

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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KAUKAUNA CITY EMPLOYEES, LOCAL 130, : Case 80
AFSCME, AFL-CIO : No. 48719
 : MA-7687
and :
 :
CITY OF KAUKAUNA :
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- - - - -

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council
40, AFSCME, AFL-CIO, on behalf of Local 130, AFSCME,
AFL-CIO.
Mr. Bruce K. Patterson, Employer Relations Consultant, on
behalf of the City of Kaukauna.

ARBITRATION AWARD

Kaukauna City Employees, Local 130, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Kaukauna, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The City subsequently concurred in the request and David E. Shaw was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 2, 1993 in Kaukauna, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 6, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following statement of the issue:

When City police personnel used a City truck to transport three deer carcasses to the City yard, was the Collective Bargaining Agreement with Local 130 violated? If so, what is the remedy?

1/ The parties waived the 30 day time limit in the Agreement for the issuance of an award.

CONTRACT PROVISIONS

The following provisions of the parties' 1991-1992 Agreement are cited:

ARTICLE V

NORMAL WORK DAY AND WORK WEEK

Section 1. The normal work day for Park Department, Street and Sanitation employees shall consist of eight (8) hours commencing 7 a.m. to 12 noon and 12:30 p.m. to 3:30 p.m.

Section 2. The normal work week shall consist of a shift of five (5) consecutive work days scheduled from Monday through Friday.

. . . .

Section 4. When calling employees to work overtime, they will be called in the order that they appear on the seniority roster, within their classification.

Section 5. For hourly paid employees, all work performed outside the above normal work day and/or normal work week shall be compensated for at the rate of time and one-half the employee's regular rate of pay.

. . . .

ARTICLE XVI

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Kaukauna and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work (no employee shall be laid off due to the subcontract provision), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

BACKGROUND

At 1:23 a.m. on Saturday, November 14, 1992 two officers of the City's Police Department discovered three deer carcasses cut up and wrapped in plastic bags on Hillcrest, a subdivision in the City. The Police Department notified the local Department of Natural Resources (DNR) but there was no warden available. The police officers then staked out the area thinking someone might return for the carcasses. No one did return to recover the deer carcasses and eventually one of the officers took one of the trucks from the City's Streets Department and retrieved the carcasses and parked the truck with the carcasses in a fenced-in area by the City garage to hold for the DNR.

Sometime during the weekend the Police Department was made aware that the DNR was not interested in the deer carcasses and they were left to be disposed of by the Street Department. The Police Department and Fire Department have a key to the City garage and the keys are left in the vehicles. The Police Department did not contact anyone from the Street Department about using the truck.

The Grievant, Richard Skalmusky, an Equipment Operator in the City's Street Department, found the truck parked outside the garage when he came to work Monday morning. The Grievant called his supervisor and asked him about it, and the supervisor told the Grievant he did not know about it and to throw away the carcasses.

Another employee, Bill Kopster, who had wanted to use the truck found the carcasses and put them in the garbage dumpster. He then called the Police Department and was told what had happened. There were no repercussions against anyone for disposing of the carcasses.

The Police Department has contacted the Street Department or its employees in the past to pick up items and to pick up dead animals. However, those instances have been during the employees' regular work day.

The Grievant was the most senior employee available at the time the police officers used the truck. Skalmusky grieved the failure to call him to take the truck and pick up the deer carcasses. The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that this case does not involve a claim that the Street Department or the Union owns the Department trucks, nor does it involve items as evidence. As to the latter,

the Union notes that its witnesses testified that in the past they were called by the Police Department to pick up items, but that they had no way of knowing if the items were later used as evidence. The issue in this case is whether Street Department employees should be called in to work, by seniority, outside their normal work hours to perform the type of work assignments that they have been given from time to time during their normal work day by the Police Department and when the Police Department has determined it needed to use a City truck to get the job done at that time.

The Union asserts that it filed the instant grievance based on the past practice of Street Department employees being utilized by the Police Department to pick up and convey to the Police Station a variety of items during their regular work day. If that is a normal accepted practice, it should be just as acceptable to call-in Street Department employees to perform that same work outside their normal work day. The Union contends it was not aware of any practice of not calling Street Department employees in situations outside the normal work day and notes that the memorandums from the Police Department and Fire Department regarding such a practice are dated subsequent to the filing of this grievance. The Union also notes it was after this grievance that the Street Department Superintendent developed a policy directive that requests from the Police and Fire for City vehicles be made through him so he can determine whether to call a Street employee to handle the request or authorize the use of a vehicle. However, he also testified that there was a verbal agreement that either department could use vehicles or equipment as they deemed necessary to perform other work without contacting him.

While there have been a variety of instances over the years where the Police Department or the Fire Department have requested that Street Department employees pick up and transport items for them, it is not clear as to what extent this occurred. The Union witnesses did testify that as far as they knew, the incidents they testified to were all that had occurred.

The Union distinguishes the situation in this case from that where the Police Department used a Street truck to transport gambling machines that were confiscated as evidence in a raid and the Fire Department's use of a Street vehicle to transport educational items to schools for presentations. The gambling raid involved the need to maintain the chain of custody as to the evidence, whereas in this case, the deer carcasses were simply transported back to the garage and abandoned. The transportation of educational items, unlike this case, is of a planned nature and is a situation where the Fire Department is utilizing a City vehicle because the Department does not have the type of vehicle needed to suitably perform that task. The Union finds the use of Street employees and a Street Department truck to assist the Fire Department in the retrieval of hoses, while involving call-in of

Street employees, to be more in the nature of the two exceptions cited, rather than similar to this situation. However, while there has been much testimony about situations unlike the case at hand, where the City would not be required to use Street Department employees, it does not mean there are no situations where they would be used to operate City vehicles. That option does not exist since both parties testified as to instances where the Police and Fire Departments did ask that a Street employee be assigned to do the work.

The Union concludes that it is a "simple question of equity". If Street Department employees are expected to perform various assignments to assist the Police Department and Fire Department during their normal work hours, they should be able to expect to perform those tasks when they occur outside of their normal work hours. The Union was not aware of any policy of not using Street employees outside of their normal work hours to pick up items under the same circumstances where they were required to do the work during their normal work day. The Union requests that the grievance be upheld.

City

The City notes that the grievance alleges a violation of Article V, Section 6, of the Agreement. It asserts that provision only establishes what the rate of pay would be to employees who are called in to perform duties for the City. Article XVI, Management Rights, in the Agreement provides that the right to "determine the methods, processes and manner of performing work, are vested exclusively in management." The City clearly established a long history of utilization of Street Department equipment by the Police and the Fire Departments to transport department equipment and personnel and other items, such as confiscated materials, with Police or Fire personnel operating that equipment. Both the Police and the Fire Departments have keys to the City garage so that they can access vehicles for their needs. There is no contract provision that requires or specifies who can or cannot use City equipment. The lack of specific contract language, along with the lack of a clear practice establishing that only Street Department personnel operate City equipment assigned to that Department, clearly illustrates the lack of a contractual basis for finding any violation on the part of the City in this case.

The record establishes that the City has procedures for the direction of Streets Department employees to perform certain tasks in support of the Police and the Fire Departments. It also establishes that these departments have regularly, both during and outside the Street employees' normal workday, operated equipment when necessary to accomplish the mission of their respective departments. The only instance the Union could cite where Street employees were called-in was where they were used to help the Fire Department in the cleanup of hoses at a major fire, and then a

procedure was followed to coordinate the activity.

The City concludes that there is no contractual provision restricting the use of City equipment by police personnel or requiring the call-in of Street Department employees to perform duties for the Police or Fire Departments. The City also notes that in this case there was a concern about protecting the chain of evidence. Given the lack of contractual foundation for the grievance and the stipulated issue before the Arbitrator, the City requests that the grievance be dismissed.

DISCUSSION

The issue to be decided is whether the City violated the parties' Agreement when one of its police officers, outside of the Street Department employees' normal work hours, used a City truck assigned to the Street Department to pick up three plastic bags with parts of deer carcasses in them, rather than calling in the most senior available Street Department employee to drive the truck. For the following reasons, it is concluded that the City did not violate the Agreement.

Article V, Sections 4 and 5, of the Agreement, state the procedure to be followed and the rate to be paid when an employee is called in to work overtime. The provisions do not specify in what situations Street Department employees are to be called in, leaving it to management to determine when they are needed, pursuant to Article XVI, Management Rights. It is important to note that the work in dispute is not of the type unique to the Street Department. Here, the evidence indicates that the police officers used a Street Department truck to bring in what was, at the time, potentially evidence during the very early morning hours. The evidence also indicates that the Police and the Fire Departments have used Street Department trucks from time to time in the past for their respective department's business.

While this case bears some resemblance to those instances where Street employees were requested to pick up a dead animal during regular work hours, it is only in the respect that the potential evidence consisted of deer carcasses. The carcasses were not initially picked up in this case for the same reasons that dead animals are ordinarily removed from roadways or public areas. The fact that the DNR apparently was not interested in the carcasses after they were brought in, does not change why they were initially brought in by the police. The testimony of both Union and City witnesses indicates that although Street Department employees have been sent to pick up and transport potential evidence, it has been during their regular work hours, and that at times the police have obtained a truck from the Street Department and driven it themselves, both during and outside of Street employees' normal work hours to transport potential evidence. The distinction made by the Union between planned use, as in the

transport of educational items, and unforeseen instances such as this, is not determinative. The factor to consider is whether the nature of the work performed is uniquely Street Department work, e.g., street or sewer repairs. The work performed here was not unique to the Street Department and no contract clause was violated by the Police Department's use of the vehicle assigned to the Street Department.

The Union raises an equity argument, i.e., that if the Street Department employees are sent on various assignments to assist the Police or the Fire Departments during regular work hours, they should be similarly used outside regular work hours. The Arbitrator's role, however, is not to do equity, rather the Arbitrator is constrained to interpreting the terms and the application of the parties' Agreement. The limitation the Union seeks in this case is not contained in the parties' Agreement and cannot be inferred from the practice that has been described by the evidence presented.

It is therefore concluded that the City did not violate the Agreement when its police personnel used a City truck assigned to the Street Department to transport the three deer carcasses to the City yard on November 14, 1992.

On the basis of the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 17th day of August, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator