

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DISTRICT COUNCIL 48 and its
affiliated LOCAL 133, AFSCME, AFL-CIO

and

CITY OF OAK CREEK

Darlene Wegner
November, 1988 grievance
regarding job duties

Case 70
No. 42073
MA-5558

Appearances:

Ms. Nola J. Hitchcock Cross, Podell, Ugent & Cross, S.C., 207 East Michigan Street,
Milwaukee, WI 53202-4905, appearing on behalf of the Union.

Mr. Robert Buikema, Davis & Kuelthau, S.C., 111 East Kilbourn (Suite 1400)
Milwaukee, WI 53202-3101, appearing on behalf of the City.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance arising pursuant to the grievance arbitration provisions of the parties' July 1, 1988-June 30, 1990 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held in Oak Creek City Hall on June 20, 1989. The hearing was not transcribed. The close of the record was delayed repeatedly in an ultimately unsuccessful attempt to permit testimony by a witness in ill health. Briefing was completed on January 24, 1990, marking the close of the record.

ISSUES

At the hearing, the parties could not agree on how to frame the issues for determination in this case. However, the parties did agree to authorize the Arbitrator to frame the issues on the basis of the parties' presentations.

The Union proposed that the issues read "Does the City violate the Agreement when it requires the Grievant to perform involuntary typing duties as a part of her job? If so, what is the remedy?" The City proposed that the issues read, "Whether the City violated the Agreement by assigning typing work to the Grievant? If so, what shall the remedy be?"

The Arbitrator finds no material difference between the two proposed formulations and frames the issues as follows:

1. Did the City violate the Agreement when it required Grievant to perform typing duties?
2. If so, what shall the remedy be?

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE 1 - RECOGNITION

Section 6. No employee shall be asked to make any written statement or verbal contract which may conflict with said Agreement, or which may jeopardize his position with the employer.

ARTICLE 3 - MANAGEMENT-EMPLOYEE RIGHTS

The City retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, and regulations. Included in this responsibility, but not limited thereby, is the right to:

- (A) Determine the kinds and numbers of services to be performed; and the number of positions and classifications thereof to perform such services;
- (B) To direct the work force;
- (C) To establish qualifications, test, hire, promote, transfer and assign employees in positions within the City subject to existing practices, terms of the agreement and subject to Civil Service procedure;
- (D) To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- (E) To release employees from duties because of lack of work or lack of funds;
- (F) To establish reasonable work rules and schedules of

work relating to personnel, policy, procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement;

(G) To maintain efficiency of operations by determining the method and means and the personnel by which such operations are conducted;

(H) To take whatever actions are reasonable and necessary to carry out the duties imposed by law upon the City, or to carry out the functions of the City in situations of emergency;

(I) To introduce new or improved methods or facilities; to change existing methods or facilities.

The City reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. these rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.

ARTICLE 20 - WORKING CONDITIONS AND WORK RULES

Section 1. The parties agree that the working conditions in effect as of the date of this Agreement shall remain in effect unless changed by mutual Agreement in writing.

Section 4. Job Descriptions and Classifications

(A) Upon request, the City shall provide the Union with a definition and/or clarification of classifications including a delineation of job duties. Any dispute arising out of such clarification involving proper rate of pay shall be subject to the grievance procedure.

(B) Unit employees shall not work outside of their classification except in an emergency or a temporary

necessity.

(C) Unit employees assigned work out of their classifications shall be paid their base rate plus thirty [cents] per hour, in addition to any applicable task rate, in the event the work assigned is in a higher classification.

(D) Nothing in Sections (B) and (C) above shall prevent the City from assigning work essentially designed to provide increased training to an employee or to require the City to pay compensation for such time as the employee may be so assigned. Such training shall not displace another employee.

Whenever a laborer in the Highway Department is assigned to drive a truck under the terms of this clause, his time so assigned shall be recorded and when accumulated time reaches eighty (80) hours, any further assignment shall require the City to pay the appropriate rate for the assignment as specified in paragraph (C) above.

(E) An employee who enrolls in a training course or educational program which is job related will, if such course is approved by the department head, be reimbursed for one hundred percent (100%) of the cost of registration and tuition fees. The City will make payment upon presentation of proof that a grade of "C" or higher was achieved in such course. Such completion and reimbursement for course work shall not guarantee subsequent upgrading of the employee who took the course.

PORTIONS OF CIVIL SERVICE COMMISSION RULES AND REGULATIONS

RULE III, SECTION 3.1 CLASSIFICATION OF POSITIONS.

(4) Class Specifications.

a. Preparation and content. Class specifications shall be prepared and promulgated by the Commission. It shall define the duties and responsibilities of all positions within the class and the minimum entrance qualifications for successful performance.

. . .

d. Interpretation and use. The class specifications are mainly descriptive and not restrictive, except as to the minimum qualification requirements specified therein. The inclusion of particular expressions of characteristics or examples of duties shall not exclude others of similar kind and quality. . . .

Any employee may be required by competent authority to perform any of the duties described in the class specification, any other duties which are of similar kind and difficult, and any duties of lower classes in the same occupational series or in other series which have similar characteristics. Any employee may also be required to temporarily serve in a higher position in emergencies, as a training assignment, or in relief of another employee on leave of absence.

JOB DESCRIPTIONS FOR CLERK/BUYER

[The following description was in effect at the time Grievant successfully bid for the Clerk/Buyer position in March of 1979.1]

CLASS TITLE: CLERK-BUYER

Duties:

1. All incoming calls, either provide answers or direct to proper individual. Meet all callers to Municipal Building including interviewing of salesmen
2. Operates radio equipment for the department and transmits necessary communications between supervision and personnel as directed by his supervisor.
3. Make out and process all purchase orders and maintain adequate inventory and records such as gasoline and oil supply at Municipal Building and Police Department and order as required.
4. Make out and forward all charges to other departments for services and supplies.
5. Maintain accurate records charging materials used for road maintenance and snow and ice removal.

6. Responsible for petty cash account of the department, sale of trash bags, collection of money from other sources, and the delivery of this money to proper authorities.
7. Responsible for constant search of suppliers to assure securing of best price of goods and services required by Street and other Departments. Consolidation of purchases to obtain volume discounts must be investigated.
8. Responsible for the orderly operation of the stock room and sign department. Must make street and other signs using vacuum applicator. (Savings in make vs. purchase and time procurement.)
9. Must upon request at a moment's notice, be ready to go anywhere to secure and pick up parts or services required by this and other departments. Vehicle used can be a car or truck with automatic or standard shift and must be capable of operating vehicle in safe and efficient manner, in fair or foul weather, as the situation demands.
10. During emergency situations, Clerk-Buyer must remain at post during period of emergency day and/or night serving as a link between vehicle operators, supervisors, and other departments who operate radio equipment through base and tower.
11. Responsible for security of the building, working hours adjusted to meet this demand. Clerk-Buyer must be acquainted with the various types of equipment in the building and must be qualified to take personal charge if an emergency should arise.
12. Must be capable of starting and operating any piece of machinery under emergency situations.
13. Must be capable of administering first aid. Is responsible for first aid supplies.
14. Responsible for equipment requiring electricity as a source of power during emergency electrical or other situations that could adversely affect the electrical supply and equipment utilizing this supply.

15. In the course of pickup and/or delivery and stock room work, heavy articles are encountered requiring ability and strength to perform the Clerk-Buyer function as specified in 8 and 9.

16. Other miscellaneous duties as directed by supervision.

[The following description was produced as a part of a Hay study and is apparently the job description presently in effect for the position.]

CLASS TITLE: Clerk-Buyer

#214

DEFINITION: Under general supervision, performs work of moderate difficulty in the records management of the Street Department, in the purchase of materials required for the operation of the department, and the proper charging for services to all other City Departments.

EXAMPLES OF DUTIES: Maintains records of the department, controls inventory, purchases required materials at best price possible, operates radio equipment during emergency situations, knowledgeable of equipment in the building and capable of reacting to any emergency within the building, responsible for building security, petty cash accountability, and administration of first aid when required.

Responsibilities include pick-up and delivery of heavy articles.

MINIMUM REQUIREMENTS:

Training and Experience. Graduation from high school and two years' experience in bookkeeping. Some experience in labor time accountability, purchasing and inventory control.

Knowledge, Abilities, and Skill. Individual must be knowledgeable in bookkeeping and possess mechanical ability and a good learning aptitude. Must be capable of developing an effective working relationship with management and fellow City employees, as well as citizens of the city. The ability to follow oral and written instructions and to adhere to prescribed routines are requirements of the position. Individual must possess the physical ability to handle materials in excess of 50 pounds by hand.

City of Oak Creek

FACTUAL BACKGROUND

The grievance in this matter was filed on behalf of Darlene Wegner. It asserts that Street Superintendent Dale Behling had violated portions of Agreement Arts. 1, 3 and 20 as follows: "11-11-88 Dale B. instructed Darlene to type letters for him. When Darlene told him that was not in her job description he replied that if she refused she could be subject to disciplinary action." The relief requested was, "no additional job responsibilities or requirements outside of the job description she was hired under. Refer duties to part-time clerical currently being used by Planning-Ins."

Management's Step Three answer denied the Grievance for the following stated reasons:

The decision of denial is based on, but not limited to the following: (1) the Management Rights clause in Article 3, paragraphs A, B, G and I give the City of Oak Creek the right to assign work, direct a work force, and determine the methods and means by which operations are conducted. The City reserves the right to assign typing responsibility to clerical employees. (2) Furthermore, there has been a past practice in the Highway Department of typing performed by the Grievant and by the person occupying the Grievant's position for the Superintendents of Public Works. (3) Finally, the job duties prescribed for the Clerk/Buyer position written by former Superintendent E. Boers and given to the Grievant when she assumed the duties of Clerk/Buyer indicate that the Clerk/Buyer will perform such duties as are assigned by the supervisor. Included in those responsibilities would be typing by the Grievant. Based on these and other reasons, the grievance is denied.

Grievant began her City employment at the end of 1968 as a Clerk/Secretary in the Park and Recreation and Planning Departments and later worked as a Receptionist/Typist in the City Clerk's office. Then, on March 5, 1979, Grievant successfully bid for a lateral transfer to a vacancy in her current position as Clerk/Buyer in the Highway Department (then referred to as the Streets Department). The first of the job descriptions set forth above was in effect and provided to Grievant in connection with her selection as Clerk/Buyer in 1979. At some point in time thereafter, the current job description for the position (the second one set forth above) was promulgated pursuant to the Civil Service Rules and Regulations. A portion of those Rules relating to the nature and interpretation of job descriptions is also set forth above.

It is undisputed that Grievant has performed typing duties since she began working as the Clerk/Buyer. Grievant estimated that her primary duties break down as follows: seeking and

procuring supplies (75% of her time); taking items for repair as needed (10%); and keeping logs, doing paperwork, answering the phone, radio dispatching, and securing and locking up the building (15%). She stated that occasionally, but rarely, her work on some of those duties has involved typing as opposed to hand writing forms or other documents. In some instances, the decision to type a form or other document has been Grievant's judgment alone as to what will look better, and in some cases Grievant has typed a form so that handwritten data contained on it could more legibly and easily be read by another City department for computer entry purposes. It is undisputed that the only working typewriter in the department has been on a rolling cart located in Grievant's work area (which is an office adjacent to the Superintendent's office). The only exception occurred perhaps a month preceding the arbitration hearing when an employe on light duty volunteered to do some typing at a location outside Grievant's office.

The abovenoted typing that Grievant has done in connection with her primary duties is not at issue in this case. In addition to that typing, Grievant has, throughout her time as Clerk/Buyer, also performed typing of memoranda, correspondence, and other documents for each of the individuals who served as her immediate supervisor, i.e., for each of the individuals who served as Street Superintendent since she became the Clerk/Buyer in 1979. Edgar Boers was Superintendent from at least 1962 until his retirement in 1983. He was succeeded by Tom Dillon who served until late in 1987. For several months thereafter, the Department was headed on an interim basis by William Shaper who has been the Assistant Superintendent since at least 1983 and remains in that position at present. The current Superintendent, Dale Behling, took over in early September of 1988.

Grievant testified that the typing work she did for the Superintendents (as opposed to that associated with her other duties) was not a part of her job because there was no reference to typing in her job description. Grievant testified that she was given typing work by the previous Superintendents only when there was no other clerical employe available in the City to do the typing involved and that it typically amounted to no more than one hour's work per month. She later admitted that she was not certain that she had never done more than an hour of such typing in any month. She also stated that until Behling, she had only done that portion of the Superintendent's typing that no one else was available to do for them, such as times when the City Clerk's office was too busy to do it. In that regard, Grievant noted that Dillon had given most of his typing to Sandy Thompson in the City Clerk's office and that Thompson had, in fact, given Dillon a set of forms that he could use as the basis for his typing requests of her. Grievant also asserted that the typing she did for the various Superintendents, Behling included (at least in the first couple of months) was done exclusively on a voluntary personal favor basis for each of them and not as a mandatory part of Grievant's Clerk/Buyer job duties. Grievant stated that prior to November of 1988 she was never told that she would be subject to discipline if she refused to perform the typing work involved. Grievant stated that the various Superintendents asked her to do the work, sometimes making comments such as, "do me a favor" or "would you do this form me as a favor." Grievant acknowledges that she always performed the work involved and did not resist any requests from the various superintendents involved until November of 1988. Grievant

stated that she often responded to Superintendents' requests that she do typing by saying, "It's not in my job description but I'll do it as a favor." She stated that the Superintendents would sometimes tell her when the typing needed to be completed but she did not recall any situation in which she was asked to do the typing before completing her other work. Grievant asserted that each of the Superintendents she worked for understood that she was doing the work involved as a favor and not as a required part of her Clerk/Buyer job duties, though she acknowledged that she could not recall if that had been Boers' understanding because it had been so long since she had worked for him.

With regard to the events leading up to the grievance, Grievant stated that she was on vacation when Behling began his work for the City as Superintendent on September 6, 1988. Upon Grievant's return later in September, Behling introduced himself and they had a get-acquainted discussion. Among other things, Behling asked if Grievant did typing. Grievant replied that it was not in her job description but that she had done it for prior Superintendents on occasion in the past when no one else in City government could do it. Grievant stated that she willingly helped out by doing typing at Behling's request but that she soon found that the amount of that typing involved was growing and that Behling seemed to be treating it as a requirement of Grievant's job rather than as a voluntary personal favor on Grievant's part. Grievant discovered that Behling was giving Grievant all of his typing without touching base with other possible sources of clerical support at City Hall. Grievant was not able to say how much work Behling had given her by November of 1988, but it was clearly no longer "just something here and there" as she had been willing to voluntarily do in the past. Grievant was concerned that she would not be able to get the typing Behling had for her done along with all of her other duties. Grievant stated that several discussions ensued during the course of which Behling stated that if Grievant did not perform the typing work he assigned her, she would be subject to discipline. Shortly thereafter the grievance was initiated orally, answered at the first step on November 15, 1988 and then submitted in written form as noted above on November 29, 1988. Following additional events that are the subject of another grievance, Grievant has complied with Behling's typing work assignments and pursued the two grievances.

Following Grievant's testimony, the Union rested subject to its right to call Tom Dillon to corroborate Grievant's testimony as regards the 1979-1987 period that he supervised Grievant. The City presented its case, and the hearing was adjourned until Dillon's physical condition would permit his being called as a witness. After a lengthy period of time, it was agreed by the parties that the record should be closed despite Dillon's continued unavailability to testify due to illness.

The City's case consisted of testimony from Boers, Schaper and Behling.

Boers testified that he routinely assigned typing of correspondence and other documents to Grievant and that Grievant performed all of the work so assigned without protest. Boers did not recall any mention of personal favor or other special conditions associated with Grievant's performance of the work. Rather, Boers considered Grievant to be performing the work as a part

of her regular job duties just as her predecessor, Carl William Haupt had done before her. Boers stated that had the Clerk/Buyer do all of the typing he needed done except for those items he considered confidential. These latter items he had typed in the City Clerk's office in City hall which was and is approximately one half mile from the Highway Department office. Boers testified that he did not have typing for grievant every work day but that he gave Grievant at least some typing every week. He estimated that that the eight letters one memorandum and one rate sheet that Grievant typed for him from April 26-October 2, 1979 were probably representative of the quantity of typing Grievant had done for him. He also estimated that that the six letters Haupt had typed for him from March 1-June 3, 1965 were representative of the amount of typing work Haupt had done for him. Boers stated that he prepared the 16-point job description for the Clerk/Buyer position at the request of the Civil Service Commission. Haupt signed a copy of that description in January of 1979. Boers explained that he could not include in that description each and every duty Grievant performed and that he considered the typing Grievant performed for him as incorporated in the concluding item #16, "Other miscellaneous duties as directed by supervision."

As noted, Dillon was too ill to testify. The City submitted 17 letters and memoranda typed by Grievant for Dillon from February 15-October 15t 1985. Schaper, who served as Assistant Superintendent under Dillon, testified that he was not aware of any oral or written understanding between Grievant and Dillon or between Grievant and himself regarding Grievant's performance of typing work. Schaper stated that so far as he knew, typing was a part of Grievant's job, based on his observation that Grievant did typing work for Dillon on a consistent basis and whenever Dillon had typing for Grievant to do. Schaper acknowledged, however, that he did not personally assign typing work to Grievant until after Dillon left and that he was not privy to conversations Dillon and Grievant may have had concerning the conditions under which Grievant was doing the typing for Dillon. Schaper also acknowledged that Grievant did not do all of Dillon's typing, but rather that Dillon had confidential correspondence typed at the City Clerk's office.

Schaper stated that after Dillon left, Schaper assigned typing work to Grievant and grievant performed it without protest. Schaper admitted that it was possible Grievant was performing the work on the premise that it was voluntary on her part, because the question simply never came up in any conversation between them. Schaper stated that while he headed the Department he also sent some work to the City Clerk's office when it was of a confidential nature and when Grievant was on vacation. He also stated that he had the City Clerk's office type some bid specifications on their electronic word processor to facilitate later corrections or additions. Schaper testified that Grievant had typed three documents for him from July 14-August 1, 1988 and that that was "possibly" representative of the amount of typing Grievant had done for him while he served as acting head of the Department.

Behling testified that Grievant was on vacation when he started with the City as Superintendent. Until Grievant returned from vacation, Behling had his typing done by his wife at home. Upon Grievant's return, Behling asked her, among other thingst if she did typing.

According to Behling Grievant replied that it was not a part of her job and Grievant suggested that perhaps Behling should have it typed for him at City Hall.

Behling stated that he decided to give Grievant all of his typing because he preferred to have it done within the Highway Department rather than by personnel in another department and at another location. He felt he was acting appropriately because: his review of his predecessors' correspondence showed that Grievant had done typing for them; because such typing seemed in keeping with the other clerical functions Grievant performed such as accounting, billing and inventory record keeping; Grievant was the only clerical employe in the Department; the Agreement appeared to give him the right to assign Grievant the typing; and Grievant had the only typewriter in the Department in her office. In November of 1988, Behling had occasion to discuss the subject of typing with Grievant and told her that if she refused to perform typing assigned by Behling she would subject to discipline. The grievance was subsequently initiated.

Regarding the amount of typing he was assigning Grievant, Behling testified that he had given Grievant ten letters over a six week period, which he estimated would amount to an hour of typing work perhaps in a week or every other day. He also anticipated assigning Grievant the typing articles for submission to a newsletter three times per year. In questioning about typing assignments in April of 1989 (i.e., following the initiation of the grievance) Behling stated that from April 5-13, Behling had wanted five or six one page letters typed by Grievant.

It is undisputed that from that time until April of 1989, Grievant performed all of the typing work that was given to her and did not grieve or resist performing that work until November, 1988.

POSITION OF THE UNION

Grievant bid for the Clerk/Buyer position by way of a lateral transfer to get away from typing, which had been a part of the positions she previously held with the City. Neither the Clerk/Buyer posting she responded to nor the discussions she had with supervision about the position during the course of the selection process made any mention of typing duties. No typing skill was sought and no typing test was given in connection with that posting. Typing is not mentioned anywhere in the current Clerk/Buyer job description, either.

Grievant's job does not involve typing any more than a mechanic's job does. While she has typed some forms on occasion, it has always been at her own discretion, such that the same forms have on occasion been prepared in handwritten form.

During the time when Dillon was Superintendent from about 1983 through November 30, 1987, when he or his assistant needed typing they ordinarily took it outside the Department to the City Clerk's office. Very infrequently the workers in the City Clerk's office were busy and Dillon would ask Grievant to type something for him as a favor. Grievant did so, but always on a

personal favor basis and never on a required assignment basis, and never amounting to more than an hour a month.

Schaper confirmed that Highway typing was performed in the City Clerk's office, but asserted that Grievant had been "assigned" the typing work that he did. Schaper admitted, however, that such was an assumption on his part since it was only Dillon and not Schaper who gave typing work to Grievant. Similarly, after Dillon retired and before Behling was hired as the new Superintendent, Grievant did some typing for Schaper, but always with the continuing understanding on her part that she was doing that work as a personal favor and not as a job requirement, and in circumstances where most of the typing was going to the City Clerk's office and Grievant was doing, at most, one hour of typing a month.

When Behling began on September 6, 1988, Grievant was on vacation. When she returned, Behling assigned her to do all of the Department's typing, without ever explaining why he was changing the longstanding practices of sending most of the typing to the City Clerk's office and of asking Grievant to type no more than an hour a month on a personal favor basis rather than on a required assignment basis. At first Grievant performed the typing work Behling gave her until she realized that she was being required to do all of the Superintendent's and not just the overflow that the City Clerk's office was too busy to handle.

The Agreement and the Civil Service Rules set forth classifications. The Rules require that class specifications "shall define the duties and responsibilities of all positions within the class " Typing is not among the duties and responsibilities defined for the Clerk/Buyer classification. Nor is it "of similar kind and quality" to the duties contained on the Clerk/Buyer classification, as is required by Sec. 4(d) of Rule III.

The working arrangements concerning typing that were in effect during Dillon's tenure established a "working condition" which Agreement Art. 20 prohibited the City from changing unless the Union agreed in writing which it has not done. Specifically, all Highway Department typing was to be given to the City clerk, with Grievant only to be asked but not required to do some as a personal favor and then never more than one hour monthly.

By changing that arrangement, the City has not only altered a working condition without mutual consent, but it has also deprived Grievant of the benefit of the lateral transfer she took in reliance on the nature of the Clerk/Buyer job as it was then reflected in the posting and associated discussions. Thus, by assigning Grievant duties outside the scope of her job, the City has violated both the Civil Service Rules and the implied covenant of good faith implicit in the Agreement.

For those reasons, the grievance should be sustained and the relief requested therein should be granted.

POSITION OF THE CITY

The right to assign typing work to Grievant is inherently a City right and function and one clearly and unequivocally reserved to the City in Article 3(A), (B), (C), (F), (G) and (I). There is no applicable contractual provision that limits that right. A historical pattern of work assignments is not an Art. 20, Sec. 6 "working condition," but rather an exercise of Art. 3 rights. The Union's evidence of an unwritten past practice must be rejected out of hand as irrelevant in the face of clear and unambiguous language to the contrary.

If past practice evidence is considered in this case, it shows that the City has always assigned typing to the Highway Clerk/Typist without objection, until the incidents giving rise to the instant grievance. The record does not support Grievant's assertion that supervisors have agreed that Grievant need do it only if and when she is willing to volunteer to do so.

The Union's reliance on job descriptions and related Agreement provisions is also unavailing. In this relationship, as is generally the case, job descriptions do not constitute an agreement on the City's part to about what an employee will or will not be assigned to do. Rather, they are a general statement of the sorts of duties performed by the position. The only obligation the Agreement imposes regarding job descriptions is the Art. 20 Sec. 4 requirement to provide a delineation of job duties for each classification with disputes concerning same expressly limited to those "involving proper rate of pay" and hence not including the content of the classification itself.

In any event, typing duties are consistent with and incidental to the Clerk/Buyer job description. Grievant is the highest paid clerk in the City's employ and the only clerical employee in the Highway department. She is qualified to perform the typing work in question and such work has been performed by her and by her predecessor Clerk/Buyer for many years, without dispute until now. Typing is related to primary job duties specified in the Clerk/Buyer job description such as bookkeeping, record maintenance and the preparation and processing of purchase orders, and it falls within the "other duties as required by supervision" specification on the 1979 job description that was shared with Grievant at the time she was originally selected for the position in 1979.

For all those reasons, and because the amount of typing work assigned to Grievant has been reasonable, the grievance should be denied.

DISCUSSION

Contrary to the City's contentions about a clear and unqualified right to assign work, the City's right "to assign employees in positions within the City" is specified in Art. 3(C) is expressly made "subject to existing practices, terms of this Agreement; and subject to Civil Service procedure." In the Arbitrator's view, the case turns on whether Behling's exercise of that right has violated an "existing practice" within the meaning of that provision. For, the Arbitrator is

persuaded that the assignments at issue here do not violate any other term of the Agreement and do not violate the Civil Service procedure.

The way in which management has chosen over time to exercise its Art 3(C) right to assign does not constitute a "working condition" protected from unilateral change by Art. 20, Sec. 4. "A general 'catch-all' provision, designed to freeze general working conditions . . . has been construed to refer to such things as employee benefits, and not to restrict basic management functions absent clear indication of such intent." Elkouri and Elkouri, How Arbitration Works, 450 (4 ed., BNA 1985) citing, Borden Co., 39 LA 1020, 1023 (Morvant, 1962). There is no clear indication in this case that the parties mutually intended Art. 20 Sec. 4 to restrict basic management functions.

A comparison of Grievant's testimony describing her overall job duties with Grievant's current job description makes it clear that the description is not intended to enumerate each of the duties of the classification. The interpretative guidance provided in Sec. 4(d) of Civil Service Rule III conveys a the same idea. The examples of duties in Grievant's current job description include references to record keeping, purchasing and communications duties. The typing work at issue here is closely enough related to those aspects of Grievant's job to render it "of similar kind and quality" to the listed examples in the description. For those reasons, the Arbitrator is persuaded that requiring Grievant to perform the typing in question does not involve the performance of work outside of her classification within the meaning of Art. 20, Sec. 4, nor is it inconsistent with Sec. 4(d) of Civil Service Rule III.

The Arbitrator turns now to the question of whether Behling's assignments have violated an "existing practice" limiting the City's right to assign typing work to the Clerk/Buyer position. The Union bears the burden of proving the existence of such a practice. Moreover, to be binding, a past practice must be shown to be sufficiently longstanding, uniform and unequivocal to reflect a mutual understanding that things will continue to be handled in the same way in the future unless there is a material change in the circumstances giving rise to the practice. The right to assign is a fundamental management right. The fact that management may have exercised that right in a certain way, even for a long period of time, is not enough to constitute an Art. 3(C) existing practice absent a further showing that the practice was sufficiently unequivocal and mutually known that it is fair to conclude that both the Union and the City were in agreement that it would continue to be exercised only in that way in the future.

In essence, Union asserts that Behling's assignments violate an existing past practice because they involve: all rather than only some of the Department's typing; more than the hour a month of typing work that Grievant had been asked to do by previous Superintendents; and mandatory rather than voluntary performance of typing work for the Superintendent.

The Union has shown that there were no specific references to typing skills or duties in the 1979 job description or the discussions associated with Grievant's 1979 transfer to the position. It

has also shown that before Behling became Superintendent, Grievant had been given some but never all of the Superintendent's typing, with the balance being done at City Hall. The Arbitrator also finds that Behling was giving Grievant somewhat more typing in absolute terms than his predecessors had given her, as might be expected given his assignment of that work to her exclusively.

The Union has also presented Grievant's testimony that Schaper and Dillon (and indeed Behling himself), understood that Grievant was not required to do their typing because typing was not specified in her job description and that her willingness to do limited typing for them when it could not be done at City Hall was on a personal favor basis only and not a mandatory part of her job duties. Boers and Shaper both deny that there was any special understanding of the sort referred to by Grievant and assert, instead, that they considered doing typing work assigned by the Superintendent to be a part of the Grievant's mandatory job duties. In light of Grievant's acknowledgment that she could not recall what understanding if any she had with Boers because she had worked for him so long ago, Boers' testimony regarding the time Grievant worked for him stands un rebutted. Similarly, Boers' testimony about the typing he had previously assigned to Haupt also stands un rebutted. Unfortunately, Dillon was not able to testify.

The Union has not, however, presented any written acknowledgement of what Grievant said she believed Dillon and Schaper understood. Nor has the Grievant in her testimony claimed that either of them ever: orally agreed that Grievant need not do typing work if she did not want to; or assured Grievant that she would never have to do more than an hour of typing in a month for them; or assured them that they would always have some of their typing done elsewhere than by Grievant. Rather, the Union would have the understanding as to voluntariness of the work inferred: from comments Grievant attributes to Dillon and Schaper such as "do me a favor" or "would you do this [typing] for me as a favor"; from the fact that Dillon and Schaper never told her that she would be subject to discipline if she refused to do the typing they wanted her to do for them; and from the fact that Dillon and Schaper never disagreed with Grievant when she asserted as she stated she often did, responses such as, "It's not in my job description but I'll do it as a favor." The Union would have the mutual understanding as to amount of the work inferred from the amount of work she did for previous Superintendents. The Union would have the mutual understanding that Grievant would only be asked to do that portion of the Superintendent's typing that could not be performed at City Hall inferred from the fact that each of the prior Superintendents had sent a portion of their typing work to City Hall, together with Grievant's uncorroborated impression--supported somewhat by her reference to a set of forms supplied to Dillon by Sandy Thompson--that it was City Hall workload rather than any other consideration that determined what typing work Behling's predecessors had assigned to her.

The inferences urged by the Union must be assessed in the context of the undisputed fact that Grievant was given typing by each of the Superintendents she has worked for and that she has always performed that work without grieving about it until from March of 1979 until November, 1988. That fact makes it insignificant that Grievant was told before November of 1988 that she

would be subject to discipline if she refused to perform typing work for the Superintendent. Since Grievant always did all of the typing work the various Superintendents gave her to do there would have been no occasion for them to have uttered such a warning. Only when Grievant resisted doing the typing in the November, 1988 discussions with Behling did a Superintendent need to make such a statement in order to cause Grievant to perform typing work.

Upon consideration of the foregoing and the record as a whole, the Arbitrator concludes for reasons noted below that the Union has not sustained its burden of showing that there was a mutually known and accepted practice requiring that some or most of the Department's typing must be given to other than the Clerk/Buyer limiting the typing that could be given to the Clerk/Buyer to one hour or less of such work a month, and/or making typing for the Superintendent voluntary rather than mandatory on the Clerk/Buyer's part.

Here Behling's predecessors saw fit to have some documents typed at City Hall rather than by the Clerk/Buyer in the Highway department. Boers and Schaper testified that they did so only for "confidential" documents. In addition, Schaper testified that he also had some typing done at City Hall during Grievant's absences and some bid specifications done on the City Clerk's word processing equipment to facilitate redrafting. Grievant's understanding was that she was only being asked to do overflow work the City Clerk's office could not handle, but there is no evidence as to the kind or amount of work performed at City Hall for prior Superintendents by which to resolve that conflict. Because it was Boers and Schaper who were deciding what to have typed where, the Arbitrator finds their description of the basis on which those decisions were made to be more reliable than Grievant's, at best, second-hand understanding in that regard.

More importantly, while there was always some splitting of the typing work between the Clerk/Buyer and clericals outside the Department, the evidence does not establish the requisite mutual understanding between the parties that such must always remain the case. There was no instance of record in which Grievant turned down typing given her by a Superintendent (or forwarded it to City Hall herself) because she thought City Hall would be able to do it. Rather, it appears to have been a matter of supervisory discretion as to which documents they felt comfortable having typed by the Clerk/Buyer and which they did not. Behling's preference, unlike his predecessors', was to have the Highway Department be self-sufficient. He was apparently not concerned about confidentiality of documents. He preferred not to have any of his typing done outside the department. His decision to have all of his typing done by the Clerk/Buyer rather than only some of it appears to have been the same sort of discretion exercised by his predecessors, though with varying outcomes, just as Shaper's typing allocation criteria may have differed somewhat from Boers's. In the Arbitrator's opinion, these differences do not constitute changes in existing practices within the meaning of Art. 3(C), but rather the exercise of managerial discretion reserved to the City in that paragraph and in Art. 3 generally.

The Arbitrator is also not persuaded that an "existing practice" has been shown to exist regarding the amount of work Grievant was to be given in any period of time. Grievant does not

claim that any of her supervisors ever assured her that she would never be asked to do more than an hour of typing a month. She asserts only that seldom if ever was she asked to do more than that in a given month. Such testimony simply does not reflect the sort of unequivocal conduct that would reliably reflect a mutual understanding that there was a specific typing limit beyond which Grievant could not be asked to go. For example, there is not a single instance of record in which Grievant was relieved of a typing project because she had reached her limit for in a given month. Rather, it appears that the amount of typing Grievant did was determined by the amount the Superintendent chose to have her do, i.e., again an exercise of managerial discretion rather than an adherence to an unspoken but somehow mutually understood limit.

The question of Grievant's performing the work as a favor rather than as a mandatory assignment involves both the Union's reliance on the absence of references to typing in the job descriptions and transfer selection discussions and the Union's reliance on conversations she had with Dillon and Schaper.

The Union's reliance on the absence of typing from the 1979 and current job descriptions and the 1979 discussions is not persuasive. As noted above, the Civil Service Rules and Regulations recognize in Sec. 4(d) of Rule III, job descriptions are not all inclusive. Moreover, as noted, the Arbitrator has found that the typing assignments involved herein are closely enough related to other duties listed on Grievant's current job description to be "of similar kind and quality." The same is true with respect to the duties listed on the 1979 description, not to mention the express notice that paragraph 16 gave that there were other duties besides those listed in 1-15 that the Clerk/Buyer would also be required to perform "Other miscellaneous duties as directed by supervision." Specifically, the typing work involved here is closely enough related to other aspects of Grievant's job to render it "of a similar kind and quality" to various of the other clerical functions referenced in the 1979 job description, including: internal and external communications involving telephone, radio and in person contacts; purchase order preparation and processing; maintaining inventory records; and preparing and forwarding charges to other departments for services and supplies. Furthermore, Grievant does not claim that she was affirmatively assured in the discussions leading to her transfer that she would not be doing any typing. Had that been a matter of significant concern to Grievant at that time, she could have inquired whether the incumbent was doing any typing for the Superintendent. She would presumably have learned that Haupt was the only clerical employe in the Highway Department; that he had the only Department typewriter in his office; and that he was, in fact, doing some typing for Boers every week. For those reasons, the absence of any mention of typing duties on the job description documents and in the discussions does not foreclose the City from continuing to assign typing to Grievant as it has in this case.

The conversations Grievant recalls having with Dillon and Schaper do not reflect an unequivocal understanding on the Superintendents' part that Grievant was free to refuse to do typing if she preferred not to continue to do it. Grievant does not describe them as assuring her she would never be required to do any typing she was not willing to volunteer for. Rather, she

merely describes them as using words such as "do me a favor and type this." Such expressions are equivocal. They could indicate that the Superintendent understood that he was without authority to require Grievant to type for him. On the other hand, they could indicate that the Superintendent was simply being polite and easy-going in the manner in which he made the typing assignments. Similarly, Grievant recalls accepting work with a frequent reminder that she considered it to be outside the duties listed in her job description. Assuming the Superintendents never disputed that point with Grievant, that reticence on the Superintendent's part is also equivocal. It could be that the Superintendent agreed with Grievant that typing duties were outside those listed on her job description and agreed with the further but unstated notion that the City therefore could not require Grievant to perform typing for the superintendent. On the other hand, it could just as well be that the Superintendent saw no reason to make an issue about any of that since Grievant invariably did all the typing work the Superintendents gave her to do. As noted, there is no evidence of instance any in which Grievant turned down typing work given her by Dillon or Schaper or Boers. The conversations Grievant recalls are simply not the sort of unequivocal conduct upon which the Arbitrator can reliably conclude that the Dillon or Shaper (and hence the City) shared an understanding that the City could not require Grievant to do typing for the Superintendent. Hence, the Union has not shown that there was an Art. 3(C) "existing practice" to the effect that Grievant was free to turn down typing work.

For those reasons, the Arbitrator concludes that the City acted within its Art. 3(C) rights when it required Grievant to perform typing duties as it has giving rise to this grievance. It follows that by requiring Grievant to perform the typing duties at issue the City did not require Grievant to violate the Agreement and did not itself violate Art. 1, Sec. 6.

Finally, in view of the operations-related and nondiscriminatory reasons Behling gave for that decision in his testimony and the absence of other evidence of an intent to discriminate against Grievant or to weaken the Union, the Arbitrator finds no basis for concluding that Behling's decision in that regard was violative of the last sentence of Art. 3. By so concluding, the Arbitrator is not making any judgments about the wisdom of Behling's decision to assign Grievant typing as he has, or about the effectiveness of Behling's human relations techniques in implementing that decision. Rather, the Arbitrator is only deciding that Behling's typing assignments to Grievant did not exceed the rights reserved to the City in the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The City did not violate the Agreement when it required Grievant to perform typing duties.
2. The grievance is denied.

Dated at Shorewood, Wisconsin this 31st day of May, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator