BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME LABOR UNION NOS. 1365 and 2494

and

WAUKESHA COUNTY

Case 130
No. 50393
MA-8241

Appearances:
Lawton & Cates, by Mr. Bruce F. Ehlke, on behalf of the Union.
Michael, Best & Friedrich, by Mr. Marshall R. Berkoff, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration before a three-member panel. Pursuant thereto, I was designated Chair of the panel and panel members Robert Chybowski and Allan C. Walsch were designated by the Union and County respectively. Thereafter, and without any objection from the Union, the County substituted James H. Richter after Mr. Walsch left County employment. Hearing was held in Waukesha, Wisconsin, on June 20, 1994. The hearing was transcribed and both parties filed briefs which were received by August 22, 1994. The arbitration panel subsequently met in executive session on November 21, 1994, in Madison, Wisconsin, and participated in a telephonic conference call on March 7, 1995.

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

ISSUE

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

> Has the County violated the letter of agreement attached to the collective bargaining agreement by using an outside vendor to perform custodial work at its mental health offices on Airport Road, Waukesha, Wisconsin, and, if so, what is the appropriate remedy?

DISCUSSION

The County for a number of years provided mental health services in its Northview Road, Waukesha, Wisconsin, facility. Throughout that time, employes represented by the Union and classified as Building Service Workers I and II performed all custodial services at that facility. The job descriptions for the Building Service Workers I and II do not refer to any specific building locations or County departments. Building Service Worker I Mary Stone thus testified that these employes over the years have been assigned to clean various parts of the County's facilities and that they have been rotated and transferred from one building to another.

The Northview building also housed the County's Department of Aging whose offices were, and still are, cleaned by employes represented by the Union. A Metro Drug unit also was located there before September, 1993, and it has been expanded since then. Its offices, too, are cleaned by bargaining unit personnel. In addition, the County after September, 1993, moved a microfilm service to the Northview facility. Its offices also are cleaned by bargaining unit personnel. The County in April, 1994, opened up a Huber facility there and its facilities are cleaned by the inmates.

The County in September, 1993, moved its Mental Health Department from Northview to a larger County-owned building located at 1501 Airport Road, Waukesha, which is better equipped and which offers better services than the Northview facility. Thus, County Labor Relations Manager Jim Richter testified that the "primary reason" for the move was that "a broader range of services could be provided at less cost." From that time forward, those offices have been cleaned by custodial employes employed and supervised by Gibb Maintenance Co., Inc., an outside vendor which successfully bid for that work. As a result, no bargaining unit employes clean those offices. The County estimates that it will save about $20,000 a year under its arrangement with Gibb, which it has not yet finalized.

No bargaining unit employes have been displaced or suffered any reduction in hours because of the County's actions in transferring its mental health services from the Northview building to the Airport Road facility and using Gibb to clean it. Thus, two custodial employes who formerly cleaned the Mental Health offices at the Northview facility have been transferred to do custodial work in the County's Courthouse. As a result, only one custodial employe remains at Northview to clean the building.

In addition to the aforementioned facilities, the County since about 1986 has operated a public health office in a privately-owned building located at 325 East Broadway, Waukesha, Wisconsin. Its rented offices at that building are cleaned by Program Cleaning, Inc., a private contractor, and not County employes. The Union has never filed a grievance protesting the fact that non-bargaining unit personnel clean those offices and that bargaining unit personnel at one time cleaned the public health offices when they were previously located in the Courthouse.

From about 1972 to the present, the parties have agreed to a series of side letters appended

to their collective bargaining agreements which have been addressed to the Union's various staff representatives and signed by County representatives on County stationery which have stated in substance:

. . .

> The purpose of this letter is to confirm an agreement reached during collective bargaining process covering AFSCME Locals No. 1365 and 2494 for the calendar years 1992 and 1993.
>
> It was agreed that Waukesha County would not subcontract its custodial work now currently being performed by employees represented by AFSCME.

. . .

The Union filed the instant written grievance on August 9, 1993, wherein it asserted that the use of the Gibb cleaning service to perform custodial services at the County-owned Airport Road facility violates this letter of agreement.

In support thereof, the Union mainly argues that the grievance must be sustained because the County's position "conflicts with the plain language of the letter of intent" since the County has "failed to demonstrate that the custodial work was new work within the meaning of the letter of agreement. . .", and because past practice "with regard to other County facilities supports the grievance". The Union also maintains that bargaining unit employes inevitably will be laid-off if the County's position is sustained because the County then will be free to open up new facilities which are not cleaned by bargaining unit employes. As a remedy, the Union requests that the disputed work be assigned to members of the bargaining unit it represents.

The County, in turn, mainly contends that using an outside vendor "is not subcontracting of custodial work in violation of the letter of agreement" because the phrase therein stating "now currently being performed" refers to the custodial work being performed within the facilities which actually existed at the time that the letters were agreed to, as opposed to any new facilities opened up thereafter.

The resolution of this issue must start out by examining Article I of the contract, entitled "Management Rights Reserved", which provides:

> 1.01 Except as specifically provided herein, the Management of the County of Waukesha and the direction of the work force, including but not limited to the right to hire, the right to promote, the right to discharge for proper cause, the right to

> decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish and/or create positions, the right to make reasonable rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods, processes, and manner of performing work are vested exclusively in the Management. Management in exercising these functions will not discriminate against any employee because of his/her membership in the Union. (Emphasis added).

The key phrase here refers to the County's "right to subcontract work (when it is not feasible or economical for County employes to perform such work). . . except as "otherwise specifically provided herein. . ."

Here, there is no evidence that it is not "feasible" for bargaining unit employes to perform the disputed work. The County therefore has failed to meet the first part of this stated test. However, the County has shown that it will save about $20,000 through its contract work with Gibb. While the Union asserts that such a saving is insubstantial and that the County has failed to meet the second part of this test, I find otherwise. A savings of $20,000 is a considerable sum in these days of cost cutting and cost saving. I therefore find that the County's action is not violative of this part of the contract.

Article I, however, goes on to limit the County's rights by providing that they are curtailed to the extent "specifically provided herein." This dispute therefore boils down to whether the County has violated the parties' letter of agreement spelled out ante, at page 3, as said letter provides a further refinement regarding what the County can do in this area.

The question then becomes whether, under that letter, the disputed work herein constitutes "work now currently being performed by employes represented by AFSCME." This language is not a model of clarity because it is susceptible to different interpretations.

It thus can refer to the general kind of custodial work which bargaining unit employes were performing when the letters were renewed every one or two years and which employes are capable of performing at any other subsequently-opened County facilities not already in existence when the letters were agreed to. In short, this view - advanced by the Union - treats this language as a work expansion clause. 1/

1/ The Union also argues that this language should be construed against the County because it drafted the side letter. I disagree. The side letter clearly states that it confirms "the

The County's alternative interpretation, however, is just as plausible since the phrase "now currently being performed. . ." seems to refer to a place in time and therefore presupposes that the County can subcontract any new work which was not being performed by bargaining unit personnel at the time the letters were agreed to. 2/ This view therefore treats this proviso as a work preservation clause - one which in effect freezes the scope of the bargaining unit.

There are problems with both of these interpretations. For if this proviso were meant to be a work expansion clause, one would think that it would expressly state words to the effect, "The County cannot subcontract any custodial work, wherever performed, in any of its present or future facilities." That certainly is clearer language than what we have here. But by the same token, if the letter only covered work retention, clearer language would have stated in substance, "The County is free to subcontract custodial work at any newly-opened operation or facility, provided only that bargaining unit employes not be displaced."

The bastardized language in dispute here falls short of such clear expressions - a situation which is not enhanced by the fact that there is no bargaining history as to what the parties meant when they initially agreed to this language over twenty years ago. Arbitral precedent is not much help either, as the arbitration cases cited by both parties turn on specific contract language which differed, to one extent or another, to what we have here.

The resolution of this issue hence must try to accommodate the two fundamental objectives which underlie many contractual subcontracting clauses: on the one hand, subcontracting cannot erode the bargaining unit by taking away the work actually being performed by bargaining unit personnel on a day-to-day basis; on the other hand, an employer can subcontract new and different work which has never been actually performed by bargaining unit employes in the past, provided only that the size of the bargaining unit remain the same.

Applying these principles here, it follows that the County did not violate the letter of understanding because its awarding of the Gibb contract has not reduced the number of custodial employes in the bargaining unit in any way. Thus, there were 28 custodial employes in the unit before Gibb came on the scene, and there were 28 custodial employes in the unit at the time of the

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agreement reached during collective bargaining negotiations. . .", thereby showing that both parties agreed to this language without identifying which side first proposed it.

2/ The County argues that the disputed work herein does not constitute "subcontracting" because the custodial work now being performed at the Airport facility differs from the kind of work performed at Northview. I disagree, as the totality of this record establishes that, but for a few exceptions, the work now being performed by Gibb is substantially the same custodial work historically performed by bargaining unit personnel.

hearing. The scope and integrity of the bargaining unit therefore have not suffered.

However, the County's right to subcontract is conditioned on the fact that the number of custodial employes not shrink through the simple device of subcontracting custodial work as the number of custodial employes shrinks through attrition. As a result, the County cannot subcontract any custodial work if there are less than 28 full-time custodial employes and if it does not otherwise meet the requirements of Article 1.

In light of the above, it is my

AWARD

1. That because the number of custodial employes in the bargaining unit has remained the same, and because there was no reduction in the number of hours worked by custodial employes in the bargaining unit, the County did not violate the Letter of Agreement attached to the collective bargaining agreement by using an outside contractor to perform custodial work at its mental health offices on Airport Road, Waukesha, Wisconsin;

2. That the County is free to subcontract custodial work only if the number of full-time custodial employes in the bargaining unit remains the same and only if there is no reduction in their hours, provided that the County otherwise meets the contractual requirements regarding subcontracting which are spelled out in Article 1 of the contract.

Dated at Madison, Wisconsin this 7th day of April, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

Robert Chybowski /s/ -- See attachment
I dissent

James Richter /s/ 3/28/95 -- See attachment
I concur

Attachment # 1

* *The undersigned, representing the County in this phase of the proceeding, while concurring in the decision wishes to express the County view on 2 points in the decision:*

1. *While the County agrees that the fact no County employees were laid off as a result of the County using an outside vendor in the new Mental Health Center is a relevant consideration for the panel in this case, the County disagrees with any rationale which suggests the County's right to future subcontracting is based in any way on the future size of the unit.*

2. *It then follows that the County specifically disagrees with paragraph 2 of the award which purports to add a "unit size" criteria to any future subcontracting.*

   Article VI of the governing contract does not empower grievance arbitrators to add to the terms of a contract which the undersigned believes paragraph 2 of the award arguably does.

Dated at Waukesha, Wisconsin this 28th day of December, 1994.

By James Richter /s/
James H. Richter

Attachment # 2

I dissent. In my opinion the County violated the Agreement by contracting with Gibb Building Maintenance Company to have custodial work performed at the County-owned Airport Road facility.

It is a well established principle of contract construction to interpret ambiguity against the party selecting the language. To the extent that the language of the side letter in question is ambiguous, as Arbitrator Greco has found, it must be construed against the County. On its face, the side letter (page 31 of the parties' Agreement) shows the County to be the drafter. A unique page of the Agreement, it is the only part of the Agreement that appears as a letter on Waukesha County stationery, signed only by a County official. The record before us does not show that the language of the side letter was drafted jointly, the result of give-and-take negotiations, or based on the language of a Union proposal; thus we can only take it at face value. By agreeing to put this part of the Agreement in the form of an official letter from the County to the Union, the County accepted the inherent risk of having any ambiguity construed against it.

Certainly under the factual circumstances of this case no employee should have been laid off or suffer a reduction in hours worked, but, in my opinion, for reasons different from those presented by Arbitrator Greco.

Robert Chybowski /s/
Arbitrator

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