

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
 : Case 144  
 CITY OF OSHKOSH : No. 44080  
 : MA-6161  
 and :  
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 OSHKOSH CITY EMPLOYEE UNION :  
 LOCAL 796, AFSCME, AFL-CIO :  
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Appearances:

Mr. Warren P. Kraft, Assistant City Attorney, on behalf of the City.  
Mr. Gregory N. Spring, Staff Representative, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the City and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on August 13, 1990, in Oshkosh, Wisconsin. The hearing was not transcribed and briefs were received by October 17, 1990.

Based upon the entire record, I issue the following Award.

ISSUE:

Since the parties are unable to jointly agree upon the issue, I have framed it as follows:

Did the City violate the contract when it discontinued having Park Department employees pick up trash in parks on weekends and when, instead, it assigned such work to Sanitation Operators during those weeks having a holiday and, if so, what is the appropriate remedy?

DISCUSSION:

Prior to the spring of 1990, the City for about 20 years assigned three Park Department employees to weekend work in its parks once all of its parks opened up for full-time use, with each one working half a day on Saturday and Sunday on an overtime basis. Two Groundsmen thus would go to the approximately 24 parks in a garbage compactor truck and pick up trash and a Maintenance man would perform routine maintenance and cleaning at the parks' various shelters.

Starting in April, 1990, the City transferred the pickup of garbage in the parks from the Parks Department to the Sanitation Department. It therefore no longer called out the two Groundsmen to work weekends, as it kept only the Maintenance man to maintain and clean out the facilities for half a day on Saturday and Sunday. At the same time, the City assigned Sanitation Operators, who normally work Monday through Friday and who are in the same bargaining unit as the Parks Department employees, to empty newly-acquired dumpsters whenever a holiday fell within the work week. If there is no holiday, the trash is picked up on Monday. The Sanitation Operators do not pick up litter on the weekends they work because the City leaves that chore for the regular Groundsmen when they come in to work the following week.

The instant grievance was filed on April 23, 1990, and claims that the City has violated the contract by unilaterally discontinuing the prior practice of having the two Groundsmen pick up trash on weekends on which a holiday occurs and by now assigning such work to Sanitation Department employees. 1/ In support thereof, the Union primarily contends that the City's actions are violative of Article XXVI of the contract because the City has changed a condition of employment, i.e. the offering of weekend overtime to Parks Department employees and the transfer of that work to Sanitation Department employees. It further argues that said action is contrary to an arbitration award issued by Arbitrator Richard B. McLaughlin who, in another case, ruled upon Article XXVI's applicability. 2/ As a remedy, the Union requests back pay for the two Park Department employees for each weekend that sanitation employees worked in the parks.

In response, the City primarily maintains that it retains the right to assign work to bargaining unit personnel consistent with their job

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1/ The Union does not challenge the City's right to totally eliminate garbage pickup on the weekends, since it recognizes that this is a public policy decision which does not have to be bargained.

2/ Oshkosh City Employees Union, Local 769, AFSCME, AFL-CIO and City of Oshkosh, Case 84, No. 37237, MA-4236 (May, 1987).

classifications; that it has done so here and that no duties have been transferred outside the bargaining unit since Park and Sanitation Department employes are in the same bargaining unit; that its actions were dictated by its legitimate desire to save money and to provide efficient service to the taxpayers; that Article XXVI is inapplicable because trash collection is a management determination and thus constitutes a permissive subject of bargaining which is not covered under Article XXVI; and that it in fact has the right to make said assignment, pursuant to Article I, the contractual management rights clause.

The resolution of the issue here partly turns upon the applicability of Article XXVI, entitled "Maintenance of Benefits", which provides:

ARTICLE XXVI

MAINTENANCE OF BENEFITS

The City will not change any benefit or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

Since the City admittedly never bargained over this subject with the Union, the key issue here therefore is whether or not the transfer of the work in issue is mandatorily bargainable as the Union contends, or whether it is a permissive subject of bargaining as the City contends.

In this connection, the Union relies upon Arbitrator McLaughlin's Award which found that the City violated the contract when it used temporary employes rather than regular full-time employes to work in its parks on summer weekends.

In so ruling, Arbitrator McLaughlin found that the past assignment of such work only to bargaining unit employes constituted a "benefit or condition of employment"; that said assignment represented a mandatory subject of bargaining; and that the City unilaterally changed that benefit.

This was, however, one key difference between that case and here: the work there was assigned outside the bargaining unit; here, it remained within the unit. That is why Arbitrator McLaughlin pegged his decision to United School District No. 1 of Racine County vs. W.E.R.C., 81 Wis. 2d 89, 102 (1977), which involved the subcontracting of a food service operation which "merely substituted private employes for public employes" and which had no material change in the employer's operations.

The City thus is quite correct in pointing out this difference and noting that the policies of the City here are in fact affected by the decision to transfer these duties "...because it has resulted in the use of eight routes throughout the City rather than the previous nine" thereby freeing up the use of another truck; because its policy has resulted in slightly dirtier parks on those weekends when trash is not picked up by the Sanitation Operators; and because this latter result is "a choice among alternative social or political goals of the City...", thereby representing a permissive subject of bargaining which is not covered under either Article XXVI or the McLaughlin Award.

Moreover, the City has the right to reassign work within the bargaining unit pursuant to Article I, entitled "Management Rights", which provides:

"Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains solely and exclusively, all of its Common Law; statutory and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous agreement with the Union."

Well, here, there is no "specific provision" of the contract which prohibits the City from exercising its inherent management right to reassign work within the bargaining unit.

Under slightly different facts, Arbitrator Marshall L. Gratz, in City of Oshkosh Employees Union, Local 796, AFSCME, AFL-CIO, and City of Oshkosh, Case 139, No. 43075, MA-6094, (10/90), ruled that the City did not violate the contract when it assigned bargaining unit work, the removal of manhole covers, to non-bargaining unit employes. In so ruling, Arbitrator Gratz held that "it is clearly a management function to determine what work, if any, shall be performed by bargaining unit personnel..."

The same is true here since there is no express contract language stating that only Park Department employes can pick up the trash in issue and since there is no contractual provision which guarantees a minimum amount of overtime work. Accordingly, and because the picking up of such trash clearly falls within the Sanitation Operators' job description, and since they, too, are in the same bargaining unit, it must be concluded that the City did not violate the contract when it assigned such work to the Sanitation Operators in those weeks with a holiday.

In light of the foregoing, it therefore is my

AWARD

That the City did not violate the contract when it discontinued having Park Department employes pick up trash in parks on weekends and when, instead, it assigned such work to Sanitation Operators during those weeks having a holiday; the grievance therefore is dismissed.

Dated at Madison, Wisconsin this 9th day of January, 1991.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator