BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF PARK FALLS

and

LOCAL 1405-A, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Case 20
No. 57383
MA-10605

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appeared on behalf of the Union.

Attorney David Deda, Slaby, Deda, Marshall, Reinhard and Fuhr, LLP., 215 North Lake Avenue, P.O. Box 7, Phillips, Wisconsin 54555-0007, appeared on behalf of the City.

ARBITRATION AWARD

On March 12, 1999, Local 1405-A, AFSCME, AFL-CIO requested the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance pending between the Union and the City of Park Falls. The Commission subsequently appointed William C. Houlihan, to hear and decide the matter. A hearing was scheduled for June 17, and subsequently postponed. The matter was rescheduled, and heard on September 15, 1999, in Park Falls, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by November 15, 1999.

ISSUE

The parties stipulated to the following issue:

Does the City's contract for services with Helping Hands violate Article 2 of the collective bargaining agreement? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

Section 1. The Employer hereby recognizes the Union as the exclusive collective bargaining representative of all employees of the Board of Public Works and Sewage Disposal Plant, but excluding supervisory, confidential, summer, temporary, part-time and/or casual help, on all matters pertaining to wages, hours and working conditions and other conditions of employment.

Section 2. The Employer further recognizes that all employees in the bargaining unit have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other lawful concerted activities for purposes of collective bargaining or other mutual aid or protection.

. . .

ARTICLE II – MANAGEMENT RIGHTS

Section 1. **Management Rights**: The parties to this Agreement recognize that they are engaged in a common endeavor in which each of them has separate and distinct responsibilities which both of them are obligated to meet in a manner consistent with their mutual overriding responsibility to the community as a whole. The Union recognizes and respects the obligation of management to provide for the best interest and general welfare of the community. The Employer retains the sole right to manage its government and business, including the right to decide the number and location of employees, the machines and equipment used, the projects to be worked on, the methods of work, the schedules of projects, the designing and engineering of projects and the scheduling of emergency or overtime work hours; to maintain order and efficiency in its operations; to hire, lay off, promote, assign, transfer, discipline, and discharge employees for just cause, subject only to such restrictions governing grievance and arbitration as expressly provided in this Agreement.

Section 2. **Subcontracting**: The Employer shall have the right to contract for work where necessary, whether or not such work is being performed by its employees, provided that any employees as may be affected shall suffer no impairment of rights or benefits during the term of this Agreement, including the right of the Union to represent employees.

. . .

ARTICLE XI – WORKDAY, WORK WEEK, OVERTIME PAY/ COMPENSATORY TIME

Section 1. All employees covered by the terms of this Agreement shall work the following schedule of hours:

A. The workday shall consist of eight (8) hours each day for five (5) consecutive days each week, Monday through Friday, for a total of forty (40) hours each week.

1. The hours of work shall be 7:30 A.M. to 12:00 Noon and from 12:30 P.M. to 4:00 P.M., Monday through Friday.

2. The hours of work can be changed by mutual agreement between the Employer and the Bargaining Unit. The agreement by the Bargaining Unit does not require each individual employeee to agree but only the Bargaining Unit as a whole.

. . .

C. The custodian shall work forty (40) hours in five (5) days, Monday through Friday, and shall be responsible for the care of the building on Saturday and Sunday as necessary. Compensatory time is to be taken during the normal work week for any work on Saturday at the rate of time and one-half times the hours worked and any work on Sundays or holidays at the rate of two times the hours worked. Work on Monday through Friday outside the normal work day is to result in compensatory time hour for hour unless the employeee works over eight (8) hours in a day, in which case the compensatory time is to be at a rate of one and one-half times the hours worked over eight (8) hours. . .

. . .

BACKGROUND

The City of Park Falls has a crew consisting of ten individuals. The crew size has not changed since the initiation of subcontracting, which is the subject matter of this dispute. One member of the crew is classified as a Custodian. That also has remained constant throughout the period of subcontracting. The custodian works at three sites; the municipal building, the

police/fire building, and the library. Custodial duties include interior duties such as cleaning and maintenance as well as exterior duties which encompass lawn care, plantings, and snow removal.

In October of 1998, the library was remodeled. One impact of the remodeling was to increase the amount of custodial work. Space that had previously been used as a garage was converted into a lobby. This increased the carpeted floor space and the dusting area by approximately one third. The basement of the building was finished. Previously half the basement had been unfinished and non-public. The effect of finishing the basement was to increase the amount of space open to the public. Some second floor space was reassigned. A parking lot was added. A sidewalk was added, lawn area was increased, and shrubs were planted. The Employer installed a new HVAC system, with an anticipated higher level of maintenance.

At some point in the construction process, Gregory Buraglio, the Union President, had a conversation with Gary Olson, the Library Director. According to Buraglio, Olson remarked that the expanded library would need more custodial attention. Olson went on to indicate that the two men would have to sit down and discuss the consequences of that. That conversation never occurred.

The City determined to subcontract out the additional custodial work inside the library to an outside contractor, Helping Hands. A contract was executed in December of 1998, and took effect in January of 1999. The work performed by Helping Hands is work which had previously been done by bargaining unit employees. That custodial work is compensated at a relatively high rate of pay under the terms of the collective bargaining agreement between the parties.

The bargaining unit custodian continues to work as he did prior to the subcontracting. His hours have not changed as a result of the subcontracting. What has changed is that the amount of inside work the custodian performs has diminished. His work at the library focuses on outside work. Testimony indicates that inside work is at times preferable to outside work in the cold weather. Testimony further supports a finding that the work performed by Helping Hands could be done on an overtime basis. There is no dispute in this proceeding that bargaining unit employees are capable of performing the work contracted to Helping Hands.

Helping Hands cleans the library from 8:00 a.m. to 10:00 a.m. on weekdays and from 10:00 a.m. to 2:00 p.m. on Saturdays. This reflects the City's desire to have the library cleaned outside of the hours of operation of the library. Helping Hands brings in two to three people and a large commercial vacuum to do its work.

There is a history of subcontracting involving this Employer and bargaining unit. In the mid to late-1970's, the City subcontracted garbage collection. That subcontracting constituted a permanent, ongoing operation. A bargaining unit member retired, and another was reassigned. The Employer contracted out one truck driving and one laborer position, without bargaining with the Union, and without a grievance. Approximately three to four years before the subcontracting giving rise to this grievance, the City subcontracted out its recycling operation. That too was a permanent, ongoing process. The recycling contract involved one truck driver and one laborer position. It was done unilaterally and without negotiation with the Union. That work was not regarded by bargaining unit members as preferred work.

Periodically, the City contracts for the cleaning of sewers and the rehabilitation of manholes. There is a dispute as to whether that is work City employees are capable and/or equipped to perform.

Periodically, the City contracts for gravel hauling, snow hauling, the installation of water and sewer lines, the installation of storm sewers, paving, the construction of curbs and gutters, and concrete work. All of this work is work the City crew is capable of performing. The Union claimed to be unaware of the existence of some of this work. There was a grievance filed over some of this work and resolved on a non-precedential basis.

The parties stipulated that Article II – Management Rights, Sections 1 and 2, have been in effect since 1972. They stipulated that the language relevant to this dispute has not changed in that time period.

POSITIONS OF THE PARTIES

It is the position of the Union that the custodial position is a relatively preferred one in this bargaining unit, and that the work is basically indoors thus removing employees from the oft-times harsh winter weather of northern Wisconsin. Additionally, the position pays a relatively high wage rate.

While there is no specifically expressed right to overtime work, when such work becomes available, it must be paid at a premium rate of pay. In some cases, it can double the rate of pay an employee earns. This is also a negotiated benefit which can significantly augment an employee's yearly income. Thus, together with the generally high rate of pay, there can be little question but that "employees as may be affected. . ." and that as a result of the subcontracting they, "have suffered. . . impairment of rights or benefits during the term of this agreement".

Additionally, the Union contends that it is not legally or contractually eligible to represent the employees of Helping Hands, Inc. Its certification and the contractual recognition clause confine its representation to employees of the Employer. Among the express limitations on the Employer's ability to subcontract is that it may not impair "the right of the Union to represent employees". The very existence of employees of Helping Hands constitutes an impairment of the Union's ability to represent the workforce.

The Union contends that the language in this agreement clearly and unambiguously preclude the subcontracting that has occurred. It cites several arbitrators for the proposition that clear, unambiguous contract language must be enforced.

The Union seeks a cease and desist order accompanied by a make-whole remedy.

In its reply brief, the Union takes issue with the City's contention that to adopt the Union view in this proceeding writes the subcontracting provision out of the agreement. As an example, the Union contends that during an extreme winter weather emergency where City streets could not possibly be made safe by the current workforce, even with all available employees working extended overtime, it might be "necessary" to temporarily contract with either another public agency or private concern in order to clear the streets. Such an occurrence would remain consistent with the parties' collective bargaining agreement. That example stands in contrast to the instant case where the Union contends that subcontracting was done on an extended basis and obviously designed solely to save money.

It is the view of the Employer that the effect of the arbitrator accepting the Union's position is the same as striking Section 2, Subcontracting, from the agreement. In the Employer's view, Article II – Management Rights, read in its entirety, gives the City the right to subcontract work. The City notes that the custodian continues to work as before, doing the same type of work for the same pay with no changes in hours due to the subcontracting.

To the extent there is any ambiguity in the contract language, the City contends that the numerous occasions in the past where subcontracting has occurred clarifies the intent of the language.

As to the Union's contention that it is not available to represent employees of Helping Hands, the City's view is that that contention never arose during the course of the hearing and the Union is therefore precluded from raising the matter post-hearing. On the merits, the City takes the position that the right of the Union to represent employees can only refer to existing employees.

In summary, it is the view of the City that the City possesses the right under Article II – Management Rights, to subcontract, so long as the existing Union employees are working full-time. Potential additional employees or potential future employees are not members of the bargaining unit, and do not have protection of the contract. Had the City laid off a custodian and hired Helping Hands, the situation would be different.

DISCUSSION

The analysis of this dispute begins with Article II, Section 2, Subcontracting. That article addresses the right and restriction on the Employer to subcontract out bargaining unit work. Contrary to certain arguments advanced in this proceeding, this is not a clear and unambiguous provision. The Article begins with a general right of the Employer to subcontract, whether or not the work involved is performed by bargaining unit members or not. That general proposition is subject to restriction.

The first restriction on this expressed employer right is that the Employer may "contract for work where necessary". The record is silent as to what constitutes "necessary" or who makes the decision as to what is and is not "necessary". It is not clear to me whether "necessary" refers to work; i.e., the necessity to get certain tasks accomplished, or to the term "contract", i.e., the necessity to search outside the work force due to a lack of equipment or expertise to perform certain tasks. The "where necessary" provision was ignored by the Employer, and noted, though not explained, by the Union's post-hearing brief.

The Employer's right to subcontract is additionally encumbered by a proviso, which limits the Employer under three circumstances. The Employer's act of subcontracting; 1) cannot impair an employee's rights, 2) cannot impair an employee's benefits, and 3) cannot impair the right of the Union to represent employees.

With respect to the first two provisos, the Union contends that employees have suffered a loss, in that the custodian's access to overtime has been restricted or diminished, that other employee's periodic access to the higher-rated custodial job has been diminished, and that employees will now work a greater preponderance of time outdoors rather than the more favored indoors. I disagree. The Union acknowledges in its brief that there is no express right to overtime. My review of the contract confirms this fact. I find no contractual right to perform out-of-classification work. Similarly, I find no contractual right to work a preponderance of hours or any mixture of hours inside when performing work at the library. Historically, the custodial job has consisted of indoor work and outdoor work. It continues to do so. Article II, Section 1 gives the Employer the right to establish the number of positions and goes on to grant to the Employer the right to determine the scope and type of work to be performed. All of the "rights" alleged to have been compromised fall within the scope of the Employer's control of the workplace set forth in Article II.

Article XI, Section 1, C, addresses the hours of work of the custodian. There has been no change in the hours of work of the custodian, and the hours worked by the custodian are consistent with those mandated by the collective bargaining agreement. This is the right created by contract, and it has not been altered.

The Employer is precluded from impairing employee benefits as a consequence of subcontracting. In the context of benefits appearing in the same sentence as rights, I read the contractual provision as a reference to traditional economic benefits such as health insurance, vacation, sick leave, etc., set forth in the agreement. This reading of benefits, gives it a meaning separate and distinct from the notion of a contractual right, and avoids a redundancy. No economic benefit has been altered for any employee, either explicitly or due to a reduction in hours and concomitant loss of accompanying benefit.

The Employer's act of subcontracting does not impact the Union's right to represent employees. The Union continues to represent the same number of employees and the same employees it represented prior to the Employer's act of subcontracting. The Union never had a contractual right to represent employees other than those of the Employer. The Union continues to have the same right to organize employees of Helping Hands that it possessed before the act of subcontracting. What the Union does not represent are those employees who perform the new work. To read this clause to require that, is to give it a circular meaning. That is, if the Union must represent all employees who perform all work for the Employer, the Employer has no right to subcontract. Such a reading effectively eliminates the general right to contract for work which is the premise of this section.

In the absence of clear and unambiguous language, I believe the practice of the parties is relevant. In this instance, there are two occasions under which the Employer subcontracted out operations. Additionally, there are a number of instances where the Employer has contracted out certain tasks. While the Union denies knowledge of relatively minor instances, I do not find the Union's contention in this regard to be persuasive. This is a small operation, and I find it difficult to believe that bargaining unit members did not know who was hauling gravel and snow, installing water and sewer lines and doing blacktopping for the City. The Employer can only point to two major instances of subcontracting over a 20-year span. The relatively small number of instances is not compelling. However, the impact of the decision to subcontract out an operation is enormously significant. Here, the Employer has contracted out two operations. Both of these actions were taken under the language that is being construed today. Given the inherent magnitude of a decision to contract out bargaining unit work, I believe the Employer's actions to be both clearly enunciated and acted upon and readily ascertainable over a reasonable period of time. As such, I believe the Employer has established an interpretive practice.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 26th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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