

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF NEW BERLIN (WATER DEPARTMENT)

and

NEW BERLIN PUBLIC EMPLOYEES UNION,
LOCAL 2676, AFSCME, AFL-CIO

Case 83
No. 52043
MA-8823

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing for the Union.

Mr. Lowell E. Clapp, Director of Human Resources, City of New Berlin, appearing for
the City.

ARBITRATION AWARD

New Berlin Public Employees Union, Local 2676, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of New Berlin, herein the City, concurred with said request, and the undersigned was designated as the arbitrator. Hearing was held in New Berlin, Wisconsin, on May 4, 1995. There was no transcript made of the hearing. The parties completed the filing of post-hearing briefs on August 3, 1995.

ISSUES:

The parties stipulated to the following issues:

Did the City violate the collective bargaining agreement when it refused to reclassify the grievant based upon her added responsibilities in the position of Water Utility Clerk? If so, what is the appropriate remedy?

BACKGROUND:

Elaine Lackowski, the grievant herein, has been employed as a Clerk Typist in the City's Water Utility since October of 1991. In December of 1991, Lackowski's supervisor, Terry Johnson, left the employment of the City. Prior to Johnson's replacement being hired, Lackowski assumed additional responsibilities, which she continues to perform as a result of her current supervisor, Tom Krumplitsch, now performing much of his work in the field, rather than in the office like his predecessor Johnson. Lackowski has now become the primary operator of the two-way radio communications system in the Water Utility, by which system information is transmitted from the office to the crews in the field. Additionally, Lackowski assumed additional duties in 1992, when another employe left the Water Utility and was not replaced.

In a letter to the Union steward on August 5, 1993, Lackowski listed nine changes in her duties as a Clerk Typist, which changes she believed warranted her classification being changed to a Utility Clerk Dispatcher in wage range 7. Such a reclassification to the higher range would give Lackowski an increase in her wage rate. Said request for a reclassification was supported by the former Utility superintendent in a written statement. In early 1994, the City received a report from an independent consulting firm with respect to said firm's analysis of and operations in the Utility office positions, including Lackowski's. Said report included a new job description for Lackowski's position, which contained the additional duties referred to in her letter dated August 5, 1993.

Negotiations for a successor contract to replace the 1992-93 contract were commenced by the parties in late 1993. Included in the Union's proposed changes was a proposal to reclassify Lackowski's position from range 5 to range 7, which range carries a higher wage rate. During a negotiating session on April 18, 1994, the Union withdrew its proposal to reclassify Lackowski's position. The parties reached a tentative agreement on a 1994-95 contract in May of 1994, and the Union ratified the settlement on May 25, 1994. The City Council ratified the settlement on July 12, 1994.

In a letter to the City dated August 10, 1994, the Union asked the City to meet and bargain over the impact of the additional duties listed therein being performed by Lackowski. The listed duties were essentially identical to the duties listed in Lackowski's letter dated August 5, 1993. The City met with the Union and rejected the request to reclassify Lackowski's position on the basis of additional duties. On September 21, 1994, Lackowski filed a grievance over the City's refusal to reclassify her position. The City denied the grievance.

POSITION OF THE UNION:

There is clear and compelling evidence that there have been significant changes in the duties and responsibilities of Lackowski's position. She should be reclassified to a Clerk III

classification, pay range 7 with an effective date back to the date on which she assumed those duties, and she should be made whole for all contractual wages and benefits which she may have lost as a result of the City's failure to reclassify her.

The Union did not waive its right to file the instant grievance by withdrawing, during the negotiations resulting in the current contract, its proposal to reclassify Lackowski's position. During a discussion of the Union's proposal, the Union was made aware of a number of retirements from the Utility as well as other changes, which resulted in a possible temporary shift of responsibilities for bargaining unit employees. On April 18, 1994, the Union withdrew its proposal with the understanding that a period of transition might be necessary before employee responsibilities were more clearly defined and fixed. The Union never indicated that the withdrawal was unconditional, as the City now argues. A mediated settlement was reached on May 18, 1994, and was ratified by the Union on May 25, 1994. The Union requested the reclassification three months after withdrawing its proposal during negotiations.

Furthermore, the City has never provided an updated job description to the grievant or the Union, as required by Section 6.07. Thus, the Union believes the grievance is timely, contrary to the City's assertions, and should be sustained.

POSITION OF THE CITY:

The grievance filed on September 21, 1994, was not timely filed and must be dismissed for lack of arbitrability. Lackowski's letter to her Union steward in 1993, shows that she was aware at that time that changes in her job were occurring. Consequently, a grievance filed on September 21, 1994, is not timely. Further, the filing date is more than thirty days after the reclassification proposal was withdrawn and/or after the contract was ratified in either late June or early July of 1994. There is nothing in the record to support the Union's claim that implicit in the terms of the withdrawal of the reclassification proposal was an understanding that the matter might need to be resolved at some point when responsibilities within the department became more fixed. In fact, discussion of the reclassification proposal was very limited.

The Union is now seeking to obtain a rate increase through arbitration after it was unsuccessful in obtaining the increase in bargaining. For these reasons, the City contends the grievance should be dismissed.

The City also believes that the Union is guilty of laches. There was unreasonable delay in filing the grievance. The City had no knowledge during the contract negotiations that the Union would reassert its claim to reclassification on the job in question. Finally, the City would be prejudiced if the Union prevails in this grievance. If the Union had pursued reclassification prior to reaching agreement on and ratifying the 1994-95 contract, then the City would have had the opportunity to negotiate other changes to the listing of classifications to insure internal equity and

cost containment provisions.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 - Definition and Procedure A grievance shall be defined as any matter concerning the interpretation, application, or enforcement of the terms of this Agreement. Any grievance that may arise between the Employer and an employee, or the Employer and the Union, shall be subject to the following procedure:

Step 1 The aggrieved employee, accompanied by a representative of the Union, if he/she so desires, shall orally submit the matter to the employee's immediate supervisor within thirty (30) calendar days of the date the employee knew or should have known of the event giving rise to the grievance. Such oral submission shall be supported by a writing briefly summarizing the facts and referring to the provision of the Agreement which is relied upon. The immediate supervisor shall attempt to make a mutually satisfactory settlement of the matter, and shall respond to the aggrieved employee and the Union in writing within seven (7) calendar days.

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ARTICLE VI - PROMOTIONS, TRANSFERS AND NEW POSITIONS

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6.07 - Rate for New or Changed Positions When a new position is created or the duties or responsibilities of an existing position are changed significantly, the Employer shall prepare a job description and establish the appropriate wage or salary. If the Union disagrees with the wage or salary rate so established, it may make a grievance as to the rate and such grievance shall be handled in accordance with Article IV herein.

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DISCUSSION:

The basic background facts are not in dispute. However, the City argues that if the Arbitrator now finds that her reclassification was warranted, it will have been precluded from addressing any internal inequities it believes have been created. The undersigned finds this contention unpersuasive. The City is always at liberty to request the Union to agree to reopen the contract, during its term, to bargain over things like internal pay inequities or any other matter it deems so significant that it cannot wait until negotiations commence for a successor agreement. Clearly, then, that is not a reason to deny the grievance.

With regard to the City's argument that the grievance should be dismissed as untimely, or on a theory of laches, the undersigned thinks it is significant that the City had never, up to the date of hearing in this matter, prepared and presented the grievant or Union a revised job description reflecting the changed duties and responsibilities as required by Article 6.07. Clearly, the City cannot be permitted to render the language unenforceable by not fulfilling a mandatory command of the contract. Article 6.07 states:

When . . . the duties or responsibilities of an existing position are changed significantly, the Employer shall prepare a job description and establish the appropriate wage or salary. . . .

Thus, to ignore that changes had taken place and not update Lackowski's position description, if permitted, would render the language of Article 6.07 meaningless.

Making matters worse, in this case the City had received a new position description that had been prepared by an outside consultant hired by the City to ". . . analyze operations in the Utilities (sic) office, and review and revise (sic) if necessary (sic) any job descriptions. . . ." The City had these final revised job descriptions in its position not later than February 24, 1994 (Union Exhibit #5). No explanation has been proffered for the City not implementing the consultant's recommendation and adopting the new position description. During discussions on the grievance, "the City acknowledged that activities within position descriptions have changed over time," but never explained why the job descriptions had not been revised to reflect those changes. Rather, the City stated it did not believe the duties of Lackowski's position had changed "so significantly that the primary basis for its existence is undeniably altered." That, clearly, is not a standard established anywhere in the contract for determining when a new position description needs to be prepared or when a new wage rate is warranted.

In summary, the facts of this case are that the City was aware Lackowski's duties had changed, was in possession of a suggested revised job description for her position prepared by an outside consultant it had employed. However, it never took any action to adopt a revised job

description for Lackowski's position.

Thus, to deny the grievance on a procedural basis confronted with this contract language, and these facts would be to countenance the City's disregard of its contractual responsibility to act, and preclude challenges to similar actions of the City, should they occur, in the future. Clearly, that would be an inappropriate result.

Similarly, to grant the City's claim that the Union is guilty of laches would be equally inappropriate when the City does not come forward with clean hands. Had the City fulfilled its responsibilities under the contract and the Union then sat on its hands, the claim of laches would have been persuasive. Those, however, are not the facts in this case.

Turning then to the merits of the dispute, the Union addressed evidence to show that Lackowski's job duties had changed, and the level of her responsibility increased. These facts were not disputed at the hearing. Rather, the City merely argued that those changes in duties and increased responsibility did not warrant reclassification of the position to a range 7.

The undersigned is persuaded the Union is correct in its assertion that Lackowski's Utility Clerk Typist position duties and responsibilities place it on at least a par with the Streets Division Clerk Dispatcher. When the Utility Clerk Typist job description, prepared by the consultant, 1/ is matched with the then-existing job description for Streets Division Clerk Dispatcher, that conclusion seems obvious.

Position: STREETS DIVISION CLERK
 DISPATCHER

Department: STREET DEPARTMENT

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Salary Grade: 7

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MAJOR DUTIES AND RESPONSIBILITIES

1/ This job description was prepared after "observing the general organization of the department and the work process of the utility office clerical staff," and reviewing the draft description with the Public Works Director and Director of Human Resources.

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- Receives incoming calls.
- Transmits information to public works vehicles via two-way radio communications system.
- Maintains files and records of equipment maintenance, work records, inspection records, and other information as required.
- Maintains departmental inventory of material and equipment.
- Performs other related duties including typing as assigned.

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POSITION REQUIREMENTS

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Requires a High School diploma or equivalent with one year experience of clerical related experience including the following knowledge, abilities, and skills.

- Knowledge of clerk and/or dispatching duties.
- Ability to clearly and concisely issue spoken instructions.
- Ability to type.
- Requires a valid Wisconsin Driver's license.

**City of New Berlin
Position Description**

Name:	Elaine Lackowski	Department:	Sewer and Water
Proposed Utilities Billing Clerk Position Title:		Pay Grade:	FLSA:
Date:	January 6, 1994	Reports to:	Utility Superintendent

Purpose of Position

The purpose of this position is to perform clerical and customer account related tasks for New Berlin water and sewer utilities.

Essential Duties and Responsibilities

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- * Performs reception tasks including answering telephones, routing calls and messages to appropriate personnel, greeting visitors.
- * Performs customer service tasks. Answers routine questions concerning billing and water meters. Composes and types correspondence in answer to customer complaints and questions. Collects customer payments. Verifies correct meter installations, calculates final reading, checks billing discrepancies. Contacts engineering department for new accounts and other billing information. Updates customer records on computerized records regarding name, address, verification of joint water and sewer services, stop box locations, dates of service, dates of meter testing.
- * Coordinates meter installation and service. Identifies meters to pull and arranges appointment with property owner and utility crews.
- * Maintains meter service and performance records including reviewing reports of meters running above or below accepted parameters (meter test reports). Arranges repairs. Types correspondence to customers regarding meter changes. Contacts inspection department regarding connections and changes. Tracks number of meters pulled on monthly basis. Prepares meter connection and changes reports.
- * Relays messages and work orders, via two-way radio, to utility crew regarding meter pulls, pressure tests, new meter installation, service calls and inspections. Relays messages to waste treatment personnel regarding problems. Relays information between diggers hotline and work crews.
- * Prepares quarterly consumption report and MMSD report.
- * Collects payment for hydrant use charges.
- * Performs general secretarial support for the Utility Superintendent, foremen and staff, and performs other clerical duties as assigned.
- * Enters labor data in computer database.

Minimum Training and Experience Required to Perform Essential Job Functions

High school diploma with training in office practice and computers, with one to two years clerical or accounting experience, or any combination of education and experience that provides equivalent knowledge, skills, and abilities.

Physical and Mental Abilities Required to Perform Essential Job Functions

Language Ability and Interpersonal Communication

- * Ability to classify, compute and tabulate data and information, following a prescribed plan requiring the exercise of some judgment. Ability to compare, count, differentiate, measure and sort information. Ability to assemble, copy, record and transcribe data and information.
- * Ability to advise and interpret how to apply policies, procedures and standards to specific situations. Ability to explain, demonstrate and clarify to others within well-established policies, procedures and standards.
- * Ability to utilize advisory data and information such as technical operating manuals, maps, Public Service Commission manuals and rate files, computer software operating manuals, hydrant permits, sewer lateral reports, work orders, meter testing records, procedures, guidelines and non-routine correspondence.
- * Ability to communicate verbally and in writing with utility Superintendent, maintenance workers, account clerk, plumbing inspector, inspection clerk, assessors' office personnel, computer specialists, WEPCO personnel, customers.

Mathematical Ability

- * Ability to calculate percentages, fractions and decimals; ability to calculate volume, ratios, and ability to interpret basic descriptive statistical reports.

Judgment and Situational Reasoning Ability

- * Ability to use functional reasoning development in the performance of semi-routine functions involving standardized work with some choice of action.
- * Ability to apply situational reasoning ability by exercising judgment,

decisiveness and creativity in situations involving the evaluation of information against measurable criteria.

Physical Requirements

- * Ability to handle, load and unload, and move and guide materials using simple tools.
- * Ability to coordinate eyes, hands, feet and limbs in performing skilled movements such as rapid keyboard use. Ability to operate telephone, computer keyboard/typewriter, photocopier, computer printer, calculator, two-way radio, fax machine and Scada Computer System.
- * Ability to exert light physical effort in sedentary to light work, involving lifting, carrying, pushing and pulling. Ability to handle, finger and feel.
- * Ability to recognize and identify degrees of similarities or differences between characteristics of colors, forms, sounds, tastes, odors, textures etc. associated with objects, materials and ingredients.

Environmental Adaptability

- * Ability, in regard to environmental factors such as temperature variations, odors, toxic agents, violence, noise vibrations, wetness, disease and/or dust, to work under very safe and comfortable conditions.

The city of New Berlin is an Equal Opportunity Employer. In compliance with the Americans with Disabilities Act, the City will provide reasonable accommodations to qualified individuals with disabilities and encourages both prospective and current employees to discuss potential accommodations with the employer.

Supervisor's Signature

Employee's Signature

Date

Date

Both positions receive incoming calls and relay messages via each department's two-way radio system. However, the Utility Clerk Typist is also required to perform customer service tasks which the Streets Clerk is not, e.g. Utility Clerk Typist collects customers' payments, checks

billing discrepancies, calculates final readings, and verifies joint sewer and water services, stop box locations, etc. They both maintain department records and files, and perform related clerical functions. The Utility Clerk Typist, however, also coordinates meter installation and service with the Utility crews, and is responsible for preparing several different reports. All in all, the undersigned is persuaded the duties of Utility Clerk Typist are at least equal to, if not greater than, those reported for the Streets Division Clerk Dispatcher. That conclusion is affirmed when one examines the statements of "Position Requirements" in the Streets Clerk job description with "Minimum Training and Experience Required to Perform Essential Job Functions" of the Utility Clerk Typist. Therefore, the undersigned is persuaded that the Utility Clerk Typist position should have been reclassified to a range 7.

The final argument of the City that needs to be addressed is its claim that the Union should not be permitted to obtain through grievance arbitration that which it was unsuccessful in securing through collective bargaining. It is a fact that the Union proposed in negotiations for the subject contract that the Water Utility Clerk Typist be reclassified from a pay range 5 to range 7. The Union stipulated at hearing that the proposal was withdrawn on April 18, 1994. The City argued in its brief that the Union withdrew this proposal "unconditionally." The Union's brief disputes the characterization of its stipulation as an "unconditional" withdrawal of its proposal. The undersigned's notes on the stipulation do not contain the word "unconditional" nor does he have an independent recollection that the word "unconditional" was a part of the stipulation. Further, the testimony of Streets Division Clerk Dispatcher, Racetti, who was on the Union bargaining team, was that the City had stated when it denied the proposal that it believed all positions covered by the contract should be reviewed. She also testified that the Union was aware that there had been many changes in the Utility Department, and it was willing to wait and see if things changed back such that Lackowski was no longer doing those things that warranted her reclassification. Based upon the testimony of both the City and Union witnesses on this point, the undersigned does not believe that the Union's withdrawal of its bargaining proposal number 16, for reclassification of the Utility Clerk Typist position, constituted a clear and unmistakable waiver of its Article 6.07 contractual right to grieve the City's failure to prepare a revised position description, and its refusal to reclassify the Utility Clerk Typist position to a pay range 7.

The remedy appropriate in this case is an award directing the City to prepare a new job description and reclassify the Utility Clerk position to a pay range 7 effective the date the Union filed the subject grievance, as well as requiring the City to grant the grievant, Lackowski, back pay in an amount equivalent to the difference between the Utility Clerk Typist, pay range 5, and the Streets Division Clerk Dispatcher, pay range 7 hourly rate for all hours worked by Lackowski between the date of the grievance, and the date of her reclassification to a range 7 as directed by this Award. Even though Lackowski was performing these duties before the grievance was filed on September 24, 1994, the undersigned believes it would be inappropriate to grant remedial relief in this case that pre-dates the grievance. To do so would unjustly penalize the City and reward the employee because the Union changed its mind about how to pursue rectifying what it perceived to be a problem, and its obvious intent to forego any opportunity for back pay prior to the date it

reached a contract settlement with the City. The bargaining team had apparently determined to drop the matter if the department changes were altered such that Lackowski no longer performed those duties believed to warrant her reclassification. In light of that factor, the undersigned is persuaded it would be inappropriate to now grant back pay to the effective date of the subject contract or beyond. Furthermore, the matter could have been grieved sooner, but the result might not have been the same, and no doubt, as time passed, the need for reclassification became more obvious. The undersigned believes that the wiser course was for the Union to wait, inasmuch as every new change in duties and/or responsibilities does not warrant a change in pay. Also, notwithstanding the City's claims that the grievance was untimely, faced with the choice between having the Union wait until things have changed sufficiently to warrant reclassification or be forced to grieve every change for fear that if it doesn't, the City will claim it's too late, the City would opt for the wait and see approach adopted in this case.

AWARD

The City violated Article 6.07 when it failed to prepare a new job description for the Utility Clerk Typist position after February 22, 1994, and reclassifying the position to a pay range 7. Therefore, the City shall immediately prepare a new job description for and reclassify the Utility Clerk Typist position to a pay range 7 effective September 21, 1994. Also, the City shall immediately award the grievant, Lackowski, back pay in an amount equivalent to the difference between the Utility Clerk Typist pay range 5 hourly rate in effect during the back pay period, and the Street Division Clerk Dispatcher pay range 7 hourly rate then in effect, for all hours worked by Lackowski between September 21, 1994, and the date of her position reclassification to a pay range 7, as directed by this Award, including adjustments to any premium pay she received during that period, e.g. overtime.

Dated at Madison, Wisconsin, this 26th day of January, 1996.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator