IN THE MATTER OF THE ARBITRATION

WASHINGTON FEDERATION OF STATE EMPLOYEES

and

AAA 75 390 00018- 14
Sub-contracting

SOUTH SEATTLE COMMUNITY COLLEGE

Appearances: For the Union: Sharon English, Esq.
Younglove & Coker

For the Employer: David J. Slown, Esq.
Asst. Attorney General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. A hearing was held in the above matter on June 17, 2014 in South Seattle, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties did not agree on the issue. The Arbitrator finds:

> Did the Employer violate the Parties Collective Bargaining Agreement when it sub-contracted plumbing work and did so without notifying the Union in advance? If so, what is the appropriate remedy?

BACKGROUND

South Seattle Community College, hereinafter referred to as the College is an institution of higher learning in South Seattle. The Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement with the State of Washington that covers several different Colleges within the State. The College is covered by the Agreement. The one in effect at the time of the grievance began July 1, 2012.

The Agreement covers among others, the Maintenance Mechanics employed by the College. There are three Maintenance Mechanics. A Maintenance Mechanic must be able to perform a variety of functions. They may be called upon to "perform preventive maintenance and repair all types of mechanical equipment."[1]

Each of the Maintenance Mechanics has a particular area of expertise. One is a licensed electrician. Swavu Matovu has been a Maintenance Mechanic for over 12 years and employed by the College for over 20 years. He has been the individual primarily responsible for repairing plumbing fixtures. This includes sinks, toilets, urinals and drinking fountains. He testified he has taken out old fixtures and replaced them with newer ones on many occasions.

The College had been informed by the State of Washington in 2010 that many of its plumbing fixtures were not ADA compliant. This included water fountains, sinks and urinals. Aaron Morgan was hired by the College in 2012 as Director of Facilities and Capital Projects. He became aware of the ADA issue. He consulted with the Maintenance Supervisor about the work and after

[1] This was taken from the Job Description for Maintenance Mechanic 2 (Ex 4).

discussion decided to sub-contract the work to a Company called Stirrett Johnsen. They are a plumbing contractor. That Company was awarded separate contracts. One contract was for several combined plumbing projects for a total of $53,000.They were also awarded a contract to replace five drinking fountains and another to replace two sinks. The changes to the fountains and sinks were being made to make them ADA compliant.

Greg Dehnert was the Project Manager for Stirrett Johnson. He and all his plumbers are licensed. He testified the old drinking fountains had to be removed, which left a hole in the wall where they had been attached. The piping connection needed to be moved as it was too high for the new fountain. They were able to do this through the hole left by the removal of the old fountain. When they were done, rather than simply repair the sheetrock, they installed a stainless steel backing that they custom made to fit the area being covered. Only the hole had to be patched. This worked for four of the five fountains. The location of the water lines was different for one of the fountains. Another hole had to be made which did require repair of the sheetrock.[2] Stirrett sub-contracted that repair work to another contractor.

The sinks also had to be made ADA compliant. The position of the sinks had to be lowered, which required the pipe connections at the T junction to be changed. The pipe had to be cut and repositioned to fit the new sink.

The Union learned of the sub-contracts in April of 2013. One of the Stewards notified the Union that he observed Stirrett Johnsen on campus doing what he believed to be bargaining unit work. The Union filed an

[2] As will be discussed, the need for this repair was an unexpected problem that necessitated an additional contract award to make these repairs.

information request with the College and received documents showing the work that had been done by Stirrett. It learned from those documents that the Company had first been contacted in 2012 and that it started the work towards the end of 2012. The first contract was for the replacement of the five drinking fountains. The work was completed in December of that year. They were then awarded the work on the sinks. Stirrett Jehnsen was subsequently awarded the $53,000 contract. The work included the replacement of additional sinks and work on cabinets, countertops and urinals.

The Union was not notified prior to any of the work going to Stirrett Johnsen. The Agreement provides:

> Article 37.1 Mandatory Subjects
> The Employer will satisfy its collective bargaining obligation before changing a matter that is a mandatory subject. The Employer will notify the union staff representative, with a copy to the Chief Union Steward, of these changes and the Union may request discussions about and/or negotiations on the impact of these changes on employee's working conditions.
>
> Article 49 Contracting
> The Employer will determine which university or college/district services will be subject to competitive contracting in accordance with RCW 41.06.142, Department of General Administration WAC 236-51, and Department of Personnel WAC 357-43. Nothing in this Agreement will constitute a waiver of the Union's right to negotiate a mandatory subject in association with Employer's right to engage in competitive contracting.

The Union filed a grievance after obtaining the information from the College. It felt the above provisions of the Agreement were violated.

POSITION OF THE UNION

The primary issue is whether the work that was sub-contracted was bargaining unit work. Decisions on whether to sub-contract work that is bargaining unit work requires bargaining as it is a mandatory subject of bargaining. Past practice determines whether work is bargaining unit work. Section 37.1 requires the College to satisfy its bargaining obligations. It did not do that when it sub-contracted the work. It violated both the Agreement and its statutory obligations. Article 49 further provides there is nothing in the Agreement that constitutes a waiver of the Union's right to negotiate mandatory subjects of bargaining.

The evidence showed the work that was done had been bargaining unit work. Mr. Matovu testified he reviewed the work that had been done and noted it was simple and was work he has performed many times over several years. He has installed and repaired fountains, sinks, toilets and urinals. The College contends Grievant only replaced "like for like" meaning the replacement was the same as the fixture removed. Mr. Matovu testified that is not so. He has replaced old sinks and fixtures with different models and has had to redo piping when doing so. This was the same work done by Stirrett Johnsen. He has done that work when dealing with both potable and non-potable water. The distinction the College tried to draw regarding potable and non-potable water is not justified. Mr. Matovu had worked on both.

The sheetrock rock repair was also bargaining unit work. The Maintenance Mechanics have historically performed that type of work. Much of the work in the later contract was also bargaining unit work. The College contends it was

easier to bundle the work together and that is why it was done the way that it was. That does not justify contracting out work that was bargaining unit work.

The College contends a plumbing license was needed for the work that was done. It has never required a license in the past. Mr. Matovu is not licensed yet he has performed similar work. Licensing requirements do not apply to plumbing work performed by the business itself on its own property.

Since the work in question was bargaining unit work, the College was obligated to bargain with the Union prior to awarding any contracts for that work. The College concedes it did not bargain with the Union. It violated the Agreement by that failure. Any claim that no time was lost by the Maintenance Mechanics and that justified its decision should be rejected. The College is not relieved of its obligation to bargain simply because there is no tangible detriment to the bargaining unit. It still must bargain. The Union is entitled to preserve bargaining unit work and any attempt to contract that work out requires bargaining before it can occur.

POSITION OF THE COLLEGE

The law is clear that an employer cannot contract out work that has historically been performed by the bargaining unit. The work here, however, was not bargaining unit work. There was pressure from the State to get the ADA compliant work completed quickly. Mr. Morgan reviewed all the work that had to be completed in order to comply. Some of the work, such as moving coat hooks, was given to bargaining unit members. He determined that other work was outside the realm of Maintenance Mechanics and needed to be done by an outside contractor. He consulted with the Maintenance Supervisor before

making any decision. The Supervisor agreed certain work was not work historically done by the Bargaining Unit. The Supervisor had been employed by the College for many years and was recognized by Mr. Matovuas as an expert on how things were done. It was the Supervisor who concluded the work previously done by Matovu was limited to removing "like for like." He also recommended the work be done by a licensed plumber. It was after all these discussions the decision was made to award the work to Stirrett Johnsen. They knew re-piping would be required and for that reason they reached the conclusion that they did. Only after careful deliberation, did the College make its decision to sub-contract. The Arbitrator should not set aside that decision.

The only evidence offered by the Union as to the nature of the work performed in the past was the testimony of Mr. Matovu. He testified he could have done the work but the question is whether he historically did that work and evidence was that he did not.

A license was required for the work done. The Law in the State of Washington requires a license when work on pipes is needed which involves potable water. Both Mr. Morgan and the Maintenance Supervisor after reviewing the work required reached the conclusion a license was neededto be in compliance with State Law. The Union alleges the law does not apply when the work is done by employees on the employer's own property. The law exempts businesses when doing work on its own property. It is not clear that the exemption applies to a College serving the public. Both Mr. Morgan and Mr. Delnert from Stirrett Johnsen concluded the exemption was inapplicable to the work done here. Their conclusions should be accepted by the Arbitrator.

DISCUSSION

The Parties do not disagree that sub-contracting is a mandatory subject of bargaining. Both the Agreement and Washington Statute require it. There is also no dispute that the College did not bargain with the Union prior to awarding the contracts to Stirrett Johnsen. The caveat to the requirement is that the work in question be work that has traditionally or historically been performed by bargaining unit members. Work that has not historically been within the scope of work performed by the bargaining unit does not trigger the bargaining obligation. It is on this issue where the Parties disagree.[3] The Union contends its Maintenance Mechanics have done precisely the same types of work that was done under these sub-contracts. The College disagrees. In order to determine which side is correct, it is necessary to discuss the work that Stirrett Johnsen did and weigh it against any work previously done by Bargaining Unit members. The Union's case will rise or fall on that determination. Given that there are different types of work involved, it is necessary to discuss each type of work independently to determine whether that particular work has historically been bargaining unit work.

Five Water Fountains

The first contract awarded to Stirrett Johnsen was to replace five water fountains with five new fountains that were ADA compliant. The Contractor had to move the piping to fit the new drinking fountains as they had to be lower than the prior one in orderto be ADA compliant. Stirrett would also replace the sheetrock that had been behind the fountain with a stainless steel

[3] The College points out that Mr. Matovu testified he was capable of doing the work, but the real question is whether in the past he did work similar tothe work done here. It is not relevant whether he could do it, but only if he has done it. The Arbitrator agrees.

panel. The College and the Contractor both maintain that a license from the State is required for this type of work as it involves potable water. RCW 18.106.010 requires a licensed plumber be used when installing and renovating “potable water systems.” The Union contends there is an exception for work done by a “business” or “corporation” on its own premises. It argues this work falls within that exception. The College and the Contractor maintain this exception is inapplicable to a College serving the public.

The Arbitrator is not prepared to make a determination as to whether this work falls within that exception. That is something for the State to decide. Consequently, it will not be a factor in the determination as to whether the work has been bargaining unit work, however, it should be noted the Statute is not new. If Mr. Matovu has done work on potable water in the past and a license was not required, why would it be required now?Thus, regardless of any finding on this issue, the case still turns on whether Mr. Matovu did this type of work in the past, including work on potable water systems.

The College does not disagree that Mr. Matovu has replaced fountains previously, but it says this has been limited to replacing“like for like.” That work it contends was different from what was involved here, as the changes were substantial due to ADA requirements. Mr. Matovu counters saying he has done more than simply taking out an old fountain and replacing it with the same type of fountain. He noted many of the fountains and even sinks were old and had to be replaced with newer models. This he said entailed cutting and moving the piping. His Supervisor does not agree with that contention. He does not believe Mr. Matovu has done work as extensive as what was required here.

In weighing all the evidence, the Arbitrator agrees with the College and finds that more was required for this particular work than had been done by Mr. Matovu in the past. The Contractor fabricated its own stainless steel backing for the fountain. It is part of the installation work. Matovu has not done that. Further, the change in piping was more extensive than prior work given the need to totally revamp the piping to fit the new lower fountains. Mr. Matovu certainly may have moved pipes in the past when installing a newer version of a fountain. The basic fountain, however, was roughly the same height and style as the one he removed. The pipes may have had to be tweaked to accommodate the newer fountain, but for these onesthe move was considerably more substantial. The College was not simply taking out a worn out fountain and replacing it in the normal course of business with a newer one. It was making the change regardless of the condition of the fountain being replaced due to requirements of the State. To do that, the piping had to be modified to an extent not required previously. Mr. Matovu is primarily responsible for repairing and replacing equipment, not a total changeover from what had been. The work done here was distinctive and that is significant. The Arbitrator finds that due to the distinctive nature of the work, it was not bargaining unit work and the College did not violate the Agreement when it contracted with Stirrett Johnsen to do this work.

Two Sinks

The College awarded this work after it had awarded the water fountain work. Stirrett Johnsen was to "modify waste and water rough in to match ADA compliant Bradley wash fountains." Like with the water fountains, cutting the

piping joints to fit the new sinks was required. Also like the fountains the change was required by the State, not by a need to replace aging sinks. In many respects, the rationale for contracting this work to Stirrett Johnsen is the same as was true for the drinking fountains. Again, Mr. Matovu indicated he has had to cut or move pipes in the past as he replaced old sinks with newer ones. While Mr. Matovu has extensive experience doing plumbing work for the College, the work here was once more above and beyond the work he has historically and traditionally done. The Arbitrator cannot distinguish this work from the work on the water fountains. Both came about for the same reason and involved new work not simply repairing and replacing. That again is significantly differentfrom what was done in prior years. The Arbitrator finds this work was not bargaining unit work.[4]

Sheet Rock Work

Stirrett Johnsen was able to perform the needed piping work on all but one of the five fountains using the hole in the plaster where the old fountain had been attached to the pipes. It simply utilized that hole to get to the pipes. It was not able to do that on one of the fountains. It had to break the sheetrock behind the old fountain to get to the pipes. This necessitated repairing the sheetrock on that fountain when the installation was completed. There was also some additional sheetrock work required on three other fountains. As a result, Stirrett was awarded an additional contract for $2558 to "sheetrock, patch and paint as needed at 4 of the drinking fountains installed due to

[4] Of course, once these new ADA compliant fixtures need to be replaced, that is the normal task of the Bargaining Unit as has been the case in the past.

unknown conditions encountered." Mr. Dehnert testified he had to sub-contract the work. It did not or could not perform the work itself.

There is no dispute that bargaining unit members have done extensive sheetrock rock in the past. It is part of their normal repair work. Mr. Morgan testified he chose to have Stirrett do the patchwork instead of the bargaining unit members as he did not want to split the job. The problem with that argument is twofold. First, it was split by Stirrett. They did not do the work. Another company did it for them. Bargaining unit members could just as easily have done the work for them. More importantly, unlike the installation work on the fountains and sinks, this was patch work at the end of the process. No particular skill beyond the skill the bargaining unit members had already shown was needed. The desire to "not break up the project" is not justification for depriving bargaining unit members of work that has historically been theirs. The College violated Article 37.1 and Article 49when it awarded this work without bargaining with the Union.

<u>$53,000 Contract</u>

Mr. Morgan testified there was additional work needed as part of the ADA compliance. He indicated he spoke with the Department of Enterprise Services about the work and was told to bundle it into a single contract. The Department gets involved whenever there a contract to be awarded in excess of $10,000. Following their suggestion, he did bundle the work and awarded a contract to Stirrett Jensen for $53,000. This was work separate from the work on the five fountains and two sinks and the sheetrock work. It involved moving additional sinks, lowering urinals and counters. There is a question raised by

the College as to whether this work was part of the grievance. Regardless, given the un-refuted testimony of Mr. Morgan as to why it was done the way it was, and the prior findings made by this Arbitrator regarding the nature of the work, the Arbitrator finds there was no violation of the Collective Bargaining Agreement when this work was contracted. It involved a substantial amount of work all in compliance with the ADA and the cost was over $10,000. Mr. Morgan testified that as he was new to the position at the time he did not realize the amount of work that was needed to meet the ADA requirements. He discovered more was needed than simply the five fountains and two sinks. There were roughly ten more fixtures of one variety or another that had to be replaced. All needed to be done as soon as possible. Awarding a large contract to get the work done expeditiously was not unreasonable and was done in compliance with the requirements of the Department of Enterprise Services.[5]It was once again all ADA required work. There was no violation of the Agreement when this contract was awarded.

REMEDY

The Arbitrator has found the College did violate the Agreement when it awarded the Sheetrock work to Stirrett Johnsen. The contract was worth $2558. The Union asks as a remedy that the College "be instructed to send timely notice of intent to contract for any future similar services." It also asks it "be awarded the amount paid by (the College) to Stirrett Johnsen for the labor associated with the work performed." Labor costs on that project were $2352.

[5] The Union argues a desire to bundle is no defense just as the desire to not break up the project was no defense to contracting the sheetrock work. The Arbitrator finds they are not the same. There was no legitimate basis to contract the sheetrock work, which clearly was bargaining unit work. That cannot be said for this work.

The Arbitrator will include those as part of his remedy, although the funds will not go directly to the Union.

AWARD

1. The grievance is granted in part and denied in part.

2. The College did not violate the Agreement when it awarded a contract for the installation of five drinking fountains and two sinks.

3. The College did not violate the Agreement when it awarded a contract for $53,000 for ADA compliant work.

4. The College violated Articles 32 and 49 when it awarded a contract for sheetrock repair for $2558.00, $2352 of which was labor costs.

5. The College must negotiate with the Union in the future when it is considering contracting work traditionally performed by bargaining unit members, such as the sheetrock work.

6. The College shall pay $2352 to the Maintenance Mechanics to be distributed equally among those Maintenance Mechanics employed at the time the work was awarded and still employed as of the date of this Award.

Dated: September 5, 2014

Fredric R. Dichter,
Arbitrator