ARBITRATION DECISION NO.:
532

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Administrative Services
Division of Public Works

DATE OF ARBITRATION:
August 17, 1993

DATE OF DECISION:
January 10, 1994

GRIEVANT:
Leonard (Ted) Woods, et al.

OCB GRIEVANCE NO.:
02-03-(91-09-11)-0251-01-05

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Donald Conley

FOR THE EMPLOYER:
Michael P. Duco
Georgia Brokaw

KEY WORDS:
Sub-contracting
Notice
Displacement

ARTICLES:
Article 39 - Sub-Contracting

FACTS:

This grievance was filed as a result of ODOT's decision to no longer purchase bargaining unit custodial services from the Division of Public Works. Instead, ODOT decided to use a private entity to perform the work. The Union received formal notice within ten days of the ODOT decision. In its letter to the Union, DAS cited greater economy and efficiency as the reason for ODOT's decision to subcontract custodial services. In addition, DAS cautioned that bargaining unit employees currently performing the custodial duties may be displaced. In fact, 14 bargaining unit positions at the Division of Public Works were abolished as a consequence of subcontracting the custodial services.

The parties, dispute primarily centered around the following questions: (1) who was the "employer" according to Article 39, (2) was the subcontracting major or minor, (3) whether DAS was responsible for

notifying the Union and (4) if the subcontracting was major, what would be the appropriate remedy for the State's breach of the 90 day notice provision?

UNION'S POSITION:

The Union argued that the subcontracting was "major", thereby entitling the Union to 90 days advance notice. DAS's failure to notify the Union at least 90 days prior to the decision to subcontract custodial services constituted a breach of Article 39 of the Contract. Further, the Union argued that the distinction of whether contracting out is "major" or "minor" must be made on the basis of function. In this case, the total function of custodial work was eliminated from ODOT Central Office. Thus, ODOT's decision to subcontract must be regarded as a "major" contracting out.

EMPLOYER'S POSITION:

The State argued that the subcontracting was "minor" and, therefore, the Union was only entitled to "reasonable advance notice" under Article 39 of the Contract. The State pointed out that the Union represents a total of 37,000 civil service employees, 800 of whom are employed at DAS (244 at the Division of Public Works). Of the 80 Public Works employees who performed custodial services, only 14 were laid off. The State emphasized that only 1.7% (17 of 800) of all DAS employees and only 17% (14 of 80) of DAS custodial workers were displaced because of the contracting out. Therefore, the State argued that the subcontracting was only minor.

In addition, the State presented the intent testimony of their Chief Negotiator for the 1986 Contract negotiations who testified that (1) the right to subcontract was an essential issue on which he was ordered not to compromise, (2) the State intended the word "Employer" to mean "state" and "agency" interchangeably to provide the State flexibility in determining responsibility, (3) the State likened a "major" contracting out to closing down an entire institution, and (4) the parties intended for the "major" or "minor" nature of a subcontracting decision to be decided on a case-by-case basis.

ARBITRATORS OPINION:

The Arbitrator decided the four issues as follows: First, in the context of Article 39 of the Contract, the word "Employer" meant the State. Since the intent notes from the 1986 negotiations did not specify who was to make notification, the State bears the ultimate responsibility to notify the Union. The State could have delegated (with proper instruction) its duty to notify to the Agency; however, the State cannot escape its contractual duty by delegating its duties and then denying responsibility for their proper execution. The delegator always remains ultimately responsible.

Second, the Arbitrator held that the State's definition of "major" and "minor" must stand. In interpreting the Contract, when two parties each advance logical interpretations of a disputed Contract section and the party who bore the burden of disproving the other party's interpretation fails to do so, the Arbitrator must accept the other party's interpretation. Here, the Union bore the burden of proving that the State's interpretation was less credible than the Union's. In the Arbitrator's opinion, the Union failed to sustain its burden; therefore, the State's interpretation that the contracting out was only a "minor" one stood. In other words, the Arbitrator found the comparison between the total number of employees working at the Division of Public Works (i.e., 244) and the number of DAS custodial workers who were laid off because of the contracting out (i.e., 14) was the most reasonable figure for comparison (i.e., 5.7%).

Third, having determined that subcontracting 5.7% of the bargaining unit positions in a unit is minor subcontracting, the Arbitrator held that the Union was only entitled to "reasonable advance notice". Because neither party argued that the 66 day notice was unreasonable, the Arbitrator held that the State did not violate the notice provision of Article 39. Thus, in light of the Arbitrator's resolution of Issue 1, the State could have properly delegated to either DAS or ODOT its Article 39 responsibility to notify the Union of the decision to subcontract.

Since there was no violation of Article 39, the Arbitrator did not consider the fourth issue.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

Ohio Department of
Administrative Services
Employer.

Grievance No.:
02-03-(91-09-11)-0251-01-05
Grievant:
L. T. Woods, et al.
Hearing Date:
August 17, 1993
Briefs Date:
November 2, 1993
Award Date:
January 10, 1994

Arbitrator:
R. Rivera

For the Employer:
Michael P. Duco
Georgia Brokaw

For the Union:
Donald Conley

Present at the Hearing in addition to the Grievant and Advocates were Eugene Brundige, LRO-BWC (witness), Shirley Turrell, Labor Relations Officer (DAS), Rachel Livengood, Chief of Arbitration, OCB (observer) , Ann Hoke, Assistant General Counsel (observer), Dina Tantra, Arbitration Clerk (observer), Bob Steele Staff Representative (observer).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible

publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. 1989-1991 Collective Bargaining Agreement

2. 1986-1989 Collective Bargaining Agreement

3. Grievance Trail
4. A. Pie Chart Total filled Bargaining Unit positions in DAS.
   B. Pie Chart DAS Bargaining Unit 1-91 (Public Works).

5. The Notice Paper trail

6. Budget Fund Groups

7. Intra-state Transfer Voucher Support Documentation (This exhibit is not relevant to the facts in this case, but is merely submitted as an example of GSF and how ODOT purchases services from DAS.)

Employer Exhibits

1. Bargaining notes - Employer (1986)

2. Two Union proposals (1986)

3. Two Employer proposals (1986)

4. Bargaining notes - Employer (1989)

5. Two Union proposals (1989)

6. Two Employer proposals (1989)

Issues (Stipulated)

1. What does the term "Employer" mean as the parties used it in Article 39 of the Collective Bargaining Agreement?

2. Did the Ohio Department of Administrative Services (hereinafter DAS) have an obligation to provide notice to the Union pursuant to Article 39 of the Collective Bargaining Agreement, where the Ohio Department of Transportation (hereinafter ODOT) decided not to purchase custodial services from DAS.

3. If the Arbitrator finds this to be subcontracting as used in Article 39 of the Collective Bargaining Agreement and DAS had such an obligation, is this "major" or "minor" subcontracting?

4. If this is "major" subcontracting, what is the appropriate remedy for a breach of the 90 day notice provision contained in Article 39 of the Collective Bargaining Agreement?

Stipulations (Joint)

1. The parties agree that the four issues are the only issues properly before the Arbitrator.

2. ODOT made the decision to purchase custodial services from the Ohio Industries for the Handicap (hereinafter OIH).

3. The Director of DAS, Stephen Perry, by letter dated June 14, 1991 notified the Executive Director of OCSEA, Paul Goldberg, as to ODOT's intent to contract services with OIH on August 1, 1991.

4. The last day on which DAS performed custodial services for ODOT was August 16, 1991.

5. OIH began performing custodial services for ODOT on August 19, 1991.

6. The Custodial Services provided to ODOT by DAS, Division of Public Works, fall within the General Service Fund (GSF) budget type, that is, the actual cost in terms of, but not limited to payroll and materials, is passed along to the purchaser. DAS charged ODOT for the fourteen Custodial positions.

7. DAS still provides maintenance and security services to ODOT.

Relevant Contract Sections

Article 39 - Sub-Contracting

The Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, programmatic benefits or other related factors.

If the Employer considers contracting out a function or service which would displace state employees the Employer shall provide advance notice in writing to the Union. In the event of minor contracting out the Employer shall provide reasonable advance notice and in the event of major contracting out the Employer shall provide not less than ninety (90) days notice prior to displacing any employee as a result of the contracting out which is under consideration. Upon request the Employer shall meet with the Union during the notice period and discuss the reasons for the proposal and provide the Union an opportunity to present alternatives.

If the Employer does contract out, any displaced employee will have the opportunity to fill existing equal rated permanent vacancies at his/her work location or other work locations of the Agency. In the event an employee needs additional training to perform the required work in such other position, which can be successfully completed within a reasonable length of time, the Employer shall provide the necessary training during working hours at the Employer's expense.

Except for government employees from other jurisdictions who are part of a state agency's organizational structure, non-state employees will not ordinarily serve as supervisors (as defined by Ohio Revised Code Section 4117.01 (F)) of any bargaining unit employees. Bargaining unit employees will not be responsible for training contract workers, except bargaining unit employees may be required to provide orientation and training related to agency policies, procedures and operations.

Facts

On June 5, 1991, Mr. Jerry Wray, Director of the Ohio Department of Transportation, wrote to the Director of the Ohio Department of Administrative Services, Mr. Stephen Perry. In his letter, Director Wray notified Director Perry that ODOT would be discontinuing its use of custodial services from DAS. Prior to this time, DAS had provided custodial services to ODOT by providing bargaining unit employees to do certain work on ODOT facilities. For these services, DAS charged ODOT. Director Wray indicated in his letter that, in the future, ODOT would be contracting with a private entity to provide the services previously provided by the bargaining unit employees of DAS.

On June 14, 1991, Director Perry wrote to Paul Goldberg, the Executive Director of OCSEA/AFSCME Local 11. He stated that "[t]his letter serves as formal notice, pursuant to Article 39 of the State of Ohio-

OCSEA Collective Bargaining Agreement that the Department of Public Works will not be performing custodial and maintenance duties at the central office of the Department of Transportation .... the Department intends to contract out those services for greater economy and efficiency." Director Perry indicated "... the employees performing those duties who are in one of your bargaining units may be displaced." Perry stated "[t]he state considers this a minor contracting out of services,..."

In July, the parties, DAS and OCSEA, met and discussed this topic and also exchanged various documents and letters on the topic. As a consequence of the contracting out, DAS abolished or laid-off 14 custodial positions. On September 7, 1991, Grievant Woods filed a class grievance alleging that the proper 90 day notice of major contracting out mandated by Article 39 had not been given. The Grievance proceeded to Step 3, and a Step 3 meeting was held on January 23, 1992. On March 20, 1992, a Step 3 answer was given, denying the Grievance. On April 27, 1992, a Step 4 Grievance Review was issued also denying the Grievance. On May 4, 1992, the Union requested Arbitration, and, on August 17, 1993, an Arbitration hearing was held.

At the hearing, the State alleged that the State has over 37,000 employees covered by the Collective Bargaining Unit with OCSEA. Moreover, DAS has 801 employees who are OCSEA members. The Division of Public Works, the actual unit from which the workers were laid off, has 244 OCSEA bargaining unit employees. In total, in 1991, DAS had 80 custodial workers the type of worker laid off in this contracting out. The Employer noted that, therefore, only 1.7% of DAS bargaining unit employees were displaced, and only 5.7% of bargaining unit employees within the Department of Public Works were displaced. 17% of all custodial workers employed by DAS were laid off. The Employer offered these statistics (See Joint Exhibit 4) to prove that the contracting out was "minor."

The Employer also offered the testimony of Eugene Brundige, formerly of OCB, who had participated in the 1986 bargaining and was the chief negotiator for the Employer of the 1989 contract. Mr. Brundige testified that the right to subcontract was an essential issue for the State and one that he was ordered not to "give on." As part of his testimony, he offered Employer Exhibits 1 through 6. Exhibits 1, 2, and 3 represented material from the 1986 bargaining, and Exhibits 4, 5, and 6 represented materials from the 1989 sessions.

On the issue of the meaning of the word "employer" in Article 39, Mr. Brundige stated that the word was used to mean "State" and "Agency" interchangeably through the Contract. He claimed that this interchangeability was designed so that the Employer "would have the flexibility to determine who had the responsibility." With regard to Article 39, Mr. Brundige pointed to Employer's Exhibit #1 and the interchange between himself and Russell Murray, the Union bargainer. In this interchange, Mr. Brundige was apparently putting forth the position that the determination of the need for contracting out was to be made by the Agency. Mr. Brundige also supported this view by pointing to Employer Exhibit 4 as making clear the Employer's position that any decision on the need for contracting out was an Agency decision.

Mr. Brundige also testified as to his understanding of the meaning of "major" and "minor" as used in Article 39. He said that he used, at bargaining, the illustration of closing down a whole institution, and he felt that such a closing down would be a "major" contracting out. Mr. Brundige also said that his understanding was that "major" and "minor" would be decided on a case by case review of the pertinent factors.

Discussion

The parties have asked the Arbitrator to answer very specific questions and to confine herself to those questions:

The first question asks the Arbitrator to define the word Employer as used in Article 39. The State argues that the word employer means agency, not state, and since the agency that made the contracting out decision was ODOT and not DAS, DAS had no responsibility to notify the Union of the contracting out. Frankly, the Arbitrator finds this argument without merit. The contract clearly imposes the duty on the Employer to notify the Union of contracting out under certain conditions. The testimony of Mr. Brundige and the bargaining notes do not really speak to the precise issue of "who is to notify," rather the notes appear

more specifically to speak to the issue of who within the Employer has the decision as to whether contracting out should occur. Mr. Brundige insisted that the Agency had the right to decide and, in this case, the agency (ODOT) did decide. However, that decision does not tell us who should "notify." If the Employer can choose the agency or the state, as the "employer," to suit its purposes, the requirement of notification has no meaning. The State as the Employer has the ultimate responsibility to notify the Union, and the State as the Employer cannot get off the hook by saying that my agency DAS did not have to notify in this case because, in reality, "agent" ODOT made the decision. Once the conditions arise that require notice, State as the Employer, has the obligation to see that notice occurs and can designate any agency that suits its managerial plan. However, that designation cannot defeat the intention of the Contract that the Union is entitled, under certain conditions, to notice. If the State wishes to place the ultimate decision making as to contracting out within each agency (as the state has the right to do) then, arguably, if the "notice" required by the Contract is to be given by that agency, then the agency had better be properly instructed to give notice. The Employer (State) cannot escape its duty under that contract by delegating responsibilities and denying responsibility for their proper execution. A basic tenet of delegation is that the delegator always remains ultimately liable.

In a sense, the answer to the first specific question, answers the second. Under Article 39, “[i]f the employer considers contracting out a function or service which would displace state employees the employer shall provide advance notice in writing to the Union." If, as appears from the evidence, ODOT is the Agency that decided to stop using bargaining unit employees, albeit from DAS, and use employees from a private entity, then under Article 39, the Union had to be notified. The key is that once work normally performed by state employees who are bargaining unit members to going to be turned over to a private entity "contracting out" is occurring. To claim that Article 39 does not apply because the employees were technically employed by DAS while the contracting out decision was ODOT'S, is to elevate form over substance and vitiate the meaning of the Contract. Again, the ultimate responsibility is the Employer, the State, and how the State allocates these functions among various agencies is a managerial function. But that allocation cannot defeat the plain meaning of the Contract.

The main issue in this Arbitration is whether the notice given was within the time limits set by the contract. The Union argues that the contracting out in this situation was "major," and, therefore, the Union was entitled to 90 days notice. The Employer argues that the contracting out was "minor" and, therefore, only required "reasonable advance notice.” Paragraph two of Article 39 spells out the notice requirements. The first sentence creates the requirement of notice and states the conditions under which notice must be given. The second sentence specifies the two types of time limits applicable to two types of contracting out. The first sentence requires ("shall") that if the Employer (1) considers contracting out a function or services which (2) would displace state employees, the Employer must give notice. In the case under consideration, the conditions of the first sentence were met. The Employer acknowledges these facts in its brief. The second sentence differentiates the timing of the required notice based on a labeling of a contracting situation as "major" or "minor." However, neither the sentence, nor the Article, set any criteria for differentiating a "major" contracting out from a "minor" contracting out.

Mr. Brundige testified that, in negotiations, he gave the example of the closing of a institution as an example of a "major" contracting out. However, no evidence exists that the Union agreed with this characterization nor does evidence exist that this intention, as vague as it was, was built into the contract example. The Employer advances the position that "major" ought to be based on the percentage of workers displaced as compared to some total workforce number. At one point, the Employer noted that 37,000 persons were covered under the contract. Surely, in comparison with that number, contracting out will always be "minor." A comparison with the total number of bargaining unit employees is unreasonable. The Employer also offered the percentage (1.7%) of DAS Department of Public Works and percentage (17%) of DAS custodial workers. The Union argued that the line between major and minor be drawn on the basis of function. In this case, the total function of custodial work was eliminated from ODOT Central Office. Neither the Union position (function) nor the Employer position (percentage of workforce) is implausible nor unreasonable.

Mr. Brundige testified that the decision ought to be a "case by case" determination. However, he, not

surprisingly, suggested that the determination should rest solely with the Employer. This position is untenable under the Contract. Negotiations about this issue indicate that the Employer was determined not to give up a right to contract out. The Union was equally determined to circumscribe this "right" as much as possible. In Paragraph Two, the Union obtained the right to advance notice. Advance notice was a requirement imposed by the Contract on the Employer. To have the Employer decide major and minor would render the notice less valuable to the Union. No evidence was adduced to indicate that the Union intended to leave such a determination to the Employer's sole discretion.

The distinction between major and minor, crucial to a proper interpretation of the second paragraph of Article 39, is not provided by the contract. For purposes of contract interpretation, when two plausible reasonable interpretations are offered, then the distinction is ambiguous. When faced with an ambiguous word or phrase, the Arbitrator must turn to the "plain meaning of the words." According to the newest edition of the American Heritage Dictionary, "major" means "greater than others in importance or rank" or "great in scope or effect" or "great in number, size, or extent." Minor means "lesser or smaller in amount, extent, or size" or "lesser in importance, rank or statute." These definitions do not solve the interpretation problem. Both definitions require a comparison. In this case at hand, is the number of persons displaced greater or lesser in importance than what? The Contract offers no criteria to judge major and minor. The interpretations offered by both parties to solve the patent ambiguity are equally rational and plausible. However, a choice must be made.

In this case, the Union has the burden of proof to show that the Employer has interpreted the Contract incorrectly. Since the Arbitrator cannot find that the Union's proffered interpretation is more plausible than the Employer's interpretation, the Union has not met its burden, and the Employer's interpretation stands.

The Employer offered a comparison (14 jobs lost) to three different workforces. The first workforce number offered was 37,000 OCSEA bargaining unit employees. As stated earlier, a comparison to this number is patently unreasonable. The other two numbers offered were total number of DAS employees who are OCSEA members (801) and the total number of OCSEA employees in the Division of Public Works (244). [The Division of Public Works was the unit from which the employees were laid off.] Also offered was the number of DAS custodial workers (80). The Union did not offer any evidence that one unit (for comparison) was more reasonable than another. Therefore, the Arbitrator lacked critical guidance from those closest to the issue. The issue is somewhat complicated by the ODOT involvement in a DAS layoff. Neither party presented any ODOT figures.

In this case, the Arbitrator suggests that a comparison with the unit from which the layoff occurred seems most logical. Therefore, the Arbitrator suggests that 14 layoffs from a 244 person unit is the most reasonable comparison (5.7%). Again, the Union offered no argument as to what percentage should be minor or major. The Arbitrator holds that the Employer's decision that 5.7% of the unit was minor is plausible and not unreasonable.

If the contracting out is characterized as "minor" in this case, given the specific circumstances, then the Employer need only give "reasonable advance notice." No argument was made that the 66 days in this case was unreasonable and that question is not before the Arbitrator.

Award

The Grievance is denied for the reasons stated.

RHONDA R. RIVERA, Arbitrator
Date: January 10, 1994