BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PIERCE COUNTY HIGHWAY EMPLOYEES, LOCAL 556, AFSCME	Case 91 No. 48373 MA-7582
and	
PIERCE COUNTY	

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Richard Ricci, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. The undersigned conducted grievance mediation on February 25, 1993, at which time the grievance was tentatively settled. Afterwards, the tentative settlement was not ratified by the County. Subsequently, a hearing was held on March 23, 1994, in Ellsworth, Wisconsin. The hearing was not transcribed. The parties filed briefs which were received by April 29, 1994. Based on the entire record, the undersigned issues the following Award.

ISSUE

There was no stipulated issue. From a review of the record and the briefs, the undersigned has framed the issue as follows:

> When a seasonal employe fills a position other than the seasonal employe classification, is he entitled to the contractual rate for that position? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1991-1993 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 7 - GENERAL PROVISIONS

. . .

> Section 4. Seasonal employees may be hired for the months of May through, and including, October. Seasonal employees shall receive the amount set forth in Appendix A for that classification and shall be

eligible for overtime. They shall receive no fringe benefits, and they shall have no recourse to the grievance procedure in the event of disciplinary action. These employees may apply for vacancies upon the exhaustion of the job posting process by permanent employees, and if hired as permanent employees shall be entitled to retroactive seniority for their periods of work with the County.

. . .

ARTICLE 8 - COMPENSATION

Section 1. Employees covered by this Agreement shall be compensated according to Appendix "A" attached hereto and made a part hereof.

. . .

APPENDIX A - COMPENSATION

Vacations

Section 1. All permanent and regular seasonal employees shall be granted paid vacations on the following terms and conditions:

. . .

e. Regular seasonal employees' vacation benefits shall be allowed for accumulated months of service from year to year to qualify the employee for the same vacation benefits earned by the permanent employee;
f. All employees shall receive their classified rate of pay for vacation time.

. . .

Holidays

Section 1. All regular employees shall receive the following holidays with pay: New Year's Day, President's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, and the employee's birthday. (The employee's birthday holiday shall be taken as a floating holiday during the calendar year in which the birthday occurs.)

Section 2. Seasonal employees shall be entitled to paid holidays occurring during the length of the season they are employed by the Highway Department.

Section 3. All new permanent employees and all new seasonal employees shall serve one hundred and thirty (130) work days from the initial date of employment to qualify for the paid holiday benefit. The probationary period for the seasonal employees may extend over a two (2) year period.

. . .

Classification and Pay Plan

Section 1. All employees shall be paid their classified rate of pay at all times, except when working in a higher classification, for which they shall receive the higher rate of pay.

. . .

Section 4. Effective 1-1-91 through 12-31-93 the present classification of wage rates for all employees covered by this Agreement shall be set forth as follows:

Classification of Jobs	Hourly	Overtime	Date
. . .			
IV Temporary Foreman, Loader and Tractor Operator-2 yards and over, Equipment mover, Cat & Scraper Operator , Grader Operator, Hot-Mix Plant Operator, Traveling Parts Man, Paver Operator, Sandblaster, Screwman, Rollerman, Yard Man, Truck Spotter, Crusher Helper, Bridge Crewman, Janitor I, Sweeper	$ 11.33	$ 17.00	1-1-91
	11.44	17.16	7-1-91
	11.78	17.67	1-1-92
	11.90	17.85	7-1-92
	12.26	18.39	1-1-93
	12.38	18.57	7-1-93
. . .			
VIII Seasonal Employees	$ 7.50	$ 11.25	

BACKGROUND

The County has employed seasonal employes during the summer months since at least 1990. Seasonal employes are included in the bargaining unit represented by the Union. The record indicates that on several occasions in 1990 and 1991, the Employer paid seasonal employes at the seasonal wage rate regardless of the type of work they performed. Thus, the Employer did not pay seasonal employes a higher wage rate for working in a higher classification. The parties stipulated at the hearing that the Union was not aware of the foregoing and never agreed to same.

In 1992, the parties' representatives (County Labor Counsel Richard Ricci and AFSCME Council 40 Staff Representative Guido Cecchini) exchanged a series of letters concerning the usage of seasonal employes for the upcoming summer. One letter dated March 20, 1992, from Ricci to Cecchini provided in pertinent part:

> On the basis of this understanding, the County will be following its normal policy of hiring seasonal employees pursuant to Article 7, Section 4 of the contract which employees will not be entitled to fringe benefits and access to the grievance procedure so long as they work only for the months of May through October as per the contract.
>
> If this understanding is not correct, please advise immediately as the County wishes to commence the hiring process for seasonal employees very soon.

Ricci wrote another letter dated March 27, 1992, to Cecchini regarding the same subject matter. It provided in pertinent part:

> Again, we wish no confusion or potential issues coming up with respect to the utilization of seasonal employees for this upcoming year and would request that you contact Kim and discuss this with him and then respond to this letter at your earliest convenience.

On May 5, 1992, Cecchini responded to Ricci's letters as follows:

Re: Seasonal Employees Issue

Dear Mr. Ricci:

During the negotiations for the Labor Agreement encompassing 1992, it was agreed that Article 7, Section 4 would be amended to extend the seasonal period from 'May through, and including, September,' to 'May through, and including, October.'

The plain and simple purpose for the change is to allow the county to employ seasonal employees for one additional month. Period. Nothing more. There is no other unexpressed intended change.

The contents of the second paragraph of Article 7, Section 4 was not changed and continues as previously stated. This means that seasonal employees shall receive such pay and overtime as provided for in the Agreement excluding fringe benefits, and shall have no recourse to the grievance procedure in the event of disciplinary action.

Obviously, there is a distinction between 'New Employee' as contemplated in Article 3, Section 1 and 'Seasonal Employees' as contemplated in Article 7, Section 4. 'New Employees' have recourse to the grievance procedure upon completion of the 130 day probationary period. 'Seasonal Employees' have no such right under Article 7, Section 4.

Let's get on with it and sign the Agreement.
(Emphasis in original)

FACTS

In the summer of 1992, the County posted for a replacement for the position of screwman. No one in the bargaining unit posted for the position. The County filled the vacant screwman position with a seasonal employe, Dan LaBeck. LaBeck worked in the screwman position until he was replaced by a regular permanent employe. While LaBeck worked as a screwman he was paid at the seasonal employe classification rate (which in 1992 was $7.50 per hour). He was not paid at the screwman rate (which in July, 1992, was $11.90 per hour). The Union filed a grievance contending that LaBeck should have been paid at the screwman rate rather than the seasonal employe rate. The grievance was not resolved and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

The Union contends at the outset that contrary to the County's claim it is not estopped from pursuing this grievance. According to the Union none of the letters cited above between Ricci and Cecchini are relevant to this matter except the statement in Cecchini's letter that seasonal employes will "receive such pay and overtime as provided for in the agreement." The Union asserts that the present dispute is over what constitutes such pay and overtime as provided for in the agreement. Turning to that point, it is the Union's position that seasonal employes and students who work out of their classification are contractually entitled to be paid at the higher rate. To support this premise, the Union relies on the language found in Appendix A (Classification and Pay Plan) Section 1. According to the Union that language is clear and unambiguous where it refers to "all employees." The Union reads the phrase "all employees" as being just that--all employes. The Union submits that since seasonals are not specifically excluded from this provision, they are entitled to be paid pursuant to same. To support this contention the Union notes that the parties carved out exceptions for seasonals elsewhere in the agreement. Specifically, it cites the Vacation and Holiday provisions of Appendix A wherein the seasonals are mentioned by name. The Union argues these provisions show that the parties knew how to carve exceptions for different groups of employes, particularly seasonals. The Union asserts that if the parties had wanted to exclude seasonals from Appendix A (Classification and Pay Plan) Section 1, they knew how to do so. The Union argues that since seasonals and students are not excluded from that provision, they are not excluded from its coverage. With regard to the provision which the County relies on (Article 7, Section 4) the Union submits that reliance on that provision here is misplaced because, in the Union's view, that section is simply irrelevant to this case. As a remedy for the alleged contractual violation the Union asks the arbitrator to uphold the grievance and make whole all employes (seasonals and students) who were paid incorrectly.

The County argues at the outset that the Union is estopped from bringing this grievance against the County based on assurances the Union made to the County in 1992 that no issues existed regarding seasonal employes' pay and status. To support this premise, the County notes that in the spring of 1992, the parties corresponded with each other regarding seasonal employes. According to the County, that correspondence establishes that the parties understood there would be no changes in the handling of seasonal employes in 1992 from previous years. The County asserts it then hired seasonal employes for the summer of 1992 and utilized them as it had in the past, only to be faced with this grievance involving the utilization of seasonal employes. The County argues that what happened here was that the Union filed the instant grievance after it gave the County assurances that there were no outstanding issues concerning seasonal employes. The County argues the Union should be estopped from doing so. Next, with regards to the merits, it is the County's position that seasonal employes and students who fill in at other classifications are not entitled to be paid at the higher rate. In support of this view it relies exclusively on Article 7, Section 4. According to the County that provision is clear and unambiguous in providing that seasonal employes are only entitled to be paid at

the "seasonal employee" rate of pay--no matter what position the seasonal employe is assigned. It therefore contends that the grievant, a seasonal employe, was not entitled to the screwman wage rate even though he filled in at that position. The County argues that to find otherwise would render the second sentence of Article 7, Section 4 meaningless. The County also relies on the arbitral principle that specific language controls over more general language. According to the County the more specific language with respect to seasonal employes is Article 7, Section 4, while Appendix A (Classification and Pay Plan) Section 1 is general in nature. Finally, the County argues in the alternative that if the arbitrator finds the applicable language to be ambiguous, he should look to the Employer's prior practice. The County notes in this regard that on several occasions in 1990 and 1991 it placed seasonal employes in higher classifications and paid them the seasonal rate--not the higher rate. The County argues that the Union should have been aware of this practice. The Employer therefore contends the grievant was not entitled to the screwman rate of pay for working in that position, and it requests that the grievance be denied.

DISCUSSION

Attention is focused first on the County's contention that the Union is estopped from bringing this grievance. According to the County, the Union made assurances to the County in correspondence in 1992 that there were no outstanding issues concerning seasonal employes. Since this contention is based exclusively on the 1992 correspondence which was exchanged between the parties relative to the seasonal employes, it follows that a review of that correspondence is in order. The record contains two letters from Cecchini to Ricci which are dated February 20 and May 5, 1992, and are identified respectively as Joint Exhibits 3 and 4. If Cecchini made any assurances relative to the specific topic and/or issue involved here, it stands to reason that such assurances would be contained in one or both of those letters. The County only cited one of those letters in their brief, namely the one dated May 5, 1992. By implication then, the letter dated February 20, 1992, is deemed irrelevant to this discussion. A review of the May 5, 1992 letter convinces the undersigned that nothing therein assures the County that a grievance will not be filed on the specific topic and/or issue involved here (namely whether seasonal employes who work in a higher classification are entitled to be paid at the higher rate). In my view, that specific topic and/or issue is not mentioned in the letter. That being so, it is not reasonable to read tacit or actual assurances into a letter on a subject that was not mentioned. Accordingly, it is held that the Union is not estopped from bringing the instance grievance.

Having so found, the focus now turns to the merits. As previously noted, at issue here is whether seasonal employes who work in a higher paying classification are entitled to be paid at the higher rate. The Union contends that they are while the County disputes this contention.

What happened here is that the County had the grievant, a seasonal employe, work as the screwman for an unspecified period of time. While the seasonal employe worked as the screwman he was paid the seasonal employe rate, not the screwman rate. The County's paying the grievant at the seasonal employe rate for working in the higher paying classification was consistent with what it had done on several occasions the two prior years (1990 and 1991). The parties stipulated at the hearing though that the Union was not aware of same and never agreed to it. In light of the Union's lack of knowledge, the Employer's prior practice does not constitute a binding past practice which can be used to help interpret the labor agreement. Consequently, the Employer's prior practice will not be utilized to decide this case.

In deciding this contractual dispute the undersigned will look at the two provisions relied upon by the parties, namely Article 7, Section 4 and Appendix A (Classification and Pay Plan) Section 1. The County relies on the former while the Union relies on the latter. In the discussion which follows, I will review both contractual provisions and decide which one controls here.

Article 7, Section 4 pertains to seasonal employes. My analysis of that section begins with the following overview. The first sentence details when seasonal employes may work, namely May through October. The second sentence specifies that "seasonal employes shall receive the amount set forth in Appendix A for that classification and shall be eligible for overtime." Appendix A contains, among other things, a wage schedule. The third sentence provides that seasonal employes shall receive no fringe benefits and do not have recourse to the grievance procedure if disciplined. The fourth sentence provides that seasonal employes can apply for vacancies after permanent employes do so.

The second sentence is reviewed further below. As previously noted, that sentence provides that "seasonal employes shall receive the amount set forth in Appendix A for that classification . . ." I read this sentence to mean that seasonal employes are to be paid the amount set forth on the wage schedule. This interpretation is not particularly significant though because seasonal employes are not the only employes who are paid the amount set forth on the wage schedule. All employes are paid the amount set forth on the wage schedule. The critical question is whether seasonal employes can ever be paid at an hourly rate higher than the seasonal employe rate. Specifically, can they be paid for working out-of-class? The County contends they cannot. In their view, seasonal employes are to be paid at the seasonal employe rate regardless of the work or position they are assigned. However, I do not read the second sentence to specifically state that. It is noted in this regard that the language does not say that seasonals are not to be paid for working out-of-class. That matter is simply not addressed in this sentence. As a result, I read the second sentence of Article 7, Section 4 to be silent on whether seasonal employes can be paid for working out-of-class.

Given this finding, the Employer poses a rhetorical question of why the second sentence is included in that paragraph. In all honesty, it is a mystery to me. In my view this sentence adds little substance to the matter of seasonal employe pay because the seasonal employe pay rate is listed in the pay schedule. Thus, this sentence does nothing more than state the obvious concerning seasonal employe pay. The Employer's question about why something is included in the agreement also applies to Article 8, Section 1. That section provides that: "employees covered by this Agreement shall be compensated according to Appendix "A" attached hereto and made a part hereof." For all intents and purposes, this provision says the same thing as the second sentence of Article 7, Section 4.

Attention is now turned to Appendix A (Classification and Pay Plan) Section 1. That section contains what is commonly referred to as the working out-of-class provision. It provides as follows: "all employees shall be paid their classified rate of pay at all times, except when working in a higher classification, for which they shall receive the higher rate of pay." This clause states as a general proposition that all employes are to be paid at their classified rate at all times. It then goes on to identify one exception to this general proposition which is that employes who work in a higher (paying) classification will be paid at the higher rate. On its face, this section does not contain any limitations, exemptions or exceptions. Instead, it says it applies to "all employees." A general rule of contract interpretation is that an exemption or exception will not be read into a

contract where none has been specifically provided. In light thereof, the presumption adopted by the undersigned is that when the language in Appendix A (Classification and Pay Plan) Section 1 says that "all employees" will be paid for working out-of-class, this includes seasonal employes.

This presumption will now be tested to try to determine if the non-exclusion of seasonal employes from the working out-of-class provision was intentional or simply an oversight. A review of the labor agreement finds several specific references to seasonal employes. These references are found elsewhere in Appendix A, namely the Vacation and Holiday provisions. Seasonal employes are mentioned by name in both provisions. In Section 1 of the Vacation clause it refers to "all permanent and regular seasonal employees . . ." Then in Section 1(e) of that clause it identifies the vacation benefits that "regular seasonal employees" receive. Finally in Section 1(f) of that clause it states that "all employees" shall be paid "their classified rate of pay for vacation time." In Section 1 of the Holidays clause it identifies the holidays that "all regular employees shall receive . . ." Then in Section 2 of that clause it identifies the holidays that "seasonal employees shall be entitled to . . ." Finally, in Section 3 of that clause it indicates how long "all new permanent employees and all new seasonal employees" have to work in order to qualify for the paid holiday benefit. The reference to seasonal employes in these provisions indicate that the parties knew how to carve out exceptions for the seasonal employes in those areas. Had the parties wanted to carve out another exception for seasonal employes in terms of working out of class (specifically excluding them from that provision), they certainly knew how to do it. However, they did not do so. This buttresses the presumption adopted above that seasonal employes are not excluded from the coverage of the working out-of-class provision.

It is therefore held that seasonal employes who work in a higher paying classification are entitled to be paid at the higher rate. That did not happen here so the Employer violated the agreement, specifically the working out-of-class provision. In order to remedy this contractual breach the Employer shall make the grievant whole.

Based on the foregoing and the record as a whole, the undersigned makes the following

AWARD

That when a seasonal employe fills a position other than the seasonal employe classification, he is entitled to the contractual rate for that position. That did not happen here so the Employer violated the agreement. In order to remedy this contractual breach the Employer is directed to make the grievant whole.

Dated at Madison, Wisconsin, this 28th day of July, 1994.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

mb
0728RJ91.A