

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LOCAL UNION 67, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**  
and  
**CITY OF RACINE (PARKS DEPARTMENT)**

Case 652  
No. 61720  
MA-12043

(Veselik – Ramp Construction – Gr. #28-02)

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**Appearances:**

**Mr. John Maglio**, Staff Representative, AFSCME Council 40, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of Local 67.

**Mr. Guadalupe Villarreal**, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, WI 53403, appearing on behalf of the City of Racine.

**ARBITRATION AWARD**

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 67 (hereinafter referred to as the Union) and the City of Racine (hereinafter referred to as either the City or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the City's decision to allow volunteers to perform maintenance work at the City's skateboard park. The undersigned was so designated. Grievance mediation sessions were held, but the parties were unable to resolve the matter. An arbitration hearing was held on the matter on August 19, 2003, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. A stenographic record was made of the hearing and a transcript was received on September 16, 2003. The parties submitted briefs, which were exchanged through the undersigned. The record was closed on November 17, 2003.

## **ISSUE**

The issue presented by this grievance is:

Did the City violate the collective bargaining agreement when it allowed volunteers to perform maintenance tasks and/or rebuild a ramp at the skate ramp facility? If so, what is the appropriate remedy?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE II**

#### **CONDITIONS AND DURATION OF AGREEMENT**

. . .

E. Management Rights: The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

7. To contract out for goods or services, however, there shall be no layoffs or reduction in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

## **BACKGROUND**

There is virtually no dispute about the facts giving rise to this grievance. The City provides general municipal services to the citizens of Racine in southeastern Wisconsin. Among the services provided is the operation of public parks and recreation facilities. The Union represents, among others, the non-supervisory employees of the Parks, Recreation and Cultural Services Department. Donnie Snow is the Director of the Department.

In 1998, a group of citizens approached the City about opening a skate board park on land occupied by four municipal tennis courts. The City agreed to allow the effort. The citizens raised approximately \$130,000, which was supplemented by \$10,000 in federal Community Block Development Grant money administered by the City. The skate board ramps were constructed on the site using volunteer labor, and the park opened in 1999. Between the opening of the park and the summer of 2002, maintenance work was performed both by volunteers and by employees represented by Local 67. Since the opening of the park, maintenance costs have been partially paid by citizens, but the City has annually budgeted between \$10,000 and \$15,000 for that purpose.

Andy Veselik is a carpenter in Local 67's bargaining unit. He works for Parks and Recreation, and is the only carpenter in the City's work force. His duties include repair and maintenance of Park buildings and equipment, as well as construction of items such as ticket booths. Veselik is normally scheduled for an eight-hour day, and has never worked any authorized overtime during his employment with the City, since as a matter of policy the Department does not authorize overtime for carpentry work.

In the summer of 2002, the ramps at the skate board park began to deteriorate because the volunteers had constructed them out of untreated lumber. Veselik worked on reconstructing them using the proper materials. On August 7<sup>th</sup>, he noticed some of the volunteers hanging around the site, one of whom said they planned to rebuild one of the ramps. Veselik did not witness any of the volunteers doing carpentry work that day. However, when he arrived at the site the following morning, he noted the remains of the old skate ramp in a pile next to the gate, and observed that the ramp had been rebuilt. He mentioned this to his supervisor, who agreed that the volunteers had rebuilt the ramp after Veselik had quit for the day. The materials for the rebuilding were supplied by the City.

The instant grievance was filed protesting the City's decision to let volunteers perform bargaining unit work, and also protesting the unsafe manner in which the work was performed. At the hearing, Veselik clarified that it was not his personal safety he was raising, but the safety of persons using the park, since he felt the workmanship was quite poor. 1/ The City called the Union President adversely, and elicited testimony that the contract allowed subcontracting so long as the contracting did not result in layoffs or reduction in hours. He also testified that for some time there have been contracted maintenance employees in City Hall, and that no grievance had been filed over the use of those employees. He agreed that no one had been laid off as a result of the volunteers' work on the skate board ramps, and that no employee grieved over a reduction in hours, but pointed out that Veselik would have earned overtime had he done the work when the volunteers did, after 3:00 p.m.

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*1/ Given Veselik's explanation, I have found it unnecessary to analyze the safety aspect of the grievance in terms of any contract violation. The contract does not provide some general guaranty for the safety of the public, and this portion of the grievance is more a critique of the quality of the volunteers' work than a claim that it violated some protected right of the bargaining unit employees.*

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## **POSITIONS OF THE PARTIES**

### **The Union**

The Union takes the position that the use of volunteers for construction and maintenance at the skate board park is a violation of the contract. The work is plainly bargaining unit work and has been performed by bargaining unit members in the past. While the Union has allowed some volunteer labor on unit projects in the past, notably on the annual Make a Difference Day, that limited gesture of good will is a wholly different thing than allowing volunteers to supplant bargaining unit members on an on-going basis. Nothing in the contract allows for the use of volunteers for bargaining unit work, and the Arbitrator should accordingly direct the City to cease and desist from allowing these unskilled volunteers to have the free run of the skate board park.

Even assuming for the sake of argument that the volunteer labor here could be considered a form of subcontracting, the contract places restrictions on the City's right to engage in that type of diversion of work. Specifically, the contract prohibits subcontracting which results in a layoff or in reductions of hours. While there were no layoffs in this instance, there was plainly a loss of hours to Veselik. He estimated at hearing that he would have worked for 40 hours on the tear-down and rebuilding of the ramp in question. Given that the work was performed after normal work hours, Veselik would have earned overtime for his labors, and he lost these hours when the City let the volunteers do the work instead. Thus, under any theory of the case, the use of volunteer labor is a contract violation. The Arbitrator should so find and should make Veselik whole for his losses.

### **The City**

The City takes the position that there has been no contract violation. The skate board park was originally built with volunteer labor and has since been maintained by a mix of City and private efforts and resources. Until this grievance, this sharing of responsibility has been accepted by both parties. The fact that the Union now objects does not change the fact the contract specifically allows the use of non-unit personnel for unit work. The Management Rights clause allows contracting for services, so long as there is no layoff or reduction in hours. The City has used this authority for years to have custodial and maintenance work performed by contractors in the City Hall. The Union has been fully aware of this practice and has never challenged it. The City's use of volunteers is no different. So long as there is no adverse impact on the bargaining unit, the Union has no valid complaint. As there is no claim that any unit employee was laid off or reduced in hours because of the volunteer efforts at the skate board park, there can be no finding of a violation. Accordingly, the grievance must be denied.

## DISCUSSION

The contract is silent as to the use of volunteers, but it does speak to subcontracting for goods and services. Subcontracting is allowed, so long as no bargaining unit member is reduced in hours or laid off as a result of the contracting. The initial question, then, is whether the City's decision to allow volunteers to perform what is plainly bargaining unit work at the skate board park should be analyzed under the specific contracting language, or under the more general contract terms governing recognition and management rights.

Both the use of volunteers and the employment of a subcontractor involve personnel other than the Employer's performing work which would normally be reserved to the members of the bargaining unit. In both cases, the bargaining unit is adversely affected, at least in principle, by using an alternate source of labor. The sole distinctions are in the cost to the Employer and in the Employer's ability to choose the project or projects on which the outside personnel will be used. On the one hand, volunteers cost the Employer nothing, while contractors must be paid. On the other hand, the availability of volunteer labor is controlled by the volunteers – the Employer cannot simply decide that a particular project will be done by volunteers, as it can when it goes into the marketplace to hire a contractor. Volunteers also, as a practical matter, limit the Employer's ability to enforce standards of quality in the work performed.

These distinguishing features are not, in my judgment, sufficient to remove the use of volunteers from the scope of contract provisions regulating the use of outside contractors. The action at issue and the core interests of the Union and the Employer are essentially the same in both cases. Work is performed by labor outside the bargaining unit. The Union is concerned that the bargaining unit not be diminished and employees not suffer losses. The Employer is concerned with economy and a desire for flexibility. All of this is at the heart of any discussion over subcontracting, and the agreements reached on that topic would extend to the use of free labor as well as paid.

The contract, at Article II, reserves to the City the right to manage the enterprise, including the right "To contract out for goods or services . . ." That right is not unfettered. The provision goes on to say "however, there shall be no layoffs or reduction in hours due to any contracting out of work." This right has been exercised in the past, with the use of contractors for maintenance and cleaning at City Hall. 2/ In this case, the parties agree that there has been no layoff of unit personnel resulting from the use of the volunteers at skate board park. They do, however, disagree about whether there has been a reduction in hours.

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*2/ There have also been instances of volunteers performing unit work in the past, both at the skate park and on "Make a Difference Day." I attach no significance to the "Make a Difference Day" example, as that is a discrete, limited civic event. It has little or no impact on the bargaining unit, and the Union's failure to object to this event cannot be read as a generalized acquiescence in the use of volunteers for bargaining unit work.*

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The Union argues that the work of the volunteers denied Veselik the opportunity to perform ramp reconstruction in August of 2002, and that this work would have been performed on overtime. Thus, it was a “reduction in hours” relative to what he would have done but for the involvement of the volunteers. Although this is an ingenious slant on the contract language, it cannot be the case that a loss of potential hours is what the parties meant when they negotiated the contracting clause. All bargaining unit work that is performed outside of the unit could be performed by unit employees working overtime. If that is what constitutes a “reduction in hours” all contracting is barred. That is contrary to the plain language of the provision, which on its face contemplates allowing contracting out, so long no unit employees suffers any actual loss. The more plausible reading of the contract language, and the reading I adopt, is that a “reduction in hours” refers to a reduction in the hours of employment normally associated with the job. Whether this would include normal overtime associated with a job need not be answered in this specific case, since the carpenter has never been authorized to work overtime.

The use of volunteer labor is a form of contracting out, which is addressed by the specific language of Article II. Article II allows the City to contract out for services, so long as no employee is laid off or loses hours by reason of the contracting. In this case, the carpenter is the employee affected by the contracting. The record shows that the carpenter worked his normal hours before, during and after the volunteers reconstructed the skate board ramps. I therefore conclude that the use of volunteers to reconstruct the ramp was not a violation of the collective bargaining agreement, and accordingly, the grievance is denied.

On the basis of the foregoing and the record as a whole, I have made the following

### **AWARD**

The City did not violate the collective bargaining agreement when it allowed volunteers to perform maintenance tasks and/or rebuild a ramp at the skate ramp facility. The grievance is denied.

Dated at Racine, Wisconsin, this 8<sup>th</sup> day of March, 2004.

Daniel Nielsen /s/

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Daniel Nielsen, Arbitrator