

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF LOWELL *

-and- *

AFSCME, COUNCIL 93 *

ARB-16-5658

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Eric McKenna, Esq. - Representing AFSCME, Council 93

Hannah Pappenheim, Esq. - Representing City of Lowell

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The painting work completed by non-bargaining unit members was in violation of the collective bargaining agreement, but the HVAC work performed by a non-bargaining unit member was not a violation of the collective bargaining agreement. The City is hereby ordered to make bargaining unit members whole in a manner consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
October 10, 2017

INTRODUCTION

AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's Boston office on June 1, 2017.

The parties filed briefs on July 14, 2017.

THE ISSUE

The Parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Was bargaining unit work performed by non-bargaining unit members in violation of the parties' collective bargaining agreement and 12/9/15 settlement agreement? If so, what shall be the remedy?

The City proposed:

Was bargaining unit work performed by non-bargaining unit members in violation of the parties' collective bargaining agreement? If so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

Was bargaining unit work performed by non-bargaining unit members in violation of the parties' collective bargaining agreement? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

ARTICLE 6 GRIEVANCE PROCEDURE AND ARBITRATION (In Part)

Section 1. Matters Covered

As provided in M.G.L. c. 150E, §8, the grievance procedure hereinafter set forth shall only be involved in the event of any dispute concerning the interpretation or application of this collective bargaining agreement. No other matters shall be the subject of the grievance procedure. ...

Section 5. Arbitration

The Arbitration proceedings shall be conducted by an arbitrator to be selected by the Employer and the Union within seven (7) days after notice has been given. ...

The arbitrator hereunder shall be without power to alter, amend, add to, or detract from the language of this Agreement. The decision of the Arbitrator shall be final and binding upon the parties. ...

ARTICLE 34 MISCELLANEOUS PROVISIONS (In Part)

Section 3. Volunteers, Thirty Day Notice to Contract Out Work Presently Performed

A. Volunteers

Nothing in this Agreement shall prevent the City from engaging persons outside of the bargaining unit to perform work which could have been performed by employees within the bargaining unit or otherwise from contracting out bargaining unit work so long as such engagement or contracting out does not result in the reduction of the bargaining unit.

The City will not use volunteer forces unless the Union has had a chance to review and approve. (appropriate language to be negotiated).

B. Thirty Day Notice to Contract Out Work Presently Performed

The City shall provide the Union, except for instances that are of an emergency nature, with a thirty (30) day notice of its intent to contract out work presently performed by bargaining unit members. Upon notice, the parties agree to meet and discuss alternatives to contracting out work presently performed by bargaining unit members.

STIPULATION

Painting and HVAC work performed in City school buildings is work exclusive to members of Local 1705 in the City of Lowell and was performed by outside parties on or about the dates set forth in the grievances.

FACTS

The City of Lowell (City) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. George Pilato (Pilato) is a working foreman in the City's Department of Public Works (DPW). Pilato and a crew of craftsmen in his division regularly perform painting work as part of their positions. Pilato's duties include making determinations as to the size and scope of a work assignment. Matthew Sandelli (Sandelli) is a HVAC technician in the City's DPW and routinely performs HVAC work in City owned buildings. Both Pilato and Sandelli testified that they and their fellow bargaining unit members were working at full capacity during the times in question and did not have any downtime.

On or about July 27, 2016, Pilato observed that painting work had been performed at the Murkland School. Pilato was informed by the school custodian that school employees, including teachers, had painted five classrooms. Pilato testified that the painting job at the Murkland School would require repairing,

caulking, priming and two coats of paint on the walls of the five classrooms. Pilato testified that the job would require four workers working ten days for a total of three hundred and twenty hours. The City failed to provide the Union with any notice of its intent to have the painting performed by non-bargaining unit personnel.

In late July or early August, 2016, Sandelli came across a completed work order that showed that HVAC work had been performed at the Pyne Arts Magnet School (Pyne School) by Bob Carroll (Carroll) a non-bargaining unit employee/contractor. Sandelli testified that Carroll informed him that he had been called in and performed HVAC repairs at the Pyne School. Sandelli testified that the work involved an overheating HVAC system and was routine work he performed on a regular basis. Sandelli testified that Carroll reported that the work was performed on an emergency basis, though he was unclear on how Carroll came to that conclusion. Sandelli testified that the work would have been performed in four hours. The City failed to provide the Union with any notice of its intent to have the HVAC work performed by a non-bargaining unit employee/contractor.

On or about August 17, 2016, Pilato observed that painting had been performed at the Wang School. Pilato was informed that non-bargaining unit members had painted two classrooms and a hallway. Pilato testified that the painting job at the Wang School would require repairing, caulking, priming and two coats of paint on the walls of the classrooms and hallway. Pilato testified that the job would require four workers working four days for a total of one hundred and

twenty eight hours. The City failed to provide the Union with any notice of its intent to have the painting performed by non-bargaining unit personnel.

The Union filed three grievances which were denied by the City at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

This case involves the City's assignment of bargaining unit work to volunteers and/or outside contractors for work when bargaining unit members were both available and qualified to perform that work. The City has not disputed that it failed to provide any advance notice of its intent to transfer the work in direct violation of Article 34 of the collective bargaining agreement. The Union does not dispute that in certain circumstances, it is appropriate for the City to assign work to volunteers or outside contractors. However, in the circumstances that gave rise to each of the three grievances, the City has failed to establish that it complied with the collective bargaining agreement. Indeed, the evidence is clear that the City did not provide the Union with a chance to review and approve the use of volunteers when it transferred the painting duties. Additionally, the City did not provide the Union with any notice of its intent to use an outside contractor to perform HVAC duties, nor has it established that there was an emergency situation that would obviate the need for the required notice.

Painting work for City owned lands and buildings is performed exclusively by Union bargaining unit members. The parties have previously agreed in a similar dispute involving this specific division that such labor and painting work,

specifically work in City owned school buildings, is work that is exclusive to the bargaining unit.

Murkland Elementary School

On or about July 27, 2016, Pilato observed that painting work had been performed in the Murkland Elementary School. Pilato was informed that teachers had painted five classrooms in the building. The City failed to provide prior notice of the painting performed by the teachers and failed to provide the Union with an opportunity to review and approve the proposed work. Pilato testified that this project would require repairing, caulking, priming, and painting of the walls, and that it would take a crew of four bargaining unit members ten days to complete, for a total of three hundred and twenty hours.

Wang Middle School

On or about August 17, 2016, Pilato observed that painting work had been performed at the Wang School. Two classrooms and a hallway were painted by teachers and perhaps a principal. The City failed to provide prior notice of the painting performed by the teachers and failed to provide the Union an opportunity to review and approve the proposed work. Pilato testified that the painting job would also require repairing, caulking, priming, and painting of the walls. Pilato testified that this work would require a crew of four bargaining unit members a total of four days to complete for a total of one hundred and twenty eight hours.

Pyne Arts Magnet School

On or about late July or early August 2016, Sandelli observed a completed work order for HVAC work performed at the Pyne School. Sandelli spoke to Carroll, a school employee and/or school contractor, who confirmed that he was called in to perform repairs on a HVAC system. The City failed to provide prior notice of the HVAC work performed by Carroll and failed to provide the Union an opportunity to review and approve the proposed work. Sandelli testified that the work performed involved an overheated HVAC system and that constituted routine work, which he previously performed on a regular basis. In his professional opinion, the work did not constitute an emergency or necessitate immediate repair. Sandelli testified that the job would consist of four hours of work.

Settlement Agreement

The City's use of outside contractors has been disputed by the Union on several occasions. Most recently, in 2015, a dispute arose between the parties involving the use of outside contractors for work that involved painting at the City's schools. The dispute involved the same group of employees that are involved in the instant matter. A settlement agreement was reached in that matter which expressly stated that painting work in the school buildings was exclusive work of the bargaining unit.

Clear and Unambiguous Language

The contract language at issue here is clear and unambiguous. The City can only utilize volunteers after the Union has had "a chance to review and approve". Additionally, the City is only authorized to utilize outside contractors after providing the Union with thirty-days notice, unless there is an emergency.

The City has not disputed that the work in question was performed by non-bargaining unit members. The City argues that it did not intentionally allow bargaining unit work to be performed by non-bargaining unit members and that there was no bad faith present. The City has portrayed the violation as a technical violation relating to its notice requirements. The City's intent, however, has little relation to its alleged violation. The City should not be absolved of responsibility for contract violations because of an apparent internal communications issue with its school department. Moreover, considering that there has been at least one prior related dispute regarding this subject matter, the City has had ample time to fix its internal communication problems.

Consequently, because the contract clearly does not allow the City to indiscriminately assign bargaining unit work to outside contractors or volunteers without meeting its notice requirements to the Union, the City should be held to the clear and unambiguous language that it had bargained.

Remedy

In the present matter, the City has violated the contract by depriving both Union members and the Union itself from bargaining unit work. Testimony showed that aggrieved members suffered specific monetary damages as a result of these unlawful assignments. Additionally, the work performed was done outside of the bargaining unit members' regular work hours. As such, the aggrieved bargaining unit members should be awarded the hours lost at their overtime rate of pay.

Conclusion

For all the foregoing reasons, the Union asserts that the grievances should be upheld, and the Union respectfully requests that the grievants be made whole for all losses.

THE EMPLOYER

The 2015 Settlement Agreement

Union Exhibit 1 is a settlement agreement which was signed in 2015 in relation to a grievance filed by the Union in 2014. The settlement agreement establishes two points. First, it delineates certain work which is within the scope of the Union and is exclusive to the Union. Second, it provides for payment in exchange for the withdrawal of the grievance. The City has stipulated that the work performed in the current matter is work exclusive to the Union. This makes the settlement agreement moot and irrelevant as to its first point. As to the second, the payment in exchange for withdrawal of the grievance is irrelevant to the current matter before the arbitrator.

Violation of the settlement agreement should not be included as part of the issue in this matter. The Union has never argued that payment was not made in accordance with the settlement agreement, and the settlement agreement is confidential between the parties. Additionally, the settlement agreement states that it “shall not serve as precedent for any other employee.” The current grievance filed as a class action represents other employees who were not part of the prior settlement agreement.

The settlement agreement cannot be offered as an example of payment made related to this type of grievance (work performed by outside parties). If the

proper payments of the amounts listed in the settlement agreement were an issue before the arbitrator, then the introduction of the settlement agreement would be appropriate. However, that is not the issue here. Therefore, the fact that payment was made and the amount of that payment is not relevant to the present case. Admittance into the record would belie the point and purpose of non-precedent setting settlement agreements.

Thus, where neither the scope of the work nor the settlement payments are at issue in this matter, the settlement agreement has no evidentiary value and should not be considered or admitted in the record.

HVAC Work

During the hearing, Sandelli testified that the HVAC work performed at the Pyne School was done on an emergency basis. Article 34 contains a specific exception for work performed on an emergency basis. Therefore, the HVAC work performed at the Pyne School was not in violation of the collective bargaining agreement.

Sandelli testified that Carroll, who monitors the computers controlling heating and cooling at Lowell Public Schools, made an adjustment to the HVAC system for a classroom at the Pyne School. He further testified that the work was done on an emergency basis. Thus, the City did not contract out HVAC work, which is exclusive to the Union. Instead, an adjustment was made on a one-time emergency basis. This does not violate the collective bargaining agreement, but rather is expressly permitted.

Painting Work Lacked Proper Notice

While the HVAC work performed at the Pyne School was done on an emergency basis, this is not the case with the painting at the Murkland and Wang Schools. Instead, to the best knowledge of the Union and the City, teachers performed the work. It was not a case of contracting out the work, but rather a project that the City had not authorized. Whether the teachers volunteered or were paid for their time, the Union should have been given notice of the work.

However, other than lacking proper notice, the Union was not harmed in any material way. The collective bargaining agreement specifically provides that “nothing in this Agreement shall prevent the City from engaging persons outside of the bargaining unit or otherwise from contracting out bargaining unit work so long as such engagement or contracting out does not result in the reduction of the bargaining unit.” Here, there has been no reduction in the bargaining unit as a result of this incident.

Remedy

Payment of wages for work not performed by the Union is not an appropriate remedy. It is an overly punitive remedy for an error and relatively minor notice infraction on the part of the City. The Union has presented no evidence that the City intentionally or otherwise willingly violated the terms of the collective bargaining agreement. Instead, the work performed was an oversight by public school teachers, which was done without the blessing of the City’s administrators. Proper notice was the City’s only violation of the collective bargaining agreement. The Union has offered no evidence to support the claim that, if the proper notice had been given, the Union would have performed the work on an overtime basis.

The contract does not prohibit the work being done, but conditions it on proper notice to the Union and opportunity to bargain, if necessary. Therefore, payment of lost wages would be unduly punitive and an inappropriate windfall to the Union.

For all the foregoing reasons, the City requests a ruling that there was no permanent adverse impact on the Union and no monetary damages are necessary.

OPINION

The issue before me is: Was bargaining unit work performed by non-bargaining unit members in violation of the parties' collective bargaining agreement? If so, what shall be the remedy?

For all the reasons stated below, I find that the painting work completed by non-bargaining unit members was in violation of the collective bargaining agreement, but the HVAC work performed by a non-bargaining unit member was not a violation of the collective bargaining agreement.

2015 Settlement Agreement:

I find the inclusion of the December 5, 2015, Settlement Agreement (Settlement Agreement) to be inappropriate in the matter before me. In part, the Settlement Agreement states:

The parties agree that this AGREEMENT shall not serve as precedent for any other employee.

The parties understand and agree that this AGREEMENT and its content shall be maintained as confidential by the parties, their agents and representatives.

As the parties have agreed in writing that the Settlement Agreement has no precedential value and is to remain confidential, I decline the Union's request to

include the Settlement Agreement in the Issue for this Arbitration, and I further decline to consider it in either my decision or remedy for the matter before me.

Merits:

The parties in this matter have stipulated that:

Painting and HVAC work performed in City school buildings is work exclusive to members of Local 1705 in the City of Lowell and was performed by outside parties on or about the dates set forth in the grievances.

On the surface, this stipulation foretells most, but not all, of the answer to the issue before me. However, as the City argues, one must also read the language of Article 34 of the collective bargaining agreement for a complete analysis of the facts in this matter. Article 34, Section 3 (B) states that:

The City shall provide the Union, except for instances that are of an emergency nature, with a thirty (30) day notice of its intent to contract out work presently performed by bargaining unit members. Upon notice, the parties agree to meet and discuss alternatives to contracting out work presently performed by bargaining unit members.

It is undisputed that the painting work performed at the Murkland and Wang Schools was exclusive bargaining unit work, which was performed by non-bargaining unit members in a non-emergency setting. As such, this work is unequivocally a violation of the collective bargaining agreement.

The HVAC work performed at the Pyne School however falls into a different category. Again, it is undisputed that HVAC work performed in City buildings is bargaining unit work. However, the City has argued here that the work in question was performed on an emergency basis. In as much as the City failed to call any witnesses, or submit any independent evidence to support its denial of the

grievances, I am left to the testimony of the Union's witnesses. On direct examination, Sandelli testified that Carrol had informed him that the HVAC work, which Carroll performed, was done on an emergency basis. Sandelli was then asked if he felt the situation was an emergency and stated that "it must have been or he (Carrol) would have waited and called." Based on this testimony, I find that the HVAC repair work in question was performed on an emergency basis, and, as such, is not a violation of the collective bargaining agreement.

REMEDY

As the City failed to call any witnesses, or submit any independent evidence to support its denial of the grievances, I am left solely with the Union's witnesses' testimony in fashioning an appropriate remedy for the City's violation of the collective bargaining agreement with the painting work performed at the Murkland and Wang Schools.

Murkland School

Pilato testified that his duties as a working foreman include making determinations as to the size and scope of a work assignment. His assessment of the painting work performed at the Murkland School was that it would have required repairing, caulking, priming, and painting of the walls, and that it would take a crew of four, ten days to complete, for a total of three hundred and twenty hours of work. While, I am inclined to give some level of deference to Pilato's estimation of the time necessary to perform the Murkland painting work as the only witness to testify about the scope of the project, I find the number of hours to be inflated. If one is to assume that the repairing, caulking, priming, and painting of

the walls took a full-day to perform, then adding a second full day of work per classroom for the necessary second coat of paint seems excessive. In light of this, I am reducing the total number of days necessary to complete the painting to seven and one half, and a total of two hundred and forty hours of work.

Wang School

As with the analysis outlined in the Murkland School section of this decision, while I am inclined to give some level of deference to Pilato's estimation of the time necessary to perform the Wang painting work, I find the number of hours here to be inflated as well. If one is to again assume that the repairing, caulking, priming, and painting of the walls took a full-day to perform, then adding a full work day for the necessary second coat of paint seems excessive. In light of this, I am reducing the total number of days necessary to complete the painting to three, and a total of ninety six hours of work.

Rate of Pay

The Union argues that any award of hours owed should be paid at an overtime rate of pay. The City simply argues that any monetary award is inappropriate. I disagree with the City's position that this is simply a notice violation case and a monetary award is inappropriate. Regardless of whether this was an intentional act by the City, it resulted in the loss of work for bargaining unit members. Additionally, as the only witnesses presented at the hearing, the bargaining unit members who testified all stated that they were working at their normal work rate during the time in question and did not have any down time. As the City failed to provide any testimony to the contrary, I am left to find that the

painting at the Murkland and Wang Schools would have necessarily been performed on an overtime basis.

The City is ordered to make bargaining unit members whole for a total of three hundred and thirty six hours of overtime pay. The City and the Union are hereby ordered to confer and reach an agreement as to which bargaining unit members were affected by the City's violation of the collective bargaining agreement and to make such members whole at the rate of time and one half, for all hours missed up to the total of three hundred and thirty six hours awarded.

I will retain jurisdiction of this matter until such time as the parties agree on a compensation payment plan and the bargaining unit members are made whole.

AWARD

The painting work completed by non-bargaining unit members was in violation of the collective bargaining agreement, but the HVAC work performed by a non-bargaining unit member was not a violation of the collective bargaining agreement. The City is hereby ordered to make bargaining unit members whole in a manner consistent with this decision.

Timothy Hatfield, Esq.
Arbitrator
October 10, 2017