

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE DISTRICT COUNCIL 48 AND ITS  
AFFILIATED LOCAL 2, AFSCME, AFL-CIO**

and

**FRANKLIN SCHOOL DISTRICT**

Case 63  
No. 56347  
MA-10246

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Appearances:

Podell, Ugent, Haney & Delery, S.C., by **Attorney Carolyn H. Delery**, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Mark L. Olson**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the District.

**ARBITRATION AWARD**

Milwaukee District Council 48 and its affiliated Local 2, AFSCME, AFL-CIO, hereafter the Union, and Franklin School District, hereafter District, are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On July 3, 1998, the Commission appointed Coleen A. Burns, a member of its staff, to hear and decide the instant dispute. Hearing on the matter was held on August 5, 1998, in Franklin, Wisconsin. The hearing was not transcribed. The record was closed on November 9, 1998, upon receipt of post-hearing written argument.

**ISSUE**

The parties stipulated to the following statement of the issue:

Did the District violate the provisions of Article 9, Section D, of the 1995-1998 collective bargaining agreement when it paid the Grievant at the contractual rate for his Custodian II position when he was assigned to plow snow in the District in December of 1997?

**RELEVANT CONTRACT LANGUAGE**

4. **SCHOOL BOARD FUNCTIONS:** The Board possesses the sole right to operate the school system and all management right repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include, but are not limited to, the following:

A. To direct all operations of the school system.

. . .

C. To hire, promote, transfer, schedule and assign employees in positions with the school system.

. . .

F. To maintain efficiency of school system operations

. . .

I. To determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kind of positions and job classifications to perform such services.

. . .

K. To determine the methods, means and personnel by which school system operations are to be conducted.

L. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

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8. **GRIEVANCE PROCEDURE:**

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E. **Arbitration:**

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3) All expenses which may be involved in the arbitration processing shall be borne by the parties equally, however, expenses relating to the calling of witnesses, the cost of representation and/or legal fees, or the obtaining of depositions or any other similar expenses associated with such proceedings shall be borne by the party at whose request such costs of representation, witnesses or depositions are required. The parties shall share equally in the cost of any transcript prepared for the use of the arbitrator.

4) The arbitrator so appointed shall hold a hearing at a time and place convenient to the parties within fifteen (15) days of the notification of the selection unless otherwise mutually agreed upon by the parties. The arbitrator shall take such evidence as in his/her judgment is appropriate for the disposition of the dispute.

5) The decision of the arbitrator shall be final and binding. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

9. **WAGES AND HOURS OF WORK:**

. . .

D. **Other Conditions:** Whenever any employee is assigned work normally done by those in a higher classification, the corresponding higher rate shall be paid, when such assignment is four (4) or more consecutive hours, and at that time the employee shall also accept fully all of the responsibilities and obligations attendant to the higher classification while on such assignment. There shall be no pyramiding of overtime. The Board has the right to shift the hours of assignment to cover the following conditions:

- 1) Substitute for the Head Custodian during his/her absence.
- 2) During periods when school is not regularly scheduled.

3) During periods of emergency to protect the district property.

The provisions of this section shall apply at all times including during the summer vacation period.

. . .

### **BACKGROUND**

The District has two vehicles that can be equipped with a snowplow. Inasmuch as two vehicles are insufficient for the District's needs, an outside contractor plows some of the District's grounds.

The Custodian I at the High School regularly plows snow at the High School and Pleasant View. The Custodian I receives his regular rate of pay when performing this work.

The Grounds Specialist, who is classified as a Custodian I, regularly plows snow at ECC, Forest Park and Southwood Glen. The Grounds Specialist receives the rate of a High School Custodian I, which is his regular rate of pay, when performing this work.

When the Grounds Specialist is not available to plow snow, either the Custodian I at the High School or the Custodian I at Pleasant View usually plows snow at ECC, Forest Park and Southwood Glen. When neither Custodian I is available, this snow plow work would normally be assigned to Bill Reeves, the Custodian II at the High School.

Reeves plows snow six or seven times a year. Reeves, who has plowed snow for more than four consecutive hours, receives his Custodian II rate of pay when performing this work.

Occasionally, other employes in the Custodian II classification have been assigned to plow snow. At times, these employes have plowed snow for more than four consecutive hours. These employes have received their Custodian II rate of pay when they have plowed snow.

During the 1997 Christmas week, the Grounds Specialist, the Custodian I at the High School, and the Custodian I at Pleasant View were not at work. Reeves was at work, but could not be assigned to plow snow because he had lost his driver license.

Mike Gagliano, the Custodian Supervisor, asked Lawrence Foeckler, hereafter the Grievant, to plow snow at the schools. When the Grievant advised Gagliano that he had never plowed snow, Gagliano responded that the schools had to be plowed and that Reeves would show the Grievant what to do.

Reeves instructed the Grievant for approximately fifteen minutes. Although plowing usually involved salting, neither Reeves, nor the Grievant, was able to activate the salter. Following this instruction, the Grievant plowed snow for eight consecutive hours on one day and six consecutive hours on the next day.

Thereafter, the Grievant filed a grievance alleging that the District had violated Section 9, Paragraph D, of the collective bargaining agreement by not reimbursing him at the Grounds Specialist rate of pay for the time that he plowed snow. The grievance was denied at all steps and, thereafter, submitted to arbitration.

The Grievant holds the position of Custodian II-Delivery/Warehouse. The Grievant's job position states as follows:

#### **POSITION DESCRIPTION**

|                            |   |
|----------------------------|---|
| <b>Position Title:</b>     | Custodian II – Delivery/Warehouse   |
| <b>Classification:</b>     | Classified Staff – Custodian II   |
| <b>Relationships:</b>      | Reports to the Custodial Supervisor.<br>Works with Building Principals, Custodian I's & II's, Manager of Food Service and District Office staff in setting daily delivery schedule within set guidelines. |
| <b>Primary Assignment:</b> | Delivery and Warehouse  |

#### **Qualifications**

1. High School degree or equivalent.
2. No more than one moving violation within a 3-year span.
3. Must have good communication skills (verbal and written) in order to effectively work with staff, students, parents, community and outside suppliers.
4. Must have good manual and mechanical ability.
5. Must be able to work independently in a variety of environmental situations including indoors, outdoors and confined spaces.
6. Ability to drive with concentration; maintain behavior when transporting students; ability to follow route instructions.
7. **Ability to maintain accurate written records.**
8. **Ability to move materials and heavy loads safely.**
9. Such alternatives to the above qualifications as the district finds appropriate and acceptable.

### **General Responsibilities**

1. Obeys all traffic laws.
2. Observes all mandatory safety regulations.
3. Keeps assigned vehicle clean and checks vehicle before each operation for mechanical defects notifying proper authority in case of mechanical failure and lateness.
- 4. Maintains warehouse in neat, clean, orderly, fashion.**

### **Essential Job Functions**

#### **Lunch Run**

1. Load van with lunches, deliver to schools, unload at schools.

#### **Deliveries**

1. Responsible for miscellaneous pick-ups and deliveries as directed by the ~~Manager of Buildings and Grounds~~ **Custodial Supervisor.**

#### **Mail (posted and district)**

1. Pick up mail from the District Office and deliver to the Post Office at the end of each work day.
2. Pick up and deliver all district communications per scheduled daily runs.

#### **Warehouse**

- 1. Maintain in neat, clean, orderly, fashion.**
- 2. maintain (sic) accurate records of inventory counts, orders processed and backorders.**

### **Marginal Job Functions**

1. Grounds duties including but not limited to cutting grass, watering, recreational field maintenance, ~~snowplowing, and shoveling~~ **and snow removal.**
2. Perform such other duties as may be assigned consistent with the position of Delivery Person.
3. Transport student(s) within district.
- 4. Perform minor maintenance duties including but not limited to painting, replacement of lights/ballasts and minor plumbing repairs.**

### **Requirements of Essential Functions**

1. Constant (67-100%) bending, pushing, pulling, lifting, twisting, grasping, walking, and eye hand coordination.

Frequent (33-66%) climbing, squatting and reaching.

|           |                |            |
|-----------|----------------|------------|
| Lifting   | 0-50 pounds    | constantly |
|           | over 50 pounds | frequently |
| Reaching: | 90 degrees     | constantly |
|           | 180 degrees    | frequently |

2. Constant (67-100%) operating grounds equipment/vehicles large and small.

**Terms of Employment**

12 months; 8 hours per day

**Evaluation**

To be completed by the Custodial Supervisor.

. . .

