

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

**CITY OF FOND DU LAC EMPLOYEES,
LOCAL 1366 AFSCME, AFL-CIO**

Case 169
No. 59283
MA-11242

(Assessment Clerk Duties Grievance)

Appearances:

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, P.O. Box 2236, Fond du Lac, Wisconsin 54936, on behalf of Local 1366.

Davis & Kuelthau, S.C., by **Attorney William G. Bracken**, Employment Relations Services Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2000-2002 collective bargaining agreement between the City of Fond du Lac (City) and City of Fond du Lac Employees Local 1366 AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to resolve a dispute between them regarding the alleged performance of bargaining unit work by managers in the City Assessor's office. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Fond du Lac, Wisconsin, on February 5, 2001. No stenographic transcript of the proceedings was made. The parties agreed to file their briefs directly with each other postmarked March 12, 2001, and they agreed to waive reply briefs. All briefs were received by March 14, 2001, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues for decision in this case. The Union suggested the following issue:

Did the City of Fond du Lac violate the collective bargaining agreement when the City Assessor and Deputy Assessor assigned the work of the bargaining unit position, Assessment Clerk, to themselves in the Summer of 2000? If so, what is the appropriate remedy?

The City suggested the following issues for determination:

Did the City violate Article XXVII, Management Rights when, consistent with past practice, it operated the City's Assessment Department in the same manner when the Assessment Clerk's position was vacant from June 30, 2000 to August 28, 2000? If so, what is the remedy?

The parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument and their suggested issues in this case. Based upon the relevant evidence and argument, as well as the above-quoted issues, I find that the Union's issue is the more reasonable of the two and it shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE I RECOGNITION

Section 1- The City recognizes 1366, AFSCME, AFL-CIO, as the exclusive bargaining representative in the bargaining unit consisting of all permanent full-time, permanent part-time, in the Public Works Department (Waste Collection, Sewage Treatment, Electrical, Construction & Maintenance, Parks and Water Utility (field and plant) Divisions), the Department of Community Development (Transit, Inspection Services and Parking Meter Utility Divisions), Fire Department (Fire Records Clerk), Departments of Administration, Engineering, and Water Utility (office), located in City Hall, Police Department, and seasonal employees of six (6) months or more duration in the Parks Division of the City of Fond du Lac, 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 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.

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.

BACKGROUND

The City Assessor's Office (part of the Department of Administration) is responsible for evaluating all real and personal property in the City including vacant land, homes, mobile homes, boathouses and buildings on leased land. The City Assessor's office consists of two managers, the City Assessor and Deputy Assessor, as well as four bargaining unit positions: Assessment Technician, Assessment Clerk, Property Appraiser I and Property Appraiser II.

Starting in October, 1999 and through fiscal 2000, the City of Fond du Lac was in the process of re-evaluating all real and personal property in the City. In the past, the City had contracted with outside firms to re-evaluate its property but in 1999 and 2000, the City decided

to use its own employees in the City Assessor's Office to perform all re-evaluation duties in order to save the City money. There are approximately 14,000 parcels of land in the City of Fond du Lac and 12,000 residential units.

As a part of the 1999-2000 re-evaluation duties, bargaining unit employees in the Assessor's office regularly went out on calls to residences to attempt to get home owners to let them in for re-evaluation purposes. If a home owner was not present, the Assessment employee would leave a hanger on the door knob of the residence asking the home owner to call the Assessment Office to make an appointment for the inspection. If the home owner was present and willing to let the Assessment employee into the home for an inspection, the inspection occurred immediately.

Job descriptions for the City Assessor and Deputy City Assessor indicate that these positions are managerial/supervisory positions responsible for the development, implementation and administration of policies and procedures to assure a fair and equitable assessment of general property which is subject to local taxation. The City Assessor job description includes, *inter alia*, the following duties and responsibilities:

Establishes and maintains good public relations; provides information and assistance to the general public regarding public records related to assessments; responds to telephone and mail inquiries; gives speeches or other presentations to service groups and other organizations regarding assessments.

The job description for the Deputy City Assessor contains verbiage similar to that quoted above from the City Assessor's job description but does not contain any reference to the Deputy providing information and assistance to the general public or to answering telephone and mail inquiries. Both the City Assessor and the Deputy City Assessor are solely responsible to assess all commercial real estate as well as residential real estate valued in excess of \$300,000.

The Property Appraiser I and Property Appraiser II conduct real estate and personal property field inspections, gather and analyze information regarding building construction; both make market value appraisals of real and personal property; both prepare various property and real estate records and draw sketches for the City; both gather and enter data into the computer and prepare records for the City. Both the Property Appraiser I and II job descriptions list the following:

Provides information and assistance to the general public and others . . .

The Property Appraiser I essentially performs duties that are less complex than those of the Property Appraiser II. Both Property Appraisers I and II are out of the office doing inspection work for the City on a regular basis.

The Assessment Technician is a paraprofessional position in the City Assessment Division. The Technician does bookkeeping and prepares maps, plats and charts, as well as transfers and other records for the City. In addition, the Technician is responsible for taking certain measurements of properties as well as taking photographs for City records and filing these. The Technician does not actually appraise any property in the City. Prior to October, 1999, the Technician worked in the Assessor's office most of the time. However, once the re-evaluation project got under way, the Technician was also sent out of the office to assist with re-evaluation duties three days per week. The Technician's job description lists the following:

Assist the assessor and appraiser with public information request.

Under required knowledge, skills and abilities the City also lists the following for the Technician:

Ability to maintain effective working relationships with other departments, staff and the general public.

The job description for the Assessment Clerk reads in relevant part as follows:

...

Characteristic Work of the Class

Nature: Under general supervision, to perform clerical work related to the preparation and maintenance of assessment records, and to perform related work as required.

Examples:

1. Reply to inquiries regarding assessments, lots sizes, property locations, etc., under the direction of the Assessor and/or members of the assessment staff.
2. Prepare and make ready property assessment blotters of new additions and changes of legal descriptions, etc.
3. Record building permit information on assessment work blotter.
4. Screen telephone and walk-in request from attorneys, realtors, abstractors, general public etc., and make appointments for staff as necessary.
5. Record building permit information on assesment [sic] work blotter.
6. Type and/or file all records, reports, real estate documents, legal descriptions, correspondence, etc., as directed in a neat and efficient manner.
7. Type notice of assessment changes and personal property notices and enter changes on computer files as directed.

8. Maintain and update computer files as directed.
9. Supply photocopies of requests for information on legal descriptions, lot sizes, ownership, etc.
10. Open and route incoming mail.
11. Relieve assessment staff of minor administrative and business details.

Qualifications

Essential Knowledge and Abilities:

1. Working knowledge of real estate and personal property assessment procedures and practices.
2. Working knowledge of legal descriptions and documents.
3. Working knowledge of office machine operations.
4. Working knowledge of modern office methods and procedures.
5. Working knowledge of business English and spelling.
6. Ability to type accurately and to perform varied and difficult clerical tasks.
7. Ability to make arithmetic computations.
8. Ability to communicate effectively and create effective public relations.
9. Ability to work with computer terminal.
10. Ability to understand and carry out oral and written instructions with accuracy, neatness, and dependability and to perform routine duties with minimal supervisions.

Desirable Training and Experience:

1. Graduation from high school or its equivalent, including or supplemented by course work and/or experience in secretarial and clerical fields.
2. Two or more years experience in real estate, abstract, appraisal, or legal office desirable.

The Assessment Clerk is the only one of the Assessment Office employees (including the managers) who is in the office and does not perform work out of the office. 1/ Approximately one and one-half years ago, the City got a new telephone system which could transfer incoming calls from one phone to the next if the first person, etc., on the routing system did not pick up the phone. Until July, 2000, the City Assessors' phones were prioritized for the Assessment Clerk to pick up first, then the Technician and then the Property Appraiser I. If none of these employees is available to pick up the telephone, the telephone goes to a voicemail system.

1/ Both the Assessor and the Deputy Assessor have extensive duties out of the office assessing property and maintaining public relations.

The Deputy Assessor stated herein that he picks up the telephone between 6 and 12 times a day. If one of the priority employees have already picked up the telephone, the Deputy gets a busy signal and does not actually speak to the caller. The Deputy Assessor stated that telephone calls are very important and that everyone in the office is responsible to respond when a member of the public walks into the office to ask for information. However, normally the Assessment Technician or the Assessment Clerk handle initial contacts with those at the counter and if the Assessment Clerk cannot answer the question, she generally passes the inquiry off to one of the Property Appraisers or to the Assessors.

Both the City Assessor and Deputy Assessor have separate offices in the back of the Assessment office. Neither the Assessor nor Deputy Assessor can see the counter from their offices. The Assessment Clerk is mainly responsible to handle the counter and telephone and to schedule appointments with members of the public, although whoever answers the telephone can schedule appointments by looking at the appointment book, which is kept on the Clerk's desk. Normally the day before an appointment, the Assessment Clerk pulls sheets for these appointments so that the Appraisers or Technician have the proper documents for the appointment.

The Union offered evidence that in May, 1995, a prior grievance regarding receipting work being performed by non-unit employees in the Central Collections Office (also in the Department of Administration) was processed and settled. The Union submitted the following document on this point to Local 1366 representatives, drafted by HR Director Mercer:

. . .

I have reviewed the grievance concerning the amount of receipting being performed in the Central Collection Division by non-union personnel. I have spoken to several employees and it is difficult for me to determine what constitutes excessive receipting. There are many factors that determine the amount of receipts processed by any one employee. Some transactions take longer than others, the time of the year impacts the receipting process, interruptions such as phone calls make an impact and the need to provide prompt customer service all determine who handles a particular receipt and how long it takes.

In an effort to resolve this grievance, the City would be willing to enter into an agreement limiting receipting done by non-union personnel to emergency situations, occasions when the receipting will not be completed by the close of business, periods of high customer demand for prompt customer service and other times that occur which the City and the Union can agree upon.

If the union wishes to discuss this option further the City is willing to discuss a possible agreement with the Union.

Please contact me at your earliest convenience if the Union is interested in discussing this issue further.

. . .

Clerical employees in the City's Parks and Police Departments also stated herein that when they are gone on vacation, training, on sick leave or at a doctor's appointment, the City has consistently replaced them with bargaining unit employees. They stated this practice has been done followed over a long period of time – more than 20 years.

FACTS

Sometime during May, 2000, Assessment Clerk Evie Olig announced at a staff meeting that she intended to retire in June, 2000, and she stated that her last day of work would be June 30, 2000. The paperwork was not done until approximately mid-June, 2000, and the City considered this Olig's official notice, two weeks before her last day of work. Olig officially retired effective June 30, 2000.

On July 5th Deputy City Assessor Wagner had a conversation with Properly Appraiser I, Linda Baxter regarding who would perform the duties previously performed by Ms. Olig. Wagner stated that Baxter should go out to perform re-evaluation duties. Baxter responded that she thought that she would need to stay in the office in order to cover the duties that Olig had previously performed. Baxter also stated that as Olig's was Union work it should be covered by one of the remaining three bargaining unit employees – the Assessment Technician, Property Assessor II or Baxter (Property Assessor I). Wagner told Baxter that he would have to get back to her; that she did not have to go out to do her re-evaluations and that she should stay in the office that morning. Wagner then called the Personnel Office and discussed Baxter's concern about having a bargaining unit member perform Olig's work until the City replaced Olig. Later on that afternoon, Wagner told Baxter that she should go out and perform re-evaluations; that Wagner did not agree with Baxter's assertion that a Union person had to perform the work formerly done by Olig. At this point, the Union filed the instant grievance. 2/

2/ *Ms. Baxter is a trustee and steward of the Union's City Hall unit and she filed the instant grievance.*

It is undisputed that the City did not fill Olig's position because it had not budgeted in advance for her accrued vacation (approximately eight weeks) and the good attendance bonus due her under the contract. It is also undisputed that the City did not discuss with the Union,

prior to Olig's retirement, what would happen regarding Olig's position after to her retirement.

Prior to Olig's retirement, the City had regularly covered Olig's work during her two weeks of vacation by assigning one of the bargaining unit employees to stay in the office and handle her work; and when Olig was ill or went on her lunch hour or breaks, bargaining unit employees covered her work.

After Olig retired, the City Assessor and Deputy Assessor took over Olig's duties answering the telephone, setting up appointments and responding to walk-ins. The remainder of Olig's work was assigned to City Clerk's office bargaining unit employees or it was allowed to pile up until Olig's successor (Linda Schiessl) was hired and employed beginning on August 28, 2000. After Olig's retirement, the telephone system was changed so that the Property Appraiser II would pick up the telephone after the Property Appraiser I and the Technician. During the two month period following Olig's retirement, the Property Appraisers I and II and the Assessment Technician were out of the office a significant period of time performing re-evaluation work.

The Deputy City Assessor stated that it is normal for two customers per day to come to the counter. In the Assessment office, vacations are scheduled so that there are three assessment employees (including one manager) in the office. The Deputy City Assessor schedules his vacation around the City Assessor so that one of the two managers is present in the office at all times.

In 1998, the Union and the City entered into an agreement regarding a procedure for covering the lunch hour in the various City Hall offices which have to remain open to the public from 12 Noon to 1 p.m. That agreement reads in relevant part as follows:

. . .

1. Each year, the head of each division in City Hall with two or more full time AFSCME employees, which is open to the public from 12:00 to 1:00 p.m., shall provide each AFSCME employee in that division, a form to indicate their lunch preference for the following calendar year.

2. If a majority of the employees in a division agree, the scheduling in effect in that division prior to this agreement may be continued until the next posting. If not, each employee will be offered the following lunch hour options:

Option A: Work 12:00 to 1:00, and choose a lunch hour which begins at 11:00 or 1:00.

Option B: Take lunch from 11:30 to 12:30

Option C: Take lunch from 12:30 to 1:30

Option D: Take lunch from 12:00 to 1:00

3. Lunch hour coverage shall be accomplished by seniority pick using the options in #2. The least senior employee shall be assigned any portion of the lunch hour not covered by seniority pick.
4. In the event a vacancy occurs involving the person(s) covering the lunch hour, through promotion, demotion, retirement, or for any other reason, the posting procedure shall be repeated to determine the lunch hour coverage for the balance of that calendar year.
5. The lunch hour coverage schedule for each division shall be forwarded to the President of Local 1366 prior to the beginning of each calendar year.

This procedure shall be included in the next AFSCME Contract.

...

Prior to the parties' entering into the above-quoted agreement, only three City offices were open during the noon hour. After this agreement was entered into, all City offices remained open over the noon hour. In offices where only one bargaining unit employee is employed, the supervisor may relieve the unit employee during the noon hour by agreement of the parties. It is undisputed that if a unit employee is on vacation, the remaining unit employees would switch lunch hours in order to cover the lunch hour with unit employees. The Union has also allowed managers to do unit work in emergencies and no grievances have been filed regarding working short during the lunch hour.

All of the unit employees in the Assessment office have the skills to perform the Assessment Clerk's job duties. The Union has never grieved the fact that from time to time the City Assessor and the Deputy City Assessor have answered the telephone and dealt with customers at the counter.

POSITIONS OF THE PARTIES

The Union

The Union argued that the contract language relating to seniority rights, such as job postings, layoffs, move-up pay and overtime, provides employees with protection against the City's right to use non-unit employees to perform bargaining unit work. The Union observed that if the City is allowed to assign managers to perform Assessment Clerk work for a two month period of time on a daily basis, bargaining unit employees' contract rights surrounding their seniority would be rendered meaningless. Here, the Union is not seeking back pay for any lost overtime opportunities due to the City's actions because the Union believed Assessment Office employees could have done the work without overtime being paid and that

to make a claim for overtime would be the equivalent of seeking punitive damages.

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Nonetheless, the Union asserted that the damage done by the City's approach in this situation is real. Although the City asserted that it had no money to fill Olig's bargaining unit job immediately, the Union noted that the City failed to offer any evidence to support this claim. Indeed, the Union asserted that the City could have transferred another City employee to temporarily fill Olig's job. In this regard, the Union noted that the City in fact used City Clerk employees to perform some of Olig's work prior to the hire of Schiessl. In any event, the Union observed that the City made no attempt to talk to the Union about its decision not to immediately fill Olig's job after her retirement despite the language of Article II, which requires that the Union and the City "cooperate in every way possible to promote harmony and efficiency among all employees." The Union noted that it has been flexible in the past and it cited both the lunch hour agreement and the 1995 grievance regarding Central Collection office receipting.

The Union anticipated that the City would argue that duties of the Assessment Clerk were not exclusively assigned to that position in the past. The fact that the Assessment Clerk duties were sometimes done by managers on an incidental or emergency basis or by other office employees does not mean that these duties should be allowed to be exclusively assumed by managers for a long period of time. This was not business as usual as the City argued at the hearing. The Union noted that the best evidence of the parties' intent regarding who was to do bargaining unit work is found in the lunch hour agreement entered into by the parties, which indicates that the bargaining unit work is to be done by bargaining unit employees even during the lunch hour, except in very limited circumstances.

In addition, the Union noted that prior to June 30, 2000 (Olig's last day of work), bargaining unit personnel had performed all bargaining unit work except in incidental or emergency situations. Nor did the City Assessor or Deputy Assessor regularly perform counter work or telephone work prior to Olig's retirement. The Union also noted that the routing of calls to the Assessment Clerk was a clear indication who should receive that work and that the managers in the office were not on the list of caller recipients.

The Union noted that the City was likely to argue that no harm had been done and therefore no fault should be found regarding the City's actions in this case. In this regard, the Union noted that the fact that the Union has not asked for back pay herein does not mean that the contract has not been violated. The Union urged that if the Arbitrator were to allow the City to use managers to do bargaining unit work on a daily basis as occurred in this case, such an approach would essentially open a "Pandora's box."

The Union resisted the City's argument that because the contract contains no language prohibiting supervisors from doing bargaining unit work, the Management Rights clause allows the City to do as it did in this case and assign work away from the bargaining unit. The Union urged that the Recognition clause implicitly restricts the City from assigning bargaining unit work away from unit members unless the Union agreed to do so or there are special

contract. The Union noted that there are cases which indicate that seniority provisions provide employees with rights to obtain or retain particular jobs and give them certain rights regarding their removal, transfer or layoff from those jobs. Bargaining unit employees' rights to their jobs would otherwise be illusory if people outside the bargaining unit could deprive them of their jobs based solely on a management rights clause.

The Union anticipated that the City would argue that the amount of work involved was minimal and that the Arbitrator should find in favor of the City on this basis. The Union noted that the parties had voluntarily agreed to the lunch hour arrangement and had not found such lunch hour work to be *de minimus*. Furthermore, the City's implicit argument that Olig's retirement constituted a special circumstance is groundless. Retirements are only special to the employees retiring and retirement is a normal and expected process in any employment situation. Indeed, the Union noted that the City had several options regarding how to handle Olig's retirement: The City could have kept a unit employee in the office on a rotating basis; it could have asked for the temporary transfer of another employee to the office to do the work; it could have kept one unit employee in the office and handled the work on an overtime basis; or it could have posted the job when Olig retired and transferred the successful posting employee into the position immediately. The Union noted that the Employer had total control over the situation and therefore that it was not a special situation as the case law would indicate as an exception.

The Union urged that the evidence of past practice shows that supervisors have only done bargaining unit work in emergency periods of high customer demand or at incidental times or during the lunch hour when only one bargaining unit employee is in the office. The Union noted that both in the Parks and Police Department the testimony supported such a past practice. Furthermore, the Union observed that the City submitted no evidence that supervisors have done bargaining unit work for weeks on end in the Assessor's Office or anywhere else. Therefore, the Union urged that the Arbitrator sustain the grievance and direct the City to cease and desist from assigning bargaining unit work away from the unit.

The City

The City argued that the pursuant to the Management Rights clause of the labor agreement, the City has retained the exclusive right to "determine work schedules" and "to determine the methods, processes and manner of performing work". In this regard, the City noted that it had the right to determine whether and when to fill the Assessment Clerk position. Here, the City had a legitimate reason not to fill the position —budget concerns arose regarding paying out Olig's accrued vacation and good attendance bonus. Where there is no contract language indicating that bargaining unit work cannot be assigned away from unit employees, the City urged that it can assign such work to non-bargaining unit employees. Indeed, that is what the City did in this case. The City noted in addition that the Deputy City Assessor stated herein that work assignments did not change after Olig retired and that the

The City noted that the Union admitted herein that there is no express language in the contract restricting the City from assigning bargaining unit work away from the unit. Therefore, the City urged, it did not violate the contract in this case. In addition, the City noted that its Management Rights clause expressly retains all management rights not specifically limited by the contract.

The City contended that many arbitrators do not read the recognition clause as an absolute prohibition against assigning work outside of the bargaining unit. The City argued that if the effect on the bargaining unit is minor and the employer has a good reason, or if the work is temporary, experimental or emergency work, or a change in the technology or character of the work has occurred, some arbitrators have held that employers are privileged to assign unit work away from unit members. This is particularly true where, as here, the work has not been exclusively performed by bargaining unit employees and no individual or group has benefited from the assignment away from the unit. The City also noted it made the assignment in good faith and for a legitimate business reason.

Here, a past practice of using both bargaining unit and non-bargaining unit employees to perform the Assessment Clerk duties demonstrates that no distinction has been made between bargaining unit and non-bargaining unit work in this area. In addition, the City noted that the grievance arbitration clause limits grievances to matters of “interpretation, application or enforcement of the terms of the Agreement” and that the arbitrator is limited to rule “only on matters of application and interpretation of this agreement.” Because there is no prohibition against supervisors doing bargaining unit work expressed in this contract, the City urged the Arbitrator not to venture into this area and find in favor of the Union.

The City argued that the Union has failed to meet its burden of proof to show that the duties of the Assessment Clerk were performed exclusively by bargaining unit employees. Here, the evidence showed that the duties of answering telephones, greeting customers at the counter, making appointments and pulling appointment sheets were done by everyone in the office, including the managers from time to time. In addition, the City noted that all of the job descriptions show that the employees (including the managers) are responsible to provide public relations for the office. The City urged that it made its decision to have the Deputy City Assessor and City Assessor perform the Assessment Clerk duties for a two-month period in good faith, not in an arbitrary, capricious or bad faith manner. As the duties performed by the Deputy City Assessor were *de minimus* and necessary for the efficient operation of the office and had no adverse impact on the Union (a full-time employee was ultimately hired), the City urged that the case falls into the category of “no harm, no foul.” Here, there was no evidence that the City was attempting to undermine the Union by assigning work away from the bargaining unit. As the Union never grieved the supervisors’ doing bargaining unit work in the Assessment office before this, the City argued that the Union has waived its right to now assert that supervisors are performing bargaining unit work.

The City urged that the Union has fallen short in proving that any past practice existed regarding bargaining unit employees continuously doing bargaining unit work — that there is no uniform practice in terms of how routine clerical duties of answering the phone and greeting customers are handled in the various divisions of the City Department of Administration. The City also argued that the facts surrounding the Central Collections Office grievance are distinguishable from the instant case. Thus, a past practice has not been proven to be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice and mutually accepted by both parties. As there was clearly no mutual understanding regarding how bargaining unit employees' duties must be handled and no consistent performance of those duties by the unit employees, the Union failed to demonstrate a "past practice" in support of its position.

The City contended that the Union's remedy runs counter to Article XXVII – Management Rights. As the Union has asked the Arbitrator to restrict the City from having supervisors perform bargaining unit work, the City urged that this was not only beyond the Arbitrator's authority but also expressly counter to the language of Article XXVII. As Article XXVII specifically provides that all management rights are retained by the City unless some limitation is expressly bargained by the parties, the Arbitrator would essentially be creating a strict work preservation clause if it ruled in favor of the Union in this case. As no evidence was submitted to show that the City's actions undermined the Union or the job security of unit members, the Union's argument that the Recognition Clause and job security provisions are relevant is without merit. The Union's requested remedy would amount to running the Assessment Office in an inefficient manner and such remedy would run counter to the City's right pursuant to Article XXVIII to determine "methods, processes and manner of performing work." The City argued that requiring one bargaining unit employee to be assigned to the office would completely disrupt the operation and jeopardize the City's efforts to ensure that the property re-evaluation project is completed on time. Therefore, the City urged that the grievance be denied and dismissed in its entirety.

DISCUSSION

The parties cited and discussed various cases in their briefs which demonstrate the dichotomy in results concerning cases such as the instant one involving the out-of-unit assignment of unit work. In the absence of contract language or a past practice specifically reserving bargaining unit work to unit employees, some arbitrators have found it a management right to assign work away from unit employees. See, e.g. EVERGREEN INDUSTRIES, INC., 76 LA 535 (BECK, 3/81); STEWARD-WARNER CORP., 22 LA 547, 551 (BURNS, 5/54). However, other arbitrators have found in favor of the Union and have refused to allow employers to assign work away from the unit in the absence of a work preservation clause, where the contract contains a recognition clause and other contract language specifically granting unit employees certain seniority rights (such as overtime, differential and holiday pay, promotion, job posting and layoff.) See, e.g. GREAT LAKES PIPE LINE CO., 27

Other cases have turned upon whether there are business justifications to support the assignment of unit work away from unit employees where there is no work preservation clause and the employer has acted in good faith. Those justification's include the following:

1. Small quantity of work having little or no affect on the unit is involved;
2. Experimental or temporary work is involved;
3. Emergency assignments;
4. A change in the character of the work through technology or for other reasons has occurred;
5. The disputed work is not specifically covered by the contract or it has not been exclusively performed by unit employees in the past;
6. Other legitimate business reasons exist for assignment out of the unit.

See, e.g. LAKE CITY ELKS LODGE, 72 LA 643, 647-649 (NEILL, 3/79); Elkouri and Elkouri, supra, at p. 758-759. These cases generally include more than one such justification to support a ruling in favor of the employer on this basis.

The issue in this case is whether the City's assignment of Assessment Clerk duties to supervisors/managers for a two-month period violated the effective labor agreement. Initially, I note that there are no provisions of the contract which either specifically grant or deny the City the right to assign unit work away from the bargaining unit and that contract does not contain a work preservation clause. The City has argued that because Article XXVII-Management Rights, gives the City the right "to determine schedules of work," and the right to determine "the methods, processes and manner of performing work," this language requires a conclusion that the City has the right assign unit work away from unit employees. In my view, the quoted language standing alone, is not specific enough to allow the assignment of unit work out of the unit.

Indeed, the plain meaning of the language quoted above belies the City's argument. In this regard, I note the determination of work schedules normally involves the decision when work should start and when it should cease. The reference to the methods, processes and manner of performing work, in my view, goes generally to the organization of work as well as the use of technology and the details regarding the performance of work as directed by management.

Looking at the facts surrounding the City's work assignment, it is significant that this case does not involve automation, technological change or changes in the character of the Assessment Clerk work. Nor does this case involve experimental work or emergency assignments. In addition, the Assessment Clerk work is undisputedly covered by the contract at Appendix A and is clearly clerical, not supervisory or managerial in nature.

The City has argued that the Union failed to prove that a violation of a specific provision of the labor agreement has occurred in this case. The grievance herein specifically

provisions.” Appendix A of the contract specifically lists the Assessment Clerk position and states a wage rate therefor. I noted that the contract also contains various provisions concerning seniority and promotion, overtime, layoffs, longevity and work out of class. These provisions essentially guarantee a certain level of job security to unit employees. In my view, all of these provisions (along with Article I - Recognition) evidence an intention to restrict the performance of unit work to unit employees. When taken in conjunction with the fact that the labor agreement contains a general management rights clause and that there is evidence of past practice, by formal agreement and otherwise, to reserve unit work to unit employees, I find, based upon the specific facts of this case, that the Union has proven that the contract has been violated by the City as alleged in the grievance.

In regard to past practice, it is significant that on at least two occasions in the past, the parties have agreed to accommodate each other’s needs while essentially reserving unit work for unit employees even when relatively small amounts of unit work were involved. Thus, the fact that the parties entered into a formal agreement regarding office coverage at the lunch hour in City Hall and a formal agreement covering clerical work at Central Collections demonstrates that the parties perceived that counter and telephone work was in fact bargaining unit work. In addition, I note that there was no statement in either of these written agreements indicating that the agreement was not intended to set a precedent between the parties. Furthermore, the testimony of two unit clerical employees from the City’s Parks and Police Departments respectively, show that the City has, for at least 20 years, consistently replaced unit clerical employees in these departments with other unit clerical employees, whenever they have been at training, on sick leave, on vacation or at a doctor’s appointment during the workday. This evidence also tends to support a conclusion that the parties have treated unit work as belonging to this unit. 3/

3/ H.R. Director Mercer stated that no uniform City Hall practice exists regarding coverage of sick leave, vacation and other leaves. However, the examples Mercer gave lacked enough specificity to demonstrate they were similar and applicable to this case.

The City has argued that it had a legitimate business reason for assigning the Assessment Clerk work away from the bargaining unit after Ms. Olig retired — that it had not budgeted to pay out Olig’s accrued vacation and good attendance bonus. On this point, it is significant that the City offered no evidence that it could not afford to pay out its obligations to Olig and hire a replacement for her. In addition, the record failed to show that the City would necessarily have had to expend additional funds in order to cover Olig’s duties for the two-month period in question. 4/ Therefore, although the City’s concern for covering the costs of Olig’s replacement was a legitimate one, it was not the only option that the City had.

The question then arises whether the Assessment Clerk work had been exclusively performed by unit employees in the past. The City has argued in the negative on this point, asserting this as a strong reason to find it its favor. In this regard, I note that in most modern offices it would be difficult, if not impossible, to show that clerical duties are solely performed by clerical employees. Here, the record demonstrates that the Deputy Assessor and City Assessor did not regularly answer the telephone in the Assessment Office, as they were not included on the routing system, prior to Olig's retirement. Indeed, the City Assessor and Deputy City Assessor only answered the telephone after several unit employees on that routing system failed to pick up the telephone after several rings. Nor did the Deputy and City Assessor regularly wait on customers at the counter prior to Olig's retirement. In this regard, I note that the City Assessor and Deputy Assessor's offices do not even command a view of the counter. Thus, the Deputy Assessor's testimony on this point demonstrates that he and the City Assessor did no more than minor or incidental counter and telephone work before Olig retired.

In addition, the fact that other unit employees assisted the Clerk with counter and telephone work in the past does not go to prove that that work was thereby assigned out of the bargaining unit. Based on the record in this case, I find that the Assessment Clerk work had been exclusively performed by unit employees except in minor or incidental situations.

The City has argued that because the amount of work involved is *de minimus* and the City's assignment of the work away from the unit had no long-term affect on the unit (as Olig's replacement has been hired), the Arbitrator should dismiss the grievance. I disagree. Here, the facts of this case show that the City admitted intentionally delaying filling the Assessment Clerk position and that delay did not flow naturally from the hiring process. I note that there were approximately 39 working days or 312 working hours from Olig's retirement to Schiessl's hire. Certainly, the City Assessor and Deputy Assessor did not spend 100% of their time performing assessment duties. But even assuming, *arguendo*, that the Deputy and City Assessor expended no more than a total of three to four hours on Clerk work per day, that would amount to a total of between 117 and 156 hours for the two-month period. This appears to be greater than the amount of time covered by the 1995 Central Collections grievance settlement but less than the number of hours involved per year in the lunch hour agreement between the parties. In these circumstances, I cannot say that the amount of work involved in this case is *de minimus* or that the assignment away from the bargaining unit would have an insignificant impact on the unit in the future. Based upon all of the evidence and argument in this case, and the specific facts hereof, I issue the following

AWARD

The City of Fond du Lac violated the collective bargaining agreement when the City Assessor and Deputy Assessor assigned the work of the bargaining unit position, Assessment

Clerk, to themselves in the Summer of 2000. As the Union has sought no monetary award

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herein, the City is hereby ordered, in the future, not to assign bargaining unit work away from the unit as it did in this case, where the City intentionally delayed filling a unit position and had supervisory/managerial personnel daily perform unit duties for a period of two months.

Dated in Oshkosh, Wisconsin, this 25th day of May, 2001.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/ans

