

## Arbitration Decisions

Labor Arbitration Decision, Cal. State Univ. Monterey Bay, 2021 BL 506787,  
2021 BNA LA 426

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November 1, 2021

### OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

California State University Monterey Bay, Employer

and

Teamsters Local 2010, Union

Contracting Out Locksmith Work

November 1, 2021

Hide Headnotes

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### BNA Headnotes

#### LABOR ARBITRATION

##### SUMMARY

**[1] Subcontracting - Normal bargaining unit work - Exemptions from subcontracting restrictions - Availability of required skills ▶ 117.385 ▶ 117.381 ▶ 117.383**

▶ 117.395 [Show Topic Path]

Arbitrator Paul D. Roose ruled that California State University violated its CBA when it contracted out locksmith work during a five-day period when its one journey-level locksmith was available to work after returning from medical leave, but the university properly refused to offer locksmith work to a facilities worker II. This employee was a generalist who wasn't deemed qualified to perform the work without supervision when the journey-level locksmith was on leave. The university failed to offer sufficient proof that the five-day violation was subject to an exemption for work performed for a "separate, independent corporation[]" operating dormitories, as it didn't offer a purchase order and financial records to establish payment by such an entity.

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**APPEARANCES:**

For the Employer: Hector Fernandez, Manager of Systemwide Labor Relations

California State University

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Long Beach, CA 90802

For the Union: Susan K. Garea, Attorney

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**PROCEDURAL BACKGROUND**

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators contained in their collective bargaining agreement (CBA). The matter was heard on August 3, 2021, on the Zoom videoconferencing platform.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants a remedy.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties concluded their presentation by written briefs. The briefs were received by the arbitrator on October 11, 2021, and the matter was submitted for decision.

**ISSUE**

The parties proposed different statements of the issue. The Union's statement of the issue is as follows:

Did CSUMB violate the CBA when it contracted out locksmith work to Smo-keys beginning in the summer of 2019? If so, what is the remedy?

The Employer's statement of the issue is as follows:

Did CSU Monterey Bay violate Provision 4.3 and /or Provision 4.4 when they contracted out backlogged work orders to Smo-Keys from July 24<sup>th</sup> to August 25<sup>th</sup>, 2019, while the one locksmith named Grievant was on leave? If so, what is the appropriate remedy?

The arbitrator formulates the issue as follows:

1. Did the Employer violate the CBA when it contracted out locksmith work to Smo-Key Key Service in July and August 2019?
2. If so, what is the appropriate remedy?

**COLLECTIVE BARGAINING AGREEMENT BETWEEN CALIFORNIA STATE UNIV. AND  
TEAMSTERS LOCAL 2010 — UNIT 6 SKILLED CRAFTS JANUARY 26, 2016 - JUNE 30,  
2020**

**Article 4 — Contracting Out**

4.1 Normal bargaining unit work may include the maintenance, repair, remodel, minor renovations and minor construction of University facilities, where the Union represents employees who do the work, and does not include Major Capitol [sic] Outlay Projects or work performed by or for separate, independent corporations or auxiliaries.

4.2 In addition to normal bargaining unit work, the following types of work may be assigned to bargaining unit employees:

- a. Charge-back work
- b. Work funded from the following sources:
  - Minor capital projects
  - Minor capital — deferred maintenance projects
  - Minor capital — renewal projects
  - Minor capital — energy savings projects, and
- c. And other projects approved by campus facilities manager.

4.3 The University shall have[\*2] the[\*2] 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 before contracting out the 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 normal Bargaining Unit 6 work at the Campus. Circumstances permitting, such notification shall be prior to the start of such contracted work.

**Article 9 — Grievance Procedure**

**Level I — Formal — Appropriate Administrator**

a. ...The grievant shall state clearly and concisely on a grievance form provided by the CSU:

4. The name and classification of the grievant(s). Where the identities of all grievants for whom a remedy is being sought is not known, and/or cannot be reasonably ascertained at the date of the initial filing, the union shall provide information to the CSU no later than the date of the Level III hearing sufficient to allow the CSU to identify, through further inquiry if necessary, the individual grievants for whom a remedy is being sought by name...

**CLASSIFICATION AND QUALIFICATION STANDARDS — Locksmith Series**

**OVERVIEW:**

Locksmiths as defined in this series are journey-level skilled trades workers responsible for the full range of skilled locksmith work including the installation, repair, remodel and maintenance of manual and automated locks, locking systems and security devices; low voltage computerized access control systems; and door openers, closers and hardware...

**LEAD LOCKSMITH:**

In addition to performing skilled locksmith work, the Lead Locksmith works under general supervision and is responsible for providing lead work direction to a small group of skilled Locksmiths, other skilled crafts workers and their assistants...Incumbents typically provide lead work direction to and work with a small group or crew performing locksmith or related work; plan, schedule and assign work; determine material, equipment and staffing needs for projects; monitor work in progress; inspect work to ensure it meets quality requirements and specifications; provide input on performance evaluations; may oversee a locksmith shop...

## **California State University, Monterey Bay Job Description: Facilities Worker II**

Under the general direction of the Physical Plant Manager and the direct supervision of the Facilities Maintenance Supervisor, the Facilities [\*3] Worker II independently [\*3] performs a wide range of more complex semi-skilled and basic skilled facilities and systems maintenance, repair, and renovation work...

Other Functions:... Works under the direction of a skilled crafts worker on the more complex, trade-related assignments.

### **FACTS**

**The University Employs One or More Journey-Level Locksmiths to Perform Locksmithing Duties on the CSUMB Campus:** Normal staffing for the campus is one lead locksmith and one locksmith. The lock shop services the entire campus. This includes student housing and dining services that are under the control of the "corporation," an entity separate and distinct from CSUMB. On occasion, a facilities worker has performed locksmithing duties on a temporary as-needed basis.

At the beginning of calendar year 2019, the campus had two journey level locksmiths — Ken Foster and Jeremy Horn.<sup>1</sup> From April 15 through May 20, 2019, Mr. Horn took a leave of absence for urgently needed surgery. A week after Mr. Horn returned from his leave, Mr. Foster resigned from CSUMB, on May 28.

From May 28 through mid-September, the locksmith shop had only one locksmith — Mr. Horn. On September 16, CSUMB hired a second journey-level locksmith, Ralph Ramirez. During the months when the locksmith shop had only one locksmith, Mr. Horn went out on a second leave of absence for follow-up surgery. He was off work from July 22 through August 19.

Mr. Horn's regular schedule was day shift, Monday through Friday. He was on the list for call back emergencies and overtime projects.

Diane Miller is the associate director of maintenance and operations at CSUMB. She testified that, when Mr. Horn went out on leave July 22, the Employer was given his projected return date as August 29, 2019. However, Mr. Horn returned ten days early.

Scott Morinini is a facilities worker II (FW II) at CSUMB. He began work in May 2006. Beginning in 2011, he received occasional assignments to the locksmith shop. He was "in and out for about three and a half to four years," he testified. Once, he was assigned to the lock shop for eight months. He received reassignment pay. He stated the following:

The workload, work orders, were piling up, and they just needed an extra hand to go in and help out...I re-pinned cylinders, cut keys, worked on door handles, crash bars, door closers...

Mr. Morinini testified that the longest duration he ever reported to the lock shop and worked there alone was "probably a week."

On August 6, 2019, Mr. Morinini wrote an email to Diane Miller. The email indicated his willingness to do lock shop work "If there is any re keys or cylinders that need to be re pinned and swapped out."

Mr. Morinini was not asked to perform any lock shop work during the time Smo-Keys was performing work on campus. He was on the list for overtime projects, but not for call back emergencies.<sup>2</sup>

**In May 2019, the Employer Notified the Union That It Intended to Contract Out Lock Shop Services Under Specified Circumstances:** Joe Nugent is Director of Facilities Services [\*4] and Operations at CSUMB.<sup>3</sup> He [\*4] wrote an email to Union representatives on the CSUMB campus on May 7, 2019. The email reads as follows:

All, please be advised that we will be contracting out various Lock shop services in order to provided [sic] adequate support to the University. The primary purpose of these contracts are to cover after hour calls and other issues during times when lock shop employees are out, or are unwilling to take cover [sic] the after hour calls. There may be some occasions where work will be done during regular working hours. We will also inform you of any specific special projects should that occur.

We have developed general service agreements with the following vendors:

Smo-Key Key Service; Marks Mobile Locks; A Better Lockout

Please feel free to contact me if you have any questions or concerns.

Joe

Olegario Fernandez is a metal worker at CSUMB and a shop steward for the Union. He was one of the recipients of the email from Mr. Nugent. After consulting with union members in the lock shop and with the Union's business agent, he responded to the email the following night, as follows in relevant part:

Joe, I'm sure that your intentions are good. However, [w]hat you have emailed us states that you have decided to contract out Unit 6 work without the proper considerations. Furthermore, I would like to hear what you consider "unwilling." Especially considering that after hours calls only became an issue after FSO management decided to eliminate the evening / weekend shift. From our last conversation considering contracting out the after hours and Emergency Locksmith work (Melanie Chavez<sup>4</sup> and Jeremy Horn were in attendance) I remembered we all agreed that you would go through the call back list if there was any instances where a Locksmith could not respond. As far was [sic] we know there has not been an issue with call back...I would like to schedule an informal grievance meeting [with] you...

Mr. Fernandez and other Union representatives met with Mr. Nugent and other CSUMB representatives on May 20, 2019. In a follow up email on May 21, Mr. Fernandez wrote the following:

After discussing the issue we came to the understanding that lock shop work will only be contracted if there is a life safety emergency. The example given by management was as follows:

When we are unable to secure / lock a building.

I would add:

Or if someone is locked in a room and cannot get out.

This will be contracted out only if they have tried calling the Unit 6 members on the call back list and they are unable to get ahold of a Unit 6 member.

Also, I asked about restricted keys (these keys are restricted to CSUMB Lockshop only) that were taken from the CSUMB lockshop and handed over to a contractor to be cut. Management responded that it needed to be done as soon as possible because of a change over at Promontory Apartments. The key blanks were given to Res Life and then Res Life staff member, then the key blanks to Aliance, and then Aliance either[\*5] cut them or contracted out as well. The issue could have been taken care of by [sic][\*5] Scott Morinini. As he was available and is capable of cutting keys.

In hopes to help with the understaffed lockshop, I suggested to management to consider using Scott Morinini for lockshop duties. In the past Scott has worked in the Lockshop and accomplished tasks such as hardware repair and / or replacement, rekeys, key cutting, cylinder replacement, locking mechanism adjustments, etc.

Please let me know if I missed anything or if there is something that you would like to add. Thank you!

Mr. Nugent responded to Mr. Fernandez' email on May 22, as follows:

Thank you for summarizing our discussion from 5-20-19 — my only comment is that we need to be flexible on how to structure call backs depending on the level of security and safety is addressed for each situation. So there may be occasions where the steps that you identified will be different depending on the situation and I think we

discussed this aspect of the process in our meeting. We also discussed the need to contract out the A-3 door access work as the project is nearing completion and will become more and more time sensitive.

**The Employer Contracted Out Locksmith Services Beginning on July 24, 2019 and Ending on August 25, 2019:** Representatives of the University and of the Corporation signed an agreement with Smo-Key Key Service on May 2, 2019. No evidence was presented that any additional locksmith contracts were executed at times relevant to this grievance.

The first locksmithing work performed by Smo-Keys was on July 24, 2019. The last day work was performed was August 25, 2019. The following chart is based on information contained in Smo-Keys invoices and employee time records.

| <b>Date</b>    | <b>Work performed</b>                  | <b>Hours Worked</b> | <b>Charge</b> | <b>Jeremy Horn Availability</b> |
|----------------|--|---------------------|---------------|---------------------------------|
| Wed. 7-24-19   | Campus work orders                     | 6                   | \$990         | Medical leave                   |
| Tues. 7-30-19  | Make keys, fix locks                   | 6                   | \$990         | Medical leave                   |
| Wed. 7-31-19   | Lubed hinges, made keys                | 3                   | \$495         | Medical leave                   |
| Fri. 8-9-19    | Key cutting                            | 8                   | \$1320        | Medical leave                   |
| Mon. 8-12-19   | Key cutting                            | 7                   | \$1155        | Medical leave                   |
| Tues. 8-13-19  | Key cutting                            | 6                   | \$990         | Medical leave                   |
| Wed. 8-15-19   | Key cutting                            | 5                   | \$825         | Medical leave                   |
| Tues. 8-20-19  | Dorm rooms                             | 8                   | \$1320        | Worked 8 hours                  |
| Wed. 8-21-19   | Dorms - locksets                       | 4                   | \$660         | Worked 8.5 hours                |
| Thurs. 8-22-19 | Dorms                                  | 5                   | \$825         | Worked 9 hours                  |
| Fri. 8-23-19   | Making keys, fixing locks Dorms        | 6                   | \$990         | Worked 8 hours                  |
| Sat. 8-24-19   | Made keys and repaired locks For dorms | 8                   | \$1320        | Worked 8 hours                  |
| Sun. 8-25-19   | Made keys and repaired locks for dorm  | 3                   | \$495         | Worked .5 hours                 |

Associate director Miller testified about the reasons that the University brought in Smo-Keys during this time frame:

We had some lengthy absences in the lock shop and one of our locksmiths had resigned, so we had a staffing challenge, and work was starting to pile up. And there

was no one available to do the work...We were down to one locksmith and he was out on leave for an extended period...The University advertised and interviewed[\*6] and eventually filled the vacancy...The new locksmith started on September 16<sup>th</sup>...We also offered overtime during that summer to the locksmith himself.

Ms. Miller[\*6] also testified to the issue of whether the Employer could have used facilities worker Morinini to perform locksmith work in the absence of Mr. Horn:

...some of the work was complicated repair of locks on doors. Some of it was cutting keys, unsupervised. It took a level of expertise that, to my knowledge and understanding of locksmithing, required someone who was a journeyman...

I'm aware that [Morinini] wanted to do that work, but beyond that, I don't know that he could have done it or should have done it. His classification was facilities worker II, and as such, he's required to be supervised. He's not supposed to work independently, and the lock shop was unmanned, so he wouldn't have been supervised in that capacity.

Scott was doing work that was related to fire life safety and keeping us...in compliance with state fire marshal codes. And it would not have been in the university's best interest to pull him off of that work...There had been a notation on an audit that some fire extinguishers hadn't been inspected in a timely manner.

On cross-examination, Ms. Miller conceded that inspecting fire extinguishers is normally done by Unit 5 employees, not Unit 6 employees as Mr. Morinini is. She also conceded that other CSUMB employees are capable of doing the fire extinguisher inspections.

Ms. Miller also spoke about the University's efforts to assign "corporation" work to Smo-Keys. The following exchange took place on direct examination:

Q: ...based on the date here of 8/21, was there a reason you decided to go ahead and contract this work out?

A: I think at this point...I realized that there was so much of a backlog that we had to divide and conquer. So I think this is around the time where we were saying, okay, everything on the corporation side should be given to Smo-Keys, and we should try to keep as much of the state-side work in the lock shop as possible.

Locksmith Horn testified that he was available to work overtime on August 20, the day he returned to work. He testified that he was also available to work overtime on August 21, 22 and 23. Mr. Horn testified that he was willing to work overtime on the weekend of August 24-25.

**The Union Filed a Grievance Alleging That the Contracting Out Violated the CBA:**

The Union's grievance form names Jeremy Horn under "NAME" on the form. The grievance was filed due to a sighting of Smo-Keys on the campus performing locksmith work on July 24, 2019. The grievance asks that the Employer discontinue the contracting out of Unit 6 work. It also asks for "Compensation in the amount equal to the time the contractor spent making these repairs."

The University denied the grievance at step one, noting that the Union had been notified properly and the Employer had made "an informed decision" to contract out work.

The Union's step two appeal included the following:

Scott Morinini, a unit 6 member with lock[\*7] shop experience, reached out to the University in an attempt to help out the University with the understaffed lock shop...The union[\*7] stewards also, in [sic] many occasions, have suggested allowing Scott Morinini to help in the lock shop as he had been used in CSUMB lock shop by the university in the past.

In the University's step two reply, they referenced the section of Article 4.1 that excludes work for independent corporations and noted that the parties had discussed this issue. "Work performed on building 30 was identified as most concerning, as it is not an independent corporation or auxiliary occupied building," the reply recounts.

In its step three reply, the University goes further on the issue of the corporation, as follows:

...many of the work orders performed would not fall under the scope of this grievance, as they were performed for Student Housing & Residential Life which is an auxiliary corporation.

The University also addressed the issue of whether facilities worker II Morinini should have been utilized to perform the locksmithing work in question. In its step three reply, it wrote the following:

The University took consideration for the request to have the FW II perform bargaining unit work in the Lock Shop. After a review of the bargaining unit work, it was determined the FW II did not have the required skills based on his knowledge of the locksmith theories. The University took into account the ability of the locksmith to supervise the FW II, but determined this would not be feasible for the work needing to be performed (which required more independent performance.)

It is that grievance that is now before the arbitrator.

### **UNION'S POSITION**

The Union asserts that locksmithing work is "normal bargaining unit work" and therefore the University was required to make "every reasonable effort" to perform the work in-house.

The Union rejects the argument that the work performed by the contractor was not covered under Article 4.3. "CSUMB did not provide any evidence that the parties have ever interpreted this language to mean that work already assigned to the lock shop can be subcontracted without consideration of the Article 4.3 factors," the Union writes in its brief. It was "CSUMB — not a separate corporation — that entered into a contract with Smo-key's," the Union adds.

Even if "the contract were read as CSUMB urges, then CSUMB failed to establish with any specificity which particular work fell into this category," the Union further asserts.

The Employer had other options other than contracting out, the Union contends. The "parties have negotiated provisions that allow them to deal with the situation of covering leave — CSUMB can utilize temporary reassignments and can hire temporary workers," the Union's brief states.

The Union contends that a "backlog of work orders" is not a factor that can be considered under Article 4.3. "CSUMB presented no evidence that any work done was subject[\*8] to any time constraints," the Union writes.

The Union argues that the University made the decision to contract out before it had all the necessary information to consider[\*8] all the applicable factors. The Union cites arbitration decisions involving these two parties by arbitrators Norman Brand and Walter Daugherty in support of its position. The Union also argues that the University further violated the contract by using Smo-Keys in July and August without providing more specific and timely notice to the Union.

The University's failure to use Scott Morinini showed that it did not make a reasonable effort to keep the work in-house. The "refusal to even gather the necessary information regarding Morinini alone demonstrates a contract violation," the Union argues in its brief. The Union contends that Morinini was fully capable of performing the work and he had done so in the past.

The Article 4.3 factors require the University to consider the cost of contracting out versus the cost of doing the work in-house. "CSUMB apparently did not consider cost at all and it is undisputed that it was significantly more costly to contract with Smo-Key's rather than keep the work in house even at an overtime rate," the Union asserts.

The Union asks that the arbitrator find that CSUMB violated the agreement. The Union asks that the arbitrator award Mr. Horn and Mr. Morinini, divided equally, the equivalent in overtime pay of all hours worked by the contractor Smo-Keys.

### **EMPLOYER'S POSITION**

The Employer contends that the Union should be barred from naming Scott Morinini as a grievant in this matter. To include Morinini would be a clear violation of the grievance procedure, Article 9.7 of the CBA. Jeremy Horn is the only named grievant in this matter, and therefore the only individual the arbitrator can consider in his decision. "Allowing the Union to



amend the scope of the grievance at arbitration harms the University, as the University presented its case in reliance of the grievance filings," the Employer argues in its closing brief.

The Union has not met its burden in this matter, the Employer asserts. The "evidence presented supports that the University made every reasonable effort to perform the work in-house. In making its decision to contract out the work, the University assessed the availability of bargaining unit employees and the skill and qualifications for all bargaining unit members," the Employer brief contends.

The University correctly decided not to use Scott Morinini due to his not being available and there being no one in the lock shop to properly supervise him.

The University rejects the idea that the Brand and Daugherty awards set precedent, characterizing them as being based not on comparable fact situations.

The University asserts that the work performed by Smo-Keys in the residential dorms does not fall under the definition of "normal bargaining unit work" and is exempt from the contracting out provisions. "The Union's assertion that[\*9] Grievant performing this work creates a precedent to make it normal bargaining unit work lacks any merit," the Employer writes.

The Employer contends that[\*9] the grievant Horn was not available to perform the work done by Smo-Keys when he returned from his leave because he was already working overtime those same days.

The University claims that the email and subsequent meetings with the Union in May 2019 constitute sufficient notice of intent to contract out under Article 4.4.

The Employer concludes that there "is no evidence to show the CSU violated Provisions 4.3 or 4.4 of the Collective Bargaining Agreement. Therefore, the University respectfully requests that this grievance and remedies requested be denied."

## **DISCUSSION**

**The Union Cured the Initial Failure to Name Both Grievants at the First Step in Accordance with the CBA Grievance Procedure:** The Employer claims that it could not adequately prepare for the Union's argument that facilities worker Morinini should have been assigned the locksmith work in question. It bases that claim on the fact that Mr. Morinini was not named as a grievant on the grievance form.

Under the language in the CBA grievance procedure, the Union should have named Mr. Morinini as a grievant. Doing so would have more clearly communicated the Union's intentions to the University. But this failure to list Mr. Morinini as a grievant was corrected by his inclusion in the body of the grievance narrative. It is abundantly clear from the written grievance that the Union considered Mr. Morinini as a unit member who could have performed the contracted work.

Moreover, the University put forward a robust defense of its decision not to utilize Mr. Morinini. Beginning with its step three reply, and continuing into the arbitration hearing, the Employer countered the Union's assertion about Mr. Morinini. The Union's failure to list Mr. Morinini as a grievant did not in any way disadvantage the Employer in this matter. The Union's claim that Mr. Morinini should have been utilized is thereby fully examined and weighed in this decision.

**The Employer Properly Notified the Union of its Intent to Contract Out Locksmith Services:** The Union claimed that the University did not properly notify the Union of its intention to contract out work, in contravention of Article 4.4. This claim does not withstand scrutiny. Director Nugent's email of May 7 and the subsequent follow-up meetings with the Union constitute adequate notice and compliance with the process.

The notice was specific as to the circumstances under which the outside contractor would be utilized. The notice served its purpose by beginning a discussion between the parties about the Employer's proposal to contract out and the Union's proposal of alternatives to contracting out.

The Union takes exception to the fact that the Employer did not give a second notice in July when it began using the contractor Smo-Keys. The precipitating event in the decision to utilize[\*10] Smo-Keys was the medical leave of locksmith Horn. This eventuality had been covered in the original notice in the phrase "when lock shop employees are out."[\*10] The Employer did not need to give a second notice and did not violate Article 4.4 in this instance.

**The Employer Asserted but Did Not Show Through a Preponderance of the Evidence that the Contracted Work Was Exempt Under Article 4.1:** The CBA includes an exemption from the contracting out restrictions for "work performed by or for separate, independent corporations or auxiliaries." Testimony in the hearing was that some of the work performed by Smo-Keys was at the dorms or residential halls, purportedly under the jurisdiction of the corporation. Smo-Keys invoices had hand-written entries such as "dorms" that were put forward by the Employer as proof that this was exempt work.

The burden of persuasion in a non-disciplinary contract violation grievance initially rests on the Union. However, that burden shifts to the Employer in the case of a specific exclusion from general contract language. Article 4.1 carves out a narrow exemption from the general contracting out of Unit 6 work. The burden is entirely on the Employer to prove through documentation and testimony that the exemption applies.

In the instant case, the documentation of the "corporation" assertion was inadequate. The undersigned arbitrator might have been persuaded by purchase order and financial records sufficient to show that the work was performed for and paid by the corporation. Lacking that documentation, the undersigned arbitrator rejects the Employer's argument that the work performed by Smo-Keys in July and August 2019 was exempt from the provisions of Article 4.2 and 4.3.

**If Bargaining Unit Members are Not "Available" Then the Remaining Factors in Article 4.3 Do Not Need to Be Considered:** The Employer, in this instance, was not claiming that the bargaining unit members lacked the requisite skills to perform the work (except in the limited case of Mr. Morinini as analyzed in the next section.) The Employer was not asserting that contracting out the work saved the Employer money. Since that cost assertion was not made, this arbitration decision does not need to evaluate the Union's argument that unit members could have performed the work in a more cost-effective manner.

The Employer was consistent from the first email in May through the cessation of Smo-Keys work in August that the only reason for the contract was the availability of qualified bargaining unit members to perform the work.

Whether the Employer violated the CBA hinges on the requirement that it "shall make every reasonable effort to perform normal Bargaining Unit work in-house." In the instant case, that "reasonableness" is judged solely on whether qualified unit members were available to perform the work that was done by the contractor.

The Union made an additional argument in this matter that the work performed by Smo-Keys[\*11] could have been performed on an earlier date, or perhaps a later date, by bargaining unit members. The burden was on the Union to show that the specific jobs performed[\*11] by the contractor were available for servicing prior to Mr. Horn taking his leave of absence or after his return. The Union did not meet that burden.

**The Employer Was Not Required to Offer Locksmith Work to the Facilities Worker II in the Absence of the Lead Locksmith:** The Union makes a strong and detailed argument that the contracted-out locksmith work should have been assigned to facilities worker II Morinini. This presentation included testimony from Mr. Morinini about locksmith work he had performed in the past for CSUMB.

The preponderance of the evidence, however, is that the Employer did not violate the agreement by failing to select Mr. Morinini for the work. Management's argument that it had assigned Mr. Morinini to time-sensitive fire extinguisher work at that time has merit. Mr. Morinini's position of facilities worker II is a generalist position, not a journey-level craft position. He can be appropriately assigned a wide range of facilities maintenance work. The Union argued, but did not adequately make the case, that the fire extinguisher work was not properly assigned to Mr. Morinini.

The most persuasive and well-supported argument made by the Employer about Mr. Morinini was that of supervision. The phrase "Works under the direction of a skilled crafts worker on the more complex, trade-related assignments" in the FW II job description gives guidance on this issue. Mr. Morinini's own testimony was that, of the many months he worked as a locksmith in years past, only one week of that period did he work alone unsupervised in the lock shop.

The work performed by Smo-Keys began when locksmith Horn was on leave. Mr. Morinini would have been the only Unit 6 member arguably qualified and available during Mr. Horn's absence from July 24 through August 15 to do the work that was contracted to Smo-Keys. The undersigned arbitrator, in this instance, defers to the reasonable judgment of the University that Mr. Morinini was not qualified to perform the contracted work, working on his own, on those dates.

**The Employer Should Have Offered Additional Overtime Opportunities to Grievant Horn After He Returned from His Medical Leave:** The Employer's case in this matter rests entirely on the issue of availability of unit members. To the extent that the record shows that a qualified unit member was available to perform some of the work that Smo-Keys performed, the contract has been violated.

Given the above finding that the Employer was not required to utilize FW II Morinini in the absence of the chief locksmith Horn, no violation of the CBA occurred during the period July 24 - August 15, 2019, when Mr. Horn was on leave and the Employer used Smo-Keys for locksmith work.

This leaves a six-day period, from August 20 through August 25, for consideration for a possible[\*12] contract violation. The Employer introduced a document, not objected to by the Union, that summarizes the hours worked by Mr. Horn during the relevant period. That document is [\*12] in part, the basis for the chart created by the arbitrator above.

In combination with Mr. Horn's testimony, this time worked chart leads the undersigned to the conclusion that Mr. Horn was available to perform some of the work performed by Smo-Keys during this six-day period.

Mr. Horn did not testify specifically about how many additional hours work he could have performed on these dates. The arbitrator will make the conservatively safe assumption that Mr. Horn could have worked ten hours on a regular workday and eight hours on a weekend day. The arbitrator also limits the additional hours Mr. Horn could have worked to the hours reported by Smo-Keys on its daily invoices. Based on those assumptions, the following additional hours could have been worked by Mr. Horn:

|                            |                    |
|----------------------------|--------------------|
| Tuesday, August 20, 2019   | 2 hours overtime   |
| Wednesday, August 21, 2019 | 1.5 hours overtime |
| Thursday, August 22, 2019  | 1 hour overtime    |
| Friday, August 23, 2019    | 2 hours overtime   |
| Sunday, August 25, 2019    | 2.5 hours overtime |

A final consideration here is whether, after Mr. Horn's return on August 20, Mr. Morinini could have performed locksmith work under Mr. Horn's supervision. Two factors weigh against including Mr. Morinini in the remedy. One, the Union did not successfully rebut management's contention that Mr. Morinini was needed on the fire extinguisher project. And two, the record did not include specific time records for Mr. Morinini and testimony from him about his availability for overtime on the dates in question. Absent these facts, he is not considered for inclusion in the remedy order.

#### **AWARD**

1. The Employer violated the CBA when it contracted out locksmith work to Smo-Key Key Service in August 2019.
2. The date of the violation begins August 20, 2019 and ends August 25, 2019.
3. The Employer shall pay Jeremy Horn a total of nine hours overtime at the applicable rate of pay for the days specified on the previous page of this decision.
4. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator  
Date: November 1, 2021

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<sup>fn</sup> 1 Mr. Foster did not testify at the hearing.

<sup>fn</sup> 2 Mr. Morinini's actual work hours during the relevant period, including overtime worked, were not in evidence.

fn 3 Mr. Nugent did not testify at the hearing.

fn 4 Ms. Chavez is Associate Director of Employee and Labor Relations at CSUMB. She did not testify at the hearing.

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