The Grounds Specialist job description states as follows:

|                        | <b>Position Description</b>   |
|------------------------|---|
| <b>Position Title:</b> | Grounds Specialist  |
| <b>Classification:</b> | Craft   |
| <b>Relationships:</b>  | Reports to the Manager of Building and Grounds.<br>Works with Building Principals, Custodian I's. |

**Qualifications**

1. High School degree or equivalent.
2. Must have good communication skills (verbal and written) in order to effectively work with staff, students, parents, community and outside suppliers.
3. Must have good manual and mechanical ability.
4. Must be able to work independently in a variety of environmental situations including indoors, outdoors (summer and winter) and confined spaces.
5. Possession of a valid Wisconsin driver's license.
6. Wisconsin Department of Agriculture Commercial Pesticide Applicator-Not for Hire certification.
7. 3-5 years experience in turf and ornamental grounds care.
8. 2 years experience in athletic field maintenance.
9. 3-5 years experience in grounds equipment maintenance and calibration.
10. Such alternatives to the above qualifications as the district finds appropriate and acceptable.

### **General Responsibilities**

1. Obeys all traffic laws.
2. Observes all mandatory safety regulations.

### **Essential Job Functions**

1. Snow removal and pavement salting.
2. Pesticides application including use of proper documentation, record keeping and safety procedures.
3. Installation of plantings, terraces, flower beds and other grounds structures for beautification, erosion control or reduced upkeep.
4. Athletic field renovation/repair/maintenance.
5. Perform required maintenance of specified grounds equipment and district vehicles including use of proper documentation, record keeping and safety procedures.
6. Supervise assigned staff.
7. Implement and maintain a "Grounds Planning Calendar" to assure timely usage of chemicals and procedures.
8. Train building custodian I's in proper grounds care procedures and offer evaluative input regarding progress.

### **Marginal Job Functions**

1. Maintenance duties including but not limited to carpentry and concrete work.
2. Meeting with building administration to define needs and plan future projects.
3. Perform such other duties as may be assigned consistent with the position of Grounds Specialist.

### **Requirements of Essential Functions**

1. Constant (67-100%) bending, pushing, pulling, lifting, twisting, grasping and walking.  
Frequent (33-66%) climbing, squatting and reaching.

|           |                |            |
|-----------|----------------|------------|
| Lifting   | 0-50 pounds    | constantly |
|           | over 50 pounds | frequently |
| Reaching: | 90 degrees     | constantly |
|           | 180 degrees    | frequently |
2. Constant (67-100%) operating grounds equipment/vehicles large and small.

### **Terms of Employment**

12 months; 8 hours per day



## **Evaluation**

To be completed by the Manager of Buildings and Grounds.

. . .

## **POSITIONS OF THE PARTIES**

### **Union**

The arbitrator must enforce the clear language of the collective bargaining agreement. The clear and unambiguous contract language provides that an employe will be paid a higher rate of pay for work normally performed by a higher classification.

To receive the higher rate, three conditions must be met. The assigned work must normally be done by a higher classification. The assigned work must be performed in four or more consecutive hours. The employe shall also accept fully all of the responsibilities and obligations attendant to the higher classification while on such assignment.

It may be true that other employes have removed snow. It may also be true that other position descriptions list snow removal as a marginal job function. A marginal job function is not the same as a normal job function.

Snow removal is not the normal assigned work of the Custodian II-Delivery/Warehouse position occupied by the Grievant. Rather, "snow removal and pavement salting" is the normally assigned work of the position of Grounds Specialist. The Grievant has met the first condition to qualify for the higher rate of pay.

It is undisputed that the Grievant plowed snow for 8 hours one day and 6 hours on the second day. The Grievant performed the assigned work in four or more consecutive hours each day. Thus, he has met the second condition to qualify for the higher rate of pay.

The contract requires the Grievant to "also accept fully all of the responsibilities and obligations attendant to the higher classification while on such assignment." If the parties meant for the employe to assume all of the job functions before receiving a higher rate of pay, then the parties could have used language to reflect that intent.

The "Position Description" for "Grounds Specialist" lists the responsibilities and obligations of the position. The Employer alone defined these responsibilities.

The Grievant accepted all of the responsibilities and obligations attendant to the higher classification of the Grounds Specialist because the responsibilities are also listed in the Grievant's current position. The Grievant, on a daily basis, has accepted the same responsibilities of the Grounds Specialist. The Grievant has met the last condition and, therefore, qualifies for the higher rate of pay.

Past practice cannot vitiate plain and unambiguous language. The grievance should be sustained and the Grievant paid at the higher rate of pay for work normally performed by the Grounds Specialist.

### District

The Grievant's original job description when he was a Custodian III expressly listed "snow plowing" as a job duty. Neither the Union, nor any employee, ever grieved the inclusion of "snow plowing" in the Custodian III job description.

At the time that the Grievant was reclassified to a Custodian II, all of the custodial position descriptions, including that of the Groundskeeper, were modified to include the term "snow removal." The change from the specific term "snowplowing" in the Grievant's previous (Custodian III) job description to the more general term "snow removal" in his current (Custodian II) job description indicates an expansion, rather than a limitation, in the range of snow-related duties which the Grievant is expected to perform.

Assuming *arguendo*, that snowplowing were not contained within the inclusive term "snow removal," the fact that the Grievant's job description contains the statement "Grounds duties including but not limited to . . . snow removal" demonstrates that other related "grounds keeping" duties, such as plowing, can be assigned to the Grievant.

Since snow removal by use of a plow is not, and has never been, the exclusive duty of the Groundskeeper, the Grievant did not perform the work of a different classification. There is, in fact, a clear and consistent history of employees in other classifications performing snow removal using the plow, for which time they were always paid at their normal rate. This practice is entirely consistent with the references to "snow removal" in all the relevant job descriptions. This practice was "general knowledge."

The Grievant did not accept fully all of the responsibilities and obligations of the groundskeeper position. In fact, he did not even accept or perform all of the duties normally associated with the groundskeeper's operation of the snowplow.

The snow plow work performed by the Grievant does not meet the requirements of Article 9, Section D. The grievance is without merit and should be dismissed.

## DISCUSSION

Approximately four years ago, the Grievant transferred into the Delivery/Warehouse position. At that time, the position was classified as a Custodian III. The description of this position contained the following Item 1 under “Marginal Job Functions”:

1. Grounds duties including but not limited to cutting grass, watering, recreational field maintenance, snowplowing, and shoveling.

In the Fall of 1997, District administrative staff recommended that the Grievant’s position be reclassified to a Custodian II. The reclassification request, which was based upon a change in warehouse receiving, was approved and the Grievant’s position description was amended. One such amendment involved Item 1 under “Marginal Job Functions,” which now states as follows:

1. Grounds duties including but not limited to cutting grass, watering, recreational field maintenance, ~~snowplowing, and shoveling~~ **and snow removal.**

By replacing the specific terms “snowplowing” and “shoveling” with the more general term “snow removal,” the District has not removed “snowplow” duties from the Grievant’s position description. Rather, the District has broadened the Grievant’s duties to encompass all types of snow removal, including snowplowing and shoveling.

The position descriptions of the Custodian I employees who regularly plow snow list “snow removal” as a job function. As do the position descriptions of the Custodians II and III, the employees who regularly shovel or blow snow.

Some Custodian position descriptions, like that of the Grounds Specialist, list “snow removal” under “Essential Job Functions.” Others, like that of the Grievant, list “snow removal” under “Marginal Job Functions.”

“Job Functions” are designated “Essential” or “Marginal” for the purpose of accommodation under the ADA. “Job Functions” designated as “Essential” may be more frequently performed than “Job Functions” designated as “Marginal.” Regardless of designation, each “Job Function” is work of the employe’s classification.

Neither the Grievant’s position description, in particular, nor the Custodian position descriptions, in general, support the conclusion that “snowplowing” is a job function that is separate and distinct from “snow removal.” The undersigned turns to the evidence of the parties’ prior conduct.

The Custodian II at the High School plows snow six or seven times a year. On a few occasions, other employes in the Custodian II classification have plowed snow.

Employes in the Custodian II classification, including the Custodian II at the High School, have plowed snow for four or more consecutive hours. Regardless of the duration of the snow plowing assignment, these employes have been paid their Custodian II rate.

The evidence that the Custodian II at the High School regularly, and other employes in the Custodian II classification occasionally, plow snow supports the conclusion that the job function of "snow removal" includes "snowplowing." The evidence that employes in the Custodian II classification have received their regular rate of pay when plowing snow supports the conclusion that such work is not "work normally done by those in a higher classification," within the meaning of Article 9, Section D.

In summary, when the Grievant plowed snow in December of 1997, the Grievant was engaged in "snow removal." "Snow removal" is not "work normally done by those in a higher classification." Accordingly, the Grievant is not entitled to receive the higher classification pay set forth in Article 9, Section D, of the parties' collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

**AWARD**

1. The District did not violate the provisions of Article 9, Section D, of the 1995-1998 collective bargaining agreement when it paid the Grievant at the contractual rate for his Custodian II position when he was assigned to plow snow in the District in December of 1997.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of April, 1999.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator