

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

CITY OF SOUTH MILWAUKEE

and

MILWAUKEE DISTRICT COUNCIL 48,  
AFSCME, AFL-CIO and its affiliated  
LOCAL 883

Case 64  
No. 43694  
MA-6047

Appearances:

Mr. Joseph G. Murphy, City Attorney, on behalf of the City.  
Podell, Ugent and Cross, S.C., by Ms. Monica M. Murphy, on behalf of the union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the City and the Union, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. Hearing was held on April 19, 1990 in South Milwaukee, Wisconsin. No stenographic transcript was made. The parties completed their briefing schedule on May 9, 1990. Based on the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue at hearing.

The Union proposed the following:

Did the City violate the past practice of the parties when it failed to assign the senior mechanic to voting machine duties?

The City framed the issue as follows:

Did the City violate the collective bargaining agreement by the exercise of statutory authority vested in the City Clerk when she selected Joe Dahlman, Hilary Chybowski and Joe Medek to perform functions required by Sec. 5.83 and 7.25, Stats.?

The undersigned accordingly frames the issue as follows:

Did the City violate the collective bargaining agreement and/or past practice when it failed to assign the senior mechanic to voting machine duties? If so, what is the appropriate remedy?

RELEVANT STATUTORY PROVISIONS 1/

5.83 Preparation for use of voting devices; comparison of ballots. Where voting devices are used at a polling place, the municipal clerk shall cause the voting devices to be put in order, set, adjusted and made ready for voting when delivered to the polling place. Before the opening of the polls the inspectors shall compare the ballots used in the voting devices with the sample ballots furnished and see that the names, numbers and letters thereon agree and shall certify thereto on forms provided by the board.

...

7.25 Voting machine officials' duties. (1) The municipal clerk of each municipality in which voting machines are used is responsible for the proper ballot being placed on each machine, the sample ballots, setting, adjusting, and putting the machine in order to use in voting when delivered to the ward. For the purpose of labelling, setting, adjusting and putting the voting machines in order, one or more competent voting machine custodians may be employed.

(2) Under the direction of the municipal clerk, the custodian shall label or insert, set, adjust, put in order and deliver the machines with all necessary furniture and appliances to the rooms where the election will be held for each ward at least one hour before the time set for opening the polls on election day.

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1/ Although Article XXXI of the parties' collective bargaining agreement could conceivably be applicable, both parties in their briefs make it clear that there are no relevant contract provisions. The City expressly argues that Article XXXI does not limit the City Clerk's authority in this respect.

(3) In preparing a voting machine for an election according to the directions furnished, the custodian shall arrange the machine and ballot so both will meet all the requirements for voting and counting the election in the manner provided for in machine construction.

(4) When a voting machine is properly prepared before an election and delivered to the election ward, it shall be locked and sealed against any movement and the governing body or board of election commissioners shall provide proper protection to prevent tampering with the machines. The custodians preparing the machines shall deliver the keys for the machines to the municipal clerk or executive director of the board of election commissioners together with a written report of each machine's condition.

(5) Before an election each election official serving at a polling place where voting machines are used shall be instructed in their use and their duties in connection with them by the municipal clerk, who shall call as many meetings to give instructions to the election officials as are necessary. Officials and trainees may be compensated for attendance. Any person who does not understand the machines shall not be paid nor be allowed to serve.

(6) (a) Where voting machines are used, the election officials for each ward shall meet at their proper polling place at least 15 minutes before the time set for opening of the polls to arrange the voting machines and furniture to properly conduct the election.

(b) Before opening the polls, they shall compare the ballots on the machines with the sample ballots furnished by the municipal clerk to ensure that the names, numbers and letters thereon agree; examine the seal on each machine to see that it has not been broken; and examine the counter on each machine to see that each registers 000. If any counter on any machine does not register 000, the counter number and the number showing on the counter shall be recorded, signed by all the election officials and a copy shall be conspicuously posted by the inspectors at the polling place during polling hours.

(c) After the inspection under par. (b), on the blanks

furnished, they shall certify the condition of each voting machine and its counters. Each form shall be signed by each election official. After the election, one copy of each machine's certification shall be delivered with each copy of the election returns.

. . .

## FACTS

Record evidence indicates that for at least the last seventeen years, bargaining unit employes have performed voting machine set-up and take-down duties under the direction of the City Clerk, who selected the employes to perform these duties. Within the past seventeen plus years, the senior mechanic and a utility man have performed the work with a single exception. When Ray Styszynski, a senior mechanic, who normally performed the work was absent, on one occasion from February 8 to February 20, 1980, Thomas Novak, a mechanic's helper, performed the duties. Novak grieved his receipt of lesser pay at that time and the City agreed to pay him at the senior mechanic's rate of pay. Novak's performance was a temporary transfer. Upon Styszynski's retirement, the City Clerk assigned George Stepien, another senior mechanic, to perform those duties in October of 1980 along with the utility man, Hilary Chybowski. Stepien performed these duties for approximately nine years prior to his retirement.

Prior to the last election that Stepien was scheduled to work, the grievant, Michael Landgraf, contacted the City Clerk to express his interest in assuming Stepien's duties. Landgraf, who became a senior mechanic upon Stepien's retirement, wanted the work to get out of the garage, broaden his knowledge of voting machines and to receive 12 hours of call-in pay.

The City Clerk did not respond to Landgraf's query and upon Stepien's retirement, she selected two other bargaining unit employes to accompany Chybowski, Joe Dahlman, a laborer, and Joe Medek, a custodian. In April of 1990, she also assigned Dale Helminak, a driver, to work with the other three employes.

Landgraf grieved the City Clerk's decision.

## POSITION OF THE PARTIES

### Union

The Union argues that it has been the practice over the past 17 years to assign the senior mechanic along with the utility man to voting machine duties, performance of which results in 12 hours of extra pay. Past practice, the Union stresses, supports the position that these duties should go to the senior mechanic.

Although these duties are not mentioned in the senior mechanic's job description or the contract, they are a recognized part of the senior mechanic's job. According to the Union, the City has acknowledged as much when it agreed to pay Novak the senior mechanic's rate of pay in the 1980 grievance.

The Union submits that the assigning of voting machine duties to the senior mechanic meets all of the criteria for a past practice to be controlling. The Union contends that by virtue of its long-standing term, its bilateral recognition, and its consistency in application, the past practice of assigning voting machine work to the senior mechanic has become binding.

Noting that nothing in the statutes prohibits the City Clerk from utilizing the senior mechanic to perform said duties, the Union disputes the City's argument that the City Clerk is somehow independent and need not comply with past practice. The Union also points out that there is no contention that Landgraf is incapable of performing the duties. The Union requests that Landgraf be made whole and that the grievance be sustained.

#### City

The City disputes the existence of any binding past practice by which the City Clerk is obligated to select senior mechanics for voting machine duties. It claims that other individuals have also been selected to assist.

It also points out that there is no contract language which limits or restricts the City Clerk's decision as to whom to select for said duties. It stresses the City Clerk's vested authority pursuant to Sec. 5.83 and 7.25,, Stats.

The City notes that the purported conflict between the statutes conferring upon the City Clerk the right to select her assistants and the alleged past practice of requiring one of the assistants to be a senior mechanic exists only if the previous appointment of two senior mechanics is raised to the level of an implied contract term. According to the City, no harmonizing is required in this case between contract and statute because no express provision exists in the contract nor should one be construed from previous selections of the City Clerk.

#### DISCUSSION

The parties agree that there is no provision of the collective bargaining agreement which expressly addresses the assignment of voting machine duties. The City argues that the silence of the contract in this respect leads to the inescapable conclusion that it had the right to assign these duties to employes other than the senior mechanic. The Union, on the other hand, claims that past practice has established an implied contract term which preserves such duties for the senior mechanic.

"Even assuming that a matter is such that it may otherwise be given 'binding practice' effect as an implied term of agreement, it will not be that effect unless it is well-established - strong proof of its existence will normally be required." 2/

As the Union has correctly pointed out in the absence of a written agreement, "past practice", to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. 3/ The City disputes the existence of any "past practice" of assigning voting machine duties exclusively to the utility man and senior mechanic. It points to the assignment of Thomas Novak, a mechanic's helper and other individuals not even in the employ of the City to dispel the notion that a past practice exists.

The City's contentions notwithstanding, the evidence adduced at hearing supports the Union's position that voting machine duties have been part of the senior mechanic's duties for a period of time, in excess of seventeen years, since the City's assignment of work to bargaining unit employes, Joe Wink and Fritz Arthur. Novak's one-time performance of said duties is insufficient to disprove the existence of said practice. Rather, the fact that both the City and Union agreed that Novak should receive senior mechanic's pay for his temporary performance of these duties buttresses the Union's claim that the practice of utilizing a senior mechanic was longstanding. Settlement of Novak's grievance along this line established that both parties recognized and agreed that voting machine duties were part of the senior mechanic's duties.

The undersigned is generally reluctant to infer an implied term of agreement in the absence of express or at least ambiguous language in the contract. The instant case presents a compelling exception to this general reluctance because of the long time period involved and the clear evidence of mutual recognition as demonstrated by the Novak grievance settlement. Therefore, it is concluded that voting machine duties were a part of the senior mechanic's job duties, and that this assignment rose to the level of a binding practice upon the parties.

The arbitrator does not find the existence of such a past practice to be incompatible with the statutory authority granted to the City Clerk pursuant to Secs. 5.83 and 7.25, Stats. Nothing in either Section specifies whom the custodian assisting the City Clerk must be, but rather, vests the City Clerk with the ultimate responsibility for assuring that the voting machines are properly prepared.

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2/ How Arbitration Works, Fourth Edition, Elkouri and Elkouri, p. 439.

3/ Ibid.

Accordingly, based upon the above, it is my

AWARD

1. That the City violated an implied term of the collective bargaining agreement when it departed from its past practice of assigning voting machine duties to the senior mechanic, Michael Landgraf.

2. The City is ordered to make him whole for any loss of hours of work which he may have incurred as a result of the City's actions.

Dated at Madison, Wisconsin this 26th day of July, 1990.

By Mary Jo Schiavoni /s/  
Mary Jo Schiavoni, Arbitrator