ARBITRATION OPINION AND AWARD

In the Matter of Arbitration Between:	)	
	)	
TEAMSTERS LOCAL 2010	)	
	)	
Union,	)	
	)	Contracting Out – Grand Salon Painting
and	)	CSU Case No. R06-2019-417
	)	
CALIFORNIA STATE UNIVERSITY, CHANNEL ISLANDS	)	
	)	
Employer.	)	

ARBITRATOR

Walter F. Daugherty

APPEARANCES

For the Union:

Susan K. Garea
Attorney at Law
Beeson, Tayer & Bodine, APC

For the Employer:

Hector Fernandez
Manager of Systemwide Labor Relations
The California State University
Office of the Chancellor

INTRODUCTION

Pursuant to the relevant terms of the parties' collective bargaining agreement, the undersigned was selected as Arbitrator in this dispute. A hearing using video conference technology was held on January 15, 2021. Both parties participated and were afforded full opportunity to present relevant evidence, examine and cross-examine witnesses, and offer argument. A verbatim transcript of the proceedings was furnished to the Arbitrator. Post-hearing briefs were filed, the matter standing submitted with the receipt of these briefs on March 8, 2021.

ISSUE

The parties stipulated that the matter was properly in arbitration but could not agree on an issue statement. Each party submitted its own issue formulation and authorized the Arbitrator to frame the issue.

The Union submitted the following issue statement:

> Did California State University, Channel Islands ("CSUCI") violate Article 4 or 5 of the collective bargaining agreement when it contracted out the work of painting the Grand Salon in or around the summer of 2019?
>
> If so, what is the appropriate remedy?

The Employer's proposed issue statement was as follows:

> Did the campus violate Provision 4.3 when the campus contracted out portions of painting work at the Grand Salon, and if so, what is the remedy?
>
> Did the campus violate Provision 4.4 about notification to the Union for contracting-out painting at the Grand Salon, and if so, what is the remedy?
>
> Did the campus violate Provision 5.2, effects of the agreement, and if so, what is the remedy?

After consideration of the evidence and the contentions of the parties, the issue presented for resolution is as follows:

> Did California State University, Channel Islands ("CSUCI") violate Article 4 or 5.2 of the collective bargaining agreement when it contracted out the work of painting the Grand Salon in or around the summer of 2019?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 4

CONTRACTING OUT

. . .

4.3 The University shall have the prerogative to contract work. The University shall make every reasonable effort to perform normal Bargaining Unit work in-house, within the limitations and requirements imposed by law. The Campus shall consider the following factors before contracting out work:

a. The availability for Bargaining Unit employees to perform the work to be contracted out;

b. Whether the available Bargaining Unit employees have the special skills and licensures to perform the project;

c. Whether or not the work could be completed within time constraints applicable to the project;

d. The availability of required materials and/or equipment necessary to complete the project; and/or

e. The cost involved in performing the work in-house versus contracting out that work.

4.4 The Chief Campus Steward, or designee, on each Campus shall be notified of contracts pertaining to Bargaining Unit 6 work at the campus. Circumstances permitting, such notifications shall be prior to the start of such contracted work.

4.5 To meet this notice obligation under 4.4 upon mutual agreement between Plant Administration and Teamsters Local 2010, the Chief Steward, or designee for the appropriate trade, on each Campus may attend the weekly, bi weekly or monthly meetings of the Shop Supervisors to review all normal bargaining unit work projects pending on each Campus.

ARTICLE 5

EFFECT OF AGREEMENT

. . .

5.2 This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements, understandings, policies, and prior practices related to matters included within this Agreement. It is understood that, in the absence of a specific expressed provision in this Agreement to the contrary, all CSU policies and procedures for employee wages, hour, and other

terms and conditions of employment shall remain in effect unless changed in accordance with provision 5.3.

BACKGROUND

On August 9, 2019, a grievance was filed regarding the contracting out of the painting of the Grand Salon by Supervising Painter Jesse Padilla, and Facilities Worker II's Richard Castro, and Gus Gonzalez (Jx. 2).[1]

The Grand Salon was described as a large event space on the CSUCI campus. Bargaining unit employees routinely performed maintenance work, including painting, on the Grand Salon and had painted the entire Grand Salon interior in 2012. According to Supervising Painter Padilla, he, two facility workers, and temporary workers had done this work in 2012, which was more extensive than the 2019 work because the vaulted ceiling was painted (RT 68-71).[2]

Sometime in April 2019 a work order was placed to remodel the Grand Salon, including painting, installation of sound boards and ceiling fans, and upgrades to the flooring. Interim Director of Planning, Design and Construction David Carlson and Guy Spevak, Assistant Manager of Operations, Facility Services, were involved in planning and managing the Grand Salon remodel. In April 2019, Padilla was requested to prepare an estimate for the Grand Salon painting to be done in-house. After determining that the work could be done in-house and performing a walk through inspection, Padilla prepared a bid using the Paint Shop overtime rate

[1]Joint, Union, and University exhibits are referenced as "Jx.__," "Ux.__," and "CSUx.__," respectively.

[2]"RT" refers to the Reporter's transcript of the hearing.

for the estimated 300 hours needed to complete the project. The total estimate was $23,119, including materials (Ux. 2).[3]

Then Chief Steward Michael Middleton, Chief Steward Tim Allen, and Padilla all testified that at various weekly lead meetings beginning in May 2019 the Grand Salon project was discussed, that the bargaining unit attendees stated that they wanted to do the work in-house, and that Spevak claimed that they were waiting on the paint colors to be selected. According to Allen, Spevak said that because they had been waiting on the color selection there was not sufficient time to do the work in-house and that in meetings after July 1, 2019 Spevak was still claiming the colors had not been selected (RT 47, 50). However, in a July 1, 2019 email from Spevak to Carrie Miller of Turner & Turner Painting, Spevak listed the three colors chosen for the interior of the Grand Salon and advised that "the soonest start time is 8/5/2019 and completion date is to be 8/9/2019, please schedule your crew accordingly" (Ux. 3). Spevak had previously obtained a bid from Turner & Tuner Painting dated June 25, 2019 for interior work on the Grand Salon. This bid for "total labor & material" to paint all windows, walls, beams, ceiling arches with columns and handrails was for $39,860 and included an additional charge of $3,700 to add clear coat to various surfaces (Ux. 1). Although Spevak was uncertain as to the specific date he told the Union of his decision to contract out the work, he stated that he had advised the Union in such regard before the August 5 project start date (RT 156). Allen said that at various lead meetings at which the Grand Salon painting was discussed Padilla and Middleton had objected to contracting out (RT 46).

[3]Although work may be done on straight time, the Union witnesses testified without contradiction that the appropriate overtime rate is used in preparing bids.

Spevak testified further that he had decided to contract out the Grand Salon painting work because of the limited time in which to perform the work and the insufficient staff available – a journeyman painter, a "330" project supervisor who was a painter, and two facilities workers (RT 121-124).[4] He acknowledged that neither the Architect nor the President had dictated that the painting was to be done from August 5 through August 9 (RT 133). Padilla stated that additional facilities workers could have been obtained from other shops as had been done on previous projects and that the crew could have worked overtime to complete the job (RT 172-175).

Turner & Turner Painting was awarded the contract to paint the Grand Salon, beginning work on August 5, working through August 9, and returning on August 12, 2019. The pertinent Certified Payroll Report shows that seven painters each worked eight hours on August 5, 6, 7, 8, and 9 and that three painters each worked eight hours on August 12, 2019 (CSUx. 15 and supplemental exhibit). The total hours worked by Turner & Turner's crew was 304 hours (*Id*.) CSUCI paid Turner & Turner Painting $44,990 for their work on the Grand Salon project, which included painting all windows, walls, beams, ceiling arches with columns and handrails and additional charges for adding clear coat to various surfaces and installing window shades (CSUx. 7). Between August 14 and August 22, 2019, various prepping and painting work was done by CSUCI employees on the Grand Salon project and similar work was done by these employees from September 2019 through March 16, 2020 (CSUx. 10, CSUx. 11, and CSUx. 12).

[4]After being shown his "quick notes" of a June 25, 2019 projects meeting (CSUx. 1) and the CSUCI Step 2 grievance response stating that he had provided notification of the decision to contract out work to the Union at meetings of April 30 and June 25, 2019 (Jx. 3), Spevak said that "it was more than likely" that he had decided to contract out the work as of April 30, 2019 (RT 160-161).

As noted, a grievance was filed on August 9, 2019 regarding the contracting out at issue that was processed through the Level II and Level III steps of the grievance procedure. Since the parties could not resolve the dispute, the grievance was referred to arbitration.

OPINION

Article 4 of the collective bargaining agreement ("CBA") does not prohibit the University from contracting out bargaining unit work. On the contrary, Article 4.3 states that "[t]he University shall have the prerogative to contract work." This contractual right, however, is not unfettered, for this provision requires that the University "shall make every reasonable effort to perform normal Bargaining Unit work in-house" and enumerates five factors that the University "shall consider . . . before contracting out work."

It may properly be argued that the phrase "every reasonable effort" is inherently subjective. However, the five factors specified in the CBA that the University is to consider before contracting out work provide context and an element of objectivity in applying that phrase as used in the CBA. As argued by the University, a prior arbitration award interpreting the contractual language under consideration provides general principles in such regard, with the recognition as stated in the award that the determination of whether the University made every reasonable effort to keep work in-house turns on the specific facts of each case.[5] Additional arbitral authority concerning the interpretation and application of Article 4.3 as well as the appropriate remedy for a violation of this provision is found in *SETC-United and California State University, Monterey Bay* (Brand, 2015) ("Brand award") cited by the Union.

---

[5] *The California State University (Fullerton Campus) and State Employees Trade Council Local 1268* (Roberts, 1992) ("Roberts award") pp. 8-9. The SETC was the prior certified representative for the bargaining unit.

It is first observed that it is undisputed that painting the Grand Salon is bargaining unit work. Indeed, the testimony of the Union witnesses was unequivocal that bargaining unit employees had painted the Grand Salon in 2012. Although former Assistant Manager of Operations, Facility Services Spevak testified that he did not have any knowledge in such regard, he did not deny that this painting work was done.

Arbitrator Brand identified the most significant reason underpinning his conclusion that the University had failed to make every reasonable effort to perform bargaining unit work in-house. This was that the decision to contract the work was made "before he [the decision maker] had the facts necessary to determine if it was physically and economically feasible for bargaining unit members to do the work in a time frame consistent with the President's desires" (Brand award, pp. 7-8). In such regard, the evidence here shows that Spevak had decided to contract out the work as of April 30, 2019. While Painting Supervisor Padilla had prepared his estimate of the cost to do the work in-house on April 9, 2019 (Ux. 2), Turner & Turner Painting, the outside contractor, had submitted its bid no earlier than June 25, 2019 (Ux. 1). In light of this chronological sequence, it is apparent that before contracting out the work Spevak had failed to consider the "cost involved in performing the work in-house versus contracting out that work" as required by Article 4.3.

As noted in the Roberts award, a prior matter decided in July 1989 held that the relevant contractual provisions do not require the University to keep bargaining unit work in-house when contracting out presents a favorable cost alternative, i.e., a lower cost for the job (Roberts award, p. 9). Here, because Padilla's bid allocated the labor costs at the overtime rate, even if the Grand Salon project required bargaining unit employees to perform most if not all the work on

overtime, the cost of the project would still be less than that charged by Turner & Turner Painting.[6] Furthermore, this cost differential was not insignificant, with the outside contractor charging some $21,000 more than Padilla's in-house estimate for the job.[7]

The relevant factors identified in Article 4.3 that the University must consider before contracting out work include "The availability of Bargaining Unit employees to perform the work to be contracted out" and "Whether or not the work could be completed within the time constraints applicable to the project." With respect to these factors, the University argues that the pertinent time constraints and the availability of bargaining unit employees during this period were fully considered and demonstrate that there was no reasonable alternative to contracting out the work. According to the Union, the evidence fails to show that the work in question had to be done during the period determined by Spevak and that there were insufficient bargaining unit employees available to perform this work.

In considering the record evidence, it is first noted that neither the University President nor the Architect on the Grand Salon project had mandated or specified that the work could only be done during the August 5 through August 9 period as determined by Spevak.[8] No event calendar regarding the use of the Grand Salon either before or after this period was presented.

---

[6]Padilla estimated the total cost to paint the Grand Salon at $23,119, allocating 300 hours at the overtime rate of $53.68 an hour (Ux. 2). The University paid Turner & Turner Painting $44,990 for their work on the Grand Salon, which required 304 hours to complete (CSUx. 7, CSUx. 15, and supplemental exhibit).

[7]No evidence was presented that Padilla in his in-house estimate had underbid the cost of the Grand Salon painting.

[8]Although Spevak testified that this timeframe had been worked out with David Carlson, the Architect on the project, he acknowledged that neither Carlson nor the President had dictated that the painting had to be done from August 5 to August 9 (RT 114, 133).

Although it was undisputed that a convocation was to be held in the Grand Salon on August 23, Turner & Turner Painting had a crew of three painters each working eight hours in the Grand Salon on August 12. As such, painting work was done beyond the period initially established by Spevak. Further, absent evidence to the contrary, the reasonable inference to be drawn from this chronological sequence is that the painting work could have been performed on August 10 and August 11, the intervening weekend days.

Regarding the issue of the availability of bargaining unit employees to paint the Grand Salon, Spevak himself acknowledged that the potential painting crew consisted of Supervising Painter Padilla, a "330" project supervisor who was a painter, and two facilities workers (RT 124). It is further noted that Padilla credibly testified that he, two facility workers, and temporary workers had painted the entire Grand Salon in 2012 and that he had the ability to "burrow" facilities workers from other departments on campus. It is acknowledged that Spevak stated that he "believed" he had discussed overtime authorization with one Tom Hunt that was denied and that he had no documentation regarding the matter (RT 150) – scant evidence on which to conclude that overtime would not have been approved, particularly when the use of overtime was more cost effective than contracting out the work. The record is devoid of any evidence that Spevak had discussed with Padilla the latter's options as to securing an in-house painting crew of sufficient size to complete the Grand Salon painting work in a reasonable timeframe. Again, it is to be emphasized that the evidence simply fails to persuade that the August 5 through August 9 period was the sole window of opportunity available to paint the Grand Salon.

The reasonable effort required of the University by Article 4.3 to keep bargaining unit work in-house contemplates that the decision making process involve the good faith

consideration by the University of the factors listed in Article 4.3 before deciding to contract out work. In such regard, the evidence preponderates that the University has failed to show that the August 5 through August 9 window was the only period available to perform the required painting work and that insufficient bargaining unit employees were available to perform the work in question. In such regard, it is further concluded that in deciding to contract out the Grand Salon painting the University either failed to consider the factors regarding the availability of bargaining unit employees and whether the work could be completed within the applicable time constraints or the proffered reasons why consideration of these factors supported the decision to contract out were unavailing and unpersuasive.

The evidence of record when viewed and weighed in its totality preponderates that the University failed to comply with the obligations imposed by Article 4.3 regarding the painting of the Grand Salon at issue. It is therefore concluded that the University violated Article 4.3 when it contracted with Turner & Turner Painting, an outside contractor, for the painting of the Grand Salon. Having reached this conclusion, the question of whether the University violated Article 4.4 and Article 5.2 need not be addressed and decided here.

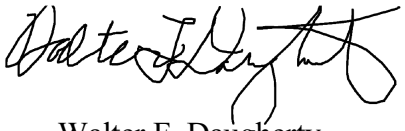
Turning to the determination of the appropriate remedy for the University's contractual violation, the Arbitrator notes that monetary compensation for violations of Article 4 were ordered in both the Roberts award and the Brand award. The undersigned concurs with the underlying reasoning as opined in both awards and believes that here too, a substantial violation requires a substantive award. The Brand award, as argued by the Union, provides an instructive and applicable template for the undersigned's determination of the appropriate remedy for the

University's contractual violation.[9] In such regard, it is acknowledged that the remedy cannot always be determined with exactness and certainty and that the remedy frequently represents a less than precise attempt to place the aggrieved in the situation in which they would have been but for the contractual violation. However, after consideration of the evidence record, it is determined that Grievants Jesse Padilla, Richard Castro, and Gus Gonzalez are to each be awarded 53.3 hours of overtime pay at their respective overtime rate on August 1, 2019. These amounts are derived from the assumption that each employee would have worked six full-time days on the painting or a total of 144 hours (the six days worked by employees of the contractor), leaving 160 hours of overtime to be equally divided.[10] The following award is therefore issued.

AWARD

It is the award of the undersigned neutral Arbitrator that California State University violated Article 4.3 of the collective bargaining agreement when it contracted out the work of painting the Grand Salon in or around the summer of 2019. As a remedy for this contractual violation, Grievants Jesse Padilla, Richard Castro, and Gus Gonzalez are to each be paid 53.3 hours of overtime pay at their respective overtime rate on August 1, 2019.

Respectfully submitted



Walter F. Daugherty
Arbitrator

Dated: April 9, 2021
Los Angeles, California

---

[9]Although acknowledging the uncertainties in such regard and that the remedy "cannot be precisely calculated," Arbitrator Brand awarded eight hours of overtime pay to each of the grievants (Brand award, pp. 8-9).

[10]These calculations have as their basis the 304 hours of work performed by employees of Turner & Turner Painting on the Grand Salon project (CSUx. 15 and supplemental exhibit).