BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF GLENDALE

and

LOCAL 1261, MILWAUKEE DISTRICT
COUNCIL 48, AFSCME, AFL-CIO

Case 78
No. 52900
MA-9146

Appearances:

Podell, Ugent, Haney, & Delery, S.C., by Mr. Robert E. Haney, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202, appearing on behalf of the Union.
Davis & Kuelthau, S.C., by Mr. Daniel G. Vliet, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City.

ARBITRATION AWARD

The City of Glendale, hereinafter referred to as the City, and Local 1261, Milwaukee District Council 48, AFSCME, AFL-CIO are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration, the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the pay rate of an employe. Hearing on the matter was held in Glendale, Wisconsin on March 8, 1996. Written arguments were received by the undersigned by June 11, 1996. Full consideration has been given to the evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties agreed upon the following issues:

> "Did the Union raise the issue in a timely matter?"
>
> If yes,
>
> "Did the City violate the terms of the collective bargaining agreement when it failed to pay the grievant at the General Repairman rate instead of the Equipment Operator III rate for time spent by the grievant working on the water sprinkler system?"

If yes, the parties agreed at the hearing that the remedy shall be that the grievant is entitled

to back pay in the amount of $64.00.

PERTINENT CONTRACTUAL PROVISIONS

SECTION 2.05 - Future Changes - Revisions

It is further agreed that the City shall negotiate with the Union on all matters concerning all wages, hours and conditions of employment which are mandatorily bargainable in regard to the creation of new operation, a new position, new equipment (but not as to the purchase thereof), reclassification and allocations, which are not in existence during the execution of this Agreement, as an implementation of Section 111.70 of the Wisconsin Statutes. Each of the parties hereto agrees that it will make a sincere effort to reach an agreement on all matters herein set forth. Retroactive to the first date of regular operation.

If, after a reasonable period of negotiations, the parties are deadlocked with respect to the mandatorily bargainable wages, hours and working conditions of said new operation, new position, new equipment, reclassification and reallocations, the City has the right to implement their latest position on the issue. It is expressly understood, however, that the issue will be subject to the bargaining process including the mediation/arbitration process when negotiations for a successor agreement commence.

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SECTION 2.06 - Working Conditions - Existing Practices

The parties agree that all wages, hours and conditions of employment which are mandatorily bargainable in effect as of the date of this Agreement and not herein changed shall remain in effect unless changed by mutual agreement, in writing.

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SECTION 4.06 - Job Descriptions

The City agrees to provide the Union with any existing written job descriptions. In the event that a job description is changed or a new job is created, a written job description shall be

provided to the Union. This provision shall in no way alter, amend or modify the application of other provisions of this contract, including, but not limited to, Section 2.05.

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ARTICLE V - MANAGEMENT RIGHTS

SECTION 5.01 - Management Rights

It is agreed that the operations and management of the City and the direction of its personnel is vested exclusively in the Mayor and Common Council of the City. The Mayor and the Common Council of the City, within their respective spheres of jurisdiction as provided by law, shall continue to have the exclusive right to establish reasonable departmental rules except those matters that have been determined to be subject to collective bargaining by the WERC, regulations and procedures in accordance with the laws of the State of Wisconsin, Ordinances of the City of Glendale, the Constitution of the United States and State of Wisconsin and Section 111.70 of the Wisconsin Statutes.

Except as modified, delegated or abridged herein, the City reserves all right to manage its own affairs. Such rights include, but are not limited to:

(a) To direct all operations of City Government;

(b) To maintain the efficiency of City Government operation entrusted to it.

(c) Determining the services and level of services to be offered by the City.

(d) Establishing, continuing, abolishing or altering methods or facilities for the operation of the City.

(e) Determining the number, type and position of employees required and to increase or decrease the number of employees according to rules, decisions and findings of the WERC and the courts of the State of Wisconsin.

(f) To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.

(g) To take whatever action is necessary to comply with State or Federal law.

(h) Assigning work, determining if overtime work is to be required, the amount of it and the employees who are to perform it and the right to contract with others to provide services providing such contract does not result in the layoff of present employees in the unit.

(i) The above rights shall not be exercised in an arbitrary or capricious manner, nor will they be used to undermine the Union, violate any terms of their agreement or discriminate against Union members.

ARTICLE VI - GRIEVANCE AND ARBITRATION PROCEDURE

SECTION 6.01 - Grievance Procedure

A. The Union and the City recognize that grievances should be settled promptly and in a just manner.

B. Only matters involving the interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance and be eligible for processing herein.

C. In the event it is not possible to comply with the time limits as set forth herein because of work schedules, illness, vacation or other reasons, such limits may be extended by mutual written consent of the Union and the City.

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STEPS:

Step 1: If an employee has a grievance, he/she shall, within thirty (30) working days of the incident or the date that the employee should have reasonably become aware of the incident, present the grievance orally to the

appropriate designated supervisor. In the event of a grievance, the employee shall perform his/her assigned task and grieve his/her complaint later.

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BACKGROUND

Amongst its various governmental functions the City operates a Forestry Department. On January 14, 1994 the City posted an Equipment Operator III - Forestry (Full-time) position, hereinafter referred to as EO3 with the following job description:

EQUIPMENT OPERATOR III - FORESTRY

Statement of Responsibility

An employee assigned to this classification is responsible for numerous assignments requiring some skill and the physical ability to perform heavy manual labor. These assignments include but are not limited to the repair and maintenance of City property and facilities within the Forestry Division as well as the Street and Light and Utility Divisions. This individual shall be available for emergency overtime assignments such as, but not limited to snow plowing, street salting, water main breaks, sewer problems, flooding, wind damage, etc., as assigned by the department supervisors.

Supervision Received

He/She receives general and specific assignments from the Director, Superintendent, Street & Light or other foremen.

Minimum Qualifications

Experience and Training

The qualified individual must be a high school graduate and have the ability to work well with others. He/she should have some experience to be able to safely and efficiently operate equipment within the City fleet, and complete job assignments within the Forestry Division as well as other divisions. This individual must have a good attendance record, and a valid CDL operators license.

He/she must be able to adapt to new methods and procedures.

Specialized knowledge, ability, skills and aptitudes

The qualified individual filling this position must have good working knowledge of methods, materials, tools and equipment used in the maintenance of City grounds, medians, trees, shrubs, flower beds, etc. The individual must have landscaping skills such as grading, sodding, seeding, plant pruning, trimming trees, etc. This person must be able to use the Hi Ranger, climb to prune and trim City trees. Individual must be able to perform heavy manual labor, as well as the following duties.

Examples of Duties:

1. Cut grass.
2. Cut trees.
3. Prune trees and shrubs
4. Set up planting beds (flowers and shrubs)
5. Plant trees and shrubs
6. Use chain saws (sharpen and maintain)
7. Grade, lay sod, seed grass, etc.
8. Repair and maintain sprinkler system
9. Apply fertilizer and pesticides, (limited amounts)
10. Collect brush
11. Shovel snow
12. Plow and salt streets
13. Other duties as assigned

In May, 1994, Hal Chalupsky, hereinafter referred to as the grievant, was hired by the City as the EO3. Prior to being hired the grievant went through an interview process where at he was given a copy of the above job description. During his probationary period the grievant performed work on the City's sprinkler system with Bob Nolan, the Union's Vice President. Nolan informed the grievant that in the past when work was performed on the City's sprinkler system the work was compensated at the higher wage rate of the General Repairman. Nolan also told the grievant that because he was still in his probationary period the City has the right to cross train him on the sprinkler system at the EO3 rate of pay. The instant matter arose when, after completion of the probationary period, the grievant was assigned to work on the City's sprinkler system and paid him at the EO3 rate of pay. The grievant grieved the matter and it was processed to arbitration in accord with the parties grievant procedure.

At the hearing Public Works Superintendent Al Reininger testified the EO3 job description

was revised by the City in the Fall of 1993 at which time the position was vacant. Reininger testified he gave a copy of the job description to than Union president Charlie Leitner for delivery to office of the District Council in December 1993. Leitner, who denied receiving a copy of the job description acknowledged he did see it when it was posted and contacted District Council Representative Patricia Yunk about the matter. The Union took no action on the matter until May 1994 when, during a meeting with Director of Public Works Brian Miller, Reininger, and Union President Raymond Banse, Banse informed them that he believed the former job description, which did not include sprinkler work, was in effect. Banse was informed the City thought the Union had accepted the job description since the Union had the new description since the preceding December and had not raised the matter. On June 3, 1994 Reininger sent the following memo to the Union:

MEMORANDUM

June 3, 1994

TO: Local 1261

FROM: Al Reininger

RE: Answers to Your Inquiries of May 25, 1994

Questions I - What is the status of Jan Starks at City Hall?

Jan Starks was hired under the Forestry Equipment Operator III job description. This job description was posted and a copy given to the union.

Because of the lack of interest in the cross training posting this Spring, Jan being the lowest in seniority is being assigned to train and help out at City Hall - DPW Tuesdays and Thursdays.

This cross training will enable Jan to fill in the absence of Al Grotkiewicz (this is not a new position).

Question II - How long will it be before the new Forestry employees take their rotation on the brush chipper?

As soon as the planting is completed (approximately 2 weeks), we plan to have the Forestry employees, including Ken Thiermann, start taking rotations on the chipper.

Question III - General repair work on median irrigation systems?

> Irrigation repairs shall be done in accordance with the Forestry Equipment Operator III job description. If the work is beyond our expertise, scheduling becomes a problem, or we cannot do the repair efficiently, a contractor may be used.

On June 23, 1994 a second meeting was held. The Union was informed by the City that the new job description was in effect. District Council Representative Malou Noth testified at the hearing that the matter was left unresolved with the City indicating it would get back to them on the matter.

UNION'S POSITION

The Union asserts the grievance is timely and points to the language of the grievance procedure to support this assertion. The Union argues there must be an actual incident, not a hypothetical one, to contend the grievant has been harmed by an employer action. The Union avers this must be more than a statement of intention. The Union contends under this theory that only when the City actually withheld payment did an action occur which was grievable. The Union argues the date of posting or any other declaration by the City is irrelevant to the fact that payment of the grievant's wage is the incident of the employer acting on its intention. The Union points out the filing of the grievance was within thirty (30) days of the incident.

The Union also argues the City defense that the grievant had earlier performed the work and did not grieve receiving the higher pay rate is without merit. The Union points out the grievant discussed the matter with the Union and it was the Union's position that as he was a probationary employe at the time he was in effect being trained, that the City had the right to train him to do the work, and that this would be compensated at his regular rate of pay. The Union asserts the City has not denied this and concludes that the date the grievant became aware of the incident is the date he performed the work when he was not on probation and did not receive the higher rate of pay.

The Union also contends the City argument that the Union has not grieved a change in the job description for an EO3 position in the Forestry Department and thirty days has passed is also without merit. The Union avers as it has above that the posting is a statement of the employer and a statement does not give rise to a grievance. Only when the City acts on the statement, by not paying a higher pay rate, does an incident arise which may be grieved.

The Union contends that the 1987 job description was in effect at the time the grievant performed sprinkler work. The Union argues the matter was discussed between Bargaining Representative Malou Noth and the City and that Noth testified there was no agreement to alter the pay rate for work performed on the sprinkler system.

EMPLOYER'S POSITION

The City contends the Union acquiesced to the revised job description when it failed to timely file a grievance or to raise the issue with the City in negotiations. The City points out Union officials testified they were aware of the changes in the job description for the EO3 position in December, 1993 or by the latest January 10, 1994. The City contends because the Union was aware of the changes in the job description it had thirty (30) days to grieve the matter and the Union failed to do so. The City concludes the Unions failure to file in a timely matter means the matter should be dismissed.

The City points out that the matter was discussed in the Spring of 1994 where the City again reiterated that the position description had been changed. The City avers that although the Union may have disagreed with the revision of the job duties, the Union again took no action at that time or until the instant grievance was filed in June of 1995. The City also points out the Union offered no reason why it did not raise the matter in negotiations which culminated into the current collective bargaining agreement except that it believed the old job description was in effect.

The City also asserts that if Section 2.05 of the agreement applied to the instant matter, which the City does not agree to because only slight modifications where made in the job, the City had the right to implement after negotiations were concluded. The City again points out the Union stood mute on the matter during negotiations. The City avers that this silence can only be interpreted as waiver and acquiescence.

The City also avers the agreement does not limit the City's ability to revise job descriptions. The City points out that prior to the expiration of the 1986-87 collective bargaining agreement it was required to negotiate changes in job descriptions and job descriptions were incorporated into the agreement. The City points out the Union voluntarily agreed to eliminate this provision from the collective bargaining agreement. The City argues it has no duty to bargain over details of the job description, except to the extent any changes affected wages, hours or working conditions. The City asserts the Union had full opportunity to do this but simply choose not to.

The City contends the Union cannot now complain the City failed to properly notify it of any changes in a job description. The City asserts the opportunity to raise that issue ended at least two years ago. The City argues it complied with Section 4.06 of the agreement when it provided the Union with a copy of the job description. The City reasserts it had no duty to bargain the change in the job description. The City contends that when all evidence is taken into consideration the record demonstrates the City provided the Union with advance notice of its intent and the Union took no action.

The City also argues that under Section 2.06 the parties have agreed that all mandatorily

bargainable conditions of employment will remain in effect unless changed by mutual agreement in writing. The City contends that at the time of the execution of the 1995-1997 collective bargaining agreement the revised job description was in effect and the one the City was operating. The City contends the *status quo*, which Section 2.06 seeks to preserve, included the wage rate for the revised EO3 job description. The City asserts the *status quo* is clear and that the Union is attempting to arbitrate its way into something else. The City contends that given the amount of time that had passed since the Union had the opportunity to bargain this issue it cannot successfully now change the terms of the employment for the grievant.

The City would have the Arbitrator deny the grievance.

DISCUSSION

The parties' collective bargaining agreement requires that a grievance be filed within thirty working days of the "incident" or the "date the employe should have reasonably become aware of the incident" and that the matter be involving the interpretation, application or enforcement of the terms of the agreement. The record demonstrates that the job duty in dispute herein, work on the sprinkler system, does not occur very often. Further, that the first time the grievant worked on the system he was still a probationary employe and informed by the Union that he was not eligible for a higher rate of pay because the work was a part of his training. As the Union has pointed out, the City did not dispute that work performed in a probationary period is considered training and the parties practice is not to pay a higher rate of pay. The record also demonstrates that it was not until the week of May 22, 1995, that the grievant again worked on the sprinkler system. When the City failed to pay him the higher rate of pay the grievant filed the instant matter.

There is no evidence in the record that there was ever an agreement between the City and the Union to change the amount of compensation for performing work on the sprinkler system. Absent such an agreement the Union could reasonably conclude that until the City acted and reduced the pay for sprinkler work to the EO3 rate of pay, there was not a violation of the collective bargaining agreement because no "incident" had occurred which was grievable. Thus, until the City acted on the position it had taken, there was no violation of the collective bargaining agreement. Until the City acted there was no application, interpretation, or enforcement of the agreement for the grievant to grieve.

Based on the above the undersigned finds the grievance timely.

Turning to the merits of the instant matter, the undersigned finds that Section 4.06 of the agreement, as the City has pointed out, mandates that the City provide the Union with a copy of any job description which has changed. However, this provision clearly requires that any such changes be in accord with Section 2.05 of the agreement. Section 2.05 of the parties collective bargaining agreement requires the City to negotiate with the Union "…on all matters concerning wages, hours and conditions of employment which are mandatorily bargainable in regard to the

creation of a new operation, a new position, new equipment (but not as to purchase thereof), reclassification and reallocations…". This provision also requires the parties to make a sincere effort to voluntarily resolve the matter and allows the City to implement their latest position on the issue if the parties become deadlocked. The record demonstrates the City created a new job description for the EO3 position. In effect the job description reduced the rate of pay an EO3 received for performing sprinkler work. The City submitted a copy to the Union, waited two (2) weeks, then posted the job description. Section 2.05 clearly requires the City to negotiate on all wage matters which are not in existence during the term of the agreement. Only after a reasonable period of negotiations can the City implement. Herein the City has taken the position the new job description was implemented no later than January 10th, 1994. There is no evidence of negotiations prior to the City's implementation of the changed wage rate. There is no evidence of deadlock prior to the City's implementation. Both are required by Section 2.05 prior to giving the City the capability to implement.

Even if the undersigned were to construe the June 3, 1994 memo from Reininger to the Union as an acknowledgement of deadlock, there is still no evidence the City made a sincere effort to reach an agreement with the Union on the compensation rate for sprinkler work (identified as irrigation repairs in the memo) prior to its act of posting the position or after the act of posting the position. The City's act of posting the job position can only be construed as unilateral in nature and contrary to the requirements of Section 2.05. Thus the Union's case prevails because even though the matter was discussed between the parties after the initial posting the City continued to take the position that the job description had been implemented on January 10, 1994. Had the City rescinded the portion of the posting which included sprinkler work as part of the EO3 position, negotiated with the Union, reached deadlock, the City could of implemented and then the Union would be required to raise the matter during collective bargaining negotiations for a successor agreement.

The undersigned notes here that the fact that the job duty of sprinkler work is not performed very often, only twice during the entire time frame of the instant matter, does not make its wage rate any less of a subject that must be bargained under Section 2.05. The City is required to negotiate and reach a deadlock on a mandatory subject of bargaining before it can implement its position. Herein there was no evidence of an attempt to negotiate and absence an attempt to negotiate deadlock can not occur. Until the City took action to implement the lower wage rate for sprinkler work, given the fact the City was aware the Union did not concur in lowering the wage rate, the Union could reasonably conclude the City would pay the higher rate. Thus the undersigned finds no waiver by the Union when it did not grieve the posted position description in January, 1994, there was no waiver when the Union did not grieve the June 4, 1994 memo from Reininger to the Union and there was no waiver by the Union when it did not raise the matter in negotiations. Herein Section 2.05 clearly requires the City to seek negotiations prior to implementation. Had the City at any time rescinded the posting and sought to meet with the Union on the matter a different result would occur. Thus absent any attempt by the City to negotiate the matter prior to implementation, the Union position prevails and the grievance is sustained.

Based upon the above and foregoing and the evidence, testimony and arguments presented the undersigned finds the grievance to be timely. The undersigned also find the City violated Section 2.05 when it failed to negotiate a rate of pay change for sprinkler work. The City is directed to make the grievant whole by paying him the stipulated amount of $60.00. The Grievance is sustained.

AWARD

1. The grievance is timely.

2. The City violated the terms of the collective bargaining agreement when it failed to pay the grievant at the General Repairman rate instead of the Equipment Operator III rate for time spent by the grievant working on the water sprinkler system. The City is directed to make the grievant whole by paying him $64.00.

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

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator