BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF MAUSTON EMPLOYEES, LOCAL 569-A, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO	Case 20 No. 46903 MA-7097
and	
CITY OF MAUSTON	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719-1169, appearing on behalf of City of Mauston Employees, Local 569-A, American Federation of State, County & Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jon E. Anderson, Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, Suite 202, Madison, Wisconsin 53701-1110, appearing on behalf of the City of Mauston, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of John Nicksic, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 27, 1992, in Mauston, Wisconsin. The hearing was transcribed, and the parties filed briefs and waived the filing of reply briefs by August 17, 1992.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the City violate the parties' collective bargaining agreement when it did not provide the Grievant with out-of-class pay?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS

Section 1 - Management Rights: Except as expressly and precisely provided in this Agreement, the management of the City and the direction of the working forces shall remain vested exclusively in the City. Such management and direction shall include all rights inherent in the authority of the City . . . Further, the City shall have exclusive prerogatives with respect to . . . classification of occupations and employees, assignments of work including temporary assignments.

. . .

ARTICLE VII - WORK WEEK AND HOURS

. . .

Section 4 - Work Assignments: Employees may be assigned to work within their department on work needed - employee available basis. An employee who is assigned to a higher rated job for three (3) consecutive work days or more shall be paid the higher rate of pay for the work performed. Waste water employees shall be allowed to exchange work days and/or shifts provided no overtime shall be paid if the exchange results in overtime work hours for an employee . . .

. . .

ARTICLE XI - WAGES

Section 1 - Wages as Set Forth in Appendix "A": Wages shall be paid as set forth in Appendix "A" which is attached hereto and make a part hereof.

. . .

Appendix "A"

Public Works Department	Jan. 1, 1991	Jan. 1, 1992
. . .		
Waste Water Division		
Disposal Plant Operator I	10.17	10.59
Disposal Plant Operator II	9.35	9.77

BACKGROUND

The City, under State and federal regulation, operates a Grade 2 wastewater treatment plant. Until late August or early September of 1991, the City used two employes to operate its plant: Dean Clark, classified as a Disposal Plant Operator I (Operator I); and the Grievant, classified as a Disposal Plant Operator II (Operator II). In late August or early September of 1991, Clark left work due to a back injury.

In 1986, after the negotiation of its first contract with the Union, the City promulgated job descriptions for its employes. The Operator I job description read thus:

> Class Description: Chief Licensed Waste-Water/Disposal Plan
>
> Nature of Job:
>
> Immediate Supervisor: Director of Public Works
>
> Examples of Work: Duties shall include but are not limited to:
>
> 1. Take charge of daily flow and required chemical addition.
> 2. Keep and maintain all required records.
> 3. Assist in the construction of new sewer mains.
> 4. Assist in repair and maintenance of existing sewer mains.
> 5. Keep abreast of all current and new Department of Natural Resources (DNR) regulations regarding the facility.
> 6. Assist Director of Public Works in enforcement of DNR regulations.
> 7. Keep equipment & buildings in good repair.
> 8. Keep grounds & landscaping in good repair.
>
> Qualifications:
>
> 1. Must be State Licensed and approved in the day to day operation of a waste water treatment facility.
> 2. Keep proper accreditation to maintain license.
> 3. Knowledge of occupational hazards involved and the safety precautions necessary in maintenance and repair work.
> 4. Ability to understand and follow oral and written instructions.
> 5. Ability to make minor repairs and adjustments of equipment.
> 6. Physical condition necessary to perform the duties of the position.
> 7. Possess a valid Wisconsin Driver's License.
>
> Training and Experience:
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> Graduation from High School and some previous experience in a Waste Water Treatment Facility

or any combination of training and experience which provides the required knowledge, skills and abilities.

The Operator II job description read thus:

Class Description: Disposal Plant Operator II

Nature of Job:

Immediate Supervisor: Director of Public Works and Disposal Operator I

Examples of Work: Duties shall include but are not limited to:

1. Assist in the required chemical addition and the daily operation of the waste-water treatment facility.
2. Assist in keeping and maintaining all required records.
3. Assist in the construction of new sewer mains.
4. Assist in repair and maintenance of existing sewer mains.
5. Keep abreast of all current and new Department of Natural Resources (DNR) regulations regarding the facility.
6. Assist Director of Public Works in enforcement of DNR regulations.
7. Perform any other related duties as assigned by Immediate Supervisor and assist street department whenever work is caught up in waste-water department.
8. Keep equipment & buildings in good repair.
9. Keep grounds & landscapting in good repair.

Qualifications:

1. Must be State Licensed and approved in the day to day operation of a waste water treatment facility.
2. Keep proper accreditation to maintain license.

3. Knowledge of occupational hazards involved and the safety precautions necessary in maintenance and repair work.
4. Ability to understand and follow oral and written instructions.
5. Ability to make minor repairs and adjustments of equipment.
6. Physical condition necessary to perform the duties of the position.
7. Possess a valid Wisconsin Driver's License.

Training and Experience:

Graduation from High School and some previous

experience in a waste water treatment facility or any combination of training and experience which provides the required knowledge, skills and abilities.

The City, roughly two years prior to the arbitration hearing, revised these job descriptions. The revised job description for Operator I changed the "Class Description:" reference to "Licensed Waste-Water/Disposal Operator I". The revised job description did not significantly modify the "Examples of Work:" section, and deleted Item 7 from the "Qualifications:" section. In its place, the revised job description added the following:

7. Shall meet all State and Federal Licensing Requirements.
8. Ability to work well with others.

The revised job description did not alter the "Training and Experience:" section.

The revised job description for the Operator II position did not significantly alter the "Class Description:", "Examples of Work:", or "Training and Experience:" sections of the predecessor job description. The reference to "and Disposal Operator I" from the "Immediate Supervisor:" section was deleted in the revised job description. The "Qualifications:" section of the revised job description reads thus:

1. Knowledge of occupational hazards involved and the safety precautions necessary in maintenance and repair work.
2. Ability to understand and follow oral and written instructions.
3. Ability to make minor repairs and adjustments of equipment.
4. Physical condition necessary to perform the duties of the position.

5. Possess a valid Wisconsin Driver's License.
6. Ability to work well with others. 1/

The Grievant's Testimony

The Grievant was hired by the City in October of 1977, and first assumed the duties of an Operator II in May of 1986. He is licensed as a wastewater treatment plant operator by the State of Wisconsin.

He noted that the Operator I and II worked together as a team, and that their duties overlapped to a considerable degree. The Grievant felt that the difference in the positions was that the Operator I was a "lead" position with the Operator II acting as an assistant. While Clark was on the job, the Grievant noted that Clark would open up the plant and take weather readings and note the amount of gallons processed by the plant in the prior twenty four hours. He would also, on a periodic basis, take samples of the raw and treated sewage and prepare them for shipment to an outside laboratory for analysis. He noted that Clark had the overall responsibility for assuring that the lagoon outside the plant had sufficient oxygen, and if not, for turning on the blowers which pump oxygen into the lagoon. Clark also had overall responsibility for assuring that the plant and its equipment were properly maintained. Such duties could run from checking the oil on blowers and filters to making sure the floors were swept and the lawn mowed.

The Grievant acknowledged that both he and Clark shared many of the duties noted above. He further noted that he and Clark shared certain lab work, such as taking the temperature and PH of the influent and effluent. Beyond this he noted that he and Clark would pull water pumps, check and maintain lift stations and keep pond weeds around the plant in check.

While Clark was at work, he would start at 6:00 a.m., and leave at 2:30 p.m. The grievant would report for work at 7:30 a.m., and leave work at 4:00 p.m. Clark and the Grievant alternated weekend work, and each employe would fill in for the other during the other's short term absences or vacations.

The Grievant noted that after Clark left work due to his injury, the Grievant assumed his duties. He acknowledged that the City did not formally assign him to do so. He entered the data required for the plant's monthly report and signed it until sometime in December of 1991 or January of 1992, when Jerry Gray, his immediate supervisor, informed him that Gray would sign the monthly reports. The Grievant noted he continued to enter the data onto the report that Gray ultimately signed. The Grievant also noted that he met briefly with Gray every day, and would receive assistance from other street department employes if he needed it. The Grievant also noted Gray did not regularly visit the treatment plant, and that it was not unusual for two to three weeks to pass between Gray's visits to the treatment plant.

The Grievant also stated that he had requested to receive Clark's rate while filling in for Clark for absences of "a week, maybe two." 2/ He noted that the City denied his prior requests. He did not appeal the denials to arbitration.

The Grievant testified that he first saw the revised Operator II job

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1/ A reference, in the job description admitted into evidence, to the date of adoption of Item 6 has been omitted.

2/ Transcript (Tr.) at 65.

description in December of 1991 or January of 1992.

Jerry Gray's Testimony

Gray was the Grievant's predecessor as Operator II, and presently serves as a Field Supervisor. Gray noted that he served the City as an Operator II for roughly three years before the Grievant assumed those duties. Gray noted that while he served as an Operator II, he did fill in the data required on monthly reports, but did not sign those reports. He stated that there is considerable overlap between the duties of an Operator I and an Operator II. Gray estimated that the two positions shared over 90% of the duties required of each position. He noted that the plant was put on a regular maintenance schedule before the Grievant assumed the position of Operator II, and confirmed that he never formally assigned the Grievant to assume Clark's duties.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union phrases the issues for decision thus:

a) Did the Employer violate the Collective Bargaining Agreement when it denied the grievant out-of-class pay as Wastewater Operator I while the incumbent in that classification was off work for nine months due to a worker's compensation injury?

b) If so, what is the appropriate remedy?

The Union argues initially that the Grievant performed the duties of the Operator I position during Clark's indefinite absence. A review of the job descriptions for the Operator I and II positions reveals, according to the Union, that the Operator I assumes responsibility for the operation of the treatment plant, with the Operator II assisting the Operator I as directed by the Operator I. Since the Grievant has been the sole operator for the plant during Clark's absence, it necessarily follows, the Union contends, that "there is no one for (the Grievant) to "assist" and in fact it is he who "takes charge" of the operation of the plant." That Gray does not regularly visit the plant, and that the Grievant either signs or fills out the State reports underscores this point, according to the Union.

The Union further contends that the distinction between the positions is established by the wage differential set forth in Appendix A.

The Union's next major line of argument is that Article VII, Section 4, mandates that an employe "assigned" to a higher rated job for three or more consecutive work days must be paid the higher rate of pay for the work performed. That the City may not have specifically assigned the Grievant to assume Clark's duties is irrelevant here, according to the Union, for "(w)hile it is true that no management employee told the grievant that he was to perform the duties of the Operator I, it is obvious that the City fully expected (the Grievant) to fill in completely for the absent Mr. Clark." The Union asserts that arbitral authority establishes that where an employe has not been given a direct assignment, but has a reasonable ground to believe the employe should assume greater responsibility, a constructive work assignment has been given. The Union concludes that "the responsibility for the day-to-day operation of the Wastewater Plant fell on (the Grievant's) shoulders . . . (t)here was simply no one else to perform the work." It necessarily follows, the Union contends, that the City constructively assigned the Grievant to assume the duties of an Operator I.

The Union concludes that "the grievance (should) be sustained, and that the grievant (should) be made whole for all losses as a result of the violation of the agreement."

THE CITY'S POSITION

The City phrases the issues for decision thus:

1. Did the District violate Article VII, Section 4 of the Labor Contract when it did not provide the Grievant with out-of-class pay?

2. If so, what is the appropriate remedy?

The City argues that Article VII, Section 4, must be read in light of the provisions of Article II, Section 1, and that, read together, the two provisions establish that an "employee is not entitled to the higher rate of pay unless he has been assigned to a higher rated job." The determinative issue here, according to the City, "hinges on the definition of the word 'assign'."

Contending that the usual and customary definition of 'assign' "connotes a person with authority placing someone in a position or job different from the one they previously occupied." A review of the record establishes, the City contends, that "(t)here is no way that the situation on which this grievance is based could be considered to be an assignment." More specifically, the City argues that no official moved the Grievant into the Operator I position; that the Grievant's duties did not substantially change during the period of Clark's absence; and that the Grievant, at best, assumed he could assign himself to the position.

The City's next major line of argument is that the positions of Operator I and Operator II "(h)ave virtually the same duties and responsibilities so that the Operator I position is not a higher job classification than Operator II." The City asserts that arbitral authority requires a substantial change in duties to warrant higher rated pay. No such change, according to the City, can be found in this case. To underscore this point, the City notes that the two position descriptions are virtually identical on key points; that the two operators are permitted, by contract, "to exchange work days and/or shifts"; and that the two operators cover for each other during vacations and weekends. Beyond this the City contends that arbitral authority establishes that "an employee is not performing a higher rated job nor is he entitled to a higher rate of pay when he performs duties associated with both jobs."

The City concludes that the record establishes that the Union has failed to meet either its burden of proof or persuasion, and that the grievance must be denied.

DISCUSSION

The parties were not able to stipulate the issue on the merits of the grievance, but the difference between their statement of the issues is not sufficiently significant to require extensive discussion. The issue adopted above is drawn primarily from the City's position. The issue has not been restricted to Article VII, Section 4, because both parties have argued that other contract provisions must be considered in construing that provision. No reference has been made to the length of Clark's absence because the record is unclear on that point.

The City accurately notes that Article II, Section I, grants it "exclusive prerogatives" regarding "classification of occupations and employees" and "assignments of work including temporary assignments." This prerogative is not, however, unlimited. Article VII, Section 4, requires out-of-class pay in certain circumstances, and Article XI, Section 1, clarifies that Appendix A establishes the pay rates which give Article VII, Section 4, meaning.

Article VII, Section 4, requires the City to pay out-of-class pay if an employe "is assigned" to a different job; if that job is "a higher rated job"; and if that assignment lasts "for three (3) consecutive work days or more". There is no dispute the Grievant, if he properly assumed Clark's duties, did so for more than three consecutive work days. The parties' dispute thus focuses on the first and second elements.

Appendix A establishes that Operator I is a higher rated position than Operator II. The hourly wage difference is eighty-two cents. The City does not contest this point, but argues that the overlap between the two positions is so significant that affording the Grievant out-of-class pay would improperly reward him for performing work associated with both classifications. The most appropriate form of analysis for out-of-class pay disputes is, in my opinion, that stated by Arbitrator Daugherty in Wilson Jones Co., 51 LA 35, 37 (1968):

> In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that "invaded" said core elements?

Daugherty also addressed the governing considerations when the work of the questioned classifications overlap:

> In many such cases there are substantial areas of overlap in the operations specified for two or more jobs . . . But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been required to perform operations that . . . are key and relatively exclusive to the latter classification.

In this case, the degree of overlap is significant. Gray estimated no less than 90% of the duties performed by both classifications were shared. Article VII, Section 4, also recognizes the significant amount of overlap by permitting employes in the two classifications to exchange work days or shifts.

That there is a core difference between the classifications is, however, established by the eighty-two cent differential bargained by the parties. A review of the job descriptions establishes that the difference is less on the specific duties or training than on the overall responsibility for the operation and maintenance of the plant. Items 1 and 2 of either the original or the revised position description specify that the Operator I has the ultimate responsibility for the duties performed, with the Operator II performing as an assistant. The Grievant's testimony underscored this point, as did Gray's. Gray noted that the Operator I and II worked as a team, but nothing in the record rebuts the Grievant's perception that the Operator I held the ultimate responsibility for the team's efforts. Appendix A underscores this point by putting a noticeable premium on the wage of an Operator I.

Both the Operator I and Operator II positions are bargaining unit

positions, and the ultimate responsibility of the Operator I is more that of a lead worker than a supervisor. Within this limitation, the record establishes that the Grievant assumed the overall responsibility for the plant's operation which Clark exercised prior to his injury. The plant continued to operate, and the Grievant was the sole employe available to oversee its day to day operation. Gray only sporadically visited the plant, and supplied help for the Grievant after the Grievant requested it. The Grievant signed the monthly reports, until December of 1991 or January of 1992. Previously, only Clark had done this. Gray did not do so when he was an Operator II. That Gray does so now is not in itself significant, since the Grievant continues to be the sole employe available to collect, verify and supply Gray the data.

That the City has operated the plant as a one-man operation during Clark's absence undercuts the persuasive force of its contention that the positions of Operator I and II overlap to a degree which makes it impossible for the Grievant to effectively assume Operator I duties. While many of the lab and maintenance duties can be seen as repetitive and routinized, the risk of the team's non-performance of those duties, prior to Clark's injury, would have been Clark's. Since Clark's injury, that risk fell squarely on the Grievant. There was no longer a team, and no longer any other employe accountable for the plant's operation.

That the City deleted the Operator I from the supervisory chain of command in its revised Operator II job description is irrelevant here, as is its deletion of a requirement that an Operator II be licensed. Under either the old or the revised job description, the duty of an Operator II is to assist in the operation of the treatment plant. Since Clark's injury, the Grievant did not assist in, but assumed responsibility for, the operation of the treatment plant.
In sum, the record shows the Grievant did perform the core duties of the Operator I position during Clark's absence.

The City's contention that the Grievant was not assigned to assume Clark's duties is unpersuasive. Gray stated, and the Grievant acknowledged, that no City representative with managerial or supervisory responsibility formally asked the Grievant to take over Clark's duties. However, the City was aware that what had been a two-man operation became, after Clark's injury, a one-man operation. The plant continued to operate, with all the necessary reports being filed. The Grievant signed the monthly reports formerly signed by Clark until Gray told him to leave the form blank so Gray could sign them. To say the City did not assign the work to the Grievant elevates form over substance. The City was aware that the Grievant had done so, and chose to take the benefit of his doing so. To characterize this as anything less than an assignment would be to grant the City, under Article II, the authority to read Articles VII and XI out of existence.

In sum, the Grievant necessarily assumed the core duties of an Operator I by operating the treatment plant on a day to day basis alone. Because the City was aware of this, and received the benefit of the Grievant's assumption of the responsibility of an Operator I, the City must be considered to have assigned the Grievant to perform the duties of an Operator I. It follows, under Article VII, Section 4, and Article XI, that the City was required to pay the Grievant the Operator I rate.

The issue of the remedy appropriate to the City's violation of Article VII, Section 4, requires some discussion. Article VII, Section 4, mandates out-of-class pay for out-of-class work extending three work days or beyond. Both the language of that section and the parties' practice establish that the work of the Operator I and II is considered unique. Article VII, Section 4, underscores the degree of overlap between the positions by allowing

employes in the two classifications to switch hours or shifts. Standing alone, this may indicate only that such trades are to be for periods of work of less than three consecutive work days. However, the language does not stand alone. The Grievant filled in for Clark during Clark's vacations, etc. Such absences were, according to the Grievant, not longer than two weeks in duration. Beyond this, the Grievant acknowledged that he dropped earlier claims for out-of-class pay, and that he did so, at least in part, because no other employe had received it. It is apparent, then, that the parties have, by practice, set a flexible means of staffing the treatment plant by which Operators I and II freely interchange. Presumably, these switches worked to the benefit of the City regarding overtime or out-of-class pay and to the Union by making schedules more flexible, permitting employes needed time off.

This practice is, however, restricted to absences of a known duration. The present grievance is the first time an Operator II has filled in for an Operator I whose return was uncertain. Clark's absence was indefinite. To extend the parties' practice regarding absences of a fixed duration of two weeks or less to the absence posed here would read Article VII, Section 4, out of existence regarding employes in the Operator I and Operator II classifications. The AWARD entered below strictly applies Article VII, Section 4, to Clark's injury related absence by awarding out-of-class pay to the Grievant from the third consecutive day of Clark's absence. This conclusion must be limited to the facts of this case. The parties have less rigorously applied Article VII, Section 4, to Operator I absences of a fixed duration of two weeks or less. Nothing said in this decision applies to such a practice.

AWARD

The City did violate the parties' collective bargaining agreement when it did not provide the Grievant with out-of-class pay.

As the remedy appropriate to its violation of Article VII, Section 4, and Article XI, Section 1, the City shall make the Grievant whole by paying him the difference between the wages and benefits he was paid during the period of time he filled in for Dean Clark, and the wages and benefits he would have been paid, during that period, at the Operator I rate. The period of time the Grievant filled in for Dean Clark shall be considered to have started with the third consecutive work day of Clark's injury related absence.

Dated at Madison, Wisconsin, this 28th day of October, 1992.

By _____
Richard B. McLaughlin, Arbitrator