In The Matter Of
The Arbitration Between:

UNITE HERE, Local 26
And
Harvard University

AAA Case No. 01-24-0007-1638
Griev. Concerning Compensation of Temporary Staffing Agency Employees
Date of Award: July 14, 2025

Preliminary Statement

Arbitration hearings involving the above-captioned matter were held in Cambridge, Massachusetts on February 24 and May 6, 2025. Representing the Union at such hearings was Michael T. Anderson, Esq., and representing the Employer was Peter J. Moser, Esq.. No stenographic notes of the hearing were taken. Both parties filed post-hearing briefs which were received by the undersigned on June 20, 2025.

Issues

The parties agreed to submit the following issues for decision; they are: "Does Art. 16.11 require the University to ensure that temporary staffing agency employees utilized by Harvard University Dining Services to perform bargaining unit work are compensated comparable to the University's in-house, unionized employees? If yes to Issue No. 1, did the University violate Article 16.11 as alleged in the Grievance and, if so, what shall the remedy be?"

Background

Harvard maintains on campus residential dining halls, cafes, and food retail services under the moniker of Harvard University Dining Services (hereinafter sometimes referred to as HUDS). HUDS is Harvard's exclusive provider for residential dining services but not the exclusive provider for on-campus catering and retail services.

HUDS employs more than 500 employees for its food services programs, and those employees are represented by Local 26, HEREIU.

In 2002 Harvard adopted a Wage & Benefits Parity Policy which requires independent contractors to insure that the employees of independent, outside contractors working on Harvard's campus receive total compensation equal to that of Harvard's in-house, unionized employees performing the same or similar work. In 2002 the Parity Policy applied to all contracts of $50,000 or more for a term of 9 months or longer, and in 2024 the threshold was increased to $89,187 or more.

Harvard, however, has not in the past required a temporary staffing agency to comply with its Parity Policy. A temporary staffing agency is an agency through which Harvard can, as a last resort, supplement its own workforce by filling temporarily open positions that bargaining unit members have declined to fill with temporary employees from a temporary staffing agency; Harvard and not the staffing agency retains control over the work and conduct of the temporary employee filling the temporarily open position which is unlike an independent contractor relationship where the independent contractor retains control over the work and conduct of its employees. When HUDS needs a temporary employee, it submits a request to one of several temporary staffing agencies with whom HUDS maintains a service level agreement covering such matters as payment for the services of temporary employees, their level of training, their clothing standards, and background checks.

From 2011 when Art. 16.11 came into the contract in its present form through the present time Harvard has never applied Art. 16.11 to temporary staffing agencies (it applied Art. 16.11 only to employees of independent contractors), and until April 2024 Local 26 never raised a claim that Art. 16.11 should be applied to employees of temporary staffing agencies. On April 23, 2024 the Union filed a grievance asserting that Art. 16.11 did apply to employees of temporary staffing agencies. That grievance is now the subject of this arbitration, and the Union now claims that temporary employees should be paid total compensation comparable to that of HUDS employees.

Position of the Parties

Position of the Union

The Union contends that the grievance is meritorious for the reasons that follow.

The Union argues that the plain language of Art. 16.11, namely, "performance of any work of a type customarily performed by employees covered by this Agreement by means of a contract, subcontract, lease, concession, rental agreement, or other agreement" applies to the Employer's use of temporary staffing agencies and requires contractors, such as temporary staffing agencies, to pay wages comparable to the Union standard even though those agencies and their temporary employees may be non-Union.

The Union next argues that the reason that it has not grieved in the past the use of temporary employees by Harvard in violation of the provisions of Art. 16.11 is that it had no basis to do so until recently since it was unaware that the use of temporary employee agencies had reached the 9 month, $50,000 per year minimum (now $89,187 for 9 months) threshold for Art. 16.11 coverage. The Union says that it only became aware of this fact recently after Harvard fulfilled the Union's information request which demonstrated that Harvard is currently contracting with at least 7 temporary staffing agencies at 2 to 10 times the threshold minimum.

The Union further contends that its right to bring this grievance is not precluded by Art. 6.5 which speaks to a dialer system offering vacant shifts to bargaining unit members before Harvard may utilize temporary employees. The Union says that Art. 6.5 explicitly preserves the Union's right to grieve if temporary employee usage is not reduced by the dialer system.

The Union contends that Harvard's current proposed interpretation of Art. 16.11 would mean even less protection for Union members by an outside contractor taking over the delivery of certain University services than would have existed under a proposal previously made in bargaining by Harvard and rejected by the Union. The Union says that

the Employer should not be granted an outcome it proposed at the bargaining table but failed to win.

The Union argues that Harvard's reading of Art. 16.11 would fail to deter the large scale use of lower-paid contract employees working alongside bargaining unit members and would, therefore, tend to defeat the purpose of the wage parity mandate in the collective bargaining agreement. The Union says that loss of members in the bargaining unit together with a recent hiring freeze imposed by Harvard will defeat the purpose of the wage parity mandate if Harvard's interpretation of Art. 16.11 prevails. The Union says that the dialer system set forth in Art. 6.5 does not solve the problem since the dialer system does not require Harvard to find new hires to fill vacancies nor maintain a minimum number of its own employees within the bargaining unit.

The Union contends that wage parity for temporary employees is consistent with growing industry regulation and with what the collective bargaining agreement requires. The Union says that establishing a separate benefit plan for temps should not be an issue since such benefit plans already exist or can be reduced to an equivalent cash amount.

The Union argues that the terms "contracting out" and "outsourcing" are not terms of art that exclude temporary staffing inasmuch as staffing agencies which supply temps to work side-by-side with bargaining unit employees are commonly referred to as subcontractors who perform outsourced or contracted out work. The Union argues that this nomenclature is garnering broad recognition in industry, in arbitral and judicial case law, and in academic literature.

The Union contends that Harvard does not enjoy the unilateral discretion to define its obligations under the Wage & Benefit Parity Policy it promulgated many years ago inasmuch as that Policy is now incorporated into Art. 16.11(a) of the contract. The Union says that once a document is incorporated into the collective bargaining agreement, it defines the rights and obligations of the parties.

In sum, the Union asks that the grievance be granted, and for remedy the Union asks that Harvard be ordered to cease and desist from

contracting with any temporary staffing agency for contracts in excess of the threshold in the Wage and Benefits Parity Policy without complying with the wage parity provisions of Art. 16.11, and that an appropriate amount of back pay from the period following April 23, 2024 be distributed pro rata among the members of the bargaining unit.

Position of the Employer

The Employer contends that the grievance is without merit for the reasons that follow.

The Employer says that it has from time to time over a long period of time utilized temporary workers obtained from independent staffing agencies as temporary replacements for its own dining services workforce members when a dining position cannot be filled internally. The Employer says that Art. 6.5 of the collective bargaining agreement ensures that before an outside temporary worker is called to staff an open position, the open position must first be offered to the Employer's in-house bargaining unit employees, and then if the position remains unfilled, the Employer may fill the position using an outside temporary worker. The Employer says that this methodology is designed to limit bargaining unit erosion and downward wage pressure on bargaining unit employees. The Employer says that over the years the bargaining unit has continued to increase in numbers as have wages as well.

The Employer says that the foregoing circumstance is to be distinguished from a situation where the Employer contracts out an entire dining service to an independent, managed services provider which utilizes its own workforce to deliver dining services. The Employer says that in 2011 Art. 16.11 was negotiated which has to date been applied only to scenarios where the Employer contracts out an entire dining service to an outside, managed services contractor; in such circumstances the outside, managed services contractor uses its own workforce and makes all operational and staffing decisions for the service it is providing. The Employer says that Art. 16.11 and Harvard's Parity Policy require that the outside contractor provide

its onsite employees with total compensation comparable to that received by HUDS bargaining unit employees who perform the same work; the Employer says that Art. 16.11 has never in the past been applied in cases where temporary staffing agencies have been utilized to fill vacancies on a shift after such vacancies have been offered to and declined by HUDS (bargaining unit) employees. The Employer says that in the 20 plus years of application of Harvard's Parity Policy and the 12 plus years of the existence of Art. 16.11, HUDS use of temporary employees from temporary staffing agencies has never been considered an outsourcing or contracting out event.

The Employer argues that the language of Art. 16.11 is clear and plain on its face and applies to situations which involve the outsourcing of an entire function but not to a circumstance involving the utilization of temporary employees filling holes in a bargaining unit work schedule. The Employer says that outsourcing or contracting out refers to the practice of engaging an outside third party to perform the entirety of a function that the Employer does not want to handle internally and which is usually peripheral to the Employer's core business. The Employer says that managed services is the term the parties use to refer to the foregoing. The Employer says that managed services (outsourcing) must be undertaken in accordance with the Employer's Parity Policy wherein employees from a managed services entity must receive total compensation comparable to that of Harvard's in-house, unionized employees performing the same type of work.

Contrastingly, the Employer says that temporary work is work generally performed by employees from temporary staffing agencies which agencies supply temporary employees to perform temporary work, such as filling holes in a work schedule.

The Employer argues that the Union's interpretation of Art. 16.11 would bring the language of Art. 16.11 into conflict with the language of Art. 6.5(6) and render certain contractual language superfluous. The Employer says, for example, that HUDS could not fill open shifts on short notice if it were required to run the dialer and/or provide 30 days' notice of shift openings inasmuch as shift positions

typically open on short notice after incumbent HUDS employees decline to fill the position, namely, the hole in the schedule.

The Employer says that the undisputed bargaining history and past practice surrounding the operation of Art. 16.11 and Art. 6.5 of the collective bargaining agreement, both of which were negotiated in 2011, confirm that Art. 16.11 was never intended to address temporary employees provided by temporary staffing agencies. The Employer says that both bargaining history and past practice should be consulted in the event that any ambiguity in contractual language is found. With regard to bargaining history the Employer says that the Union never raised the idea nor the suggestion that Art. 16.11 would apply to temporary staffing agencies, and it is the case that Harvard has been using temporary staffing agencies for a very long time.

The Employer says that prior to the present grievance filed in 2024, the Union has never suggested from 2011 to 2024 that temporary staffing was subject to the provisions of Art. 16.11 of the contract nor has the Union filed a grievance to that effect even though the Union had filed multiple grievances relating to other issues involving temporary staffing. The Employer argues that the Union is now attempting to alter the meaning of Art. 16.11 through creative advocacy in this case rather than through the channel of contract negotiations. The Employer cites the Grossman Award which, it says, was another attempt by the Union to alter the contract through creative advocacy.

The Employer says that the Union conceded during the arbitration hearing that any remedy in the present case could only run against the Employer and not a temporary staffing agency, and that, therefore, no back pay obligation could be assessed against the Employer.

In sum, the Employer asks that the grievance be denied.

Relevant Contractual Provisions

Art. 6.5 (6) provides:

"Use of Temporary Workers: All additional hours and overtime hours will be offered to bargaining unit members as provided above

prior to such hours being assigned to temporary employees, except in circumstances for which exhausting the above process as a practical matter cannot result in finding enough bargaining unit members or a bargaining unit member available to perform the work by the time that the work must be performed to meet operational needs. In such circumstances, the above process will be used until such time as it is deemed necessary to assign a temporary employee. Examples of such instances include but are not limited to:

"*Unplanned additional hours necessitated by a sick leave request made less than two (2) hours prior to the start of a shift;

"*Unplanned additional hours necessitated by the failure of a member to show for an assignment;

"*Additional hours necessitated by events requiring higher than normal staffing levels; and

"*Unplanned additional hours necessitated by unanticipated vacancies during the beginning of the academic year."

"It is the intention of the parties to reduce the use of temporary employees by means of the above process. In the event that temporary use is not reduced, the parties will discuss the issue in the Joint Best Practices Committee (without affecting either party's rights under the grievance article)."

Art. 16.11 provides in pertinent part:

"CONTRACTING OUT: The University and the Union are mutually committed to preserving work opportunities and the living standards for bargaining unit employees, and therefore agree that the University may arrange for the performance of any work of a type customarily performed by employees covered by this Agreement ('bargaining unit work') by means of a contract, subcontract, lease, concession, rental agreement, or other agreement (severally or collectively referred hereafter as a 'subcontract') subject to the conditions set forth in this section and the University's Wage and Benefits Parity Policy ("The Policy").

"(a) In keeping with the Policy, Harvard shall require any subcontract to provide that the subcontractor agrees to pay its employees total compensation comparable to that received by Harvard's in-house unionized employees who perform the same work.

…

"(c) Any subcontract shall provide that the subcontractor shall supply to the University at least thirty (30) days before performance of the subcontract is scheduled to commence, and thereafter, at least thirty (30) days before the planned effective date of any change, written descriptions (employee benefit plan descriptions, if applicable) of all non-wage benefits of employment and the rates of premiums or contributions to employee benefit plans. The University shall in turn supply each item of this information to the union on or about five (5) business days after receiving it from the subcontractor."

Analysis

This case presents the question of whether Art. 16.11 requires Harvard to ensure that temporary staffing agency employees utilized by Harvard to perform bargaining unit work are compensated comparable to Harvard's in-house, unionized employees.

Temporary staffing agency employees, as referenced in this proceeding, are temporary employees provided by a temporary staffing agency to fill holes in a bargaining unit work schedule at Harvard which cannot otherwise be filled by bargaining unit members. Bargaining unit members at Harvard are canvassed first per Art. 6.5(6) in accordance with what is colloquially called "a dialer system" to fill a temporary opening in a work schedule due to the unanticipated absence or unavailability of another bargaining unit member due to illness or other reasons. If the temporary opening cannot be filled internally, then Harvard, as a last resort, is entitled to fill the temporary opening by utilizing temporary help provided by an outside temporary staffing agency with whom Harvard maintains what is called a service level agreement. Such agreement covers matters such as payment for the services of temporary employees, their level of training, their clothing standards, and background checks. Harvard and not the temporary staffing agency retains control over the work and conduct of the temporary employee filling the temporarily open position; this is in contrast to an independent contractor relationship at Harvard where the independent contractor providing on-campus services retains control over the work and conduct of its own employees.

The inquiry here is whether Harvard is obligated to require a temporary staffing agency to pay its (the agency's) employees "total compensation comparable to that received by Harvard's in-house unionized employees who perform the same work". In short, did Harvard and Local 26, HEREIU intend that Art. 16.11 be applied in the circumstance of a temporary staffing agency supplying temporary employees to Harvard under a service level agreement wherein holes in the bargaining unit schedule remaining unfilled after an internal canvassing procedure has been conducted are filled?

While the Union does an excellent job of reviewing terminology in the abstract and the developing law around the use of temporary employees in circumstances similar to those presented by this case, this case must in the final analysis be governed by what the two contracting parties here, Harvard and Local 26, intended by their contractual language and their application of it over time.

The language of Art. 16.11, first introduced into the contract in 2011, is not so indisputably clear and plain on its face that this dispute can be resolved by reference to the language of Art. 16.11 alone.

Did the parties intend for a temporary staffing level agency to fall within the ambit of "subcontractor" as that term is used in Art. 16.11? While the parties had rather extensive discussions about subcontracting under Art. 16.11, the undisputed evidence is that at no time did the parties speak of a temporary staffing agency being subject or not subject to the provisions of Art. 16.11; the parties were silent on this topic during their 2011 bargaining. However, the parties did in Art. 16.11(c) provide that at least 30 days prior to the performance of work under a subcontract and 30 days before certain changes to a subcontract, Harvard must pass certain information on to the Union within five business days after receiving such information from the subcontractor. There was no evidence that in the case of temporary staffing agencies Harvard ever followed this requirement or that the Union ever objected about non-performance of this notification requirement by Harvard over the course of some 13 years. This would suggest that both parties viewed Art. 16.11 as non-applicable to temporary staffing agencies given the absence of discussion in the 2011 bargaining about the applicability of sec. 16.11 to temporary staffing agencies and given the absence of any grievances relating to non-performance by Harvard under Art. 16.11(c) for some 13 succeeding years following the 2011 bargaining. Those 13 years included two subsequent rounds of collective bargaining involving contract renewal in 2016 and 2021.

The Union responds that the provisions of Art. 16.11 do not become applicable until the subcontract with a temporary staffing

agency reaches the level of $50,000 or more[1] over a term of 9 months or longer as per Harvard's Wage and Benefits Parity Policy referenced in Art. 16.11(a), and that the Union first became aware that the referenced threshold in the Parity Policy was exceeded in 2024. The fact that the Union never received any information nor sought to receive any information about service level agreements over the course of some 13 years including two rounds of collective bargaining for successor contracts suggests that the Union was also likely under the belief that Art. 16.11 did not apply to service level agreements.[2]

Finally I would like to point out that the parties addressed temporary labor in Art. 6.5(6) of the collective bargaining agreement, and that there is no reference in Art. 6.5(6) to temporary staffing being compensated at a level comparable to Harvard's in-house, unionized employees.

The Union has expressed a present concern about the attrition of bargaining unit employees and the increase of temporary employees under circumstances where it may be in the Employer's interest to replace more expensive union labor with less expensive, outside temporary labor. The evidence revealed that this did not occur during the 13 years from 2011 to 2024 inasmuch as the Harvard University Dining Services (HUDS) workforce grew from 469 to 546, and that some growth occurred even after discounting the addition of employees from the Harvard Law School contract into the bargaining unit. Along with workforce growth there was some wage growth as well.

The Union, however, may now have a legitimate concern about the replacement of bargaining unit members with cheaper temporary labor given the recent introduction of a hiring freeze[3] at Harvard due to very unfortunate externalities and the slow attrition of Union members from the bargaining unit. I do note that the current collective bargaining agreement expires in less than a year's time, and that this

[1] In 2024 the threshold of $50,000 or more over a term of 9 months or longer in the Wage & Benefits Parity Policy increased to $89,187 or more over a term of 9 months or longer.

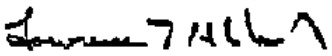
[2] The Union argues based on the sequence of proposals made during the 2011 bargaining that the interpretation that Harvard places on Art. 16.11 is unlikely. While this contention must be considered, it does not overcome the weight of other considerations detailed in this opinion.

[3] The hiring freeze did not apply to the hiring of temporary labor.

issue is best addressed by the parties in collective bargaining and not by me in this grievance arbitration proceeding. I am obliged to interpret the collective bargaining agreement based on present contractual language as defined by bargaining history and past practice.[4] Simply stated, the bargaining history and past practice do not favor the Union's interpretation of Art. 16.11 in this case.

Therefore, after having considered the evidence and arguments of the parties, I award as follows:

Art. 16.11 does not require the University to ensure that temporary staffing agency employees utilized by Harvard University Dining Services to perform bargaining unit work are compensated comparable to the University's in-house, unionized employees. The grievance is denied.



Lawrence T. Holden, Jr.
Arbitrator

[4] Other arguments made by the parties have been considered, but I do not find that they merit discussion in this decision.