In the Matter of Arbitration Between	)	
	)	
	)	
	)	
	)	
Laborers Local 483,	)	
(Union),	)	
	)	
and	)	OPINION AND AWARD
	)	
	)	Bargaining Unit Work
	)	Classification Grievance
City of Portland,	)	
(City or Employer)	)	
	)	
	)	

BEFORE:	David W. Stiteler, Arbitrator
APPEARANCES:	For the Union: Barbara Diamond Attorney at Law Diamond Law 1500 NE Irving, Suite 575 Portland OR 97232 For the City: Heidi Brown Deputy City Attorney City Attorney's Office 1221 SW Fourth Avenue, Suite 430 Portland OR 97204
HEARING LOCATION:	Portland, Oregon
HEARING DATES:	January 21–23, 2015
RECORD CLOSED:	March 20, 2015
OPINION & AWARD ISSUED:	May 1, 2015

OPINION

INTRODUCTION

The Union filed this grievance alleging that the City was violating the parties' agreement by assigning bargaining unit work to employees classified as seasonal or casual. The City denied the grievance, and the Union advanced the dispute to arbitration. The parties selected me as the arbitrator.

At the January 2015 hearing, the parties agreed that the dispute was properly before me for resolution. They also agreed that I could retain jurisdiction following the decision to resolve disagreements about the remedy, if one was awarded.

During the hearing, the parties had the full opportunity to examine and cross-examine witnesses, present documentary evidence, and argue their positions. After presenting their evidence, they waived oral closing arguments and agreed to submit post-hearing briefs. I received their briefs by March 20, and closed the hearing record.

ISSUE

The parties did not agree to a statement of the issue, but agreed I could frame one based on their submissions and the evidentiary record.

The Union proposed this statement of the issues:

> 1. Did the City violate Article 1, recognition, by misclassifying workers as recreation support persons outside the union despite performance of bargaining unit work on a regular basis?
>
> 2. Did the City violate Article 1.1.5 by assigning non-bargaining unit members the work of bargaining unit members on a non-incidental basis?
>
> 3. If so, what is the appropriate remedy?

The City's proposed issue statement is:

> 1. When the Union asserts that non-represented employees are performing bargaining unit work, does Article 31.4.B of the collective bargaining agreement (hereafter "CBA") require the Union to provide the Employer with all pertinent information about the violation?

2. If so, does the term "all pertinent information" impose on the Union a requirement, under the facts of this case, that the grievance includes enough specification so that the Employer can determine whether a Recreation Support Persons ("Casuals") has performed bargaining unit work during the time period relevant for the grievance?

3. If so, did the Union include enough specification for the Employer to make this determination?

4. If so, how is bargaining unit work defined under the terms of this CBA and the past practice of the parties?

5. Is there evidence to show that Casual employees performed bargaining unit work during the thirty day period leading up to the filing of the grievance?

6. If so, what is the appropriate make-whole remedy for the bargaining unit work performed by Casual employees?

I find the issues to be:

1. Did the Union comply with Section 31.4B in filing the grievance?

2. If so, did the City violate the parties' agreement by assigning bargaining unit work to non-unit employees?

3. If so, what is the appropriate remedy?

FACT SUMMARY

The Union represents a bargaining unit of full-time and part-time permanent employees who work for the City in Portland Parks & Recreation (PP&R). There were about 80 budgeted FTEs in the past few fiscal years. The actual number of employees in the unit has varied.

Bargaining unit members perform a wide variety of duties in various areas, including aquatics, pre-school, customer service, fitness, outdoor recreation, community music center, tennis, events permitting, and Multnomah Arts Center. The Union has had a contract with the City covering this unit since 1976.

PP&R operates a number of programs and facilities, including swimming pools and fitness facilities, as well as social services such as preschools and day camps. In addition to the bargaining unit members, the City employs a number of non-unit recreation employees who often work side-by-side with unit members. The City also hires a large number of seasonal employees, especially during the summer months.

Evolution of the contract language

The recognition clause in the parties' first contract in 1976 stated that the Union represented the employees listed in Schedule A. The listed classifications were three levels of recreation instructors. There was no relevant change to either the recognition clause or Schedule A in the 1978, 1980, or 1982 contracts.

In the 1984 contract, the recognition clause was expanded with the inclusion of a section defining permanent part-time employee, which was in the unit. Two classifications were added to Schedule A: pool attendant and recreation leader.

In addition, the recognition clause was amended to list positions that were excluded from the unit. There were two positions listed: recreation support person – seasonal (also referred to as temporary/seasonal), and recreation support person.

The recreation support person – seasonal was described as a limited duration position hired for "seasonal work during the seasonal period." The language also stated that temporary/seasonal employees would "normally be assigned to Recreation support jobs and will not normally be up-graded to classifications covered by the contract except on an incidental basis as required by day-to-day work flow."

The recreation support person (RSP) was described as limited to 19 hours a week or less and not more than 860 hours in a calendar year. Unlike the section for temporary/seasonal employees, the section for RSPs did not describe or limit the work for the position. It did provide that if an RSP went over 860 hours, they would be considered a permanent part-time employee covered by the contract.

The recognition provisions were not changed in the 1988 contract, but the recreation instructor III was deleted from Schedule A. There were no material changes in the 1992 contract.

In the 1995 contract, the section defining recreation support person – seasonal was dropped from the recognition clause. The section on RSPs was amended by deleting the 19 hour a week limitation, and the provision about what would happen if an RSP went over 860 hours.

Added to the RSP section were the provisions that such positions would be assigned to recreation support jobs and not put in unit classifications except on an incidental basis, language that had been in the temporary/seasonal section. Schedule A still listed recreation leader and pool attendant, but the recreation instructor titles were gone, replaced by recreation coordinators I and II.

There was no material change to the recognition clause in the 2001 contract. Schedule A dropped pool attendant, and added the initials "F.T." after recreation leader. Schedule A also listed various specialties related to the three job titles. The same three titles are listed in the current iteration of Schedule A.

There was no material change to either the recognition clause or Schedule A in the 2004 or 2007 contracts. In 2008, after a change in City administrative rules, the parties signed a letter of agreement raising the cap on yearly hours for RSPs from 860 to 1,200 hours. That change was made to the contract language in the 2010 agreement; there were no other material changes to the relevant provisions that year.

The parties concluded negotiations on the 2013–2017 CBA while this grievance was pending. They again amended the section on RSPs. They retained the general calendar year hourly limit of 1,200 hours. However, they agreed that during the four years of the agreement, the City could use a limited number (40, 37, 34, and 31) of RSPs for up to 1,600 hours a year.

Unit and non-unit employees and their work[1]

Doug Brenner, a City-wide zone manager, has worked for PP&R since 1985. RSPs have managed City pools throughout his tenure, and otherwise did basically the same work as unit members. The main difference was the number of hours. Aquatics Program Supervisor Nancy Roth echoed Brenner's testimony. She worked as an assistant pool manager in 1995 when she was an RSP.

Recreation Coordinator I Lee Anne Griffin has worked for PP&R for 25 years. She has been in a unit position since 2001. In her experience, unit members who worked at indoor pools in the winter months were reassigned to manage outdoor pools in the summer. As the number of pools and programs offered increased, and the number of unit recreation leader positions decreased, she has seen a transfer of that pool management, including scheduling and payroll, to RSPs.

Jamie Burrows and Jennie Birt are both recreation coordinator Is and in the unit. They both started with PP&R as RSPs in aquatics. When they were hired into permanent positions in the unit, they continued to perform many of the same duties. Both have observed that, as bargaining unit recreation leader positions were eliminated, work formerly done by those employees was shifted to RSPs. Those duties include managing a pool, working at the front desk at a community center, or handling facility rentals at a center.

The growth in the aquatics program has been mirrored by similar growth in other recreation programs, all of which require staff. Chenille Holub works 30 to 35 hours a week at the front desk at Mt. Scott; her position is not in the unit. The individual who preceded her was a recreation leader in the unit. Kathleen Madden works 30 or more hours a week as a customer service representative at the Multnomah Arts Center. She handles rentals, gives tours, makes sure events are staffed, trains other RSPs, and handles payroll. Her position is not in the unit.

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[1] To help distinguish between casual/seasonal employees and unit members, I refer to the former as RSPs, even though that title did not exist in the early years of the unit.

In the preschool program, PP&R employs both unit members and RSPs as preschool teachers. Vanessa King is a preschool teacher at Montavilla; her position is in the unit. Before she was hired as a regular employee, she was an RSP working as a preschool teacher and had the same duties. Robin Palmersheim is a preschool teacher at Mt. Scott; she is an RSP and her position is not in the unit. She has been in the position for nine years. She works about 35 hours a week from September to June. Her duties are basically the same as King's, though she does not have some financial responsibilities that King has.

The customer service center has both unit members and RSPs working there. Esther Smith is in a recreation leader position in the center. There are about twice as many RSPs as unit positions, and there is no significant difference in the work they do, including handling permits, reservations, and rentals.

PP&R rolled out what it termed the Recreation Revolution in 2012 to address how to deliver services and programs in the face of decreasing budgets. The focus was on organizational efficiencies, including centralizing some functions and eliminating some positions. Recreation coordinator IIs were moved from community centers to a centralized location as part of this process. That meant that they were generally unable to be directly involved in delivering programs, so more of that work went to RSPs.

Past disputes about unit work

Over the years the Union has represented this unit, the City's recreation program grew significantly. As one example, the City built several new swimming pools, and the hours of operation, classes, and other activities at the pools have grown as well.

The growth in programs led to a need for more employees to provide services. Budgetary constraints limited the City's ability to hire permanent staff. The contractual 860 yearly hour cap limited the City's ability to use RSPs for all the

needs. To fill the gap, the City contracted with a series of temporary personnel agencies for additional recreation staff to work more than 860 hours a year.

The Union filed a representation petition with the Employment Relations Board (ERB) in 2002 seeking to represent a unit composed of the contract recreation employees jointly employed by the City and the personnel contractor. ERB rejected the petition on the basis that it did not propose an appropriate unit. ERB noted that the Union already represented a unit of recreation employees, that the main difference between that unit and the one sought was the number of hours worked, and that the number of hours worked was not a sound basis for approving a separate unit.

In 2004, the Union filed a unit clarification petition with ERB, seeking to add about 80 contract recreation employees to the existing recreation unit. That petition likewise was rejected by ERB. The board found that the employees in question were not City employees, and that the City and the contractor were not joint employers.

The Union remained concerned about the City's use of contract employees to perform recreation work. In 2011, it filed the *Brooks* grievance alleging that the City's practice violated contracting-out language in the parties' agreement. The City denied the grievance at least partly on the basis that the City had been using personnel contractors for many years with the Union's knowledge. For that reason, according to the City, the grievance was not timely.

The parties agreed to bifurcate the procedural arbitrability question from the dispute on the merits. They presented the arbitrability issue to Arbitrator Anthony Vivenzio in June 2012. The arbitrator concluded that the City did not prove that the Union failed to comply with the requirements of the grievance procedure and returned the dispute to the parties to determine how to proceed to a hearing on the merits.

In February 2013, before the date set for the merits hearing, the parties settled the grievance. The City agreed that after its agreement with the contractor expired in

March 2014 it would no longer contract out those services, and the Union agreed to dismiss its grievance.

Current dispute

During bargaining for a successor contract in early 2013, the Union told the City that non-unit recreation employees were doing bargaining unit work. City negotiators denied the Union's claim, and insisted that there were clear distinctions between unit work and the duties performed by non-unit employees.

The Union was not convinced by the City's arguments and filed this grievance in April 2013. The grievance asserted that RSPs were doing unit work on a regular basis, and listed 13 examples of duties taken from unit job classifications that RSPs were allegedly performing. The grievance claimed that the City was violating Sections 1.1.3 (definition of permanent part-time employee), 1.1.5 (definition of RSP), and 15.2.2 (describing benefit levels for permanent part-time employees). For a remedy, the Union wanted the City to cease and desist from misclassifying RSPs who were doing unit work, reclassify those employees, and compensate affected employees for lost hours at overtime rates.

The City denied the grievance at level 1. In the response, the Division stated that it "does not agree that Seasonal Recreation workers are performing bargaining work." The Union advanced the grievance to level 2.

At the bargaining table in early May, in response to the Union's concerns about RSPs doing unit work, City Labor Relations Coordinator Jon Uto provided the Union team with a package of what he called "seasonal job descriptions." He told them that if there were duties in the descriptions that "cause concern around being Recreation bargaining unit work" to let the City know at the next bargaining session. He also said that if they had specific examples of seasonal workers doing unit work to let the City know "and if in fact individuals are doing Recreation bargaining unit work, the City will put a stop to it."

The package of job descriptions included aquatic program specialist, assistant pool manager, class instructor, customer service representative (including a lead), pool manager, and preschool instructor.

In July, Uto responded to the grievance at level 2. He stated that, with two exceptions, the City did not agree that the examples of duties listed in the grievance were unit work. The exceptions were serving as an employee in charge, and evaluating other employees or being responsible for timekeeping. He conceded that "some individual duties may overlap with those of represented employees, but Recreation represented employees job classifications are robust compared to narrow/specific duties for Seasonal Recreation Workers."

In December, the parties agreed to amend the yearly hour cap from 1,200 to 1,600 hours a year.

In November 2014, Union Organizer Angela Macwhinnie conducted an investigation into non-unit employees doing unit work, in preparation for this arbitration. She determined that RSPs in certain seasonal job descriptions were doing unit work. She specifically identified assistant pool manager, preschool teacher, and customer service representative II as having "a strong pattern of performing bargaining unit work." There were about 100 RSPs on her list.

Union Business Manager Erica Askin did her own review based on a comparison of duties listed in unit job classifications and job descriptions for RSPs. She found between 250 and 300 RSP positions that were doing work described in unit classifications.

DISCUSSION

The parties differ about whether the Union complied with the contract in filing the grievance. The substantive issue in that grievance concerns the City's use of seasonal or casual employees. For the reasons explained below, I conclude that the grievance is properly before me for resolution, and that the City violated the agreement by using RSPs to do unit work on a regular basis.

Procedural Issue

The City argues that the Union failed to comply with the requirements of Section 31.4B when it filed the grievance, and that I should dismiss the grievance for that reason. The Union contends that it complied with the contractual requirements.

Section 31.4 covers the first step of the grievance procedure. Subsection B provides:

> The grievance statement shall specify (each of) the provision(s) of this Agreement claimed to be violated and the manner in which such provision is claimed to have been violated, all pertinent information, the remedy sought, and shall be signed by (each of) the employee(s) and/or by the Union. The Grievant and the Union have a good faith obligation to be as complete and forthcoming as possible in making this statement and providing information regarding the grievance.

The above language requires the Union to identify which contract articles the City allegedly violated and how the violations occurred. It requires the Union to provide all pertinent information about the violation and to identify the remedy.

According to the City, the Union did not identify any specific alleged violation. The City claims that even after it asked the Union for details, the Union refused to comply because of concern about retaliation against seasonal or casual employees involved. The City argues that the Union's belief that an unfair labor practice complaint would not be an effective remedy for retaliation does not excuse its failure to comply with the contract.

The City also asserts that the Union not only failed to comply with the requirements of Section 31.4B, but also the general obligation of good faith and fair dealing. The City contends that the Union's position interfered with the City's ability to investigate and respond to the grievance.

The Union, on the other hand, contends that it complied with the requirements of the contract. Section 31.2 provides that a grievance can be filed on behalf of a group of employees, with or without the employees consent. Section 31.4B allows the Union to sign the grievance.

Consistent with those provisions, the Union says that it filed a group grievance alleging that RSPs were improperly classified, and that the grievance stated which contract provisions were violated and in what manner. The grievance asserted that RSPs were regularly performing unit work, and listed the duties they performed. The grievance claimed that the violation was ongoing, and the remedy was for the city to cease and desist and make the affected employees whole. The grievance did not list the names of individual casual employees because the Union did not get that information from the City until preparation for arbitration.

The Union also contends that the City was not harmed by any lack of information, because it had all the necessary information already, and never claimed surprise. City witnesses testified about work done by seasonal and regular employees. In any event, the Union had no obligation to provide confidential information about its contacts with casual employees.

One of the main purposes of a grievance procedure is to encourage the parties to resolve their contract disputes in a timely and informal manner. That purpose is undermined where one party or the other is uncooperative or is not forthcoming with relevant information.

In reviewing the grievance here in light of the record as a whole, I find that the Union substantially complied with its obligations under the grievance procedure. The Union's grievance letter clearly identifies the basic claim–that RSPs were regularly doing bargaining unit work. It lists the provisions the Union contends that the City violated–Sections 1.1.3, 1.1.5, 15.2.2. It explains why the Union believes the City had violated the contract. It sets out the proposed remedy for the claimed violation.

The City is correct that the Union did not provide specific examples, such as names and dates, regarding the alleged violations. That lack of specific information, however, did not prevent the City from responding to, and refuting, the Union's claim. The City's recreation managers had all the information the City needed.

As to the City's good faith and fair dealing claim, I note that the Union requested information in the original grievance about individuals employed as RSPs. That information could have been used by the Union to respond to the City's requests for specifics. The grievance was filed in April 2013. The issue about what information the City had to provide to the Union was not resolved until sometime in November 2014, with the information only provided after the Union filed a subpoena and paid a fee. With the parties locked in a lengthy dispute over information about RSPs, I do not fault the Union for not providing more detail when it filed the grievance.

In addition, to the extent the Union did not provide relevant specific information that it possessed, I find that the City was not prejudiced in any way. The City was able to respond to the grievance. The Union advanced the grievance to arbitration in November 2013. It was first set for hearing in April 2014. In February 2014, the parties agreed to postpone the hearing until October 2014 to allow more time to discuss a resolution. In August, they agreed on a second postponement from October 2014 to January 2015 on the basis that "there was additional data needed to continue moving forward in settlement discussions."

During the period from at least November 2013 through January 2015, the parties discussed the Union's grievance and the nature of the work being done by RSPs. When they were unable to resolve the dispute and the case went to hearing, the City presented a thorough defense, offering nine witnesses to address the Union's claims.

Finally, I considered the nature of the City's defense at hearing. During the grievance process, the City claimed that it needed specific information to be able to investigate, yet it denied that RSPs were performing the same duties as bargaining unit members. At hearing, however, the City agreed with the essence of the Union's contention–that RSPs were doing the same work as unit members–and said it had always been that way. This shift in position undermined any reasonable basis for the

City to argue for dismissal of the grievance because the Union did not provide more specific information.

Merits

In a contract interpretation dispute, the parties' intent guides the arbitrator's reading of the agreement. Sometimes that intent is clearly expressed in the contract language. Where it is not, the arbitrator may look to other aids such as past practice, bargaining history, or interpretive rules to guide his or her interpretation. The Union, as the party alleging a contract violation, has the burden of persuasion.

The Union's argument can be summarized as follows: the recognition clause should be read to extend to all employees whose work falls within the job titles in Schedule A, except for incidental work; over time the City has shifted unit work to RSPs due to budget issues; some RSPs do the same work as unit members on a daily basis; and, the job descriptions for those RSPs contain the core duties of unit positions, so those positions belong in the unit.

For its part, the City's argument in sum is that: there is no contract limitation on the duties that RSPs can perform; the unit is limited to the classifications in Schedule A, and explicitly excludes RSPs; and the basis for distinguishing between unit and non-unit employees is the number of hours worked, not the duties performed.

The recognition clause, Article 1, and Schedule A are the critical parts of the agreement here. In Section 1.1:

> The City recognizes the Union as sole collective bargaining agent for all employees of the City in *all classifications contained in Schedule A* of this agreement, as defined in sections 1.1.1, 1.1.2, 1.1.3, and 1.1.7 below. (Emphasis added.)

Section 1.1.2 defines "permanent employee" as:

> Any employee who has permanent or probationary status as provided by the Personnel Rules and *who works in a position budgeted on a yearly basis in a job classification contained in Schedule A.* (Emphasis added.)

Section 1.1.3, as relevant here, defines "permanent part-time employee" as:

> Any employee whose employment is for less than full-time *in a job classification contained in Schedule A.* * * * * *

Schedule A sets out the wage rates for the bargaining unit classifications. It lists three classifications: recreation leader – F.T., recreation coordinator I, and recreation coordinator II. In addition to the wage scale, it lists the various specialties for each classification. For example, the specialties for the recreation leader classification are aquatics, generalist, disabled citizens, customer services center representative, pre-school, pottery, tennis, senior recreation, outdoor recreation/environmental education, and community music center.

Perhaps most important is Section 1.1.5, which concerns positions that are excluded from the unit. That section defines "recreation support person" as:

> Employees as defined herein shall be excluded from the bargaining unit covered by this Agreement. A recreation support employee shall be defined as an employee *who is employed for a limited duration for up to 1,200 hours in a calendar year.*
>
> Such employees will normally be assigned to Recreation support jobs and will not normally be up-graded to classifications covered by the contract *except on an incidental basis as required by day-to-day work flow.* * * * * (Emphasis added.)

Contract language interpretation

Here both parties assert that, for the most part, the contract language is clear, though they agree that Section 1.1.5 is ambiguous. Because the language is clear, they say, I must enforce its plain meaning. Not surprisingly, that is where their agreement about the language ends. Though both argue that the language is mostly unambiguous, they propose very different readings of it.

According to the Union, under the plain meaning rule, the unit includes all employees in the three Schedule A classifications. Thus, if an employee's duties fit

within one of those classifications, that employee should be in the unit, regardless of the employee's job title.

The Union contends that Section 1.1.5 is ambiguous because the City has no classification for RSP, and apparently takes the position that the title simply refers to any recreation employee who works less than the hourly limit. As the Union sees it, the flaw in that interpretation is that it would mean that part-time employees, who are otherwise in the unit, would be excluded.

Moreover, the Union says the City ignores the language in Section 1.1.5 that prohibits RSPs from being assigned unit work on other than an incidental basis. The Union claims that portion of Section 1.1.5 is unambiguous. Read with the preceding paragraph, it can only mean that an RSP's duties, consistent with the commonly understood meaning of casual or seasonal, must be limited to non-unit work.

The Union concludes that the recognition clause should be read to cover all employees whose work is covered by the job titles listed in Schedule A, unless such work is only incidental. This is the only reading that gives meaning to all provisions.

The City agrees that the arbitrator should first consider the plain meaning of the language. Where, as here, the contract language is clear, the arbitrator should enforce it as written.

In the City's view, since the contract does not describe work that is exclusive to the unit, the parties did not intend that any particular work be limited to unit members. That lack of intent to limit work is consistent with the exclusion of RSPs from the unit, where the parties chose to define such employees not by the work they did but by the number of hours they worked.

The City contends that Union's argument that Schedule A limits the listed jobs to unit members should be rejected. Section 1.1.1 defines the unit as people employed in the Schedule A classifications, and section 1.1.5 clearly excludes RSPs. The contract does not make the jobs listed in Schedule A exclusive to unit members.

In addition, the City says, it is well established that an employer may assign the same work across classifications absent contractual restrictions. The management rights clause gives the City the right to assign work, and it has consistently assigned the work at issue to both RSPs and regular employees.

This case presents a classic example of the conflict between a union's interest in preserving the work of its bargaining unit members and an employer's interest in managing its workforce in the most efficient and cost-effective manner. Over the years, arbitrators have generally approached such disputes in one of three ways.

Some express the view that, absent an express prohibition in the contract, an employer may assign work outside the unit under its management rights. Others take the position that a recognition clause, particularly one that lists job titles, bars an employer from transferring work out of the unit except in limited circumstances. A third group does not see such cases as an "either/or" choice, but rather as a situation that requires weighing both parties' interests to find the appropriate balance.

On the facts here, I believe that the second approach is the more reasonable. That is, other than in limited circumstances or express contractual authority, an employer violates the contract by assigning bargaining unit work to non-unit employees on a routine basis. Otherwise, the promise of job security conferred by a contract may be a largely empty promise.

I find that Sections 1.1, 1.1.2, 1.1.3, and Schedule A are unambiguous. Read together, they describe which positions are in the unit. These provisions define the unit as all full-time and part-time employees in the recreation leader and recreation coordinator I and II classifications.

That is not the end of the analysis, however, because there is some ambiguity in Section 1.1.5. The City argues that past practice and bargaining history support its position that there is no contractual limitation on casual/temporary employees doing unit work. The Union argues that these City defenses should be rejected, and that the

language in context should be read to prevent the City from assigning unit work to RSPs.

I reviewed the current version of Section 1.1.5 in light of all its prior stages. As written now, it includes the initial concept of a yearly hour limitation on RSPs. Coupled with that limitation are limits on duties–recreation support jobs–and on unit work–incidental–that formerly applied only to seasonal RSPs. Thus, the two paragraphs of Section 1.1.5 read together establish that the parties agreed that the City could hire non-unit RSPs for its recreation program subject to those three distinct limitations.

This interpretation is the most logical in the context of Article 1 as a whole. It provides clarity to the structure and definition of the bargaining unit, and draws a more definite line between bargaining unit jobs and support positions in recreation.

Moreover, I find the contract language does not support the City's position that the distinction between unit and non-unit recreation employees is and has always been the number of hours they work.

In earlier versions of the contract, the parties may have considered the number of hours worked as a line dividing unit from non-unit. Those contracts did not limit RSPs to "recreation support jobs" or restrict them from more than incidental assignment to unit classifications, however. The early contracts also stated that if an RSP went over the hour cap, they would be considered to be in a covered position. Those provisions suggest the parties viewed the difference between an RSP and unit positions to be the number of hours worked.

That changed in the 1995 contract. Though the parties continued to put a cap on the number of hours an RSP could work in a year, exceeding the cap no longer meant the person would be considered to be in the unit. The logical inference to draw from that change is that the parties agreed that the number of hours was no longer the dividing line for determining the scope of the unit, at least not by itself.

At the same time, the parties moved language that had applied just to seasonal RSPs into the revised section on RSPs. Significantly, they agreed to restrict RSPs to "recreation support jobs" and limit them to only incidental assignments in unit classifications. That change shows an intent to protect the integrity of the unit by barring RSPs from doing unit work on a regular basis.

The City points out that there is no specific description of the work that belongs to the unit, and that RSPs are specifically excluded. To that point, the Union replies that it is the duties of a position that should be determinate.

The Union is correct that the title an employer uses for a position does not by itself determine whether a position belongs in the unit or not. If that was the case, to use an extreme example, an employer could circumvent a contract recognition clause by calling a position a custodian while assigning it the same functional duties as those performed by other employees in a unit of security guards. There is a reason for the idiomatic "duck" test.[2]

Most of the three-day hearing in this matter was devoted to testimony about the work being done by RSPs. At least at this point, there is little disagreement that some RSPs are doing most, if not all, of the same duties that are and/or have been done by recreation leaders in the unit, as well as some duties that are and/or have been done by recreation coordinators.

The evidence, much of it from City witnesses, established that the City has assigned unit work to RSPs, contrary to the limitations in Section 1.1.5. I conclude that Article 1 and Schedule A bar the City from assigning unit work to RSPs on a routine basis, as is being done.

Past practice

The City argues that past practice supports its position because the evidence showed that there have always been casual/seasonal employees doing the same work

[2] An expression of inductive reasoning that is usually stated, "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck."

as unit employees. The practice establishes that unit work is determined by hours worked, not duties. According to the City, this practice is consistent with the contract language, which the Union tried and failed to change in the most recent round of bargaining.

Not only have the parties not defined the unit by work performed, the City notes, they previously had language that included positions in the unit when they exceeded the hour limit. The practice existed for over 30 years, so the Union certainly was aware of it.

The City points out that arbitrators have used past practice evidence to determine whether work is exclusive to the unit. Here, the past practice is that the work in question was not exclusive to unit members. The evidence does not show that work that used to be done only by unit members has been transferred to RSPs.

In light of the practice, the City suggests that the most likely meaning of the language allowing for incidental upgrading is that it allows the City to temporarily place an RSP in a unit position on a day-to-day, as-needed basis. This would reflect the fluid nature of the workplace and allow the City to keep vital positions filled. The Union's argument that this language bars assignment of Schedule A work to RSPs should be rejected because those jobs are not exclusively unit work.

The Union contends that the City's reliance on a past practice defense is flawed. Past practice does not always indicate intent. As in the *Brooks* grievance, the Union has fought against the outsourcing of its work for years before filing a grievance. As the Union put it, one party's past practice may be another party's continuing violation.

In addition, the Union notes that the City's position changed. In responding to the grievance, Uto denied that RSPs were doing unit work and said there was a clear line between the two. His position then was consistent with what the City said in bargaining, and is contrary to the City's past practice defense.

The Union further notes that at hearing, the City stopped claiming that RSPs do not do the same work as unit members. Uto was not called to testify and explain this change in position. The City's failure to call this key witness to explain his earlier statement is significant. [3] The City should be held to the position it took before the hearing–that RSPs should not be doing the core responsibilities of recreation leaders except incidentally.

In any event, the Union points out that past practice cannot overcome express language. Where the contract is clear, a contrary past practice must give way. The Union believes that the express language of the contract supports its position.

The Union also argues that past practice is only evidence of intent if both parties are aware of, and accept it. The Union has never acquiesced, and has taken many steps to challenge the City's actions in shifting unit work to non-unit employees.

I do not find the past practice evidence particularly helpful for several reasons. The extent to which a practice existed is disputed, though there is agreement that, at this point, some RSPs are doing the same work as unit members.

The Union was already taking action to protect the work of its unit as long ago as 2002, if not before. There is no evidence it ever agreed that RSPs could perform work that unit members had previously done.

The parties' positions about past practice have been inconsistent. They had started bargaining a successor agreement before the Union filed this grievance. At the table, Union representatives expressed their concern over RSPs doing unit work. City negotiators assured the Union that was not the case. The parties eventually agreed to raise the yearly hour cap from 1,200 to 1,600 hours for a limited number of RSPs. It is reasonable to assume that the Union, having stated its concern about RSPs taking its work, would not have agreed to expand the City's ability to use RSPs in that

[3] This Union assertion is not correct. The City called Uto as its final witness on the third day of the hearing.

manner had the City taken the position that the hour cap was what defined the bargaining unit.

The Union filed the grievance because it was not satisfied with the City's assurances in bargaining. The City, consistent with its position at the table, initially refuted the Union's claim that RSPs were doing bargaining unit work. The grievance listed examples of such duties. In Uto's letter denying the grievance at level two, he said the duties of the RSPs and unit employees were distinct. He did not claim that the distinction was based on the number of hours worked.

At and after the hearing, the City's position altered markedly. Though there were some passing references that regular employees did higher level work, the City essentially admitted that much of the work was the same, and asserted that RSPs had always done unit work. In contrast to its statements in the grievance response and at the table, the City now contends that it is not the work performed that differentiates between unit and non-unit positions, it is the number of hours such work is performed.

I see no evidence in the record that the City had, before this arbitration, expressly taken the position that the bargaining unit is defined by hours worked. The City, to be sure, has said that there is an overlap between unit work and RSP duties and/or that the duties listed in unit job descriptions are not exclusive. But that is not the same as saying, as the City does here, that the only difference between unit and non-unit jobs is the number of hours.

There is also inconsistency in the Union's position. On the one hand, the Union disputes the City's past practice defense that non-unit employees have performed many of the same duties as unit members for years. At the same time, several Union witnesses testified that they did the same duties when they were in non-unit positions that they did after they became regular employees. They also testified that they had observed unit work being shifted to non-unit employees for more than 10 years.

Bargaining history

The City further argues that bargaining history supports it position. That history shows that the parties intended to differentiate based on hours worked, not duties performed. The City says this is demonstrated by the fact that from 1984 to 1995 the contract included a provision that if an RSP exceeded the hour cap, they went into the unit. When the parties eliminated that provision, they retained the hour cap, which they have increased over time.

The Union contends that the City's argument about bargaining history should also be rejected. The City's contention that the history shows that the parties agreed the unit was defined by hours, not duties, is contradicted by the most recent bargaining. There, the City's position at the table was that RSPs were not doing unit work and that the City did not intend for them to do so. Further, the parties' agreement on the hour limitation does not mean the Union agreed that RSPs could do unit work up to the hour limit, because the parties retained the ban on RSPs doing more than incidental unit work.

I find that there was no meaningful bargaining history evidence. That is, there was no testimony or bargaining notes from those directly involved in negotiating the early contracts or those in which the recognition clause was changed in areas relevant to this dispute. That leaves the language, and its evolutionary changes, to speak for themselves. As discussed above, I read that language as establishing limits on the work the City can assign to RSPs.

Conclusion

The contract defines the bargaining unit as employees in the Schedule A classifications. Schedule A lists the job titles of recreation leader and recreation coordinator I and II. The City has detailed job descriptions setting forth the duties and responsibilities of employees who hold those jobs. The work described in those job descriptions is bargaining unit work.

At the same time, Section 1.1.5 expressly excludes RSPs from the bargaining unit. It allows the City to hire RSPs but limits them in three ways. They may not work more than 1,200 (or in some cases, 1,600) hours in a year. They will be assigned to "support" jobs. And they may not be assigned to do the work of a recreation leader or recreation coordinator, except on an incidental basis.

By assigning RSPs the duties and responsibilities of bargaining unit positions, the City violated these contract provisions. The grievance is sustained.

Remedy

To remedy the grievance, the Union requests that I order that RSPs who have been doing unit work be reclassified and placed in the unit, and further order that they receive a make-whole remedy of back pay and benefits at contract rates to the date of the grievance.

The City argues that, if I conclude a remedy is warranted, reclassifying the subject RSPs would be inappropriate, and that any decision to include them into the unit is properly under the jurisdiction of ERB. The City further argues that a monetary remedy, such as an order to pay the Union for the hours worked by non-unit employees, would be inappropriate because the Union failed to establish an amount owed. The City concludes that a cease and desist order would be the only appropriate remedy.

The question presented was whether the City was violating the agreement by assigning work to non-unit employees. I concluded that it was. The question of whether those non-unit employees should be added to the unit is a question of representation that goes beyond the scope of my authority.

To remedy the violation, I will order the City to cease and desist from assigning bargaining unit work, as defined by the unit job descriptions, to non-unit employees, except on an incidental basis.

AWARD

Having considered the whole record in this matter, and for the reasons explained in the Opinion, I award as follows:

1. The City violated, and is continuing to violate, the contract by assigning bargaining unit work to non-unit employees.

2. The City is ordered to cease and desist from assigning bargaining unit work, as set out in unit job descriptions, to non-unit employees.

3. The parties shall equally share the Arbitrator's fees and expenses.

Respectfully issued this 1st day of May, 2015.

David W. Stiteler
Arbitrator