BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF STEVENS POINT

and

**WISCONSIN COUNCIL 40, AFSCME,
AFL-CIO, LOCAL 309**

Case 117
No. 60873
MA-11749

Appearances:

For the City of Stevens Point, **Attorney Therese Freiberg** and **City Attorney Louis J. Molepske,** 1515 Strongs Avenue**,** Stevens Point, WI 54481

For AFSCME Local 309, **Gerald Ugland,** P.O. Box 35, Plover, WI 54467-0035

ARBITRATION AWARD

The City of Stevens Point hereinafter referred to as "Employer" or "City," and Council 40, AFSCME, AFL-CIO, Local 309, hereinafter referred to as "Union," are parties to a collective bargaining agreement covering a period from January 1, 1999 through December 31, 2000. Under its terms, the agreement renews itself from year to year thereafter unless either party notifies the other in writing that it desires to alter or amend said agreement. On a form dated February 5, 2002, received by the Wisconsin Employment Relations Commission on February 7, 2001, the Union filed a request with said Commission for a 5-person panel of WERC commissioners/staff arbitrators from which the parties could select a person to hear and decide the grievance that had arisen between the parties. Commissioner A. Henry Hempe was selected by the parties from the panel provided and was subsequently appointed by said Commission to hear and decide said dispute. A hearing was held on July 31, 2002. The hearing was not transcribed. The Employer filed an initial brief received on August 26, 2002 and a reply brief received on September 23, 2002; the Union filed an initial brief received on August 28, 2002 and filed no reply brief.

STATEMENT OF THE ISSUE

The Union proposed the following Statement of the issue:

> Did the Employer violate the Collective Bargaining Agreement when the Director of Parks and Recreation, Tom Schrader, performed a maintenance task on July 28, 2001? If so, what is the remedy?

The Employer proposed the following Statement of the issue:

> Did the Parks Director properly exercise his managerial discretion in responding to an after-hours call on July 28, 2001? If so, what is the proper remedy?

I adopt the following Statement of the issue:

> Did the Employer violate the Collective Bargaining Agreement when the Director of Parks and Recreation unplugged two city park toilets on Saturday, July 28, 2001? If so, what is the appropriate remedy?

FACTS OF THE CASE

The grievant, Ron Check, has been employed by the City of Stevens Point for almost nine years. Originally hired as a bus driver in December 1994, Mr. Check transferred to the City's Park and Recreation Department as a Park Custodian one and a half years later. He has remained in that department to date. In 1998 Mr. Check transferred to the position of mechanic; in 1999 he became a Grounds and Maintenance Handyman, a slot in which he has remained to the present.

Mr. Check's normal workweek consists of eight hours per day, forty hours per week, Monday through Friday. On Saturday July 28, 2001, Mr. Check received a phone call at his home from a concession stand vendor for a local softball association that was sponsoring a tournament in one of the City's recreation areas, Zenoff Park. The vendor told Mr. Check that both toilet stools in the park's public men's room were plugged and had flooded. She said there was water all over the place and requested Mr. Check to remedy the situation.

Both parties agree that Mr. Check's response was appropriate. He indicated that he would be glad to accede to the request, but needed to be directed to do so by one of his supervisors, i.e., Tom Schrader or Scott Halvorsen. Mr. Schrader has been the Parks and

Recreational Director since 1986; Mr. Halvorsen has been the Park Maintenance Supervisor for about two years. Mr. Check provided telephone numbers of the two men to the concession stand vendor. Although Mr. Check remained by his phone for the next hour, he received no call from either man.

When Mr. Check returned to work the following Monday, he happened to encounter the concession stand manager that had called him the previous Saturday. She told him that she had called Tom Schrader as Mr. Check had suggested. Mr. Schrader, she said, consequently appeared at the distressed men's room and corrected the problem. Mr. Schrader, himself, later told Mr. Check that he (Schrader) had unplugged the toilets, but offered no immediate explanation to Mr. Check as to why he (Check) had not been called in.

When Mr. Schrader had been contacted by the concession stand vendor he immediately drove to the park. He was initially unable to locate any seasonal workers assigned to softball diamond maintenance duty. (He later learned they were preparing another diamond at another City park.) Mr. Schrader did visually verify that both stools in the men's room were plugged and that the toilets had overflowed. He also examined the interior of the toilet tanks, and confirmed that all parts appeared to be in good repair and able to be operated. While he was visually assessing the situation, an adult male entered the facility and wanted to use one of the stools. Mr. Schrader was successful in temporarily deflecting the visitor from the immediate use to which he proposed to put one of the stools..

Since Mr. Schrader continued to be unaware of the location of the seasonal park workers, but was aware of the location of a toilet plunger on the premises, he got the plunger out and attempted to use it on one of the plugged stools. He experienced almost immediate success, and the toilet became unplugged. Buoyed by this result, Mr. Schrader took similar action on the second stool. Again he was successful almost immediately. As he was leaving the men's room, the softball diamond maintenance crew of seasonal workers showed up and its members explained they had been working on another diamond.

Mr. Schrader testified that if a seasonal employee had been present a few minutes earlier he would have assigned to him the toilet plunging duty that Mr. Schrader ultimately performed. Ron Check, said Mr. Schrader, would have been called in only if "the chain or the guts [in the tank] had been broken." Mr. Schrader estimates his entire portal-to-portal time was no more than one-half an hour. He was able to clear each plugged toilet in less than a minute each. Mr. Schrader received no additional compensation for his Saturday services.

The public restroom facilities at the softball tournament site consist of a men's room with two stalls and ten urinals and a women's room with ten stalls. Any water that overflows in the men's room will drain either into the urinals or out the door. Approximately twenty steps to the north of these facilities is a city office building that contains a generic toilet facility. Although that building is normally not open on weekends, Tom Schrader has a key to

the building. Three other persons, all connected to the softball association, also have keys to the building. The softball association is permitted to use the building as a headquarters for its tournament umpires. Because of the building's use by the umpires, the softball association is reluctant to open the building's limited bathroom facilities for use by members of the public.

The information Tom Schrader had received from the concession stand vendor included not only her description of the plugged toilets problem, but also her report that there was no one else available to remedy the situation. She specifically indicated that she was unaware of the whereabouts of the ball-diamond crew and, further, that the softball association president was engaged in the game then being played. In the past, either seasonal employees of the City assigned to work as a ball-diamond crew or softball association officials, or both have called upon to alleviate problems such as this.

It is undisputed that Mr. Check has a plumbing background, and has been called in to take appropriate repair action on bathroom or toilet fixtures after seasonals have tried and failed. He is aware of the location of the toilet plunger at the softball diamond men's room. Unplugging park toilets is a task that has been performed by Mr. Check in the course of his duties in the past.

Although the seasonal workers are employees of the Parks Department, they are *not* members of the bargaining unit. Two bargaining unit members called as witnesses by the Union could not recall if seasonal workers had unplugged toilets in the past. Tom Schrader, however, was unequivocal in asserting that seasonal workers, as well as softball association members, have performed this unpleasant task

The Union acknowledges that seasonal workers have access to ". . . a plunger, a 'worm' to clean toilets." Under the heading "Tasks Routinely Performed," the Position Description for workers classified as "General Maintenance (seasonal)," includes "(j)anitorial work in indoor and outdoor recreation facilities and areas." However, according to Mr. Check, in some cases the efforts of seasonal workers (or softball association personnel) to unplug the toilets have been unsuccessful, and the problem remained unresolved until Mr. Check dealt with it when he came to work the following Monday.

Mr. Check doesn't recall if he has ever been called in on a softball weekend to unplug a toilet. He states that if he had been called in to remedy the park men's room toilet problem on July 28, consistent with his practice when he had been called in to deal with other problems in the past, he would have simply thrown some tools in his own vehicle and driven to the park. He would not have detoured to pick up a shop truck. Mr. Check explained that prior to working for the City, he had operated a "handyman" business; hence, he always has "handyman's tools" at his home.

Mr. Check estimates that the park men's room problem on July 28 would have required about 45 minutes. He believes that plunging a plugged toilet is semi-skilled manual labor. Mr. Check and his current supervisor live about the same distance from Zenoff Park.

Finally, the Union cites a grievance settlement in 1997 as material. In that instance, Mr. Schrader acknowledged that he had assisted bargaining unit members in assembling playground equipment during regular weekday hours of work, and agreed to ". . . cease and desist" from doing any bargaining unit duties in the future.

RELEVANT CONTRACT PROVISIONS

Section 1 – Recognition

The employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of the Department of Public Works and Department of Parks, Recreation and Forestry, except the Director of Public Works, Street Supervisor, Director of Parks, Recreation and Forestry, Assistant Street Supervisor, Park Supervision, Recreation Facilities Supervisor, clerical and administrative aides, summer, season and temporary employees.

Section 2 – Management Rights.

A) The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

1. To direct all operations of the City;
2. To establish reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees;
4. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
5. To layoff employees from their duties because of lack of work or any other legitimate reasons;
6. To maintain efficiency of City government operations;
7. To comply with state and federal law;
8. To introduce new or improved methods or facilities;
9. To change existing methods or facilities;
10. To determine the kinds and amounts of services to be performed as pertains to City government operation; and the number and kind of classifications to perform such services;
11. To contract out for goods and services; however, it will be the policy of the City to first consider the impact on the employment security of its employees as the result of any such action and to notify and confer with

the Union prior to taking such action;

12. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

Any unreasonable exercise or application of these management rights by the City shall be appealable by the Union or an employee through the grievance and arbitration procedure.

It is further agreed by the City these management rights shall not be used for purposes of undermining the Union or discriminating against any of its members, and the Union agrees that this clause shall not be used to harass the City.

. . .

Section 12 – Overtime

B. All work performed on a Saturday or Sunday shall be paid at time and one-half (1 ½) . . .

. . .

E. Call-In Pay. In addition to "B" and "C" of this Section, any employee called into work outside of his/her normally scheduled hours, and who actually reports to work, shall receive two (2) hours straight time pay . . .

POSITIONS OF THE PARTIES

Union

Plunging toilets is one of Ron Check's job duties, the Union asserts, although other bargaining unit members also perform this duty. It is not, however, one of the position responsibilities of the Director of Parks and Recreation, according to the Union.

Although the Union states that Mr. Schrader found fecal material on the floor and turned away one potential user of the facility, the Union argues there was no imminent danger of property damage since any overflow from the stools would be channeled to the urinals (or out the entrance door as a last resort.) Moreover, says the Union, the ladies' lavatory and toilet facilities in an adjoining building were also available for use by male patrons.

The Union notes that Mr. Check and Mr. Schrader each live about the same distance from Zenoff Park.

The Union contends that Mr. Schrader's toilet plunging also violated the terms of a grievance settlement dated October 16, 1997. The grievant(s) had complained that by assisting them in putting together some playground equipment Mr. Schrader was performing bargaining

unit work. The grievance was settled when Mr. Schrader agreed, in writing, that " . . . I will cease and desist doing any of your [bargaining unit] duties." The Union emphasizes that the adjective "any" is unqualified. The Union acknowledges, however, Mr. Schrader's belief ". . . that the 1997 grievance settlement does not address 'call-in' work." The Union concedes that apart from the instant matter it is aware of no other instance of Mr. Schrader performing bargaining unit work besides the activity that prompted the Union's 1997 grievance..

The Union further argues that the usual process for call-in was not used. According to the Union, the normal processes for after-hour calls provide that bargaining unit employees be called-in after on-duty staff and softball association personnel had been considered. Nowhere do the call-in procedures, even those set forth in "Parks Department After-Hours Emergency Call-In Process," contain a provision allowing a manager to perform the work, even in the case of an emergency. According to the Union, the managers are called by the police department to assess the situation. Once the assessment is made a union employee the manager should then call in the most senior bargaining unit employee that normally does the work. This was described by a bargaining unit witness, the Union notes, and claims this description is consistent with that offered by Scott Halvorsen

The Union believes a portion of the testimony of Scott Halvorsen supports its case. Specifically, the Union noted Mr. Halvorsen's statement that he would not call in Mr. Schrader to unplug toilets and that unplugging toilets is not a normal part of Mr. Schrader's duties. "For plugged toilets," says the Union, "Halvorsen would call Check or Krutza [a senior bargaining unit member] if there were no other employees on duty at the time."

The Union believes it is "unclear" that softball association members or seasonal employees unplug toilets. Again, relying on the testimony of Scott Halvorsen, the Union argues that 1) Halversen is not aware of the association unplugging toilets, and 2) is not aware of the association or seasonal employees " . . . having access to more than a plunger, a 'worm' to clean toilets."

The Union discounts Schrader's testimony that the president of the association has stated that association members have unplugged toilets as hearsay, and suggests it be given no weight.

The Union emphasizes Check's testimony that on many Mondays following softball association games he has been greeted by "locked toilets" with a sign that says "out of order."

The Union argues that "(u)nplugging toilets is something that seasonal employees have not been able to do successfully and that Mr. Check has been called to complete the duty." "Therefore," according to the Union, "unplugging toilets is semi-skilled work."

The Union contends that the toilet facilities in the adjoining building could have been used, but that this option just did not occur to Mr. Schrader. The Union also admonishes Mr. Schrader for failing to open the women's room for use by male park patrons.

The Union is also critical of Mr. Schrader's view that the 1997 grievance settlement did not address call-ins. The written settlement doesn't exclude "call-ins," according to the Union, and so clearly it was intended to apply to all bargaining unit work. Since, according to the Union, plunging toilets is bargaining unit work, Mr. Schrader should not have used that plunger in the Zenoff Park men's room. The Union notes Mr. Schrader's statement that park custodians and maintenance females plunge toilets, but points out that Mr. Schrader did not say he actually witnessed this.

The Union believes the 1997 grievance settlement is explicit. The Union defines the term "your duties" as "bargaining unit work," and continues to assert that an employee in the classification that normally does the work should have been called.

The Union reiterates its contention that "(t)here is reason to question whether the seasonal on-duty staff plunges toilets on weekends since they are often left until Monday." The Union also questions whether the softball association has accepted that responsibility, since some toilets are found plugged on Monday mornings. There is, however, no doubt in the mind of the Union that "it is the duty of the custodial and maintenance staff to attend to this duty."

As for relief, the Union agues that Mr. Check should receive two hours of his normal rate of pay as call-in time as provided by the parties' labor agreement, in addition to time and one-half his normal rate of pay as is also provided by the parties' labor agreement for the 45 minutes of time he estimates it would have taken him to respond to the call-in, portal-to-portal.

City

The City asserts that the work performed by Mr. Schrader is not bargaining unit work. The City contends that while the grievant could have been called-in if the toilet problem had been more serious, he would not have been called-in for a simple toilet-plunging.

The City cites CLEVELAND ELECTRIC ILLUMINATING COMPANY, 105 LA 817 (Franckiewitcz, Stevers, Boyle, 1995) as illustrating the factors the City believes should be examined in identifying bargaining unit work. Under this case, those factors are "whether in the past work had been performed exclusively by bargaining unit employees; whether layoffs, displacement from jobs, or loss of pay to employees resulted from the transfer of work; the effect on the bargaining unit; the amount of work involved."

The City contends that the most relevant factors of this case are that 1) the quantity of work or the effect on the bargaining unit is *de minimus* in nature and 2) that plunging toilets is not work exclusively performed by bargaining unit employees.

The City states there is no past practice establishing that plunging toilets is a task for which Mr. Check has been called-in. There is no language in the parties' labor agreement that requires his call-in for such a task, the City avers. Moreover, the City adds, the Union has failed to show that the purported past practice is unequivocal, clearly enunciated, acted upon, and readily ascertained over a period of time as a fixed and established practice. The City believes that it, on the other hand, has demonstrated the existence of a past practice establishing that plunging toilets at the park is not exclusively bargaining unit work.

In conclusion the City reiterates its view that the toilet plunging work performed by Mr. Schrader on July 28 was de minimus and not exclusively bargaining unit work. Mr. Schrader's decision to try quickly to remedy the plugged toilet situation with a plunger was a management decision he was entitled to make under the parties' labor agreement and was made in good faith.

The City urges the grievance be dismissed.

City Rebuttal

The City disagrees with the Union's contention that the plugged toilets offered no imminent danger to property and that male patrons should have been allowed to use the women's facilities or those in the nearby office building. The City justifies Mr. Schrader's action in plunging the toilets as proper, for it allowed immediate use of one of them by a male patron.

The City notes there were approximately 300 persons attending the softball tournament, and argues that under this circumstance opening the women's rest room to males without supervision "needs no further comment," and allowing patrons to use a secured office area without supervision "simply isn't acceptable."

Responding rapid-fire to other Union contentions, the City finds immaterial whether Mr. Schrader and Mr. Check live approximately the same distance from the park; that the 1997 grievance resolution that involved the assembling of playground equipment is simply not comparable to plunging a toilet in an emergency type situation; that the only call-in system in effect is one that required that supervisors such as Scott Halversen or Tom Schrader be called, and that happened; that Mr. Schrader testified seasonal employees and [softball] association members had unplugged toilets, and the fact that other persons who testified weren't aware of this doesn't render Mr. Schrader's testimony incompetent.

The City concludes its rebuttal by characterizing the grievance as frivolous. The City believes the work performed by Mr. Schrader is not exclusively bargaining unit work and was *de minimus*. His decision to remedy the situation by the action he took was made in good faith and was entirely consistent with the parties' labor agreement, according to the City.

Union Rebuttal

The Union filed no rebuttal argument.

DISCUSSION

The Union contends that the grievant was improperly deprived of bargaining unit work when City Parks and Recreation Director Schrader unplugged two toilet stools in a city park men's room. While no contractual provision specifically identifies unplugging toilets as "bargaining unit work," the Union argues that since the grievant and other bargaining unit members have unplugged park toilets from time to time in the past, Schrader's efforts violated a 1997 grievance settlement in which Schrader had pledged to "cease and desist doing any of your [bargaining unit] duties."

At first blush, the City's characterization of the Union's grievance as "frivolous" may seem apt to some, particularly in view of the relatively small fiscal relief that is in issue. Under closer scrutiny, however, the issue presented by this grievance is one that features fundamental interests of the parties in apparent competition.

To the Union, preservation of what it regards as bargaining unit work is reflective of a traditional Union value. While not necessarily insensitive to this interest, the Employer is more greatly concerned with what it regards as its interests of efficiency and economy.

Since each interest is presumptively both valid and reasonable on its face – indeed, under some circumstances may even be mutually shared by the parties – deciding this matter by simply favoring one interest over the other is both arbitrary and inappropriate. The case outcome, instead, should be governed by well-established arbitral principles and application of those principles to the facts herein.

For the Union to prevail, it must demonstrate that the alleged bargaining work is within the exclusive jurisdiction of the Union. See CONSOLIDATED COAL CO., 111 LA 587, 591 (Jenks, 1998). It is not enough that on some occasions bargaining unit employees have been required to perform the work in question, if the work is also performed by non-bargaining unit personnel. Thus, if the work is sometimes performed by bargaining unit employees and sometimes performed by persons outside the bargaining unit, the work cannot be considered bargaining unit work. See SLOAN VALVE COMPANY, 68 LA 479, 480 (Cohen, 1977).

There is no question that the Union is correct in its contention that the duties of Grievant Check have included unplugging city park toilets. Although the Union expresses some skepticism that seasonal employees (*who are not members of the bargaining unit*) have plunged park toilets in the past, neither can that fact be in serious doubt.

The Union urges that Mr. Schrader's testimony as to the past efforts of softball association members to unplug toilets be disregarded as uncorroborated hearsay. But even if Schrader's testimony as to softball association members is not considered, the grievant's own testimony acknowledged his (the grievant's) awareness of instances where seasonal employees had attempted to unplug toilets. 1/ In addition, the Union credits and accepts the testimony of Mr. Halvorsen that seasonal employees have access to toilet plungers and "worms."

1/ Mr. Check cited instances where seasonal employee efforts to unplug park toilets had been unsuccessful and that he (Mr. Check) had had to complete the task when he returned to work on Monday.

Under these circumstances, it is difficult to avoid the inference that the Union was aware that persons outside the bargaining unit were at least attempting to unplug toilets by using a plunger (or possibly a "worm") on them. There is, however, no record of the Union having ever protested the attempted performance by seasonal employees of what the Union now claims as exclusive bargaining unit work.

Moreover, the job description of these seasonal employees specifically includes "janitorial work in indoor and outdoor recreational facilities and areas," (but does not require any particular plumbing expertise). The use of plungers or "worms" seems to fall quite easily in the category of "janitorial services." Again, however, there is no record that the Union ever attempted to eliminate "toilet plunging" from the janitorial services the seasonal employees might be required to perform.

The Union argues that unplugging toilets is semi-skilled work, and bases this contention on its assertion that seasonal employees have been unable to perform this task successfully. This assertion seems overly broad, however, for the record is silent as to the success rate experienced by seasonal employees in their efforts to unplug toilets.

What does emerge and seems helpful is that seasonal employees have been limited in their "unplugging" efforts to the use of toilet plungers or "worms." On at least some occasions their knowledge and experience may not have proven adequate to the task. It is at that point, imprecise perhaps, but nonetheless recognizable, that the work of unplugging

toilets may become not only at least a semi-skilled activity, but also bargaining unit work that requires the plumbing knowledge and experience of the appropriate bargaining unit member. 2/

2/ ***This may describe some, if not all, of the instances to which Mr. Check referred in Note 1, above.***

A plunger, of course, is the sole tool used by Mr. Schrader on June 28 and his successful efforts were of extremely short duration. Indeed, what Schrader did does not appear to have been any more than what many private householders, untrained in even plumbing semi-skills, are required and able to do for themselves when they experience a plugged toilet or sink drain in their own homes.

The Union notes that the grievant and Schrader live approximately the same distance from Zenoff Park and that the grievant would not have had to first obtain a City vehicle or City tools to report to the park. Presumably, the Union makes the point that the grievant could have arrived at the problem-site as quickly as did the Parks and Recreation Director. That is undoubtedly true. But since the work performed by Schrader was not exclusively under the Union's jurisdiction, that is not a material factor in the analysis of this issue.

Finally, the Union argues that the usual call-in procedure was not used in this instance, in that nowhere does the procedure direct managers to do the required work. If, however, the work performed is not under exclusive Union jurisdiction the Employer is free to have the work performed in whatever manner it deems appropriate, including the temporary utilization of a managerial employee.

The City suggests other factors be considered in addition to whether or not the work in question was exclusively under the jurisdiction of the Union. Citing other arbitral authority, the City lists those factors as including whether the activity has caused any employee layoffs or job displacement, loss of pay to the employee, the effect on the bargaining unit and the amount of work involved. 3/ However, I do not find consideration of these factors necessary to resolve the issue presented by this case and therefore withhold comment on them.

3/ ***CLEVELAND ELECTRIC ILLUMINATING CO., 105 LA 817 (Franckiewicz, Stevers, Boyle, 1995). This case involved the permanent reassignment of duties previously performed by a retired bargaining unit member to non-bargaining unit personnel.***

Based on the foregoing and the entire record of this matter, in my opinion the Employer did not violate the Collective Bargaining Agreement when the Director of Parks and Recreation unplugged two city park toilets on Saturday, June 28, 2001.

Accordingly, the grievance is dismissed.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin, this 12th day of December, 2002.

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

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