

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF SUPERIOR

and

LOCAL #235, AFSCME, AFL-CIO

Case 209

No. 69184

MA-14517

(Grievance No. 01-235-09)

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, appeared on behalf of the Union

Ms. Cammi Koneczny, Human Resources Administrator, City of Superior, 1316 North 14th Street, Suite 320, Superior, Wisconsin 54880, appeared on behalf of the City.

ARBITRATION AWARD

On September 18, 2009 Local 235, AFSCME, AFL-CIO and the City of Superior filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on November 19, 2009 in Superior, Wisconsin. No formal record was taken. At the conclusion of the hearing the parties made oral argument. I offered, and the parties agreed to accept, an expedited and abbreviated Award.

This dispute concerns the use of non City employees to perform temporary work, without offering the work to part time bargaining unit employees.

BACKGROUND AND FACTS

During the months of February and March, 2009, the City contracted with a temporary agency to hire two employees to process storm water payments. The work consists of data entry to record payments, which are processed through the City Finance Department. It was the testimony of Dan Zuchowski, the Assistant Finance Director, that it was important to hire a full time person to process the payments. The Department had previously tried to handle the payments in house, and had discovered that it could not do so, while continuing to perform day

to day tasks. It had previously taken four people just over a month to process the payments. Zuchowski felt it was important to cut the processing time. He also felt it was important to assign a single person to promote consistency and accountability. If errors are made, they can be identified and corrected.

Zuchowski brought his request to Human Resources, and the temporary position was approved and classified as an Account Clerk. The City classifies all temporary positions for purposes of pay and minimum skills requirements. An employee was secured through a temporary agency to work full time. When the employer became dissatisfied with the individual, she was replaced by a second individual. The work was completed in approximately two and one-half weeks.

The Union filed a grievance on March 6, 2009. The grievance relies upon Side Letter A, a provision of the collective bargaining agreement, which provides:

SIDE LETTER AGREEMENT

Local #235 AFSCME, AFL-CIO and the City of Superior, enter into this agreement that when there is a Local #235 temporary position available, part-time Local #235 employees (excluding Library and Communication Center employees) will be asked if they are interested in working the extra hours before any non-union person is hired for the temporary position. If, as determined by Human Resources, the extra hours do not interfere with the part-time employee's present work schedule and the extra hours will not cause any overtime, the #235 part-time employee will be asked if he/she is interested in working the extra hours before any non-union person is hired for the temporary position. Appointment to the extra hours will be based first on prior experience in the assignment, and in the event that no one is experienced in the assignment, second by the most senior interested person.

It was the testimony of Ms. Koneczny, Human Resource Administrator, that the City commonly uses part time City employees for temporary assignments. She indicated that to be the City's preference, where feasible. City witnesses also indicated that there were instances where the City used non-City employees to perform bargaining unit work, without challenge from the Union.

Linda Byrnes, Union Secretary testified that the work in question could have been divided between two employees. She further testified that the City has split work under similar circumstances in the past. The Union introduced an exhibit which confirmed this to be the case. It was Byrnes' testimony that the Union has not protested the use of non- City workers where the matter was not brought to the attention of the Union.

ISSUE

The parties could not agree upon the issue to be decided. It is the position of the City that the issue to be decided is:

Did the City violate the AFSCME Union 235 side letter agreement A when it hired a full-time non-union temporary service employee to process stormwater payments in February and March of 2009?

It is the position of the Union that the issue to be decided is:

Did the Employer violate the terms of side letter "A" when it failed to offer two part-time employees the opportunity to work additional hours? And if so; the appropriate remedy is to make the employees whole for any and all lost wages and benefits. The City is to furthermore cease and desist from not offering part-time employees additional hours of work as per the terms of side letter "A".

I believe this decision addresses the questions put forward in each statement of the issue.

DISCUSSION

I believe the key to this dispute is whether or not the City had the discretion to decide to fill the temporary position with a full time employee. Under the circumstances presented in this dispute, I think the answer is that it did. The City had previous experience with multiple employees performing the work, and was dissatisfied with the outcome. The stated goals were to have one person accountable and to complete the task promptly. On its face the goals appear to be a reasonable exercise of the Management Right to establish work schedules.

This does not appear to be an effort to circumvent the contract. The City paid union scale to the agency workers, in addition to the Agency fee. It actually cost the City more to contract for the work than it would have to have it done in house. The City was prepared to pay for the outcome and goals it set forth.

It is my reading of Side Letter A that the Human Resource office is to determine whether or not the extra hours will interfere with the part time bargaining unit employees schedule and whether or not the hours will cause overtime. This determination is to occur before the offer of work to bargaining unit part timers. Once it was determined that the temporary position was to be filled as a full-time position, any hours offered to a part timer would generate overtime, and would quite likely interfere with the then existing work schedules.

For the Union to be successful in this proceeding, it would be necessary to break the temporary work up so that it could be dovetailed with the work of part timers. I do not read

Side Letter A to require that the work be split up. I do read the Management Rights clause to vest the employer with discretion in this area. Each side presented prior examples in support of their respective positions. That fact alone indicates that there is not a persuasive interpretive practice in this area.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of November, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator