BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF FOND DU LAC EMPLOYEES LOCAL 1366, AFSCME, AFL-CIO	Case 116 No. 50064 MA-8139
and	
CITY OF FOND DU LAC	

Appearances:
Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Bruce K. Patterson, Employee Relations Consultant, on behalf of the City o

ARBITRATION AWARD

City of Fond du Lac Employees, Local 1366, 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 Fond du Lac, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 19, 1994, in Fond du Lac, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 20, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there was no procedural issue, but were unable to agree on a statement of the substantive issue.

The Union would state the issues as being:

> Did the Employer violate the Collective Bargaining Agreement when it unilaterally and arbitrarily assigned the job duties normally and traditionally performed by the Grievant, Timothy Klima, the City's only Certified Arborist within the Parks Division, to Non-Bargaining and Bargaining Unit Employees outside of the Parks Division, and if so what is the appropriate remedy? 1/

The City would state the issue as follows:

> When the City of Fond du Lac contracted for landscaping services for the Ledgeview Corporation Center project did it violate Article I, VIII or XXVIII of the Collective Bargaining Agreement? If so what should the remedy be?

1/ The Union originally stated the issue in terms of non-bargaining unit employes being assigned the work in question, but subsequently revised the issue based on the evidence submitted at hearing.

The undersigned concludes that the issue to be decided may properly be stated as follows:

> Did the City violate the parties' Collective Bargaining Agreement when it assigned tree planting stake out and inspection duties on the Ledgeview Corporation Center project to a Non-Bargaining unit employe and a bargaining unit employe outside the Park Division, rather than to the Grievant? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE I

RECOGNITION

> Section 1 - The City recognizes Local 1366, AFSCME, AFL-CIO, as the exclusive bargaining representative in the bargaining unit consisting of all permanent full-time and permanent part-time employees of the City of Fond du Lac in the Public Works Department (Waste Collection, Sewage Treatment, Electrical, Construction and Maintenance, Parks and Water Utility (field and plant) Divisions), the Department of Community Development (Transit, Inspection Services and Parking Meter Utility Divisions), Departments of Administration, Engineering, and Water Utility (office), located in City Hall, and Police Department, excluding elected and appointed officials, department heads, professional employees, confidential employees, and supervisors as defined in the Act, on all matters concerning wages, hours and other conditions of employment in keeping with Section 111.70, Wisconsin Statutes, pursuant to an election conducted on October 4, 1967, by the Wisconsin Employment Relations Commission and as certified on October 20, 1967, pursuant to a declaratory ruling regarding Transit Employees issued by the Commission dated May 8, 1973, and pursuant to an election conducted on October 23, 1981, by the Wisconsin Employment Relations Commission regarding employees of the Police Department and as certified on November 10, 1981 (Case XLI, No. 28674, ME-2055, Decision No. 19037).

ARTICLE II

COOPERATION

> Section 1 - The City and the Union agree they will cooperate in every way possible to promote harmony and efficiency among all employees. The City agrees to maintain certain amenities of work (e.g. coffee breaks, etc.) not specifically referred to in this Agreement.

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ARTICLE V

WAGES

Section 1 - The wages and work rules shall be as set forth in the Appendix and shall be effective as of January 1, 1992, and said Appendix shall be a part of this Agreement.

. . .

ARTICLE VIII

OVERTIME AND HOLIDAY PAY

Section 1 - Time and one-half shall be paid for all time worked outside of the employee's regular shift of hours, except as otherwise provided in this Agreement. For Transit Division employees, hours worked outside of the regular work schedule (presently 5:55 a.m. to 6:55 p.m. for drivers and from 5:55 a.m. to 7:10 p.m. for employees assigned p.m. check duties) shall be paid at the rate of time and one-half. Said schedule may be subject to change including changes mandated by the City Council or required for other business reasons.

The City agrees to compensate Transit Division employees at time and one-half for all hours paid in excess of forty (40) in a work week. Hours paid shall be exclusive of holiday pay on scheduled days off. In instances when an employee uses vacation, sick leave, or other paid leave in full week increments and his normal work schedule exceeds forty (40) in a week, the employee will be paid for all hours scheduled off at a straight time rate. The employee's leave banks will be debited in accordance with actual hours scheduled off.

Compensation of overtime shall be paid at time and one half in cash or compensatory time, as the employee may choose; however, no compensatory time in excess of twenty-five (25) hours may be carried on the books beyond December 1 of each year. Hours in excess of twenty-five (25) as of that date will be paid to each employee in cash, along with pay for hours under twenty-five (25), if requested by December 1. Use of compensatory time shall be subject to authorization by the employee's immediate supervisor and/or department head. Employees may use an annual total of twenty (20) hours of compensatory time in lieu of sick leave for absences in increments of four (4) hours or less. Abuse of this privilege, like abuses of sick leave, will subject the employee to disciplinary procedures.

Section 2 - For emergency and non-emergency overtime, each Public Works Division Superintendent and Transit Division Manager will post once a year, or more often if he deems such necessary, a list of employees with space for each employee to indicate whether or not he wishes to be called in for regular overtime work. After an employee has indicated that he does not wish

to be called in for overtime work, he shall not be called unless that employee is needed due to his specific skills or due to the non-availability of a sufficient number of employees desiring overtime work. Overtime shall be divided as equally as possible among the qualified employees of the Division, except as otherwise provided in this Agreement, who have signed indicating their desire for overtime. The overtime of employees shall be posted. In the event of an emergency, all employees may be required to work overtime, however, those employees who have indicated a desire to work overtime will be called first provided they are capable of performing the available work.

. . .

ARTICLE X

LONGEVITY PAY

. . .

Section 2 - Commencing with the date of completion of ten (10) years of continuous service for the City, and continuing with each pay period thereafter, every permanent employee shall be granted a pay increase equal to an additional three (3) percent of his base pay (which means a total of six (6) percent).

. . .

ARTICLE XXII

PROMOTION AND SENIORITY

. . .

Section 8 - Department and divisional units for the application of seniority for purposes of promotion, demotion, transfer and layoff shall be:

Department	Division
Department of Public Works	Construction & Maintenance (including Sanitation)
Department of Public Works	WCTS
Department of Public Works	Parks (including Tree Care)
Department of Public Works	Water Utility (Field, Office and Plant)
Department of Public Works	Electrical
Department of Public Works	Engineering

. . .

ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac 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 initial 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 subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

. . .

APPENDIX A

	Hire	6 Mos.	12 Mos.	18 Mos.	24 Mos.	30 Mos.
Rates Effective January 1 - December 31, 1993:						
. . .	. . .	. . .	. . .	. . .	. . .	. . .
Park Caretaker III	10.10	10.72	11.34	11.96	12.58	13.21
Arborist						
Parking Meter Serviceman-Leadworker						
. . .	. . .					
Engineering Aide II	10.21	10.84	11.46	12.08	12.70	13.32
. . .	. . .					

BACKGROUND

The City maintains a Parks Division as part of its Department of Public Works. The Union represents all permanent full-time and permanent part-time employes of the City, excluding professional employes. The Union and the City are parties to a 1992-1994 Collective Bargaining Agreement covering the wages, hours and conditions of employment of those employes. The Grievant, Timothy Klima, is employed by the City as an Arborist in the Parks Division and is in the bargaining unit represented by the Union. The Grievant is currently the Union's Vice-President.

In 1992, the City took bids from outside contractors for the construction of the Ledgeview Corporate Center at the City's south edge. The City, as a result, contracted with Wondra Construction Company to develop the project, which included doing the landscaping and planting on the project to the City's bid specifications. Wondra, in turn, subcontracted with Tillman Landscaping, Inc., to do the planting on the project.

Dale Braatz, an Engineering Tech II in the City's Engineering Department, was given the responsibility of overseeing the entire Ledgeview project. Braatz was responsible for all of the engineering work, the stakeout work and the inspection work. Paul Smedberg, an Engineering Aide II in the bargaining unit, assisted Braatz on the Ledgeview project. The Grievant testified that Braatz spent approximately 16 hours on stakeout work for the planting, and approximately three hours inspecting the plantings to make sure specifications were being met. Smedberg spent approximately six hours inspecting the planting. The planting was done during the months of August, September and October of 1993.

The Grievant is a certified arborist and has an Associate Degree in Forestry. The City traditionally contracts out its plantings and the Grievant is often involved in putting the specifications together for such work and is usually responsible for supervising and inspecting the planting to make sure specifications are met. Neither Braatz nor Smedberg are certified arborists, but both have previously inspected tree plantings that were part of Public Works projects. The Grievant was not involved in developing the planting specifications, staking out the plantings or supervising and inspecting the planting for Ledgeview.

In September of 1993, the Grievant filed the instant grievance alleging

that "Non-represented employees have been assigned and are performing bargaining unit union work", referencing the stakeout and inspection work done on the planting for the Ledgeview project by Braatz. The parties were unable to resolve the dispute and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the City violated the parties' Agreement when it did not assign the supervision and inspection of the contracted out planting on the Ledgeview project to the Grievant, thus depriving him of overtime work opportunities.

The Grievant is an arborist in the City's Parks Division and as such, is the only certified arborist in the City's employ. The Grievant's duties and responsibilities derive from the job description for the Arborist position, and that description contains, in part:

> Nature: Under general supervision to be responsible for the care, removal and propagation of all public trees, and the enforcement of all tree ordinances; and to perform related work as required.
>
> Examples:
>
> . . .
>
> 5. Supervises the planting of all trees.
>
> . . .
>
> 8. Makes recommendations as to species of trees and locations for planting. . .
>
> . . .

The description lists as qualifications that it is essential that the individual have considerable knowledge of trees common to the area and related diseases and pests. Among the items listed as desirable training and experience is three years of actual field experience and the ability to pass an exam to be a certified arborist. The listed responsibilities, including the visual supervision of tree planting, has been the sole responsibility of the Grievant for the past 13 1/2 years, both before and after the Ledgeview project and have included inspections requested by the Engineering Department. The Parks Department has always been responsible for making recommendations as to species of trees to be planted, and the bidding specifications therefore, including coordinated bidding with other ongoing planting projects, the locations of plantings, on site supervision of all plantings, record keeping and subsequent maintenance of the plantings within the City. That included all public plantings as well as private subcontracted planting projects, where the trees and the shrubs would be turned over to the City for continued maintenance. Although the City traditionally contracts out tree planting projects to private landscapers, the planting of the trees is subsequently monitored and supervised to ensure compliance with the bid specifications and to ensure that they are planted in conformance with the most current techniques.

The Ledgeview project was bid out in April of 1992 and the Grievant was initially involved in that bidding process. However, shortly thereafter the Director of Public Works and the Deputy Director decided to discontinue his

involvement in the project. The Grievant testified that tree planting supervision has always been a priority and that the Parks Department had made arrangements for the Grievant to be involved in that aspect of the project by redistributing work earlier in the year so as to provide him with the time to do the inspection and supervision of the plantings in the fall of 1993. The tree plantings in the Ledgeview project were done in the months of August, September and October of 1993 by the subcontractor and without the visual on-site inspection by the Grievant. Instead, two employes of the Engineering Department were assigned to supervise the on site plantings, one being Braatz and the other being Smedberg. Neither Braatz nor Smedberg were certified arborists and neither worked for the Parks Department.

When the Union asked the City why it had circumvented the input of the Grievant in the Ledgeview project, it was told that the City had the right to do what it wanted under Article XXVII to "subcontract work (no employee shall be laid off due to subcontract provisions). . ." The Union asserts that it is not arguing that the City does not have the right to subcontract out the purchase or planting of the trees, however it questions assigning the normal and overtime work of the only certified arborist in the Parks Department to unqualified non-Parks Department employes. Article VIII, Section 2, states in part: "Overtime shall be divided as equally as possible among the qualified employees of the Division. . ." Here, unqualified employes were assigned to the supervision of the plantings.

The Union cites Elkouri and Elkouri, How Arbitration Works, (4th Edition), wherein management's right to subcontract is discussed, noting that in some cases the recognition, seniority, wage and other such clauses of a collective bargaining agreement have been found to limit that right and that certain standards of reasonableness and good faith have been applied in determining whether those clauses have been violated. (At pages 538-539). The Union notes that the parties' Agreement contains similar provisions. It also notes the job descriptions for the Arborist position and the Engineering Aide II position, also a bargaining unit position and asserts there is nothing in the record to indicate the parties discussed changing the assignments of either of those classifications, or that the on site supervision would no longer involve overtime hours or that the Arborist would be eliminated from the tree planting supervision. The Grievant possessed the necessary skills and equipment to adequately supervise the plantings in the Ledgeview project. The supervision of plantings has never been contracted out before this, nor have such duties ever been assigned to anyone other than the Arborist over the past 13 1/2 years.

The Union asserts that the City has deliberately attempted to circumvent the contract in this case and tried to support its position by arguing that the work was subcontracted pursuant to its rights under Article XXVII. The Union cites the following from Elkouri and Elkouri regarding the right of management to assign work out of the bargaining unit:

> Other arbitrators have ruled against the right of management to assign work out of the bargaining unit, even in some cases in which their might have been justification, on the basis that it is not included within the various types of general management rights clauses.
>
> Similarly, arbitrators have so ruled on the basis that the recognition, seniority, or job security clause is violated by such action; or that the job, being listed in the contract, is a part of the contract, the action thus violating the contract. (At page 549)

Here, the job description for Arborist is clear that it includes the work

assignments in question, while the job description for the Engineering Aide II does not contain anything specifically related to supervision of tree plantings. While the latter provides that an Engineering Aide II "8. May act as inspector on public works projects.", such language was intended to cover projects that employe is familiar with and does not give the City the right to assign duties from one classification to another.

The Union cites the dictionary definition of the term "subcontract" and asserts that the instant situation does not constitute subcontracting, since there was no attempt to contract with a third party, but instead, was simply assigning the work traditionally performed by the Grievant to other unqualified employes outside of the Parks Department.

The Union asserts that the City has not provided any reason for taking the work from the Grievant and assigning it to the other employes. There is no reason except for the fact that it would eliminate a small amount of overtime. The Grievant testified that he has supervised plantings that resulted in overtime in the past and that since the Ledgeview project, he has again been assigned the on-site supervision of plantings. Smedberg testified that he was so busy he could only perform "spotchecks" and that he felt spotchecks would "keep the contractor honest". Conversely, the Grievant testified as to the importance of having on site inspections of the plantings and that even with the on site inspections, contractors occasionally tried to cut corners.

The Union concludes that the City has failed to provide any meritorious reason for eliminating the Grievant's traditional role of supervising the plantings in the Ledgeview project and that this case does not involve subcontracting, but rather an attempt to eliminate the Grievant's opportunity to work overtime. The Grievant testified that he reviewed the hours reported by the subcontractor for doing the planting and computed that he would have had approximately 94.5 hours of overtime, had he been permitted to perform the on site inspections and supervision of the plantings. 94.5 hours of overtime at the Grievant's rate of pay (including longevity) equals $1,984.50. The Union requests that the grievance be sustained, the City ordered to immediately cease and desist from assigning the work assignments set forth in the Arborist job description to unqualified non-bargaining unit and bargaining unit employes outside of the Parks Department, and to make the Grievant whole by paying him for all of the overtime hours he would have worked, but for the City's reassignment of the work.

City

The City takes the position it acted within its rights under Article XXVII, Management Rights, of the parties' Agreement. That provision addresses the City's right to subcontract work and indicates there is only one restriction on the right, i.e., no employe shall be laid off due to subcontract provisions. There were no employes on layoff at the time and no employes were laid off due to the subcontracting in question.

The City cites the following from Elkouri and Elkouri:

> "In the final analysis, the thinking of many arbitrators is probably reflected in the statement that: 'In the general absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expended or

> restricted by specific contractual language" (Elkouri and Elkouri, page 540).

Here, the parties' Agreement does contain specific language authorizing contracting out with only the proviso that no one be laid off. The City made a decision pursuant to its right to direct the work force, that it would have the Grievant perform the normal activity relative to planting trees in public rights of way, as opposed to having him be involved in a specific project in terms of the development of the business park. That decision is also permitted under Article XXVII.

The City asserts that it does not question the Grievant's qualifications to perform the work, rather, it made a public policy decision as to how it would deliver service, i.e., the way it was going to use the Grievant's skills. While the Union objected to the decision to use a different bargaining unit person to be involved in the project, the City's priorities as to work assignments were not arbitrarily reached. The fundamental thrust of the project was an engineering project and therefore engineering personnel were assigned the responsibility for supervising that project.

The City notes that the Union is protected under Article XXVII of the Agreement from job loss due to subcontracting. It also asserts that the contracting out of a project such as the Ledgeview project is hardly one that falls within the normal scope of work activity year in and year out. In this case, the City opted to exercise one of the "very few" rights it possesses under the Agreement and the Grievant and the rest of the employes in the bargaining unit kept their jobs when the City exercised this right to contract out work. The City requests that the grievance therefore be dismissed.

DISCUSSION

It is initially noted that this is not a subcontracting dispute. The Union concedes that the City has subcontracted plantings before and had the right to do so in this case. Article XXVII clearly authorizes such subcontracting provided that no employes are laid off as a result.

The dispute in this case instead involves the assignment of duties normally performed by the Grievant, as the Arborist, to a non-bargaining unit employe (Braatz) and a bargaining unit employe (Smedberg). The duties involved were initial stakeout work and inspection of the planting on the Ledgeview project spanning a three-month period. Braatz spent approximately 16 hours on staking out work on the project and approximately three hours inspecting, according to the Grievant. Smedberg estimated he spent six hours on inspection of the plantings. During that same period, the Grievant was performing his regular duties as an Arborist for the City, but could not recall specifically what he was doing in that time period. Contrary to the Grievant's claim that he has always done all of the inspection of plantings prior to this, both Braatz and Smedberg testified that they have done inspection work on plantings for public works projects in the past. Braatz testified that he did it for Ledgeview as part of his overall responsibility for the project. Smedberg testified that he has done such work as part of his responsibility for doing inspection work on public works projects, citing the job description for Engineering Aide II. 2/

The parties' Agreement does not specifically address the assignment of duties other than the general reservation of management rights in Article XXVII to direct the work force and "to determine the methods, processes and manner of performing work. . ." There is no express prohibition in the Agreement

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2/ The job description lists as an example of duties: "8. May act as inspector on public works projects." (Employer Exhibit 4).

regarding assigning the duties of one classification to another classification or to an employe outside of the bargaining unit. The Agreement does contain a recognition clause, a seniority provision and the job classifications are listed in the Agreement wage schedules.

What this case involves, then, is the temporary assignment of duties from one job classification to other classifications that occasionally perform such duties, one of the other classifications being in the bargaining unit and one not in the unit. Taking first the situation where the Engineering Aide II, the unit position, was assigned to perform inspection duties on the plantings, it is generally held by arbitrators that management is permitted considerable discretion in assigning duties or tasks in the absence of an express contractual limitation on that right. 3/ That is especially true where there is some overlap in the duties and responsibilities of the classifications as it pertains to the duty in question, the assignment is temporary and/or de minimis, and the employes who normally would have performed the task were not harmed. 4/

As noted previously, there is no provision in the Agreement that expressly prohibits the City from temporarily assigning a task from one classification to another. The inspection work claimed by the Grievant is also at times performed by Engineering Aide II Smedberg as part of his inspection duties on public works projects, so that there is some overlap between the duties of the two classifications in that regard. The work performed by Smedberg consisted of approximately six hours over a three-month period. It was, therefore, both temporary and de minimis in nature. As to the harm to the Grievant, he claims that he would have worked 94.5 hours of overtime had he been assigned to supervise and inspect the planting on the Ledgeview project. The Arbitrator does not doubt that the figure is a good faith estimate by the Grievant based on how he normally would have approached that work on such a project. However, the City retains the right to determine the extent of such work on a project, and whether it will incur overtime for those purposes. The Grievant continued to perform his regular duties during the period in question and worked his regular hours. The City was apparently willing to trust the subcontractor to do the job right and decided the project did not require the constant supervision and inspection the Grievant felt would normally be necessary. Whether the City's decision in that regard was wise or not is not a question for this forum.

As to the assignment of duties normally performed by the Grievant to an employe outside of the bargaining unit, arbitrators have been divided on whether employers have that right, even where there is no express prohibition in the contract. Arbitrators who have found assignment of unit work to non-unit employes permissible have considered whether:

1. The quantity of work or the effect on the bargaining unit is minor or de minimis in nature.
2. The work is supervisory or managerial in nature.
3. The work assignment is a temporary one for a special purpose or need.
4. The work is not covered by the contract.
5. The work is experimental.
6. Under past practice the work has not been performed exclusively by bargaining unit employees.

3/ Elkouri and Elkouri, How Arbitration Works (4th Ed.) at pages 500-504.

4/ Ibid.

7. There is a change in the character of the work.
8. Automation or a technological change is involved.
9. An emergency is involved.
10. Some other special situation or need is involved. 5/

On the other hand, arbitrators have found against the right of management to assign work out of the unit even where there was no prohibition in the contract, holding such a right is not included in a general management rights clause. Those arbitrators have ruled such action violates such provisions as recognition, seniority or job security clauses or based their decision on the fact that the job is listed in the contract. 6/ Others have found that while such provisions do evidence an intent to restrict unit work to the unit, such a restriction is not absolute and assignment of work outside of the unit may be proper where there is good cause, it is de minimis, it is supervisory in nature, or it is an emergency. 7/

Finally, there are those arbitrators who approach the issue as a matter of balancing the rights of management and the interests and rights of the employes and the union under the recognition, seniority and wage classification provisions. 8/

For the most part, there is little difference between those arbitrators in the first group who consider certain circumstances as justification for assigning work out of a unit, and those in the second group who consider recognition, seniority and job security provisions to be restrictions on management's right to assign work out of the unit, but who also believe those restrictions may be overcome under certain circumstances. To the extent there is a difference, the undersigned considers the latter view the more appropriate of the two. In the undersigned's view, the recognition and seniority provisions, along with listing of the job classification in the wage schedule, evince a recognition by the parties that the work belongs to that bargaining unit and that the union and the employes have an interest in keeping it. However, taking a page from that group of arbitrators who approach the issue as a matter of balancing the interests of the parties, management's legitimate interests in efficient operation and directing its work force must be considered as well. Factors such as the amount of the work, whether the assignment is temporary or permanent, whether the work has been performed by others outside of the unit before this and the impact on bargaining unit employes are to be considered.

In this case, Braatz testified that part of his responsibilities in overseeing the Ledgeview project involved doing the engineering, all of the stakeout work and all of the inspection work, except what he had Smedberg do. Braatz also testified that he has done inspection of plantings for public works projects before this, although it does not appear to be on a regular basis. The Grievant testified that based on the listing of Braatz's hours, he determined that Braatz had spent 16 hours doing stakeout work and three hours of inspection work on the project. The Grievant did not explain how he determined that, but Braatz did not dispute those figures in his subsequent testimony. According to Braatz's testimony he worked on the project for the most part on an "as needed" basis, and only went out there when he was called

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5/ Ibid., at 548-549.

6/ Ibid., at 549. It is noted that those cases involved the permanent transfer of work out of the bargaining unit.

7/ Ibid., at 549-550.

8/ Ibid., at 550.

out there about something. Union Exhibit 4, a listing of Braatz's hours, corroborates that, indicating that he was often out there only for a short time. Spreading those hours out over the months results in Braatz only having performed a de minimis amount of the work. It appears instead that the work performed was tangential to his overall responsibilities on the project. As discussed previously, although the Grievant claims he lost 94.5 hours of overtime due to not being assigned to work on the project, that cannot be presumed, since the City determines whether overtime is to be required. Also, there is no requirement in the Agreement that the City must have the Arborist supervise and inspect all subcontracted plantings. The City determines whether such work is necessary, and if it is, to what extent.

Therefore, it is concluded that due to the temporary and de minimis nature of the work, and the fact that such work has been done in the past by employes in the Engineering Department, the City did not violate the Agreement when it had Braatz and Smedberg perform a limited amount of duties on the Ledgeview project that are normally performed by the Grievant.

Based on 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 26th day of September, 1994.

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