facilities Operations Branch of ORF, testified about the contracting out that has taken place in the Building Facility Management Unit. Mr. Walker and other bargaining unit members in this section serve as the liaisons between the maintenance operations and the users of those buildings. Mr. Walker stated that for about the past year (and clearly for more than 240 work days) there have been five contractor employees performing this work. He further stated that these contractor employees and the bargaining unit members in this work unit report to the same supervisor (an Agency employee) and contact the same Agency personnel when they need assistance.

Mr. Laubach testified that, in the Automated Systems Unit, about 10 contractor employees are performing elevator maintenance and support, which is bargaining unit work, and that this work has been contracted out for about the last two and a half years.

But Mr. Bain testified that the elevator maintenance and repair work has been contracted out since 1973 and Mr. Themelis indicated that the Union expressed concern about such contracting out during the Parties' negotiations in 1999.

The Union did not present testimonial evidence with respect to the contracting out of bargaining unit work that has occurred in other work units, but Mr. Laubach testified that the Agency has contracted out bargaining unit elsewhere as well and outside of the ORF. According to a chart that the Union introduced into evidence, 10 contractor employees have been performing bargaining unit work in the Police ECC Unit for about the last six months, and seven contractor employees have been performing bargaining unit work in the Printing Unit, two of whom have worked in the unit for the last 12 months and five of whom have worked in the unit for an unknown period of time.

According to the Union's chart, 58 contractor employees are performing bargaining unit work, exclusive of the approximately 10 contractor employees performing elevator maintenance and support work.

With respect to the extent to which Project Managers were used on these contracts, in contrast to the testimony of some of the Union's witnesses to the effect that in their work areas (other than the CRC) Agency personnel trained, assigned and directed the work of the contractor employees, Allison Stokes, Director of the Office of Acquisitions and a Chief Contractor for the Agency, testified that the contractors are each expected per the terms of the written contract agreements to have an onsite Project Manager to provide complete oversight. Her testimony in this regard was supported by the Performance of Work Statements prepared by the Agency for the solicitation of bids and for the performance of maintenance work at the PNRC and the CRC. These

Statements indicated that the contractor was to be responsible for: providing all management, supervision, administration and labor needed to perform the work; and providing a full time Project Manager to act as the on-site point of contact with the Agency for all services. However, no documentation (or other evidence) was introduced into the record that indicated that Project Managers were required to be used under the other contracts or that they were, in fact, used to supervise, oversee, direct and/or assign work to the contractors' employees at any of the work areas where bargaining unit work was contracted out.

The Impact of the Contracting Out on the Bargaining Unit

No employees were displaced as a result of the Agency's use of contractors; however, because bargaining unit members who retired since the hiring freeze were not replaced and the Agency opted to use contractors and not hire temporary employees (who would have been included in the bargaining unit), the size of the bargaining unit has substantially decreased; Mr. Laubach testified that the number of bargaining unit members was about 450 two to three years ago and that currently it is about 350 – a decline of over 20% in just two to three years.

Mr. Laubach further testified that the contracting out of bargaining unit work has raised morale and safety concerns. Whereas historically two employees were assigned to work together on remote jobs and on hazardous work, a single employee now handles such assignments due to a lack of sufficient manpower.

Evidence was also presented about the effect that the contracting out has had on overtime worked by or available to bargaining unit members. Mr. Mayberry and Mr. Rivera testified that were it not for the Agency's use of contractors, they would have

worked more overtime than they have and that they observed contractors working overtime. Mr. Bain acknowledged that, by using contractor employees, the amount of overtime available to bargaining unit members has declined.

However, the record indicates that even after the contracting out, bargaining unit members worked a substantial amount of overtime. Mr. Bain testified that overtime cost is normally budgeted at 10%, but that in fiscal year 2005 it was 14%. Indeed, Mr. Mayberry testified that, in November or early December 2005, the Shift Operations Group met with management to discuss how the high amounts of overtime bargaining unit members were working might be alleviated. Further, although not necessarily representative of the entire bargaining unit (for which evidence concerning amounts of overtime worked before and after the contracting out was not provided), several of the bargaining unit witnesses admitted to working more overtime after the contracting than before. For example, Mr. Mayberry testified that he has recently been receiving more overtime than previously, but this was due to his having been reassigned to shift operations. Mr. Morine testified that he has recently worked overtime because he wanted more overtime. Mr. Rivero testified that he worked more overtime recently because he was put in charge of the maintenance of a building and during this time period there were several instances when the building had to be shut down, requiring overtime.

Mr. Laubach testified that, because of the staffing problems, the contracting out had a negative impact on the ability of bargaining unit members to schedule leave, depending upon whether the particular supervisor permitted contractor employees to substitute for Agency employees. Evidence was not introduced as to the extent to which supervisors permitted such substitution.

Relevant Provisions of the Civil Service Reform Act, the Civil Service Regulations, the Federal Acquisition Regulations ("FAR") and the Negotiated Agreement

The Civil Service Reform Act delineates the type of Agency decisions that are exclusively within the province of management to make and those that may be subject to negotiation with the Union.

5 U.S.C. §7106, Management Rights, states, in pertinent part, as follows:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –
>
> (1) to determine the organization [and] number of employees . . . of the agency; and
>
> (2) in accordance with applicable laws –
>
> . . .
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating –
>
> . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Article 3 of the Negotiated Agreement, Rights of Agency, which tracks the language of Section 7106, states, in pertinent part, that:

> ***Section 1.*** In accordance with the Civil Service Reform Act of 1978 the Employer retains the authority:
>
> A. To determine the . . . organization, [and] number of employees. . . .
>
> B. In accordance with applicable laws:
>
> . . .
>
> 2. To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> . . .

> ***Section 2. Exceptions***
>
> Nothing in this proposal shall preclude the Agency and the Union from negotiating:
>
> A. Procedures which management officials of the Agency will observe in exercising any authority under this Section;
>
> B. Appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management; . . . .

Thus, the decision to contract out is a management right by virtue of the Statute and the Agreement, but the Parties are free to negotiate regarding the procedures that will be followed in connection with contracting out and regarding appropriate arrangements for bargaining unit members adversely affected by such contracting out.

Article 33 of the Agreement, Contracting Out, states, in pertinent part, that:

> ***Section 1.*** The Agency agrees to inform the Union as soon as possible, but in no case less than sixty (60) days prior to a review of the activity being conducted for the purposes of possible contracting out services currently being provided by bargaining unit employees.
>
> ***Section 2.*** When the Agency determines that bargaining unit work will be contracted out, the Agency will meet and confer with the Union concerning the impact on bargaining unit employees. The Union will be provided a copy of the performance work statement and contract solicitation document as soon as they are available. The Union 's recommendations will be solicited and reviewed during the study concerning the most efficient organization and performance work statement.
>
> ***Section 3.*** The Agency agrees to exert maximum effort to find suitable employment for bargaining unit employees who are displaced as a result of contracting out including:
>
> . . .
>
> ***Section 4.*** The Agency agrees to abide by all government-wide rules, and regulations with respect to contracting out activity.
>
> ***Section 5.*** Once a determination has been made to contract out services currently being conducted by the Bargaining Unit, the Union shall be notified of the solicitation for bids. The Union may submit bids to perform the services, at their discretion.
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> ***Section 6.*** Segments of the bargaining unit (i.e.: MES, MAPB, PRB, NDCC, LB) shall not be reorganized for the sole purpose of circumventing the requirement of OMB Circular A-76.

The Parties presented evidence of their conflicting views on the applicability of Article 33 to the contracting out that occurred in this case. Mr. Themelis testified that the Article only applies when the Agency is considering contracting out an entire function or

line of work, and not specific jobs. He explained that when the Parties negotiated over Article 33 the A-76 study was on the horizon and the Union wanted to obtain certain guarantees in the event the A-76 study resulted in a line of work being contracted out. He stated that the use of the word "activity" in Sections 1 and 4 of the Article supports his interpretation. He pointed out that the word "activity" has the following specific definition in OMB Circular No. 76:

> A specific task or grouping of tasks that provides a specialized capability, service or product based on a recurring government requirement. Depending on the grouping of tasks, an activity may be an entire function or may be a part of a function.

Mr. Themelis further stated that, with the exception of Section 3 addressing the Agency's obligations to take certain action to find suitable employment for bargaining unit employees displaced by contracting out and some "minor tweaking" of the language, Article 33 in the current Agreement is carry-over language from the previous Agreement.

Mr. Laubach disputed this interpretation and asserted that Article 33 applies to any contracting out, citing the Article's reference to the contracting out of "services currently being provided by bargaining unit employees" which is not limited to an entire line or function.

Neither Party introduced any documents reflecting bargaining history, such as notes of the negotiations or proposals that may have been exchanged.

Article 2, Matters Appropriate for Consultation and Negotiation, of the Agreement states, in pertinent part, that:

> ***Section 1.*** It is agreed that matters appropriate for consultation or negotiation between the Parties are conditions of employment, i.e., personnel policies, practices and matters affecting working conditions which are within the discretion of the Agency. Such matters include safety, training, labor management cooperation, [and] employee services . . . to the extent permitted by higher authority.
>
> ***Section 2.*** It is further agreed that the Agency will provide the Union with the opportunity to negotiate on negotiable subjects when changes are being considered in

> existing benefits, personnel policies and practices as they affect the working conditions of employees.
>
> ***Section 3.*** The Employer agrees that prior to making changes on personnel policies and practices or matters affecting general conditions of employment in the unit, the Employer will provide the Union with a copy of the proposed change and will provide an opportunity for discussion between the Parties. The Agency agrees that it will serve any such proposed change to the President of the Union with copies to all the Union Officers. . . . The Union may, within twenty-one (21) calendar days of the receipt of the proposed changes, request to negotiate, furnish written proposals thereto, or request a meeting to discuss those matters submitted by the Employer. The Employer agrees to give full consideration to views expressed by the Union. Exceptions to these time factors may be emergency situations that are beyond the control of the Employer.

A number of cited government-wide federal regulations govern the Agency's use of contractors.

The Civil Service regulations contained in Title 5 of the Code of Federal Regulations ("CFR"), state, in pertinent part, that:

> § 300.501 Definitions
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> . . .
>
> (e) A critical need is a sudden or unexpected occurrence; an emergency; a pressing necessity; or an exigency. Such occasions are characterized by additional work or deadlines required by statute, Executive order, court order, regulation, or formal directive from the head of an agency or subordinate official authorized to take final action on behalf of the agency head. A recurring, cyclical peak workload, by itself, is not a critical need.
>
> § 300.503 Conditions for using private sector temporaries.
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> An agency may enter into a contract or other procurement arrangement with a temporary help service firm for the brief or intermittent use of the skills of private sector temporaries, when required, and may call for those services, subject to these conditions:
>
> (a) One of the following short-term situations exists--
>
> (1) An employee is absent for a temporary period because of a personal need including emergency, accident, illness, parental or family responsibilities, or mandatory jury service, but not including vacations or other circumstances which are not shown to be compelling in the judgment of the agency, or
>
> (2) An agency must carry out work for a temporary period which cannot be delayed in the judgment of the agency because of a critical need.
>
> (b) The need cannot be met with current employees or through the direct appointment of temporary employees within the time available by the date, and for the duration of time, help is needed. At minimum, this should include an agency determination that there are no qualified candidates on the applicant supply file and on the reemployment priority list (both of which must provide preference for veterans), and no qualified disabled veterans

with a compensable service-connected disability of 30 percent or more under 5 U.S.C. 3112, who are immediately available for temporary appointment of the duration required, and that employees cannot be reassigned or detailed without causing undue delay in their regular work. In instances where a need is foreseeable, as when approval of employee absence is requested well in advance, an agency may have sufficient time to follow the temporary appointment recruiting requirements, including veterans' preference found in 5 CFR part 316 to determine whether qualified candidates are available by the date needed and for the length of service required.

