

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LACROSSE CITY EMPLOYEES' UNION, :
 LOCAL 180, SEIU, AFL-CIO :
 :
 and : Case 173
 : No. 41643
 : MA-5426
 CITY OF LACROSSE :
 :

Appearances:

Davis, Birnbaum, Joanis, Marcou & Colgan, Attorneys at Law, by
Mr. James G. Birnbaum, on behalf of LaCrosse City Employees' Union,
 Local 180, SEIU, AFL-CIO.
Mr. Thomas L. Jones III, Assistant City Attorney, and Mr. Jerome Rusch,

Person

ARBITRATION AWARD

LaCrosse City Employees' Union, Local 180, SEIU, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of LaCrosse, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on April 25, 1989 in LaCrosse, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 25, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES:

The parties stipulated to the following statement of the issues:

Did the City violate Article 10, Wages and Salary Schedule, and the wage scale of the Collective Bargaining Agreement by failing to pay the Grievant on the basis of the Engineer Aid III rate? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1989-1990 Collective Bargaining Agreement are cited:

ARTICLE 2

GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

1. Discuss the grievance with his immediate supervisor within thirty (30) working days, excluding Saturdays, Sundays, and holidays of the date the employee should have known of the grievable matter. If no solution is reached he may,

. . . .

ARTICLE 10

WAGES AND SALARY SCHEDULE

Effective January 1, 1989, and the first pay period in July, 1989, the wages and salaries of employees shall be set out on the schedule attached hereto and made a part hereof.

. . .

When there is a substantial change in job duties, a letter from each employee requesting reclassification shall be initiated by April 20 of each year and delivered to his/her department head. The department head will note his/her recommendations and refer the request to the Director of Personnel for recommendation to the Finance Committee of the Common Council. Requests for reclassification shall be considered once each year at a time designated by the Council.

. . .

ARTICLE 19

RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

. . .

CITY OF LA CROSSE
LOCAL 180 - 75 HOURS/BIWEEKLY
HOURLY RATE CALCULATIONS

POSITION	2% EFF	3% EFF
	1/1/89	7/7/89
PROP APPRAISER II	12.54	12.92
DRAFTER II	12.24	12.61
ENGINEER AID III	11.90	12.26
PROP APPRAISER I	11.89	12.25
ENGINEER AID II	11.11	11.44
ENGINEER AID I	10.37	10.68

BACKGROUND

The Grievant, John Burcum, has been employed in the City's Engineering Department since 1966. He initially was hired into an Engineer Aide I position and after gaining experience, became an Engineer Aide II approximately ten years ago. At one time there were two Engineer Aide III's in the Department, Blystad and Grosskopf. Grosskopf was reclassified to a Drafter II some time ago and Blystad retired September 15, 1988. Blystad was an Engineer Aide III at the time the Grievant was hired.

On April 5, 1987, the Grievant submitted a request for reclassification to Engineering Aide III, pursuant to Article 10 of the Agreement, based on his

feeling that he was performing those duties. That request was denied. On April 19, 1988, the Grievant again requested reclassification to Engineer Aide III and in June of 1988 it was again denied.

On January 6, 1989 the following "Job Bid Notice" was posted in the Engineering Department:

JOB BID NOTICE

City of La Crosse

Bids for the following position will be accepted by the City Personnel Office:

JOB TITLE: Engineer Aide I* DEPARTMENT: Engineering
(Job description attached)

NOTE: Only full time employees, employed with the City of La Crosse are eligible for bidding.

SALARY RANGE: \$10.27/hr - during 30-day probationary
\$10.37/hr - after 30-day probationary period

POSTING DATE: 1/6/89

CLOSING DATE: 1/12/89, 5 p.m.

* Please note -- Applicants will be required to pass a written examination administered by the Wisconsin City & County Testing Service.

NOTE: THIS BID NOTICE IS PROPERTY OF THE CITY - DO NOT REMOVE FROM THE BULLETIN BOARD!

Attached to the above posting was the following job description for Engineer Aide 1:

ENGINEER AIDE I

NATURE: Under normal supervision performs field survey, construction, and drafting activities.

JOB DUTIES:

Inspects field projects under construction to verify contractor's compliance with bid specifications.

Draws a variety of construction plans, maps, illustrations, and performs other routine drafting.

Assists on survey crew as rodman, chairman, or instrument operator.

May operate surveying instruments, transit and level for preliminary surveys of areas considered for new construction.

Assists in distance measurement, assists in locating and placement of stakes for construction projects.

Keeps construction records updated, draws completed projects, new annexations and other changes on plot maps.

Prepares appropriate graphic records of projects.

Delivers "Objection Day" notices.

Collects water main samples on construction sites.

Assists in the preparation of monthly estimates and operates various duplicating machines.

Makes daily construction reports.

SKILLS, KNOWLEDGE AND ABILITIES:

Working knowledge of modern techniques, employed in engineering field and office work.

Working knowledge of Civil Engineering terminology.

Working knowledge of the care and use of Civil Engineering apparatus and equipment.

Ability to record engineering data with care and accuracy.

Ability to draw plans, layouts, and illustrations for various projects requiring graphic displays.

Ability to follow oral and written instructions.

An Engineer Aide III position was not posted or filled after Blystad's retirement.

On January 16, 1989, the instant grievance was filed. The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union:

The Union takes the position that the Grievant has been performing the duties of an Engineer Aide III for some time and that the City has violated the parties' Agreement by failing or refusing to pay him on the basis of an Engineer Aide III. In support of its position the Union first argues that the City violated that part of the Agreement that sets forth the pay rates for Engineer Aide II and III. The Union asserts the job description for Engineer Aide III is undisputed in the record and that it is uncontroverted that the Grievant is performing all of the duties of the Engineer Aide III on a regular basis -- the same duties he observed the previous Engineer Aide III's perform. Thus, he is entitled to be classified and paid as an Engineer Aide III.

Secondly, the Union asserts that the Grievant has not waived his right to be paid as an Engineer Aide III by having twice previously requested to be reclassified to the position. Blystad was still employed as an Engineer Aide III when those requests were made and the City could have claimed that there was a person performing the tasks and that the Grievant only did so on an intermittent basis. After Blystad retired the City no longer had an excuse not to reclassify the Grievant and/or to pay him as an Engineer Aide III. It was after the Grievant became aware that the City would not pay him as an Engineer Aide III that the grievance was filed.

The Union also asserts that the reclassification procedure in the Agreement is not the Grievant's exclusive remedy. He tried that avenue and the City has been unwilling to reclassify him. A prohibited practice complaint is possible on the basis that the City is attempting to "fundamentally change" the duties and responsibilities of the classifications in order to save money by paying other than the contractually required rate. The fact that other remedies are available does not preclude the Grievant from obtaining a remedy under the express provisions of the Agreement.

It is also contended by the Union that to deny the grievance would unfairly penalize the Grievant and unjustly enrich the City. The City's claim that it simply abolished a position is not true, since the duties of an Engineer Aide III are still being performed. The City has unilaterally reduced wage rates without bargaining and has drafted a "new job description" to avoid paying the Grievant for performing the duties. Therefore, it would reward the City for its unreasonable and illegal behavior, and would be unfair to the Grievant, to allow the City to continue to pay the Grievant as an Engineer Aide II.

The Union concludes that the only appropriate remedy is to reclassify the Grievant to Engineer Aide III and to order backpay to January 1, 1989.

City:

The City takes the position that its actions did not violate the parties' Agreement. In support of its position the City first contends that, under Article 19, Reservation of Rights, unless limited by a specific provision of the Agreement, it has the right to direct the work force, including the specifically reserved rights to abolish positions and to determine the methods, processes and manner of performing work. It is irrelevant whether the City abolished the Engineer Aide III position or did not fill the vacancy after Blystad left, since there is no specific provision that requires the City to do either. There is no specific provision in the Agreement that limits the City's right to either abolish a position or to leave a position vacant after the former occupant left. Citing, School District of Nekoosa (Arbitrator Bielarczyk).

The City also asserts that it has not violated the reclassification

provision of Article 10, Wages and Salary Schedule. The Grievant understood the reclassification procedure, since he used it in each of the two years prior to this grievance. The Grievant's last reclassification request prior to the filing of this grievance was denied in June of 1988. The City reiterates its argument made at hearing that this grievance was filed January 16, 1989, far beyond the requirement in Article 2 that a grievance be filed within thirty (30) working days of the date when the employe should have known of the grievable matter. The Grievant testified that following the denial of his 1988 request he did not discuss the matter with his immediate supervisor or reduce the grievance to writing anytime prior to filing this grievance. The Grievant also testified that he had filed a similar request for reclassification in 1989; however, the instant grievance was filed months prior to the deadline for such requests in 1989 and is, therefore, premature. According to the City, there has been no evidence presented that it did not follow Article 10 as to the Grievant's 1988 request or that it would not do so as to his 1989 request.

Also with regard to Article 10, the City contends that the fact that the wage schedule in the Agreement sets forth the rates for an Engineer Aide III does not require that the position be filled. The wage schedule also sets out the rate for an Engineer Aide I, yet the testimony was that there had not been an Engineer Aide I in the Department for years.

Lastly, the City asserts that the remedy requested, i.e., the reclassification of the Grievant to an Engineer Aide III, is not appropriate. Article 17, Transfer, Section A, provides that department seniority is to be considered in filling vacancies and that the best candidate from within the department shall be awarded the position, with the City having the burden of showing that the person selected was the best candidate. Thus, the Grievant's seniority alone does not ensure that he would be placed in the vacant position. Further, Article 17, Section E, requires that vacancies in non-professional full-time positions be posted before they are filled. If it is ruled that the City must employ an Engineer Aide III, the position must be posted, since the testimony shows that there are at least two other Engineer Aide II's in the Department, either of which should have the right to apply for the position.

DISCUSSION

The Union alleges, and the City does not dispute, that the Grievant performs what had been considered the duties of an Engineer Aide III, as set forth in the job description for that classification, on a regular basis and has done so for a number of years. The essence of this grievance is that the Grievant is performing the work of an Engineer Aide III and, therefore, he should be reclassified and paid as an Engineer Aide III. 1/ As the City points out, however, the parties have negotiated a specific provision in Article 10 of their Agreement for obtaining a reclassification when an employe feels his/her duties have changed substantially. 2/ In this case the Grievant had made timely application in 1988 for reclassification to Engineer Aide III and that request was denied in June of 1988. The Grievant was aware at that point that he was not being reclassified to Engineer Aide III and under Article 2, Grievance Procedure, of the Agreement, he had thirty (30) working days to file a grievance challenging the denial of his requested reclassification. To permit the Grievant to challenge the denial through the instant grievance, filed six months after the denial, would render meaningless the procedure set forth in the reclassification provision of Article 10 and would give no effect to the time limit in the grievance procedure for initiating a grievance. That would also be the result if the Grievant were allowed to assert a claim that he should be reclassified on the basis of the general wage schedule in the Agreement.

The fact that until Blystad retired in September of 1988 the City could have argued that he performed most of the functions of an Engineer Aide III, while the Grievant only performed them intermittently, is irrelevant as far as when the Grievant was aware he would not be reclassified. That the City had a possible argument to support its denial does not alter the fact that the Grievant's request to be reclassified was denied in June of 1988 and that he had to grieve that denial within a contractually specified time if he wished to challenge the decision.

The Union's assertion that in addition to the contractual reclassification procedure, it could seek recourse through a prohibited practices complaint on the basis of a unilateral change in the duties of the classifications, also is not relevant to the issue of whether the parties' Agreement was violated. The undersigned is constrained to interpreting and applying the terms of the parties' Agreement and is not empowered in this forum to decide their rights under law or equity.

It is concluded that what the Grievant is seeking is to be reclassified to Engineer Aide III, and that the parties' Agreement contains a specific provision in Article 10 that establishes the exclusive procedure for obtaining a reclassification. The instant grievance, although seemingly based upon the City's actions in posting an Engineer Aide I position instead of an Engineer Aide III, is in reality based upon the City's refusal to reclassify the

1/ In that regard, it is noted that the Union is not alleging that the City may not post an Engineer Aide I position or that it may not abolish a position. Rather, the Union is alleging that the Grievant has been doing, and will continue to do, Engineer Aide III duties regardless of the City's claim that it abolished the position, and that, therefore, he should be reclassified.

2/ In addition to the reclassification provision, the parties' Agreement also contains specific provisions in Article 10 that deal with employes being "temporarily assigned to a higher rated classification" or being "transferred to a higher rated classification." The parties, however, do not cite those provisions in this case and the Union does not allege that the Grievant was "temporarily assigned" or "transferred" to the Engineer Aide III position.

Grievant, with the latter events alleged as merely confirming in the Grievant's mind what he already knew in June of 1988 when his request for reclassification was denied.

Based on the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 1st day of August, 1989.

By _____
David E. Shaw, Arbitrator