BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN COUNCIL OF COUNTY & MUNICIPAL EMPLOYEES, LOCAL 260-A, AFSCME, AFL-CIO	Case 35 No. 43666 MA-6038
and	
MARINETTE SCHOOL DISTRICT	

Appearances:
Mr. Michael Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Morrison and Coggins, Attorneys at Law, by Mr. James Morrison, appearing on beh

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the District or Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on November 12, 1990 in Marinette, Wisconsin. The parties filed briefs in the matter which were received by January 4, 1991. Based on the entire record, the undersigned issues the following award.

ISSUE

The parties stipulated to the following issue:

> Did the Employer violate the terms of the collective bargaining agreement on the afternoon of December 29, 1989 by not offering work to bargaining unit personnel for the girls' basketball game?

The parties further stipulated that if the arbitrator finds in favor of the Union, the remedy is that two employes (Bob Hintz and Art Schewe) will each be paid four hours overtime pay at the holiday rate (i.e. double time).

PERTINENT CONTRACT PROVISIONS

The parties' 1988-90 collective bargaining agreement contained the following pertinent provisions:

> Article 10 - Hours of Work, Overtime and Sunday Pay
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> 4. Time and one-half (1-1/2) the employee's regular straight time hourly rate shall be paid for hours worked in excess of eight (8) hours in any one day, or forty (40) hours in any one work week.
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> . . .
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> 7. Vacations, sick leave and holidays shall be considered time worked for the purpose of computing overtime.
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> . . .
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> 9. Employees required to check buildings on Saturdays, Sundays, and holidays shall be guaranteed a minimum of three (3) hours pay at the applicable rate of pay for check of middle school and elementary schools and two and one-half (2-1/2) hours at the applicable rate of pay for high school and high school pool check when the pool is in operation, and one (1) hour per day, at the applicable rate of pay for high school when the pool is not operating.
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> . . .
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> Article 12 - Paid Holidays and Holiday Pay
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> Each regular full-time and part-time employee shall be granted the following paid holidays: (A holiday shall be equal to each employee's regularly scheduled daily hours).

1. Half day (1/2) on the day before New Years;

. . .

Employees required to work on any of the above holidays shall be paid at the rate of double time (2X) their regular rate of pay for all hours worked in addition to their holiday pay.

. . .

Article 23 - Subcontracting

Council 40, AFSCME, explicitly recognizes the right of the district to subcontract to an independent contractor some or all of the work presently being performed by the employees who are members of the collective bargaining unit, provided, however, that no person who was and has been an employee of the district and an (sic) member of the collective bargaining unit as of March 8, 1982, through the present, shall be laid off or suffer a reduction in hours as a result of subcontracting.

. . .

Provided, further, however, that the district shall have the contracting right to reassign work assignments and hours of employees to effectively utilize bargaining unit personnel. The district shall have the right to reasonably determine employee qualifications. A senior employee can bump into a position for which he/she is qualified.

FACTS

The Union represents the custodial and maintenance employes who are employed by the District. In 1982, the school board decided to subcontract the work performed by these employes. Litigation followed which was decided in the District's favor. Shortly afterwards, the parties contractually agreed that the Employer could subcontract custodial work but that those bargaining unit employes who were employed by the District as of March 8, 1982 were guaranteed employment. This subcontracting language has not been changed since it was implemented. The question of overtime was not discussed when it was negotiated.

Since then, the District has been in the process of converting its custodial staff to an entirely subcontracted staff but is doing so by means of attrition. Two subcontractors (first Her Majesty's Service and currently Crest International) have provided workers to perform custodial work for the District which formerly was performed by bargaining unit employes. As District employes (i.e. bargaining unit members) have left the District's employment for one reason or another, the custodial work which they did has been taken over by these subcontracted workers. As a result, the subcontracted workers are performing an ever increasing amount of custodial work for the District.

The custodial work pertinent here concerns the setting up and taking down of the gymnasium for sports activities. So far as the record shows, subcontracted employes (hereinafter identified as Crest workers) have performed this work at the middle school for a number of years without the involvement of any bargaining unit employes. Crest workers have also performed this custodial work at the high school but were apparently assisted in this effort by bargaining unit employes prior to the instance involved herein.

Friday, December 29, 1989 was a half-day New's Years Eve holiday for bargaining unit members but was a regular work day for the Crest workers. As a result, bargaining unit employes left work at noon and received holiday pay for that afternoon while Crest workers continued to work the remainder of the day. There was a girl's basketball game that afternoon at the high school. The Crest workers who worked at the high school performed the set up and take down of the gym for that game as part of their regular work assignment. This work was performed during their regular work hours.

The Union filed a grievance contending that two bargaining unit employes who worked at the high school should have been offered the opportunity to work overtime at holiday pay during the afternoon of December 29 to help set up the gym before the game and take it down afterwards. The grievance was thereafter processed to arbitration.

POSITIONS OF THE PARTIES

The Union answers the stipulated issue in the affirmative. It contends that bargaining unit employes, rather than Crest workers, should have been

allowed to perform the work in question (namely setting up for the basketball game and taking down afterwards). According to the Union, bargaining unit employes had a legitimate right to expect to do that work. In support thereof, it relies on Article 23 for the proposition that if there is work to be done, the "hours" of bargaining unit employes (whether regular or overtime) will not be "reduced" by subcontracting. It submits that is exactly what happened here though. In its view, the fact that it happened to occur on the New Year's Eve holiday does not change this result. The Union believes that the holiday was no reason to reduce the hours of bargaining unit employes or an invitation to take their work away and give it to Crest workers to perform. Next, the Union relies on a previous arbitration award between the parties issued by Arbitrator Bielarczyk to support its position. In the Union's opinion, that award is dispositive here and any factual differences between that case and this case are inconsequential. It asserts that the Bielarczyk award encompasses not only the overtime involved in Saturday building checks, but also covers the overtime in issue here. The Union therefore contends that the District violated Article 23 when it subcontracted the overtime hours of two bargaining unit employes on December 29, 1989 to the Crest workers. In order to remedy this alleged contractual breach, the Union asks the arbitrator to sustain the grievance and award the stipulated remedy.

The Employer answers the stipulated issue in the negative. In doing so, it challenges the premise on which the Union's case rests, namely that bargaining unit employes are entitled to perform services regularly performed by the Crest workers during their normal work time even if that would mean that bargaining unit employes already receiving holiday pay would be called in to work additional hours at overtime pay and Crest workers would presumably be sent home. According to the Employer, there simply is no contractual support for that proposition. In its view, Article 23 only protects bargaining unit employes from layoff or reduction in their hours as a result of subcontracting; it does not guarantee them overtime. The Employer further notes that the work in question on December 29, 1989 (i.e. setting up and taking down for a basketball game) was work regularly performed by the subcontracted employes (the Crest workers) at their normal work location (the high school) and during their normal work hours. As a result, the Employer asserts that no bargaining unit employe suffered a reduction in their hours due to the District's action; rather, bargaining unit employes suffered only the loss of the opportunity to displace the Crest workers from their normal work assignment on that day. Next, the Employer argues that the Bielarczyk award can be distinguished from the situation here on the basis that in that case someone was going to receive overtime because the work being done (i.e. handling weekend building checks) was performed at other than normal work hours for anyone (bargaining unit employes or subcontracted employes). Here, though, there was no overtime to be offered to anyone because the set up work for the basketball game was going to be done anyway by the Crest workers during their normal work time. Thus, in the Employer's opinion, the facts in that case are entirely different from the situation here. The Employer therefore contends that the Union has not established any contractual violation of Article 23. Accordingly, it requests that the grievance be denied.

DISCUSSION

This case is the latest chapter in the on-going saga of the District's subcontracting of its custodial staff by attrition. In general, it involves the question of whether certain work was to be performed by the subcontracted workers (i.e. the Crest workers) or bargaining unit employes. Specifically though, the question posed here is whether the Employer should have offered the set up and take down work connected with the basketball game on December 29, 1989 to bargaining unit employes as overtime instead of giving it, as it did, to the Crest workers to perform during the course of their regular work day. The answer to this question is obviously more important to the parties than the matter of the 16 hours pay which they have stipulated is the remedy in this case should the arbitrator find for the Union.

The parties contractually agreed in 1982 that the District could "subcontract to an independent contractor some or all of the work presently being performed by the employes who are members of the collective bargaining unit", but that those bargaining unit employes who were employed by the District as of March 8, 1982 were guaranteed employment. This clause (found in Article 23 of the current contract) specifically protects that class of employes against layoff and further provides that they shall not "suffer a reduction in hours" as a result of the Employer's subcontracting. It is the latter portion of this clause (namely the "reduction in hours" part) that is applicable here and will be applied to the instant facts.

What happened here was that on the afternoon of December 29, 1989 the Crest workers who worked at the high school performed the set up and take down of the gym for a basketball game. They (the Crest workers) did this work exclusively; no bargaining unit employes assisted with the work. This was apparently a change from the way this work had previously been performed. Evidently prior to this instance Crest workers had assisted bargaining unit employes at the high school in the set up and take down of the gym before and after sports events. This was the first time, so far as Union representatives knew, that Crest workers at the high school performed this work without the

involvement of bargaining unit employes.

The reason bargaining unit employes did not assist with this work at the high school that day was that none of them was working at the time. All bargaining unit employes had the afternoon off as a holiday for New Year's Eve. The Employer chose to not call any bargaining unit employes back to work or have any stay over past noon to perform this work. However had it done so, it is clear that the bargaining unit employes would have been entitled to receive double time for same pursuant to Article 12.

The crux of the Union's argument is that two bargaining unit employes working at the high school suffered a reduction in their hours as a result of the Crest workers performing the set up and take down in the high school gym. This, the Union contends, violated Article 23. I disagree. In my view, those bargaining unit employes did not actually suffer a "reduction" in their (regular) work hours for that day. Pursuant to Article 10, Section 4 and Article 12, they were suppose to get eight hours pay for that day (four hours for working in the morning and four hours holiday pay for the afternoon). They did. That being the case, it logically follows that they did not "suffer a reduction" in their (regular) work hours for that day as a result of the Employer's subcontracting.

Having said that, it is equally clear that those bargaining unit employes could have earned more than eight hours pay for that day had they been called in to work overtime. Thus, as a practical matter, those employes did lose the opportunity to work overtime on December 29 by helping the Crest workers set up and take down the gym. Be that as it may, there is nothing in Article 23 which indicates that bargaining unit employes will be offered overtime, much less guaranteed it. Moreover, there is nothing in the record which indicates that bargaining unit employes were normally given the opportunity to perform work, on an overtime basis, when the Crest workers were present. Rather, the record shows that Crest workers were regularly scheduled in the high school and were regularly assigned to do this work (albeit with the assistance, till now, of bargaining unit employes). Said another way, the set up and take down of the gym for sports activities was part of the Crest workers' regular work assignment. As a result, there was no need for the Employer to call the high school bargaining unit employes back to work on overtime status to perform this set up work because that work could be performed by Crest workers during their normal work time. Accordingly, it is held that the Employer was not obligated by Article 23 to call in bargaining unit employes then on holiday pay status for overtime to perform work which was being performed by the Crest workers during their regular work time.

Having found that the lost overtime opportunity involved here was not a "reduction in hours" within the meaning of Article 23, the undersigned is well aware that this outcome is inconsistent with that reached by Arbitrator Bielarczyk in a previous award between the parties. He found that the loss of overtime in that case qualified as a "reduction in hours" within the meaning of Article 23. I believe that award is distinguishable though from this situation on the following grounds. Initially, it is noted that the Bielarczyk case involved a factual situation where the District took work which had traditionally been performed by bargaining unit employes, and only bargaining unit employes, and sought to give it to the subcontracted workers to perform. However, the work involved there (i.e. handling building checks on weekends) was clearly overtime work inasmuch as it was performed on weekends outside the normal workweek. Such is not the case here though because the set up and take down work at the gym was not performed outside regular work hours; instead it was performed by the Crest workers during their regularly scheduled daytime work hours. Next, Arbitrator Bielarczyk further relied on a contractual provision which specifically referenced weekend building checks and guaranteed bargaining unit employes overtime pay for performing that work. (See Article 10, Section 9). Once again, that is not the case here. Specifically, there is no similar language in the existing contract relating to gym set up and take down. That being so, there is no guarantee of overtime for performing that work while there is for performing weekend building checks. Given these critical distinctions, the undersigned finds that the Bielarczyk award is limited to just weekend building checks; it does not encompass or apply to all lost overtime opportunities and particularly the lost overtime opportunity involved here.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the terms of the collective bargaining agreement on the afternoon of December 29, 1989 by not offering work to bargaining unit personnel for the girls' basketball game. Therefore, the grievance is denied.

Dated at Madison, Wisconsin 18th day of February, 1991.

By _____
Raleigh Jones, Arbitrator