(c) These services shall not be used:

(1) In lieu of the regular recruitment and hiring procedures under the civil service laws for permanent appointment in the competitive civil service, or

(2) To displace a Federal employee.

(3) To circumvent controls on employment levels.

. . .

§ 300.504 Prohibition on employer-employee relationship

No employer-employee relationship is created by an agency's use of private sector temporaries under these regulations. Services furnished by temporary help firms shall be performed by their employees who shall not be considered or treated as Federal employees for any purpose, shall not be regarded as performing a personal service, and shall not be eligible for civil service employee benefits, including retirement. Further, to avoid creating any appearance of such a relationship, agencies shall observe the following requirements:

(a) Time limit on use of temporary help service firm. An agency may use a temporary help service firm(s) in a single situation, as defined in §300.503, initially for no more than 120 workdays. Provided the situation continues to exist beyond the initial 120 workdays, the agency may extend its use of temporary help services up to the maximum limit of 240 workdays.

(b) Time limit on use of individual employee of a temporary help service firm.

(1) An individual employee of any temporary help firm may work at a major organizational element (headquarters or field) of an agency for up to 120 workdays in a 24-month period. The 24-month period begins on the first day of assignment.

(2) An agency may make an exception for an individual to work up to a maximum of 240 workdays only when the agency has determined that using the services of the same individual for the same situation will prevent significant delay.

. . .

(d) Agencies shall train their employees in appropriate procedures for interaction with private sector temporaries to assure that the supervisory responsibilities identified in paragraph (a) of § 300.501 of this subpart are carried out by the temporary help service firm. At the same time, agencies must give technical, task-related instructions to private sector temporaries including orientation, assignment of tasks, and review of work products, in order that the temporaries may properly perform their services under the contract.

> § 300.505 Relationship of civil service procedures.
>
> Agencies continue to have full authority to meet their temporary needs by various means, for example, redistributing work, authorizing overtime, using in-house pools, and making details or time-limited promotions of current employees. In addition, agencies may appoint individuals as civil service employees on various work schedules appropriate for the work to be performed.

The Federal Acquisition Regulations ("FAR"), setting forth uniform policies and procedures for acquisitions by executive agencies, found in Title 48 of the CFR, state, in pertinent part, that:

> § 37.101 Definitions.
>
> . . .
>
> Nonpersonal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.
>
> Service contract means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:
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> (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
>
> . . .
>
> (5) Operation of Government-owned equipment, facilities, and systems. . . .
>
> §37.104 Personal services contracts.
>
> (a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.
>
> (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so.
>
> (c) (1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of

supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see (d) below).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

(1) Performance on site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond one year.

(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to--

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

(e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.

(f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (e.g., benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

§37.112 Government use of private sector temporaries.

Contracting officers may enter into contracts with temporary help service firms for the brief or intermittent use of the skills of private sector temporaries. Services furnished by temporary help firms shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. Acquisition of these services shall comply with the authority, criteria,

> and conditions of 5 CFR part 300, subpart E, Use of Private Sector Temporaries, and agency procedures.

The Parties presented testimony of their differing views as to whether the contracting out at issue in this case violated any of these regulations. Mr. Laubach testified that he viewed the contracts that the Agency entered into with the contractors as personal service contracts which, under 48 CFR §37.104(b), are impermissible without specific statutory authorization. Further, he stated that these contracts were for the use of private sector temporaries who, under 5 CFR §300.504, may only be used a maximum initial period of 120 days, which may be extended for 240 days.

Ms. Stokes testified that the private sector temporaries addressed by 5 CFR §300.504 only referred to services provided on a brief basis, such as in a situation when a receptionist or a secretary fills in for someone on an extended sick leave, or when an employee retires and the position needs to be filled on a short term basis immediately. By contrast, the real property management contracts involved in this case are non-personal services contracts, intended to last longer than contracts with private sector temporaries, and to which the 120 or 240-day time limits did not apply. Moreover, statutory authorization is not required for non-personal service contracts.

Ms. Stokes indicated that the six factors listed in 5 CFR §37.104(d) are used to determine whether the contract is for personal services. Further, she stated that in non-personal services contracts, the contractor performs the work without direction or daily interaction with the Agency, determines how the services will be provided, the individuals working under the contract do not have to be trained, and a Project Manager oversees the work. She acknowledged that if the individuals working pursuant to the contract are on a common work schedule with regular employees, working overtime like

the regular employees, using government tools, and taking direction from an Agency employee, that would tend to show that the contract is one for personal services.

On November 14, 2005, Joe W. Ellis, Department of Health & Human Services Assistant Secretary for Administration and Management, issued a Memorandum to various Agency officials, which stated that "the use of contractors for work that would otherwise be done by employees but for these hiring controls is prohibited." (Underscoring in original.)

The Grievance

In October 2004, the Union protested the Agency's action in contracting out bargaining unit work. Specifically, on October 6, Mr. Laubach sent an e-mail to Juanita Mildenberg, asserting that the contracting out violated Article 33. In her e-mail response of October 8, Ms. Mildenberg stated that the Agency was hiring temporary personnel until the MEO could be stood up and had a need to do so because of attrition and the hiring freeze, and that this was not a violation of Article 33.

On October 13, Mr. Laubach sent another e-mail to Ms. Mildenberg in which he stated that regardless of whether the personnel were temporary, the Agency was required to follow Article 33 in implementing the action. Carolyn Klym, a Labor Relations Officer for the Agency (with responsibility for overseeing the Negotiated Agreement), responded via e-mail to Mr. Laubach, stating that Article 33 did not apply as it deals with "A-76 issues and a blend of contracting work." She further stated that there was no impact on bargaining unit employees as no position was lost; she asked Mr. Laubach to provide her in writing with specific negative impacts.

Mr. Laubach replied via e-mail to Ms. Klym, stating that "[t]here are numerous negative impacts including leave scheduling issues. . . ." He further asserted that the Agency did not provide the Union with the required notice nor meet with it to discuss the impact. He asked her to send the Union the Statement of Work ("SOW") on the proposed contract out so that it might respond. Ms. Klym responded via e-mail, stating that the Agency would provide the SOW, that Mr. Laubach needed to be more specific regarding the impact, and that she thought there was a positive impact on leave schedules because there were more people to do the work. Mr. Laubach replied, via e-mail, stating that the loss or reduction of FTE positions in the bargaining unit is a "very negative impact" and violates other articles of the Agreement. Finally, Ms. Klym responded via e-mail again stating that the Agency could not hire due to the freeze and that contracting out was a way of filling the positions temporarily. Mr. Laubach testified that Ms. Klym never provided the SOW.

The Union grieved the contracting out.

Article 31 of the Agreement, Grievance Procedure, states, in pertinent part, that:

> Preamble
>
> . . . A grievance is any dispute, difference, disagreement, or complaint between the Agency, an Employee/s or the Union relating to conditions of employment. A grievance will include, but is not limited to, a complaint of an employee or the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement, laws, Memorandum(s) of Understanding, and local and government wide rules and regulations in existence when this agreement is effected.
>
> . . .
>
> ***Section 2. Coverage and Scope***
>
> A A grievance means any complaint:
>
> 1. By any employee concerning any matter relating to the employment of the employee;
>
> 2. By Local 2419 concerning any matter relating to the employment of any employee;

. . .

Section 7. Procedures

A. Informal Procedures

The Agency and the Union agree that every effort will be made to settle grievances at the lowest possible level. Most grievances arise from misunderstandings or disputes which can be settled promptly and satisfactorily on an informal basis at the immediate supervisory level. In the informal stage the Employee has fourteen (14) calendar days to attempt to resolve the dispute and/or grievance before proceeding to the formal grievance procedure. The employee may use either or both of the following methods:

Employee/Supervisor Discussions: speak directly with the management official/supervisor;

. . .

Employee/Supervisor Discussions: Before proceeding to any formal grievance procedures, employees will discuss such issues with their supervisor. . . .

B. Formal Procedures

Step 1

. . .

2. Generally, all grievances shall be filed in writing with the first-line supervisor who was the respondent in the informal proceeding.

. . .

Step 2

1. A grievance may be appealed to Step 2 of this procedure within fourteen (14) calendar days of receipt of a unsatisfactory Step 1 response or from the date the response was due.

. . .

2. The Step 2 appeal shall be filed with the second-line supervisor of the aggrieved employee. . . .

Step 3

1. If the grievance is not satisfactorily resolved at Step 2, the aggrieved party may forward the grievance to the appropriate section chief, branch chief, or Division Director, as appropriate. . . .

Section 8. Upon receipt of the final Step decision or if no decision is rendered in a timely fashion, the Union may refer the matter to arbitration in accordance with Article 32.

. . .

The grievance in this case was filed as an Institutional Grievance. Institutional Grievances were created by a separate agreement about two years after the execution of the Agreement. The Supplemental Agreement, entitled Institutional Grievance Procedure ("IGP Supplemental Agreement"), defines an Institutional Grievance as one: "that does not seek personal relief for a particular employee or group of employees, but concerns the Union's or Employees' bargaining unit and/or institutional wide rights." The IGP Supplemental Agreement also provides for a number of procedures that differ from those set forth in Article 31. At the First Step, instead of requiring that the grievance be filed with an employee's immediate supervisor, the Union is required to file an Institutional Grievance with the Division of Employee Relations and Training. The Agency is then required to direct the grievance to the appropriate management official for a response. The Second Step requires an appeal to the Division of Employee Relations and Training. For Institutional Grievances, there are only two pre-arbitration steps, whereas under Article 31 there are three pre-arbitration steps.

Ms. Klym testified that she did not know why the Parties bargained for an Institutional Grievance procedure. She stated that she had understood from speaking to Linda Tarlow, her predecessor and the individual who negotiated the Supplemental Agreement with Mr. Laubach, that it was intended to address matters that were not specific to individual employees, but affected a broad group of employees, such as contracting out, and that in negotiating for this procedure, the Union waived its right to seek monetary relief for individual employees. Thus, she stated, bargaining unit employees could not obtain any compensation as the result of an Institutional Grievance.

Mr. Laubach disputed that that the Union waived its right to obtain any personal relief for specific individuals in the context of an Institutional Grievance and testified that there was no discussion in the course of the negotiations to the effect that any type of relief would be barred. Mr. Laubach indicated that he sought to negotiate an Institutional Grievance procedure because the regular procedure was impractical for resolving a matter affecting the entire bargaining unit. He stated that Article 31 was too cumbersome for handling such a matter and that the requirement that the grievance be taken up with the employee's immediate supervisor at the first step did not make sense because that person lacked the authority to address the grievance. Further, he explained that the current bargaining unit represents a consolidation of what was initially recognized as multiple individual units and there are still different managers authorized by the Agency to make decisions for these groups, and the Union was seeking to avoid having to file separate grievances in each area with the various managers potentially providing different responses.

Mr. Laubach stated that whether a grievance is filed under Article 31 or under the institutional grievance procedure does not affect the ability to recover personal relief; rather, it only affects how the matter is handled. He offered, as an example, a grievance alleging a violation of the Fair Labor Standards Act that affects the entire bargaining unit. Under the Institutional Grievance procedure there would first be a determination of whether there was a violation; only if a violation were found, would it then be necessary to determine how each bargaining unit member was affected.

As noted previously, in challenging the contracting out in this case, the Union filed an Institutional Grievance. On October 19, 2004, the Union sent to the Agency a

"Step 1 Institutional Grievance." In its statement of the grievance, the Union contended that the Agency violated the Agreement and applicable regulations by failing to: advise the Union of its intent to contract out bargaining unit work; provide the Union with 60 days' advance notice of this action, as required by Article 33; notify the Union of a change in the conditions of employment, as required by Article 2; meet and consult with the Union over the impact of the action on bargaining unit employees, as required by Article 33; provide the Union with the Performance of Work Statement and the contract solicitation document and allow the Union to bid on the work; and notify the Union of the proposed changes on the bargaining unit employees' conditions of employment, including, break, lunch room and locker room facilities, parking, tools and equipment, and health and safety.

In the grievance, the Union asked for a meeting to discuss the matter. With respect to remedy, the Union asked for all legal and reasonable relief including the following: reimbursement to affected bargaining unit employees for lost overtime; termination of the contract employees and return of the work they have been performing to bargaining unit employees; and reimbursement of the Union for damages, and reasonable attorneys fees, costs, and expenses.

On October 21, 2004, the Union sent the Agency an information request relative to its grievance. It asked for a copy of all contracts that were implemented in the preceding two years that effected a reassignment to contractors of work traditionally performed by bargaining unit employees. The Union asserted that it needed the requested information to prove the facts and violations set forth in its grievance.

Mr. Laubach testified that the Agency neither met with the Union to discuss the grievance nor responded to its information request.

On November 16, 2004, the Union filed a Step 2 Grievance, but the Agency did not respond. The Union invoked arbitration on December 10, 2004.

At the February 6, 2006 arbitration hearing, at the conclusion of the Union's case, the Union moved to bar the Agency from putting on any evidence (based upon the language of Article 32, Section 5, of the Agreement that "[o]nly those issues and evidentiary documentation submitted during the grievance procedure . . . will be considered by the Arbitrator") and requested that an adverse inference be drawn against the Agency on all counts in view of its failure to respond to the grievance as required by the institutional grievance procedure and its failure to respond to the information request. After consulting with the Parties, I issued an interim Order (on a non-precedential basis) to the effect that the Agency must respond to the information request by February 13, 2006; that the Parties must meet to discuss the grievance at what would be treated as the second step under the institutional grievance procedure; and that the Agency must provide the Union with a written response to the grievance within five days of the "second step" meeting, but no later than February 28, 2006.

The Parties met on February 24, 2006. Unfortunately, that meeting did not result in a resolution. On February 27, 2006, the Agency sent the Union the following response:

> . . . [T]he agency denies the grievance.
>
> The agency has a right to hire contract employees under Article 3 Management Rights of the collective bargaining agreement and 5 USC 7106 of the Statute.
>
> The Agency denies that there has been a violation of the Collective Bargaining Agreement specifically Article 33 or Article 2. Article 33 relates to the agency's obligations when there is contracting out based on A-76 requirements when and if the

> Agency loses work in the A-76 process. The Agency has used contract employees on a temporary basis within contractually defined period of time and as allowed and approved within the FAR regulations. Additionally, some of the work the Union contends has been recently contracted out has continued for extended periods of time with renewals dating back as early as 1999 such as a Lampers and Elevator and Escalator contractors. . . .
>
> The Agency also contends that there has been no harm to current bargaining unit employees that would warrant any discussion or negotiation with the union over its actions. The Union was unable to present specific evidence of harm that occurred, other than conjecture or speculation.
>
> The Union's position that the agency has violated the FAR regulations is incorrect. The agency has appropriately followed the regulations in awarding contracts for specific tasks and specific time frames.
>
> Union's requested remedy for personal relief is inappropriate and would violate the expressed terms of the MOU signed in July of 2003 which states that this type of grievance "does not seek personal relief for a particular employee of group of employees, but concerns the Union's or Employees' bargaining unit and/or institutional wide rights." Additionally the Union's request to replace contract employees with Bargaining Unit employees would violate the Agency's legal right to hire contract employees under Article 3 of the CBA and 5 USC 7106.

CONTENTIONS OF THE UNION

The Agency violated the FAR and Civil Service regulations by contracting for the services of private sector temporary employees. Under 5 CFR §300.503, an Agency may contract for the brief or intermittent use of private sector temporaries only under certain limited circumstances not shown to be present herein: when an employee is absent for certain specified reasons, such as for an emergency, illness or family responsibility; when the work of the employee can not be delayed because of a "critical need" (defined by the regulations as a "sudden or unexpected occurrence, an emergency, a pressing necessity or an exigency"); and when the need cannot be met with current employees or the direct appointment of temporary employees. Further, such contracting may not be done in lieu of regular recruitment and hiring procedures for permanent appointments, to displace an employee or to circumvent controls on employment levels.

The Agency violated each of those regulatory restrictions. The decision to contract out was not in response to any emergency, but rather, as a result of the MEO process. The Agency contracted out work as a response to the hiring freeze and to circumvent controls on employment levels imposed by the Department. The contracting out also was in lieu of regular recruitment and hiring procedures. Indeed, Mr. Ellis' memorandum confirmed that the hiring freeze was not a legitimate reason for contracting out bargaining unit work.

The Agency could have addressed the staffing shortage by hiring temporary employees, which was permissible during the freeze and which, as the Agency acknowledged, could have been done relatively quickly. The Agency declined that course, however, choosing to assume instead that it could not have found temporary employees with the necessary skills.

The Agency also violated the regulations by entering into what amounted to personal service contracts for the performance of bargaining unit work. Under 48 CFR §37.104(b), the Agency is prohibited from entering into personal service contracts absent statutory authorization. There was no showing in this case of any such authorization. The factors used by the FARs to determine whether the contract is personal in nature include whether: performance is on site; principal tools and equipment are furnished by the Agency; and the nature of the service or manner in which it is provided requires Government direction or supervision. 48 CFR §37.104(d). Further, the Agency has a policy that requires that its contracts state that: "[a]ll work requirements shall flow only from the Project Officer to the Contractor's Project Manager" and that "[N]o Contractor employee will be directly supervised by the Government." The record in this case shows

that, for several of the contracts at issue, there was no Project Manager and that the contractors' employees used the Agency's tools, and worked side-by-side with bargaining unit employees, performing the same work and subject to the same schedule and direction from Agency supervisory and lead personnel.

Further, the evidence established that the Agency was motivated to contract out to avoid having to pay overtime to bargaining unit employees.

In sum, the Agency violated Article 33 by failing to notify the Union that it was conducting a review to determine whether bargaining unit work should be contracted out; failing to notify the Union of its solicitations of bids, thereby depriving the Union of its contractual right to submit a competing bid; refusing to meet and confer with the Union about the impact of the contracting out on the bargaining unit; and failing to abide by government-wide federal regulations on contracting out of work.

For all of these reasons, the Union requests that the Arbitrator find that the Agency violated the Agreement and order appropriate relief, including individual relief to affected bargaining unit employees, as specifically determined in subsequent proceedings.

CONTENTIONS OF THE AGENCY

Article 33 only applies to the contracting out of entire activities, functions or lines of work and not to the situation in this case where the contracting out was designed to supplement the work force on a temporary basis. Section 1 of Article 33 only addresses situations when the Agency is reviewing "the activity being conducted for the purposes of possible contracting out services currently being provided by bargaining unit employees." An activity, as defined in OMB Circular A-76, refers to an entire line or

function. Further, Mr. Themelis testified that the Parties agreed in bargaining that the word "activity," as used in Article 33, meant an entire function, and that he understood that its meaning would be consistent with the definition in OMB Circular A-76.

A review of the Article 33 in its entirety confirms that it was intended to be applied only to the contracting out of entire activities, functions or lines of work: Section 1 uses the term "activity," a term of art used in the Circular; Section 2 refers to studies and MEOs, and an MEO is only relevant to an A-76 study; Section 3 addresses the subject of displaced employees resulting from the contracting out, and in this case there were no displaced employees; and Section 6 states that a reorganization shall not be done in order to circumvent the A-76 process.

Further, under the Statute, the Agency has the exclusive right to decide to contract out work. The Union's requested relief that the Arbitrator terminate the contract employees and restore the work to the bargaining unit would infringe on this management right. See Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and AFGE, Local 2840, 22 FLRA 656 (1986) (the FLRA upheld an agency decision to contract out certain aircraft maintenance work performed by the bargaining unit pursuant to the language in Section 7106(a) stating that "nothing" in the Statute shall "affect the authority" in exercising any of the rights enumerated in the section; an arbitrator was found to lack the authority to cancel a procurement action based on the agency's failure to comply with procurement laws; the Authority found that an arbitrator could order a reconstruction of the procurement action based on a finding that the agency's noncompliance materially affected the procurement decision and adversely affected bargaining unit employees).

The Union cannot challenge in this grievance the contracting out of the work performed by the Elevator maintenance employees and Lampers because such work was already being performed by contractors well before the negotiations for the current Agreement.

In contracting out bargaining unit work, the Agency did not violate any of the FAR or Civil Service regulations cited by the Union. Contrary to the Union's assertion, none of the contracts were personal services contracts requiring statutory authorization within the meaning of 48 CFR §37.101. Further, the 120 to 240 day time limitation set forth in 5 CFR §300.504(b)(1), applies to services needed on a brief basis, such as when a sudden need for clerical support arises, and not to service contracts.

The Union has also failed to show that the contracting out adversely affected bargaining unit members. Its argument that employees lost overtime lacks merit and is inconsistent with the fact that the Union had previously complained to the Agency about there being too much overtime. Further, each of the employees who testified at the hearing worked much more overtime after the contracting out than they had in previous years. On an overall basis, the percentage of overtime increased slightly after the contracting out. Moreover, the Agreement does not restrict the Agency's right to assign overtime to individuals who are not in the bargaining unit.

In sum, the Agency exercised its right to assign work to contractors on a temporary basis to meet a staffing need pending the lifting of the hiring freeze.

With respect to the Union's request for relief, the grievance in this case was filed as an institutional grievance. As such, even if the grievance is ultimately found to have merit on some basis, the Union's request for compensation for lost overtime may not be

granted. According to the Agreement on institutional grievances, such grievances do "not seek personal relief for a particular employee or group of employees, but concern the Union's or Employee's bargaining unit and/or institution wide rights." Further, Ms. Klym testified that she was informed by the Agency official who negotiated this Agreement that the institutional grievance was designed to address disputes regarding the Union's right to bargain or have input into an agency wide matter with no personal relief available and that the Union agreed to waive its rights to remedies that may have otherwise been obtained under the regular grievance procedure in Article 31.

For all of these reasons, the Arbitrator should deny the grievance in its entirety.

DISCUSSION AND OPINION

After careful consideration of the entire record, I am persuaded that the grievance in this case must be sustained in part and denied in part. The Agency violated the Agreement by failing to meet the notice, information, consultation and other requirements of Article 33 with respect to its contracting out of certain bargaining unit work, but not by its contracting out of other work. A summary of the principal reason for this holding follows as well as a discussion of the appropriate remedy for the proven violation of the Agreement.

The factual history, as indicated by the record in this case, has been summarized earlier herein and need not be restated. The dispute in this case requires that a number of sub-issues be addressed: 1) whether some or all of Article 33 is applicable only to the contracting out of work that is governed by the provisions of OMB Circular No. A-76; 2) whether the Agency's contacting out of Lamper and elevator maintenance work was violative of Article 33; 3) whether the Union established that certain work was contracted

out to avoid payment of overtime to bargaining unit employees (and, if so, whether such motivation would have made the contracting out violative of the Agreement); 4) whether any of the work was contracted out in violation of the FARs; and 5) whether any personal relief may be granted for any violations established in light of the fact that the grievance in this case was filed as an Institutional Grievance. These sub-issues will be discussed seriatim.

Article 33, viewed as a whole, is clearly intended to apply to the contracting out of work that is governed by the provisions of OMB Circular No. A-76. The Institutional Grievance at issue in this case raises the question as to whether some or all of Article 33 also applies to non-A-76 contracting out of bargaining unit work.

Section 1 of Article 33 references notice to the Union prior to reviews of activities being conducted for the purposes of possible contracting out of work. Such reviews are performed for A-76 covered actions and were not shown to be done in other types of contracting out. The notice is presumably for the purpose of permitting the Union to submit its own bid to continue to have the work performed with bargaining unit employees. Section 2 of Article 33 relates to impact and implementation bargaining with the Union in the event that a determination is made that work is to be contracted out and providing certain information (Statement of Work and Contract Solicitation documents) to the Union as soon as they are available. The first two sentences of Section 2 could apply to A-76 covered actions, but could also apply to non-A-76 contracting out of work. The third sentence of Section 2, however, relates to providing recommendations during the MEO study process – a matter that is clearly applicable only in A-76 situations. Section 3 of Article 33 relates to Agency promises to attempt to find suitable employment

for employees who are displaced as a result of contracting out. By its terms, it could apply to either A-76 contracting decisions or decisions to contract out work made outside the A-76 process. Section 4 of Article 33 contains a commitment by the Agency to agree to abide by all government-wide rules and regulations with respect to contracting out activity. A-76 is a government-wide rule and regulation, but it is only one of a number of government-wide rules and regulations that govern the contracting out of work. By its plain terms, therefore, Section 4 would appear to be broader than simply A-76 in scope. Section 5 of Article 33 speaks in terms that would encompass A-76 process work and also encompass bargaining unit work contracted out without use of the A-76 process, although there was no evidence as to whether, as a practical matter, unions generally submit bids to compete with other potential contractors in other than A-76 situations. Section 6 is plainly directed, by its terms, solely to A-76 situations.

The record was devoid of any significant evidence of bargaining history relative to the provisions of Article 33. No notes of bargaining were introduced. No proposals by the Parties were introduced. No specific conversations were identified from a particular date or a particular speaker on either side. In sum, other than the testimony that the prospect of an A-76 review was known during the negotiations that led to the adoption of Article 33, the fact that the provisions of that Article were largely carryover (with the exception of Section 3), and the fact that the situations of the Lampers and elevator maintenance employees (neither of which were covered by the A-76 process) were discussed, the record was devoid of any evidence of bargaining history.

The record in this case lacks any clear showing of a mutual intention during bargaining to limit Article 33 to A-76 situations. As noted above, the language is

couched, in part, in A-76 terms, and, in part, in non-A-76 terms. The provisions of Section 4 that the Agency has agreed to abide by all government wide-rules and regulations with respect to contracting out activity suggest that Article 33 are broader in scope than A-76 situations. Further, the discussion regarding two non-A-76 instances of contracting out – elevator maintenance employees and Lampers – in the Article 33 negotiations also is suggestive that Article 33 was understood to be broader in scope than A-76 even if some of the provisions of Article 33 are triggered only in A-76 situations.

As applied to the particular work at issue in this case, the record revealed that the Agency made no attempt to provide the Union with sixty days of advance notice prior to review of the work to be contracted out (other than the A-76 review work which was never ultimately contracted out and which is not at issue herein). Inasmuch as Section 1 of Article 33 is limited, however, to A-76 review situations, no violation of that Section of Article 33 may be found herein. The Agency did not meet and confer with the Union regarding the impact of contracting out the work that is at issue herein. With the exception of the elevator maintenance and Lamper work (discussed in the following section), the Agency was required to have done so, as well as providing the Union with copies of the Performance of Work statement and contract solicitation documents as soon as they were available. While the record reveals that the information was provided in the course of this proceeding, it was not provided in a timely manner. Nor did the Parties meet and confer relative to the particular impact of the specific individual contracts. While such behavior plainly was required by Article 33, Section 2, to have taken place prior to or shortly after the actual work began to be contracted out, the record in this case reveals no specific harm that may be remedied in this case. The work in question

apparently is no longer being contracted out now that the A-76 has been stood up and the work was found to remain in the bargaining unit. Thus, any continuing impact on the bargaining unit may presumed to have been eliminated. (There was no showing of any specific continuing harm in that regard on the record relative to any particular contracting out of bargaining unit work; rather, the evidence of harm was somewhat general in nature and focused more on the bargaining unit as a whole and several generic situations that impact on one or more bargaining unit employees.) No point would be served by attempting now to require the Agency to meet and confer. Further, while the documents and information required to be provided under Article 33, Section 2, was plainly delivered very late to the Union in violation of the provisions of that Section, no evidence of particular harm was demonstrated on the record sufficient to warrant the entry of particular compensatory or similar relief beyond the traditional cease and desist order.

There are several reasons why the contracting out of the elevator maintenance and Lamper work were not shown to violate Article 33 of the Agreement. First, the fact that these tasks had been contracted out for years without challenge by the Union is strong evidence that the Union and the Agency both believed that continuing those contracts were permissible under the Agreement. Second, the practice and history of contracting out work of this type raises a serious question as to whether, in fact, it constitutes bargaining unit work. There are many types of work that may be done both by bargaining unit employees and by contractors and/or non-bargaining unit employees. The fact that a particular type of work is assigned to bargaining unit employees does not necessarily mean that it is bargaining unit work for purposes of Article 33 wherever it is performed and regardless of the circumstances under which it is performed. The record

in this case contains no evidence that the contracting out of Lamper work or elevator maintenance work has changed during the term of the present Agreement from the levels and circumstances under which it has historically been done by outside contractors. Nor did the record reveal that the Lamper and/or elevator maintenance contracts violated any government-wide rule or regulation relative to contracting out. For all of these reasons, the record does not support the claim that the performance of Lamper and/or elevator maintenance work by outside contractors was violative of Article 33 of the Agreement.

The assertion that the Agency was motivated to contract out maintenance work to restrict the amount of overtime worked by bargaining unit employees is rejected as factually unproven. There was no evidence that economics played any role in the contracting out of bargaining unit work. To the contrary, it appears that the amounts of monies paid to the contractors (as distinct from the monies received by the contractor employees) far exceeded the amounts that were paid to bargaining unit employees in wages and benefits for the same work. There was no evidence that there were any limits upon the amount of overtime that, if needed, could be assigned to bargaining unit employees. Accordingly, it is not necessary to speculate herein as to whether, if proven, such motivation would invalidate an otherwise proper decision to contract out bargaining unit work.

The Union raised the following objections to the contracting out of the maintenance work being performed by employees of outside contractors: 1) it was violative of the FAR, Civil Service regulations, and Agency directives by being done to avoid the effects of a hiring freeze and controls on employment levels; 2) it was violative of Civil Service regulations by exceeding the time limits on temporary help; 3) it was

violative of the FAR by constituting an improper personal services contract; and 4) the Agency improperly contracted out work to avoid payment of overtime.

There was no factual dispute that there was a hiring freeze and that the reason for the significant increase in the level of contracting out of maintenance work was the fact that the Agency would not hire new employees (on a temporary or on a permanent basis) despite a significant increase in maintenance work load as a result of the expansion of the campus and attrition from the existing work force due to retirements, resignations, and the like. The record contained no evidence that qualified employees were unavailable for hire on a temporary or permanent basis. The refusal to hire new employees was a function of both a hiring freeze (i.e., an internally imposed limitation on employment levels) and a concern that, if the A-76 process resulted in an outside contractor being selected, then the Agency wished to limit the number of employees who would be adversely affected by that award. The Agency's witnesses conceded that they made no attempt to determine if qualified individuals were willing to work on a temporary basis or on a permanent basis after learning of the ongoing A-76 process; rather, the Agency simply assumed that "fact" without any attempt to determine if it was the case.

The Agency's decision to contract out bargaining unit maintenance work in the manner done in this case was prohibited by several government-wide rules and regulations. 5 CFR §300.503(c) restricts the use of temporary contractors in situations where done in lieu of the regular recruitment and hiring procedures for permanent appointment and where done to circumvent controls on employment levels. Exceptions based upon temporary critical need to perform work were not shown to have been triggered since there was no demonstrated critical need or emergency, as that term is

defined in 5 CFR §300.501. Further, even if temporary contractors could be engaged, they were used for periods in excess of the maximum allowable periods contained in 5 CFR §300.504.

Additionally, the particular contracts appear to involve personal services contracts that are prohibited by the FARs, absent exceptions not shown to exist herein. 48 CFR §37.104. The hallmarks of personal service contracts were shown to exist in the manner in which the contract labor was utilized on many of the maintenance contracts. The unrebutted evidence of record revealed that, on a day to day basis, maintenance employees of the contractors worked side by side with bargaining unit employees, used Agency provided tools, equipment, and materials, and took supervision and direction from Agency employees in the performance of their work (including, but not limited to the scheduling of their hours to be worked). The services were integral to the proper functioning of the campus, were expected to last beyond one year, and the inherent nature of the services required the retention of significant control over the work by the government. The contracts themselves, however, between the Agency and the contractors required use of an on-site Project Manager to perform those functions. The record in this case contains no information, beyond the language of the regulations themselves, as to whether the status of a contract as personal service or non-personal service in nature is a function of the obligations as defined under the written contract without regard to the actual performance of work under that contract or whether the status is a function of the manner in which the work is actually performed or some combination of the two. 5 CFR §37.104(c)(1) states that an employer-employee relationship may be created either as a result of the terms of the procurement contract or as a result of the

manner in which it is administered during performance – a test that would result in many of the maintenance jobs contracted out in this case qualifying as personal services contracts under governing government-wide regulations despite their beginnings as non-personal service in nature. The record did not include testimony on an employee by employee or job assignment by job assignment basis as to every position that was created as, or morphed through performance, into a personal services contract. Given the holding later herein regarding the remedy, however, it is not necessary to attempt to make those findings with specificity. Rather, it is sufficient to observe that a significant portion of the overall contracted out maintenance work appears to have been contrary to both the FAR provisions on personal service contracts and the Civil Service regulations regarding contracting out, thereby violating Article 33, Section 4, of the Agreement.

The record reflected that there were adverse effects to the bargaining unit as a result of the contracting out of work in this case. Those included unit-wide effects, such as a sharp decline in the size of the bargaining unit, and individual employee effects, such as changes in working conditions related to lowered staffing levels (e.g., less flexibility in taking leave, being required to perform assignments with fewer employees, changes in overtime, etc.). It should be noted that there was no claim herein that the Union, as the exclusive representative of bargaining unit employees, lacked standing to assert the violations of the FAR and/or the Civil Service regulations, particularly given the clear language in Article 33, Section 4, of the Agreement.

The final matter raised in this proceeding relates to the appropriate remedy for the proven violations of Article 33. The instant case was filed and arbitrated as an Institutional Grievance. As such, it is governed by the Parties' Supplemental Agreement

on Institutional Grievances. The IGP Supplemental Agreement made clear that such grievances "concern the Union's or Employee's bargaining unit and/or institutional wide rights" and that Institutional Grievances, by definition, do "not seek personal relief for a particular employee or group of employees." That language is clear and unambiguous and makes clear that no personal relief for a particular employee or group of employees may be awarded herein. (It may not be amiss to note that, even absent this ban, no demonstration of entitlement to personal relief on the part of any individual employee or group of employees was shown herein.)

Accordingly, I find that the appropriate remedy in this case is to simply direct that the Agency adhere in the future to all government-wide rules and regulations in connection with future contracting out of bargaining unit work, as required by Article 33, Section 4, of the Agreement, and to direct that the Agency adhere in the future to the notice, meet and confer, and informational requirements of Article 33, Section 2, of the Agreement.

To the extent consistent with the foregoing, the grievance is sustained in part and denied in part.

AWARD

The Agency violated Article 33 when it failed to adhere to applicable government-wide rules and regulations by: a) contracting out certain bargaining unit work for performance through prohibited personal service contracts; b) contracting out certain bargaining unit work in lieu of using regular recruitment and hiring procedures and to circumvent controls on employment levels; c) exceeding the time limits applicable to temporary service contracts; d) failing to provide the Union with copies of documentation in accord with Article 33, Section 2 and failing to meet and confer with the Union, as required by Article 33, Section 2, relative to any impact on bargaining unit employees associated with the decision to contract out bargaining unit work.

The Agency is directed to cease and desist from similar future violations of Article 33 and to adhere to applicable government-wide rules and regulations with respect to the contracting out of bargaining unit work – both at the time of entry into any such contracts and in the administration of those contracts through the performance of bargaining unit work by contractor employees.

To the extent consistent with the foregoing Opinion and Award, the grievance is sustained.

December 8, 2006

Ira F. Jaffe, Esq.
Impartial Arbitrator