BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

CITY OF SUPERIOR

and

SUPERIOR CITY EMPLOYEES' UNION LOCAL #244, AFSCME, AFL-CIO

Case 157
No.55385
MA-9999

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, Human Resources Department, 1407 Hammond Avenue, Room 200, Superior, Wisconsin, 54880, appearing on behalf of the City.

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin, 54880, appearing on behalf of the Union.

ARBITRATION AWARD

City of Superior and Superior City Employees' Union Local #244 are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding, and which provides for the final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on July 17, 1997, requested the Commission to appoint either a commissioner or member of its staff to serve as arbitrator. The Commission appointed Paul A. Hahn as arbitrator. Hearing in the matter was held on November 19, 1997, in Superior, Wisconsin. There was no transcript made of the hearing, and the parties declined the opportunity to file post hearing briefs.

ISSUE

The Union stated the issue: "Did the employer violate the terms of the collective bargaining agreement and past practice by denying senior employees the opportunity to be trained and to work a job (voting machine assignment) involving overtime before less senior employees?" If so, the appropriate remedy is to allow senior employees (the Grievants) the opportunity to work the voting machines assignment in the future. Likewise, to make the Grievants whole for any and all lost wages and benefits due to the Employer's denial of allowing senior employees the opportunity to work overtime.

The City stated the issue: Article 3(C) provides that Management has the fight to hire, promote, schedule, and assign employees to positions with the City. "Did the City violate Article 18.05 (Overtime) when it assigned the Carpenter Shop employees to be trained in the elections assignment?"

Arbitrator statement of the issue: Did the employer violate the terms of the collective bargaining agreement, Article 18 (Overtime), and past practice when it assigned voting machine backup to the Carpenter Shop employees without regard to bargaining unit seniority.

RELEVANT CONTRACT PROVISIONS

ARTICLE I
RECOGNITION

1.01 The City of Superior recognizes the Union as the exclusive representative of its employees in Public Works, the Equipment Depot, Park and Recreation Department and Wastewater Treatment Plant, except those employees excluded pursuant to Section II 1. 70 of the Wisconsin Statutes, for the purpose of collective bargaining with respect to wages, hours and working conditions and other conditions of employment. The term "employee" refers to all employees covered by the terms of this Agreement.

ARTICLE 3
MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A) To direct all operations of the City.

B) To establish work rules and schedules of work.

C) To hire, promote, schedule and assign employees to positions with the City.

D) To suspend, demote, discharge and take other disciplinary action against employees for just cause. In the event that a demotion will cause a layoff, the person demoted will be laid off.

E) To lay off.

F) To maintain efficiency of City operations,

G) To take whatever action is necessary to comply with State or Federal law.

H) To subcontract work presently performed by bargaining unit members provided that regular, full-time Union members will not be laid off or lose regularly scheduled straight time hours as the result of any subcontracting. The City agrees that it shall consult with the Union prior to subcontracting work presently performed by full-time bargaining unit members.

I) To introduce new or improved methods or facilities.

J) To determine the methods, means and personnel by which City operations are to be conducted.

K) To take whatever action is reasonably necessary to carry out the functions of the City in situations and emergency.

ARTICLE 7
SENIORITY

7.01Effective January 1, 1986, seniority according to this Agreement, shall begin with the employee's starting date of employment within this bargaining unit. After January 1, 1986, employees re-assigned from other bargaining units shall, however, retain longevity, sick leave accumulation and vacation based upon his/her years of service credited in such other bargaining unit. Seniority shall not be diminished by absence due to illness, authorized leaves of absence or temporary layoff Seniority fists shall be maintained by each department and on a unit-wide basis. Each seniority list shall be brought up-to-date annually and copies of same

shall be mailed to the Secretary of the Union.

7.02 The seniority of each employee of the City of Superior shall be maintained within the various departments. Any person newly employed in any department except returning service persons shall begin at the bottom of the seniority list of that particular department.

ARTICLE 18
OVERTIME

It is hereby declared to be the policy of the parties and fully understood and agreed that in the interest of the taxpayer, who must be considered a party to this Agreement, overtime shall be kept to an absolute minimum.

18.05 Should it be necessary to require overtime that working day, employees on duty when the decision to work said overtime is made shall be entitled to work said overtime regardless of seniority. In the event that overtime is to be scheduled, employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled. Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance to receive pay for the number of hours worked by a junior employee. Said grievance shall be filed before the end of the next working day. An employee who does not answer a telephone call or who answers by a telephone answering machine may be considered unavailable for overtime. The other provisions of this Section notwithstanding, any employee who has worked sixteen (16) continuous hours shall not work or receive pay for the next eight
(8) consecutive hours.

BACKGROUND

This grievance arbitration involves the City of Superior and Superior City Employees' Union Local #244 representing employees in the various classifications set forth in Article 1, Recognition, Section 1.01. The Grievants allege a contractual and past practice violation by the City of Superior for not allowing more senior employees in the bargaining unit to bid for work involved in backing up Sign Shop employees for the handling of voting machines during the municipal elections in the City of Superior in April of 1997.

The City of Superior conducts various elections during the course of the year. The elections are overseen by the City clerk's office. For many years, the City used manual voting machines, and the clerk's office used employees from the Equipment Depot Division to assist the clerk's office during the course of the election by setting up the machines, operating them, and taking them down. In about 1989 or 1990, when the City of Superior computerized voting machines, the decision was made by the director of the Public Works Department to assign responsibility for assisting the clerk's office in handling of the voting machines to employees in the Sign Shop. The handling of the voting machines requires some training and usually consists of a three-day operation, one day before the election to set up the machines, the day of the election, and the day after the election to take down the machines. Normally, on the day of the election, the employees will work approximately eight hours of overtime because of the hours of the election.

In 1996, Sign Shop employee, Marlton was on an approved leave of absence for a period of time. Mr. Marlton was the most experienced Sign Shop employee to provide assistance to the clerk's office regarding the voting machines. The clerk, concerned what might happen if Sign Shop employees were unavailable during an election, discussed the matter with the director, in agreement with the City clerk, then assigned a voting machine backup role to employees in the Carpenter Shop.

In 1997, the two employees in the Carpenter Shop were trained to backup the Sign Shop employees for the February 1997 election. The Union did not have knowledge of this assignment of the backup to the Carpenter Shop. During the April election (April 1, 1997), the two employees in the Carpenter Shop worked the election and each received eight hours of overtime for the day of the election. The two Grievants learned of this work by the Carpenter Shop employees, and because they were senior filed a grievance alleging that the opportunity to work the overtime on the day of election should have been posted and employees in the bargaining unit should have been allowed to bid for the work based on bargaining unit seniority. The Grievants and the Union also alleged a violation of the contract in that senior employees in the bargaining unit should have been given the opportunity to train for the position of backup to the Sign Shop employees. There exists a master overall bargaining unit seniority list as well as individual division seniority lists, and there are separate seniority lists for the Sign Shop and the Carpenter Shop. (Joint Exhibit 10).

The parties processed the grievances through the contractual grievance and arbitration procedure and were unable to resolve the two grievances. The hearing in this matter was held by the arbitrator on November 19, 1997, in the City of Superior. The hearing closed at 3:30 p.m. The hearing was not transcribed. The parties were given the opportunity, but declined, to file briefs and stated their positions by oral argument at the close of the arbitration hearing.

POSITION OF THE PARTIES

Union:

It is the position of the Union that it does not dispute the City's right to establish backup for the employees in the Sign Shop. The Union position is that once the City made the decision that it wanted to provide employees to backup the employees in the Sign Shop for the voting machine assignment, it should have posted that assignment and allowed employees to bid based on their seniority from the overall master seniority list. By not posting that assignment, and unilaterally assigning the work to the Carpenter Shop employees, the Union alleges that the City has violated not only the labor agreement, but long-standing past practice. The Union's past practice argument covers situations where, when overtime work is not assigned to a particular department or division such as parades, running races, and sanding, employees are allowed to bid the work in those situations by their seniority from the master seniority list. The Union does not dispute the long-standing assignment of voting machine handling to the Sign Shop employees, but that once overtime was to be worked by people on the voting machines other than the Sign Ship employees, this should have been offered to the bargaining unit employees on a seniority basis. The Union argues that by not honoring seniority, has been a strong and historical element in the collective bargaining relationship between the City and Local 244, the City is undermining the concept of seniority and disrupting the morale of the workforce. Lastly, the Union position is that the two Grievants should be made whole for any lost wages and benefits, and that the City should allow senior employees to bid on overtime which should have been the case with the backup work for the voting machine assignment.

City:

The City position is that this grievance arbitration is not about an issue of overtime, but about the City's right under the management rights clause to assign work to the departments and divisions to which it wishes to assign work. The City argues that it properly, under the collective bargaining unit agreement and past practice, assigned the voting machine backup work to the Carpenter Shop and the two employees in that Shop. Therefore, when assistance was needed in the April election beyond what the Sign Shop employees could provide or to provide for experience and training to the Carpenter Shop employees, the City was doing nothing more than giving the work to the employees in the Division to which the work was assigned. This situation did not create overtime work outside a division and, therefore, the City was not obligated to post the overtime work and allow employees by seniority to bid for it. The City argues that both by contract and past practice the City unilaterally moved the voting machine work from the Equipment Depot to the Sign Shop and in other situations has assigned new work, such as ski trail maintenance, whatever department or division that it wished. The City argues that only when overtime is scheduled outside of the division where the work is normally performed or only when

the overtime work cannot be handled by the division to which it is assigned, is the City obligated to post that overtime. Therefore, the City argues, the Union's examples of posting for scheduled overtime for races and parades is not pertinent to the situation of the situation of the voting machine assignment. Lastly, the City argues that since the voting machine backup work was appropriately assigned to the Carpenter Shop employees, the overtime situation of
Article 18 is not applicable, and therefore, the grievances should be dismissed.

DISCUSSION

The facts in this matter are essentially not in dispute. The two Grievants who work in the Parks and Streets Divisions have more seniority than do the two employes in the Carpenter Shop. No one disputes that the Grievants and other employes in the bargaining unit could have been successfully trained to backup the Sign Shop employes to handle the voting machines. Nor is the overtime practice in dispute. Scheduled overtime outside of a particular division or department is posted for bidding under the master seniority list. But therein lies the crux of this dispute. The scheduled overtime was assigned on April 1, 1997, to a regular division of the Department of Public Works; the two employes in the Carpenter Shop, pursuant to Article 18 and the accepted overtime practice, were given the opportunity to work the overtime. In order for this work to be given to the Grievants, the Union has to prove that the work of backing up the Sign Shop for voting machine handling should not have been assigned to the Carpenter Shop in the first place. The Union has to prove that when the City wanted, in 1996, to provide that backup, the City had to open up that work for bid. In other words, could the City assign the work to the Carpenter Shop without opening that work up for bidding under the labor agreement and the master seniority list. The answer to that question determines the outcome of this arbitration.

The labor agreement management rights article gives the City substantial rights to operate the City as it determines is appropriate. In particular, subsection (J) of that article allows the City to determine the methods, means, and personnel necessary to run the functions of the City. 1/

This is strong language, and nowhere in the labor agreement does there seem to be a limitation on this right. Without a restriction, I find that this language gives the City the right to have assigned the backup work to the Carpenter Shop employes without first posting it for bidding under the master seniority list. Both parties argued and offered evidence of past practice to prove their positions.

> Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract contains gaps or is silent on a particular point. In order to be binding on both parties, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue to do things this way in the future. 2/

The Union's past practice evidence goes to prove that where there has been scheduled overtime, that overtime has been posted. The Union offered testimony that such overtime has been posted in the case of working parades, races, and sanding. While it was not specifically discussed in either parties' testimony, this work would appear to be special and normally not assigned to a particular department or division. The City did not dispute this practice. But the Union did not offer any testimony of past practice that restricted the City's right under the management rights clause to assign the work in question to the Carpenter Shop.

The credible testimony of the Public Works Director was that he felt under no obligation to post the backup work, but made the determination to assign the work to the Carpenter Shop consistent with his practice of assigning work to the department or division where he felt it best could be handled. This testimony was supported by the former Union President who testified under cross-examination that the director had alone made the determination to assign maintenance of the ski trails in a City park to the Park Division. 3/ This work was not posted and whether or not any overtime is worked in maintaining the ski trails is not important, it is whether the Union ever raised an issue about the ski trail maintenance being assigned to the Park Division; the Union did not. Further, Sign Shop foreman, Marlton testified that when the voting machine work was assigned to the Sign Shop it was never posted. This testimony was confirmed by Public Works Director Vito who assigned the work to the Sign Shop from the Equipment Depot in 1989-1990. Again, former Union President Rainaldo credibly testified that management makes the assignment to the division and then, confirming Vito's understanding, scheduled overtime is first worked in the division where the work is assigned. Only if the overtime work cannot be done by the assigned division, is the work put up for bid from the master seniority list.

It is clear that the assignment to the Carpenter Shop was an assignment that Vito made after discussion with City Clerk Alhberg. Further, the evidence makes clear that the decision to assign voting machine backup to the employees in the Carpenter Shop Division was based on legitimate reasons. The evidence also is compelling that the Carpenter Shop is a permanent division within the City organizational structure 4/ and that the Carpenter Shop has its own seniority list. 5/

In essence, there simply is not sufficient evidence of past practice to override the City's right to assign the voting machine backup work to the Carpenter Shop. The evidence, even from the Union's own witnesses, supports a finding of a past practice that supports the City's position. I wish to make clear that I do not find the labor agreement to be ambiguous or unclear on the point of whether management had the right to assign the work to the Carpenter Shop; it had that right and the evidence of past practice further substantiates that right. 6/ The Union has failed to meet its burden of proving that the City had to post the assignment of voting machine backup work rather than assign it to the Carpenter Shop Division. Having properly, under the parties' agreement, assigned the work to the Carpenter Shop, the overtime first belonged to the Carpenter Shop employees.

Based on the evidence and consideration of the oral arguments of the parties, I find that this is a grievance not about the posting of overtime, but about the City's right to assign work. I find that the City did not violate the parties' labor agreement or past practice when it assigned the voting machine backup work to the Carpenter Shop Division and, therefore, the grievances cannot be sustained.

AWARD

The grievances are denied.

Dated at Madison, Wisconsin, this 15th day of December 1997.

Paul A. Hahn /s/_____
Paul A. Hahn, Arbitrator

ENDNOTES

1/ Joint exhibit 1, Article 3, Management Rights, Section (J).

2/ LACROSSE COUNTY, CASE 149 No. 53804 MA-9646 JONES (1996).

3/ Joint exhibit 1, The Park Division has a separate seniority list as do the Carpenter Shop and Sign Shop.

4/ Employer exhibit 1.

5/ Joint exhibit 10.

6/ Arbitral authority is rooted in the parties' agreement. First and foremost, this agreement is the written contract executed by them. To the extent the contract is unclear, the most persuasive guides to the resolution of ambiguity are past practice and bargaining history. Each derives its persuasive force from the agreement manifested by the conduct of the parties whose intent is the source and the goal of the contract interpretation. GREEN BAY BOARD OF EDUCATION, CASE 185 NO. 53595 MA-9395 MCLAUGHLIN (1996).

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