

## PROTECTING THE RIGHT TO MAKE AND IMPLEMENT SUBCONTRACTING DECISIONS IN A PUBLIC SECTOR UNION CONTRACT

One of the most important rights of public management in need of protection during the collective bargaining process has been and remains the right to subcontract work. Back in 2014, I wrote in the National PELRA Newsletter the following:

“In this age of declining budgets and reduced revenues, public employers are continually looking for ways to accomplish more with less. This concern has given rise to heightened interest in concepts such as managed competition, consolidation of services, outsourcing and the like .... [P]ublic jurisdictions with labor unions and collective bargaining agreements are more than ever interested in exploring various types of outsourcing arrangements.”

*National PELRA Newsletter* (November 2014).

According to the U.S. Department of Labor’s Glossary, subcontracting refers to “the practice of employers getting work done by an outside contractor and not by workers in the bargaining unit. Also called ‘contracting out.’” Note that the phrase “union work” is not present anywhere in the definition. This is because – no matter what a union may claim – the work in question belongs to management ... it is management’s work to obtain, assign, modify and/or terminate if necessary. As sometimes improperly claimed by organized labor, this work is not “our work!” This is the public’s work to be assigned or managed by the public employer in accordance with any contract language and/or any further existing duty to bargain.

Public management’s need for sound and solid language in bargaining agreements, preserving to public management the right to make and implement decisions to subcontract work in the interest of controlling government costs and/or improving government services, is perhaps today more important than it has even been. Because of the increased pressure on public management to reduce taxes paid by citizens, coupled with rising inflation and increased union growth and more aggressive bargaining, there is an important need for this follow-up article.

Bargaining over a subcontracting clause, however, cannot be viewed in a contractual vacuum. At least where employer costs are a factor in management's desire to subcontract, then such contractual bargaining issues as layoffs, recalls, and contractual entire agreement clauses may likewise be implicated.

To be fully effective, the right to subcontract normally must be accompanied by the contractual right to lay off or terminate affected personnel, and by the further right to implement the layoff decision and, likely, its effects on bargaining unit personnel without undue delay or further time-consuming impact or effects bargaining. Absent these provisions, a union can try to slow an employer's subcontracting decisions to a grind by demanding impact and effects bargaining, and using that process to burden the public employer with common labor tactics, such as voluminous and burdensome information requests, extreme bargaining positions, and incremental adjustments to bargaining positions during impact negotiations.

So, out of an abundance of caution, a public employer should not only negotiate management-friendly subcontracting language in its management rights clause (and in any specific clause relating to "subcontracting"), but also in any clauses relating to layoffs and in the contract's "Entire Agreement" clause, as described later in this article.

The right to subcontract work is generally considered to be a basic management right. However, under most collective bargaining statutes, ordinances, and laws, whether an employer may retain that right in a labor contract – and under what conditions – is usually considered a mandatory subject of bargaining ... if ... in whole or meaningful part, the decision to contract out the work is for economic reasons. *Otis Elevator Co.*, 269 NLRB 891 (1984). Thus, in most jurisdictions with bargaining laws, regulations, or ordinances, a union may propose during bargaining to eliminate, restrict, or otherwise condition the employer's right to contract out work

performed by bargaining unit members, and/or to limit or eliminate a layoff's effect on bargaining unit personnel. Moreover, under most bargaining laws a public employer cannot refuse to negotiate over such subjects -- even mid-term.

### **The Bargaining Process.**

During bargaining, a public employer will advance – or propose to retain – basic “management rights” language for the union’s consideration and agreement. In the view of most, that language proposed by management should to the fullest extent possible retain to management the absolute and unlimited right “to subcontract.” Such language might be as simple as the following:

#### **“Management Rights.**

4. Management retains the right to contract out or subcontract work performed by bargaining unit members ....”

Some unions may agree to this form of management “subcontracting” language, and others may not. Beware, however, that if language like that reproduced above is agreed upon, without more, it may not be enough to preserve management’s right to make and immediately implement a later decision to subcontract work. That is because, under many bargaining laws or ordinances, management may “win” a key right during bargaining, but nonetheless may not implement that right without further bargaining to impasse or agreement on the impact or effects of its decision to implement such rights upon bargaining unit members. *See, e.g., Illinois Departments of Central Management Services and Corrections, 5 PERI ¶2001 (1988).* Possessing the right to make the decision without also possessing the right immediately to implement that decision significantly dilutes the right to make the decision.

Consequently, while most public employer contracts do retain in their management rights clause the right to “subcontract work,” that language may not be the end of the matter because

savvy union negotiators often will insist on separate contract clauses more specifically regulating subcontracting (with limitations on management’s exercise of such right), or regulating the right to lay off, and/or they may insist on some form of “entire agreement” language limiting management’s rights to implement subcontracting situations without first bargaining over the impact or effects of such subcontracting on bargaining unit personnel.

The following language from an existing public employer’s collective bargaining agreement is both representative and typical, granting to the employer the right to subcontract, on the one hand, but not the right to gain immediate economic cost savings from the union, on the other:

## **“ARTICLE X**

### **SUBCONTRACTING**

It is the general policy of the City to continue to utilize its employees to perform work they are qualified to perform. However, the City reserves the right to contract out any work it deems necessary in the exercise of its best judgment and consistent with the City’s lawful authority under Illinois statutes. Absent emergency, the City agrees to give thirty (30) days prior notice to the Union and to bargain upon request of the Union over the impact or effects of any such subcontracting decision ....” (Emphasis added)

Under this language, the employer may not issue the subcontract in question, absent emergency, until agreement on the impact and effects of the decision has been reached – or impasse procedures have been instituted. How long might that take? Meanwhile, the subcontract may be held hostage to father time. *But see, PBLC v. ILRB*, Appellate Court of Illinois, First District, Sixth Division (December 3, 2021).

A similar result might likely arise under the following actual contract language on subcontracting, which follows closely a management rights clause seemingly granting to the public entity, among other rights, the right “to determine the methods, means, organization and number of personnel by which such operations shall be made or purchased.” Of course, like most

management rights clauses, the clause just mentioned contains the limiting language, “provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.”

The “subcontracting” article, which seemingly takes away the major potential benefit of the management rights clause, provides:

**“ARTICLE X  
SUBCONTRACTING**

It is the general policy of the Village to continue to utilize its employees to perform work they are qualified to perform. However, the Village reserves the right to contract out any work it deems necessary in the exercise of its best judgment and consistent with the Village’s lawful authority under Illinois statutes, provided such subcontracting does not result in the layoff or reduction of force of any bargaining unit members.” (Emphasis added)

Obviously, under this language, if the public employer subcontracts work which results in a layoff of bargaining unit employees, and the union files a grievance, the employer may be found to have violated Article X, above. The remedy may be an order from an arbitrator requiring that all employees laid off because of the employer’s assertion of its rights under Article X be reinstated and receive full back pay.

In yet another public sector contract, the employer retains the right to subcontract in a very employer friendly management rights clause, as follows:

**“ARTICLE 4 MANAGEMENT RIGHTS**

**4.1 Recognition of Village Rights**

The Union recognizes that the Village possesses the sole and exclusive right to operate and direct the employees of the Village in all aspects, including, but not limited to, all rights and authority granted by law or exercised by the Village prior to execution of the Agreement, except as specifically limited in this Agreement. These rights include, but are not limited to:

- a) The right to determine the Department’s mission, policies, procedures, and to set all standards of service offered in the community;

- b) To plan, direct, control, and determine the operations and services to be conducted or delivered by employees of the Department;

\* \* \*

- m) To contract out for goods and services [emphasis added]
- n) To introduce new, improved, or different methods, equipment and/or facilities.”

And, there is not any other language in the contract referencing subcontracting.

However, this employer’s contract does have the following layoff language:

**“ARTICLE III**

**LAYOFF/RECALL**

**Section 1. Layoff**

The Employer, in its discretion, shall determine whether layoffs are necessary and from what department. The Employer shall notify the Union as soon as practicable, but no later than sixty (60) days in advance of any layoffs. The Employer agrees to meet and discuss alternatives to layoff with the Union and provide the Union with complete information pertinent to the decision to lay off any employee(s). If after such discussion the Employer determines that a layoff is still in order, employees shall be laid off in the following order:

1. Temporary and probationary employees;
2. Part-time employees, in inverse order of seniority;
3. Full-time employees, in inverse order of seniority.”

In this situation, like the situation mentioned above, the employer likely does have the right to lay off, but likely cannot implement that right without costly and time-consuming decisional bargaining (and perhaps exhaustion of any mandated impasse procedures). And, what about the duty to bargain over the impact and effects of the layoff, once the decision to lay off is made?

The right to unilaterally make a management decision without the concomitant right to then implement that decision is, in practical effect, not a meaningful right at all. Thus, the

preferred management subcontracting clause will address the right to subcontract, the right to lay off personnel, and the right to implement any subcontracting decision without the delay of decisional or impact and effects bargaining. Consider the following clauses in an existing public sector contract concerning the duty to bargain over a management decision to lay off bargaining unit members because of subcontracting or other economic reasons:

## **“ARTICLE 17 LAYOFF AND RECALL**

### **17.1 Layoff of Employees**

The Village, in its discretion, shall determine whether layoffs are necessary. Probationary employees covered by this Agreement shall be laid off first; such layoff shall be based on the relative skill and ability exhibited by each employee since their date of hire, with the least skilled and able probationary employee being laid off first, provided the remaining employees can perform the required work without additional training. The same process will be followed for remaining probationary employees, if necessary. Regular employees covered by this Agreement shall be laid off next and such layoff shall be based upon seniority, the individual employee with the lowest seniority being laid off first.” (Emphasis added)

The cited language does not mention anything about the impact or effects of the subcontract or layoff clauses shown above. The jurisdiction’s contract does, however, contain a form of “entire agreement” clause, which is as follows:

## **“NO BARGAINING DURING TERM**

**Section 19.01. Entire Agreement.** This Agreement constitutes the complete and entire agreement between the parties, and concludes collective bargaining between the parties for its term except as specifically stated below. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement and this Agreement concludes collective bargaining between the parties for its term.”

Is the public employer’s layoff contractually (or legally) permissible under this language?

What if the union demands impact or effects bargaining prior to any layoff? And, what if the

bargaining unit does not possess the lawful right to strike, but instead has the legal right to negotiate and then arbitrate over the impact and effect of the decisions to subcontract and/or layoff bargaining unit personnel? How long will that arbitration take, and is the public entity fully protected should it implement its decision on a temporary or final basis?

In order to further strengthen the employer's contractual rights to lay off personnel without undue delay, the employer's negotiator might consider adding the following underlined language, which exists in one form or another in numerous public sector bargaining agreements:

### **“ARTICLE 31 ENTIRE AGREEMENT**

This Agreement, upon ratification, cancels and supersedes all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties, and concludes the collective bargaining for its term.

The Village and the Union, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, including the impact of the Village's exercise of its rights as set forth herein on wages, hours or terms and conditions of employment. In so agreeing, the parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.” (Emphasis added)

It is likely that an employer with the above impact bargaining waiver language may make and institute any decision to subcontract work and/or lay off personnel, without the delay or uncertainty of further bargaining with its union. However, if the employer during bargaining cannot obtain such a waiver of impact/effects bargaining, the following clause is likely better – though not perfect – than no waiver of impact bargaining at all, as it allows the employer to make and temporarily implement its cost-cutting decisions unless or until the results of impact bargaining require otherwise:

## “21.1 Entire and Complete Agreement

This Agreement, upon ratification, supersedes all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties, and concludes collective bargaining for its term, unless expressly stated to the contrary herein. The Village and the Union, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, unless expressly stated to the contrary herein, except that the Union may demand impact or effects bargaining as provided by law and the Village may temporarily institute changes allowed under the contract which are subject to such impact or effects bargaining pending the outcome (as provided by law) of any such impact or effects bargaining. In so agreeing, the parties acknowledge that during the negotiations which resulted in this Agreement, each had an unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.” (Emphasis added)

Bear in mind that in some states, the right to unilaterally implement may be a permissive subject of bargaining. Another alternative – perhaps more realistic but not quite as effective – is to pre-bargain the impacts and effects of the right to lay off in the layoff article itself, along the lines of the language below:

“**Effects of Layoff.** During the period of time that non-probationary employees have recall rights as specified above, the following provisions shall be applicable to any non-probationary employees who are laid off:

1. An employee shall be paid for any earned but unused vacation days.
2. Continued coverage under the group medical insurance program in accordance with the terms applicable prior to being laid off for one (1) month; thereafter, the employee shall have the right to maintain insurance coverage by paying in advance the full applicable monthly premium for single and, if desired, family coverage.
3. If an employee is recalled, the amount of accumulated sick leave hours that the employee had as of the effective date of the layoff shall be restored.
4. Upon recall, the employee’s seniority shall be adjusted by the period of time that the layoff exceeds six (6) months.”

## **Conclusion**

I hope this article proves useful and beneficial to my fellow public sector management negotiators. Here's to your successful negotiations results!!

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