

AMERICAN ARBITRATION ASSOCIATION

**In the Matter of Arbitration
Between**

International Association of Fire Fighters

And

The City Of Erie

**AAA Case No. 55-390-00145-09
Fire Communications Layoffs
Before: Michael E. Zobrak, Arbitrator**

Appearances:

For the City: Gerald J. Villella, Esquire

For the Union: John R. Bielski, Esquire

Place of Hearing: Erie, PA

Date of Hearing: March 18, 2010

Date of Award: July 19, 2010

Type of Grievance: Contract interpretation

Award: The grievance is denied.

ADMINISTRATION

On October 22, 2009, the undersigned was notified by the American Arbitration Association of his selection to serve as the arbitrator to hear and decide a matter then in dispute between the parties. A hearing went forward on March 18, 2010, at which time both parties were afforded the opportunity to present testimony, written evidence and arguments in support of their respective positions. At the conclusion of the hearing, the parties elected to file post-hearing briefs. The record was closed on May 18, 2010, following the receipt of those briefs. This matter is now ready for final determination.

GRIEVANCE AND QUESTION TO BE RESOLVED

The grievance in this case was filed by Matt Skal and Joan Kramer on January 20, 2009, and alleges that the City intended to assign the duties of the fire alarm operators to an outside agency and/or bargaining unit, in violation of Article 13, section 4 of the parties' Agreement. The remedy sought in the grievance is that the fire alarm operators' duties be kept as a function of the existing bargaining unit employees.

The issue in this case is whether the City violated the Agreement by contracting out the duties of the fire alarm operators and if so, what shall be the appropriate remedy?

RELEVANT PORTIONS OF THE AGREEMENT

The following provisions of the parties' 2008-11 Agreement are relevant to this dispute:

ARTICLE II

RECOGNITION OF UNION

SECTION 1.

The City hereby recognizes the Union as the sole and exclusive bargaining agent for all firefighters of the said Bureau of Fire with respect to compensation, hours, working conditions, retirements, pension, terms and conditions of their employment and other aspects of employment affecting Union members' safety or welfare. The Union recognizes the Manager of Human Resources or the Manager's designee as the exclusive collective bargaining representative of the City.

ARTICLE IV

DEFINITIONS

...

SECTION 2

Firefighter – The term firefighter shall include all persons employed by the Bureau of Fire in the following classifications as defined by the Pennsylvania Civil Service Act:

...

Schedule B (Support Personnel)

...

Fire Alarm Operator

ARTICLE XIII

SEVERABILITY

...

SECTION 3

The City agrees that it shall not subcontract work presently being performed by bargaining unit members except when such work involves the repair of apparatus which repairs cannot be satisfactorily performed by bargaining unit employees....

FACTUAL BACKGROUND

The facts in this case are not in dispute. The Union represents a bargaining unit consisting of firefighters and support personnel in the City's Fire Department. The parties have had a long collective bargaining relationship, and the current Agreement is the result of an interest arbitration award in January 2009.

For many years, the City had separate communication centers for the fire and police departments, which dispatched calls for assistance to their respective departments. The Fire Communications Center handled calls to the Fire Department. It was staffed by fire alarm operators who are included in the parties' bargaining unit. In 2005, the City unilaterally decided to consolidate the dispatch units of the two departments into a single dispatch unit, and laid off five fire alarm operators, replacing them with dispatchers from the police dispatch unit. A grievance was filed by the Union, alleging that the City had improperly subcontracted work that belonged to its bargaining unit. That grievance was ultimately submitted to arbitration before Arbitrator Richard Dissen, who sustained the grievance and directed the City to restore the fire dispatch work to the parties' bargaining unit and to recall the five laid-off fire alarm operators.

In January 2009, the Union learned that the City planned to consolidate both the police and fire department dispatch units with the County's 9-1-1 emergency calls unit. It filed the instant grievance to protest that intended action, contending that the proposed transfer of these duties to an outside agency would violate Article XIII, Section 4 of the Agreement, which prohibits the subcontracting of work currently being performed by members of the bargaining unit.

Following the filing of this grievance, the City went forward with its plan to consolidate its dispatch operations with the County's 9-1-1 Center, and contracted with the County to have it handle all emergency calls for the City's fire and police departments. The City subsequently laid off the fire alarm operators.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The Union contends that Articles II and XIII clearly prohibit the City from removing the work in question from the parties' contractual bargaining unit. The City has violated those provisions by unilaterally transferring that work to the County's 9-1-1 center without negotiation with or the consent of the Union.

It is clear that the performance of these job duties is a mandatory subject of bargaining, but the City has essentially removed this work from the bargaining unit without notice to the Union, just as it did in 2005. The removal of this work from the bargaining unit in 2009 violated the Agreement, just as the removal of this work in 2005 was held to be in clear violation of the Agreement.

Article XIII specifically limits the City's ability to remove work that is presently being performed by bargaining unit members. Because that language is clear and unambiguous, the arbitrator is constrained to give effect to the parties' expressed intent. The clear intent of that provision is to protect the work performed by the members of the bargaining unit and by unilaterally carving that work out of the bargaining unit, the City has deprived the Union of the benefit of its bargain and undermined its ability to effectively represent its members.

Even if Article XIII is found to be ambiguous, the parties' longstanding practice in applying that provision confirms the City's contractual obligation to assign that work solely

to members of the bargaining unit. That work has been assigned exclusively to fire alarm operators for decades. It clearly falls squarely within the Union's exclusive work jurisdiction.

The City contends that this is not a subcontracting case because the County decided to create a single, countywide emergency response system under the Public Safety Emergency Telephone Act. But that argument must fail because although the City is permitted by that state law to join a countywide system, it is not required to do so. Nothing in that law gives a county the right to take over the emergency dispatch system of a municipality without its consent. Rather, the City voluntarily chose to join the County's system, despite the clear language of the Agreement prohibiting the reassignment of this work.

Moreover, the City did not enter into the intergovernmental agreement with the County until three months after the grievance was filed, but yet it made no attempt to bargain with the Union over this transfer of work even though it knew the Union opposed it. The City cannot rely on that intergovernmental agreement to justify its layoff of the fire alarm operators, since those layoffs began in March 2009, almost two months before the City and County entered into their agreement.

Nor can the City claim that it had no authority to employ anyone to work at the County's emergency call center. That claim is belied by the fact that one former employee from the bargaining unit was retained by the County to perform his same duties. If the City had the ability to allow that employee to continue performing his duties, it could have done the same for the other bargaining unit employees. The City also could have negotiated a requirement in the intergovernmental agreement that its employees be retained or at least that they be given a preference in hiring. There is no evidence that the City attempted to do so, however.

It should therefore be concluded that the City violated Article XIII when it unilaterally reassigned the work of the fire alarm operators to the County, and the grievance should be sustained. The City should be ordered to reestablish its Fire Communication Center and to rescind its intergovernmental agreement with the County. It should also be ordered to recall all of the laid-off fire alarm operators and to make them whole for their lost wages and all appropriate contractual benefits.

CITY CONTENTIONS

The City takes the position that it had the right to eliminate its fire communications unit in order to join the County's 9-1-1 system. The Union has failed to establish that it violated the parties' Agreement when it did so.

The general principle under Act 111 is that an employer commits an unfair practice when it reassigns bargaining unit work without the union's consent. However, a qualification is recognized that such work must have been exclusively performed by members of the bargaining unit. Since the City ceased all of its emergency dispatching, for fire, police and emergency medical, the eliminated work was not exclusively performed by the Union's bargaining unit, and hence there was no unfair practice committed by the City.

Article XIII of the parties' Agreement does not enhance this general principle of law, but rather only qualifies it to recognize a limited exception to permit the repair of equipment. Nothing in that article restricts the City from abandoning this particular service in favor of a countywide consolidation of all such services, as was done in the intergovernmental cooperation agreement.

There is a profound difference between the City's in-house consolidation of fire emergency dispatch services in 2005 and its legislatively affirmed entry into the County's 9-1-1 center in 2009, which involved the delegation of all of the City's emergency dispatch services to the County. For this reason, the 2005 award of Arbitrator Dissen is not controlling here because in that prior case, the City continued to pay for and control the eliminated services whereas in the present case, the County has taken over full responsibility for all of the City's dispatching services. The absence of any consideration by the City for this assumption of responsibility by the County is sufficient to remove this situation from the definition of subcontracting as that term is used in Article XIII.

But even if the uncompensated acceptance of these services by the County could be termed subcontracting, the strong legislative encouragement of countywide consolidation of emergency services must be given very strong consideration. The Public Safety Emergency Telephone Act was amended in 2003 to encourage the consolidation of these services at the county level, creating a virtual mandate for municipalities to abandon their existing systems. The 2003 amendments extended the monthly assessments on home phones to cell phones and internet calling systems but the additional revenue was to be disbursed only to counties and

not to municipalities such as the City, which had previously shared in the assessments on home phones. Deprived of this new source of income to maintain and update their emergency dispatching systems, municipalities were hard-pressed to acquire advanced technology that the counties were able to acquire. In light of this legislative mandate to consolidate, it would be illogical to give an expansive reading to the term subcontracting, as used in Article XIII, to permit the Union to forever thwart the City's attempt to increase public safety and avoid the effects of dwindling revenue by consolidating their emergency dispatch services to the County.

The City seeks denial of the grievance.

DISCUSSION AND FINDINGS

The grievance protests the City's plan, which has since been implemented, to consolidate its dispatch services for fire emergency calls with the County's 9-1-1 emergency call center. The clear language of Article XIII-3 expressly prohibits the contracting out of work presently being performed by members of the bargaining unit, with one limited exception that is not at issue here. The work in question was being performed by members of the bargaining unit at the time of the consolidation at issue, and therefore that work could not have been contracted out. The narrow question to be decided in this case then is whether the consolidation of the City's dispatching services constituted subcontracting of the work in question.

Article XII limits the jurisdiction of the Arbitrator to "the precise issue submitted for arbitration," and prohibits the consideration of any issue not so submitted. The Union raised several issues in arbitration that are beyond the scope of the narrow issue raised by the grievance and submitted to arbitration. Specifically, the Union argued that the City had failed to fulfill its legal obligation to bargain over the decision to consolidate its dispatching services with the County's, even though the performance of bargaining unit work is a mandatory subject of bargaining; that the layoffs of the fire alarm operators could not be justified by the intergovernmental cooperation agreement that the City entered into with the County; and that the City could have negotiated with the County to provide for the retention or preferential hiring of the fire alarm operators. However, none of these contentions is within the scope of sole issue raised by the grievance, and for that reason may not be considered by the Arbitrator.

Because the language of Article XIII-3 prohibiting the subcontracting of bargaining unit work is clear and unambiguous, the City cannot claim that this prohibition is limited to work that has been exclusively performed by bargaining unit members. That argument was raised and rejected in the 2005 arbitration before Arbitrator Dissen over the City's decision to transfer the fire emergency dispatching to police dispatchers. In rejecting that argument, Arbitrator Dissen held that the parties' longstanding practice of assigning this work to Fire Department dispatchers precluded the unilateral reassignment of this work by the City.

Likewise, the City cannot justify its action by relying on the 2003 amendment to the Public Safety Emergency Telephone Act, which encourages but does not require the consolidation of these services. Regardless of the merits of its decision, it is undisputed that the City chose to consolidate its dispatching services, rather than being mandated by the Commonwealth to do so.

The resolution of this case thus turns on whether the City's elimination of its dispatching services constituted subcontracting of the fire emergency dispatching work under the parties' Agreement. It is concluded that this action resulted in the elimination of this work rather than subcontracting that work out, and thus there was no violation of Article XIII-3. One of the City's basic managerial rights is the right to decide what services it will provide to its constituents and how that service will be provided. In this case, the City decided to eliminate the work in question, and to cede the responsibility for the performance of this service of dispatching all emergency calls to the County. The City does not directly pay the County employees who now perform these services, nor is there any evidence that they control the hiring of those employees or their terms and conditions of employment.

The record supports the City's claim that it eliminated this work rather than subcontracted it to the County. Accordingly, it must be concluded that the City did not violate Article XIII-3 when it consolidated its fire emergency dispatching service to the County. Because this case involved the elimination of bargaining unit work rather than its subcontracting, the 2005 award of Arbitrator Dissen is not controlling here. The grievance must therefore be denied.

AWARD

The grievance is denied.

A handwritten signature in black ink, appearing to read "Michael E. Zobrak", written over a horizontal line.

Michael E. Zobrak, Arbitrator

July 19, 2009

Aliquippa, PA 15001