BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HEART OF THE VALLEY METROPOLITAN SEWERAGE DISTRICT EMPLOYEES, LOCAL 130-B, AFSCME, AFL-CIO

and

HEART OF THE VALLEY METROPOLITAN SEWERAGE DISTRICT

Case 9
No. 56940
A-5725

(Pete Hennes Grievance)

Appearances:

Mr. Robert Baxter, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

Mr. John Haase, Godfrey & Kahn, Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and District or the Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on April 8, 1999 in Kaukauna, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on August 2, 1999. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided in this case. The Union framed the issues as follows:

> Did the Employer violate the Collective Bargaining Agreement and/or past practice by assigning the grievant, Pete Hennes, to the injector truck rotation? If so, what is the appropriate remedy?
>
> If not, then in the alternative, did the Employer violate the Collective Bargaining Agreement by denying the grievant, Pete Hennes, injector truck rotation continuation of the work day overtime? If so, what is the appropriate remedy?

The District framed the issue as follows:

> Did the Employer violate the Bargaining Agreement by not assigning the grievant to the injector truck rotation or by assigning the grievant to the injector truck rotation from 1992 through 1998?

Having reviewed the record and arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

1. Was the grievance timely filed?

2. Did the District violate the CBA by assigning the grievant to the injector truck rotation in late 1998? If so, what is the appropriate remedy?

3. Did the District violate the CBA by not assigning the grievant to the injector truck rotation in 1996, 1997 and most of 1998? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-99 collective bargaining agreement contains the following pertinent provisions:

ARTICLE II

RIGHTS OF THE EMPLOYER

> Except as otherwise specifically provided in this Agreement, the Management of the operation is vested exclusively in the District, including but not limited to the right to hire, to transfer, to promote, to demote, to discipline or discharge for just cause, to decide job qualifications, to determine job qualifications and

the number of employees to be assigned to any job classification, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, to require physical examinations of employees (at the expense of the Employer) and to determine the methods, processes and manner of performing work.

ARTICLE III

WORK DAY AND WORK WEEK

24 HOUR COVERAGE

The work day for the Waste Water Treatment Plant shall be eight (8) hours per day. The work week for employees who work shifts shall be six (6) days on followed by two (2) days off. The work week for all employees shall be five (5) days, Monday through Friday.

. . .

DAY STAFFING

The work day for the Waste Water Treatment Plant shall be eight (8) hours per day. The work week for employees who work the seven (7) day coverage shift shall be ten (10) days on followed by four (4) days off, however, for the purposes of vacation the work week for such employees shall be considered to be five (5) days. The work week for all employees shall be five (5) days, Monday through Friday.

. . .

These hours are intended to provide a basis for calculation of overtime pay and are not to be construed as a guarantee of minimum hours per day or week.

. . .

Placement of personnel on revised schedules shall be the function of the Employer in accordance with the terms of this Agreement. The Employer shall have the right for legitimate reason to temporarily transfer an employee from

one (1) shift to another or from one (1) work scheduled to another. In the event of such necessary transfer, employees on the shift or work schedule from which such transfer is being made shall be offered the transfer, in order of their seniority. Should no senior employee accept such transfer, the least senior employee shall be required to transfer. An employee being transferred shall be given a minimum of twenty-four (24) hours' notice of his/her new shift or work schedule (example: if new starting time is 11 p.m. notice to be given no later than 11 p.m. the previous day).

When calling employees to work overtime, they will be called in the order that they appear on the seniority roster, except for employees on vacation or leave of absence, provided that they qualified to do the work.

The Employer has the right to require an employee to stay over beyond his regular shift to complete a job on which the employee is working without regard to seniority. The Employer may excuse the employee from staying beyond his regular shift for valid reasons. In that event, seniority shall apply in securing a replacement.

Work schedule transfers due to vacations and floating holidays shall be offered to all plant operators as additional hours beyond the normal work week with wages to be paid at the rate of one and one-half times the regular rate of pay of the fill-in employees' scale as listed in the contract. These fill-in hours shall be posted at least two weeks before the fill-in time starts for vacations and at least five days before the fill-in time starts for floating holidays. Interested employees shall sign up for any fill-in hours at least four (4) work days (as per 5-2 work schedule) prior to the date of the fill-in. Management will make the decision as to whether weekday 7 to 3 shift (Monday through Friday) hours will be posted as additional fill-in hours due to vacations, floating holidays and extended sick leave. Management shall assign the employee working the fill-in hours (2) two work days (as per 5-2 work schedule) prior to the date of the fill-in and these fill-in hours that become that employee's responsibility at that time. Such assignments shall be made on a seniority basis. Should employees fail to sign up for any posted fill-in hours, then the temporary transfer procedure previously referred to in this Article III above will be used to fill the remaining needed fill-in hours.

Fill-in time during 24 Hour Coverage shall be offered in increments of eight (8) hour shifts, or any two employees may split the shift with four (4) hours to each employee.

ARTICLE IV

PAY POLICIES

Wage Schedule and Job Classifications. Employees shall be classified according to their major work assignment and in accordance with the Wage Schedule referred to in Appendix A, attached hereto and made a part hereof. In those cases where changes are made which materially affect the duties of existing jobs and/or when new jobs are established, the Employer and the Union shall negotiate the wage rate for such new or changed job, however, in the event of disagreement, the Employer reserves the right to set the rate for the new or changed job.

In order to be eligible for an increase of pay for the job classification position steps pursuant to Appendix A, six (6) full months of employment must occur within the classification, before the employee is eligible for the six (6) months of service step and twelve (12) full months of employment must occur within the classification, before the employee is eligible for the twelve (12) months of service step. A full month of service for purposes of this provision is any calendar month in which the employee has received pay for at least ten (10) regular work days.

. . .

Overtime All work performed outside of the normal work day and/or normal work week shall be compensated for at the rate of time and one-half the employee's regular rate. This compensation of overtime utilizes no night shift differential.

. . .

ARTICLE XXIV

GRIEVANCE PROCEDURE

The parties agree that prompt and just settlements of grievances are of mutual interest and concern. Grievances to be processed within this procedure shall involve matters of interpretation, application or enforcement of the terms of this Agreement, and, as such, only those items may be processed under the grievance procedure.

> The grieving employee shall first bring the complaint to the steward or Grievance Committee of the Union. Officers of the Union shall constitute the Union's Grievance Committee.
>
> If it is determined, after investigation by the Union, that a grievance may exist, it may be processed in the grievance procedure. Such processing must be begun within five (5) work days of the alleged violation. Any alleged grievance not filed within the above stated limit shall be invalid.
>
> . . .

FACTS

The District operates a sewerage district. The Union represents the District's waste water treatment plant employes. There are six employes in the bargaining unit: three process control technicians, one electrician, one mechanic and one lab technician. The Union and the District have been parties to a series of collective bargaining agreements (hereinafter CBA).

The sewerage district produces sludge which is stored year-round in holding tanks located on the District's premises. These holding tanks have to be emptied and the sludge disposed of. The sludge disposal process works as follows: the sludge is removed from the holding tanks and placed in a tanker truck. The tanker truck is then driven to various farmers' fields. An employe then drives a truck known as an injector truck to the field and hooks up a hose from the tanker truck to the injector truck and fills up the injector truck with sludge. The employe then drives the injector truck across a field in rows and injects the sludge into the ground in a plow-like fashion. It takes three to four injector truck loads to empty one tanker.

The injector truck is operated only during the summer months due to DNR regulations which prohibit spreading sludge during the winter months. Since sludge can only be spread during the summer months, the District requires operators of the injector truck to work extended hours during those months so that all of the sludge can be disposed of during the limited season that disposal is permitted. Operating the injector truck is a labor-intensive and difficult job.

This grievance involves the assignment of an employe to operate the injector truck. The District assigns employes to operate the injector truck on a weekly rotating basis. When an employe is assigned to operate the injector truck, that assignment is the employe's primary job duty for the week. The next week, the District assigns a different employe to drive the injector truck. The employe assigned to drive the injector truck for a given week has the first opportunity to accept overtime hours during that week. If the assigned operator declines the

overtime hours, the District offers the (overtime) hours to other bargaining unit employes on a seniority basis. If no other employe accepts the offered overtime hours, the District assigns the overtime to the individual who is assigned to operate the injector truck for that week.

The employes who are normally in the injector truck rotation are the District's process control technicians (hereinafter PCTs). The PCT job description specifically indicates that one of the job duties of that position is operating sludge disposal equipment. From 1992 through 1995, Pete Hennes was a PCT and was included in the injector truck rotation. In 1995, there were four employes in the injector truck rotation. At one point, there were five employes in the injector truck rotation.

In 1996, the District created a new position called laboratory technician/process control technician (hereinafter Lab Tech). The reason that the District created the Lab Tech position was to improve the efficiency of its laboratory testing and to improve the consistency of lab test results. In 1996, the laboratory was performing a large number of tests and the District concluded that it would be advantageous to have one employe who was primarily responsible for performing the lab tests in order to improve efficiency and consistency. Before the District created the Lab Tech position, it rotated the PCTs into the laboratory to perform tests on a weekly basis. Hennes was the employe awarded the Lab Tech position. Hennes testified that when he assumed the Lab Tech position in 1996, the then-District manager told him that his major duty would be working in the lab. After Hennes assumed the Lab Tech position, he worked four days a week in the lab and one day a week as a PCT. The creation of the Lab Tech position in 1996 resulted in the PCTs doing less lab work than before. The PCTs now perform lab work in the laboratory one day a week. This lab work, like the injector truck work, is done on a rotating basis.

The circumstances in the lab were different in 1996 than they were in 1998. In 1996, the laboratory was conducting a large number of tests, and the District wanted to improve laboratory test efficiency and obtain more consistent test results. By 1998, the District felt it had improved testing efficiency and quality control. Also, by 1998, the testing workload in the laboratory had subsided from what it had been the previous two years.

After Hennes became a Lab Tech, he was taken out of the injector truck rotation. During the summers of 1996, 1997 and most of 1998, the District did not assign the Lab Tech (Hennes) to the injector truck rotation. Since he was not in the injector truck rotation, he did not work injector truck continuation of the work day overtime. Late in the summer of 1998, Hennes was put back in the injector truck rotation. The circumstances of his being put back in the injector truck rotation are as follows.

In July, 1998, two PCTs asked Lab Director Glen Geurts why Hennes was not included in the injector truck rotation. At that point, there were three PCTs in the injector truck rotation. This meant that every third week, one of the three was subject to the extended hours that went with driving the injector truck.

After the lab director received this inquiry from the PCTs, he met with the District manager, Mark Surwillo, and discussed same. After they reviewed the Lab Tech's job description and the CBA, the District manager and the laboratory director concluded that the District had the authority to assign the Lab Tech to the injector truck rotation. The Lab Tech job description specifies that a Lab Tech performs all the duties performed by a PCT. They further concluded that it was no longer necessary for the Lab Tech to be in the laboratory all the time. They further concluded that adding Hennes to the rotation would reduce the pressure on the current individuals in the rotation. With the Lab Tech in the rotation, each employe would have to drive the injector truck once every four weeks as opposed to once every three weeks.

Geurts then scheduled a meeting for July 31, 1998 with Hennes and the three PCTs concerning the (impending) assignment of Hennes to the injector truck rotation. All those employes were supposed to be present at work that day, but Hennes was unexpectedly absent that day due to illness. Geurts chose to proceed with the meeting that day even though Hennes was not present. During the meeting, Geurts informed those present that Hennes was going to be put back into the injector truck rotation.

On August 3, 1998, Hennes was informed of management's decision that he was being put back into the injector truck rotation beginning September 21, 1998.

Hennes resumed working in the injector truck rotation on September 21, 1998. He worked in the injector truck rotation for two weeks in 1998.

The first day Hennes was back on the injector truck (September 21, 1998), he filed the instant grievance. The grievance was processed and appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union initially challenges the District's assertion that the grievance was untimely filed. In its view, the grievance was filed in accordance with the timelines contained in Article XXIV. It contends that the District's arguments to the contrary do not hold water. With regard to the Union's contention that the grievant should not have been assigned to the injector truck rotation, the Union notes that the grievance was filed on the first day that

Hennes was placed on, and operated, the injector truck. The Union argues that a grievance filed on the first day of impact is timely. With regard to the Union's alternative argument wherein the Union seeks backpay for the lost overtime opportunities, the Union essentially argues that the Employer's conduct constitutes a continuing violation of the CBA, and thus the continuing violation theory applies to the grievance. In sum, the Union believes the grievance is properly before the arbitrator for a decision on the merits.

With regard to the merits, the Union contends that management does not have the right to assign the grievant to the injector truck rotation. Building on this premise, the Union contends that since management lacks the right to do so, it was a contract violation for the District to assign the grievant to the injector truck rotation. It makes the following arguments to support the contention that the District's assignment was inappropriate.

First, the Union argues that the assignment of the grievant to the injector truck rotation was a mandatory subject of bargaining which could not be implemented unilaterally. This argument is based on the Union's belief that working on the injector truck is work that is outside of Hennes' normal work duties and responsibilities. The Union cites several WERC declaratory ruling decisions for the proposition that the assignment of work outside of an employe's normal duties is a mandatory subject of bargaining. The Union argues that since the District unilaterally implemented a mandatory subject of bargaining, it has violated the CBA.

Next, the Union contends that the District's actions herein have "broken the covenant of good faith" which is implicit in the parties' CBA. To support this premise, the Union cites several arbitrators who have held that labor agreements contain an implied covenant of good faith and fair dealing, and that an employer is not permitted to exercise its (management) rights in an arbitrary, capricious or discriminatory manner. According to the Union, the following points prove that the District broke this implied covenant of good faith and fair dealing. First, it asserts that Hennes was "intentionally excluded. . . from meetings with his co-workers" which concerned his (Hennes') work assignments. The Union believes Hennes should have been present for same. Second, the Union avers that the Union had an "understanding" with management that the Lab Tech would not be included in the injector truck rotation again. To support this premise, the Union cites Hennes' "undisputed testimony that the Union has an agreement with the Employer to exclude Hennes from the injector truck rotation." As the Union sees it, management reneged on that agreement by placing the grievant in the injector truck rotation. Third, the Union notes that Geurts approached some bargaining unit employes and asked them to sign a document which indicated it was their idea to put Hennes in the injector truck rotation. When these points are considered together, the Union believes they establish that the District acted in an arbitrary, capricious and discriminatory manner toward Hennes by placing him in the injector truck rotation.

Third, the Union argues that by assigning the grievant to the injector truck rotation, the District has violated a binding past practice. To support this contention, the Union notes that in 1996, 1997 and most of 1998, Hennes was not assigned to the injector truck rotation. According to the Union, this non-assignment created a past practice which should be considered binding for the following reasons. First, the Union maintains that the evidence proves that the benefit is of long-standing duration, the benefit being Hennes not being in the injector truck rotation. Second, the Union believes that this benefit was consistently applied from 1996 through September, 1998, when Hennes was not in the injector truck rotation. Third, the Union submits that this benefit was mutually accepted by both the Union and the District until September, 1998. In the Union's view, the foregoing points establish that a binding past practice exists that Hennes is not part of the injector truck rotation, and that practice is entitled to contractual enforcement. The Union asks the arbitrator to enforce that practice and remove Hennes from the injector truck rotation.

Finally, the Union maintains that the District should not be allowed to "have its cake and eat it too." It argues in the alternative that if management has the right to assign Hennes to the injector truck rotation, then he should have been on that rotation in the past. In other words, if Hennes could be assigned to the injector truck rotation in the last part of 1998, then he should have been a part of that rotation going back to 1996. The Union reasons that if he had been part of that rotation, he would have earned overtime; however, since he was not in the rotation, he lost the opportunity to earn continuation of the workday overtime. The Union therefore argues that by not assigning the grievant to the injector truck rotation in 1996, 1997 and part of 1998, the grievant lost continuation of the workday overtime opportunities during that 2 ½ year time period that he would have had if he had been part of the injector truck rotation. The Union disputes the District's assertion that this contention is inconsistent with its prior argument. In its view, both arguments are consistent with each other. It asserts that it is the District that has been inconsistent here, first not putting Hennes in the injector truck rotation, and then, 2 ½ years later, putting him in the rotation.

In order to remedy this contractual breach, the Union asks that the arbitrator direct the District to cease from assigning Hennes to the injector truck rotation. In the alternative, if the arbitrator determines that management can assign Hennes to the injector truck rotation, then the Union seeks 2 ½ years of lost continuation of the workday overtime pay for the grievant.

District

The District initially contends that the arbitrator should not address the merits of the grievance because the Union failed to file it in a timely fashion. According to the District, the grievance is untimely and should therefore be dismissed. With regard to the Union's claim that the District violated the agreement by not assigning the grievant to the injector truck rotation in 1996 and 1997, the District notes that the Union waited two years after such action

to file a grievance. It asserts that such a delay is profoundly beyond the time limitation contained in the CBA for filing grievances. It submits that if the grievant or the Union believed that the District improperly denied the grievant injector truck rotation duties, then a grievance challenging same should have been filed in either 1996 or 1997, not 1998. With regard to the Union's alternative claim that the District violated the CBA by assigning the grievant to the injector truck rotation in 1998, it avers that this claim is also untimely. This contention is based on the premise that since the grievant was informed that he would be back in the injector truck rotation on August 3, 1998, he should have filed his grievance at that time. In the District's view, the Union did not offer a reasonable explanation for waiting until September 21, 48 days later, to file the grievance. The District submits that the instant grievance far exceeds the time limitation contained in the contractual grievance procedure wherein it specifies that any grievance filed more than five days after the alleged violation is "invalid". The District maintains that this timeline is mandatory, not optional. It further asserts that the Union has offered no evidence and made no argument that a past practice exists for not applying the timelines of the grievance procedure. The District asserts that the arbitrator should therefore enforce the agreed-upon timetable for filing grievances and dismiss the instant grievance as "invalid".

With regard to the merits, the District asserts that it had the right to assign or not to assign the Lab Tech to the injector truck rotation in 1998. To support this premise, it first relies on contract language, namely the management rights clause. The District asserts that that clause reinforces the general principle that management has the right to assign duties and tasks, change schedules, and change work assignments. Conversely, it avers that nothing in the CBA suggests that management does not have the right to assign a duty to an employee, or restricts the job duties which the District can assign, especially where such a duty is in that employe's job description. Second, the District relies on the grievant's job description. According to the District, the grievant's job description indicates that the operation of sludge hauling equipment is a duty that the Lab Tech is expected to perform. The District contends that these two points (i.e. the language of the CBA and the grievant's job description) establish that the District had the right to assign the grievant to operate sludge hauling equipment in 1998 as part of the injector truck rotation.

Next, the District addresses the Union's argument that management cannot assign the grievant to the injector truck rotation because it did not do so in 1996 and 1997. The District asserts in this regard that the fact that it did not assign the grievant to the injector truck rotation in those years did not establish a past practice which prohibits the District from now assigning the grievant to the injector truck rotation. It makes the following arguments to support this contention. First, it relies on the general arbitral principle that an employer does not lose or waive a management right by not exercising same. Second, the District asserts that the evidence in this case does not indicate the existence of a long-standing "benefit" that has

been mutually accepted by the parties. It avers in this regard that employe benefits do not include job duties, but involve such items as paid breaks, employer paid insurance, pensions, vacations, sick leave, etc. Third, the District maintains that the so-called practice at issue does not involve a major term of employment. In its view, issues related to job content and work loads are not major items of employment and, therefore, are not subject to become binding past practices. Fourth, the District believes that the Union is attempting to utilize a past practice to prevent the District from exercising a legitimate function of managing the enterprise. The District argues that arbitrators routinely reject the use of unwritten practices to prevent management from exercising its legitimate authority.

The District responds as follows to the Union's argument that the grievant's assignment to operate sludge hauling equipment constituted a failure to bargain on a mandatory subject of bargaining. The District alleges this argument misses the mark because the question of whether the District has refused to bargain on a mandatory subject of bargaining is not an issue that this arbitrator has the authority to resolve; that question is subject to resolution only through a prohibited practice complaint with the WERC. The District argues in the alternative that even if the arbitrator had the authority to adjudicate the Union's prohibited practice charge, the District should still prevail for two reasons: (1) the Union has waived its right to negotiate job duties through the management rights clause of the CBA, and (2) the assignment of job duties that are within an employe's job description is not a mandatory subject of bargaining. It asserts that the Union's contention to the contrary (i.e. that the grievant's assignment to the injector truck rotation was a mandatory subject of bargaining) is simply wrong.

Next, the District addresses the Union's assertion that by assigning the grievant to the injector truck rotation in 1998, it broke the "covenant of good faith" which is implied in any CBA. The District asserts that the Union is just plain wrong in suggesting that such a covenant exists beyond the actual terms of the CBA. Beyond that, the District believes that the irony of the Union's bad faith argument is that when the District added the grievant to the injector truck rotation, it was merely trying in good faith to reduce the stress and load of the three employes who were then in the injector truck rotation. The District asserts there is nothing in the record to suggest an alternative motive.

The District responds as follows to the assertion in the Union's opening statement that it had "an understanding" with the District that the Lab Tech would not work on the injector truck again. The District contends that the Union failed to support this bold assertion with evidence. It notes that the only evidence which the Union offered to support this allegation was the grievant's testimony, and he testified that the only statement management made to him about his assignment to the Lab Tech position was that his "major job responsibilities" were in

the lab. The District asserts that even if that statement was made, the District's assignment did not contradict or violate such a statement because he was only on the injector truck every fourth week during the summer months. The District notes that the rest of the time, he performed his other job responsibilities in the lab. The District further contends that even if the grievant presumed he would not be on the injector truck rotation when he took the Lab Tech job, this was not a reasonable presumption for him to make given that the Lab Tech job description incorporates all of the duties of a PCT. The District asserts that if the Union wanted an agreement which prevented the District from assigning a Lab Tech to the injector truck rotation, it should obtain same through bargaining, not the grievance arbitration process.

Finally, the District responds as follows to the Union's alternative argument that the District violated the CBA by "denying" the grievant assignment to the injector truck rotation in 1996 and 1997. First, it contends at the outset that this Union argument contradicts its first argument. Second, it calls attention to the fact that the grievant never requested to be on the injector truck rotation in 1996 or 1997, or that he complained about such non-assignment. Third, it notes that the Union did not cite any contractual language or any evidence which suggests that the District's non-assignment of the grievant to the injector truck rotation in those years violated the CBA. The District notes in this regard that the CBA does not contain a (mandatory) requirement that the grievant must be assigned to the injector truck rotation. As the District sees it, the District was not obligated to assign the grievant to the injector truck rotation in the absence of a contractual requirement to do so. Fourth, the District notes that the circumstances in the lab were different in 1998 than they were in 1996 and 1997, namely that fewer tests were being performed by 1998. Relying on the foregoing, the District contends that it did not violate the CBA by not assigning the grievant to the injector truck rotation in 1996, 1997 or the first part of 1998. The District therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The contractual grievance procedure contains a timeline for filing grievances. The timeline is found in the third paragraph of Article XXIV wherein it specifies that the processing of a grievance "must be begun within five (5) work days of the alleged violation." The very next sentence then goes on to provide: "Any alleged grievance not filed within the above-stated limit shall be invalid." The time limit contained in this section is mandatory:

grievances "must be begun within five (5) work days of the alleged violation." (emphasis added). If they are not, they are "invalid". When the word "invalid" is used in this context, it means that unless a grievance meets this time limitation, it is time barred.

In deciding whether the instant grievance is timely, it will be necessary to review two separate time periods. The reason for this is as follows. This grievance consists of two separate parts which involve distinct time periods. The first part involves the District's assignment of the grievant to the injector truck rotation in late 1998. The second part involves the District's failure to assign the grievant to the injector truck rotation in 1996, 1997 and most of 1998. The timeliness of the grievance as it relates to these two separate parts will be addressed below in the order just listed.

The facts pertinent to the first part are as follows. On August 3, 1998, Hennes was informed that he was being put back into the injector truck rotation beginning September 21, 1998. Hennes actually began working in the injector truck rotation on September 21, 1998. The first day he was back on the injector truck, he filed the instant grievance.

Given the foregoing facts, the question here is what occurrence triggered the running of the five-day time limitation referenced in the third paragraph of the grievance procedure. Was the occurrence when Hennes received notice on August 3 that he was going to be put back into the injector truck rotation, or was it when he actually went back into the injector truck rotation on September 21 and first worked on the injector truck?

In situations such as this where a party announces its intention to do a given act but does not do or culminate the act until a later date, arbitrators usually hold that the occurrence for purposes of applying contractual time limits is the later date. In accordance with this accepted view, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not when the grievant was notified that he was going to be put back into the injector truck rotation. While the August 3 notice to the grievant certainly announced that something was going to occur a month and a half later (i.e. that the grievant was going to be put back into the injector truck rotation), it was still possible after August 3 for the District to change the date that the grievant was to start back in the rotation, or for that matter, to change their position entirely and rescind its directive. That being so, the activity which the grievance complains of (i.e. the grievant being put back into the injector truck rotation) did not ripen or come to fruition until September 21. Inasmuch as the instant grievance was filed on that very same date, the portion of the grievance relating to the District's assignment of the grievant to the injector truck rotation in late 1998 was timely filed.

The facts pertinent to the second part of the grievance are as follows. From 1992 to 1995, Hennes was a PCT and was included in the injector truck rotation. In 1996, he became a Lab Tech. During the summers of 1996, 1997 and most of 1998, the District did not assign

Hennes to be part of the injector truck rotation. Conversely though, he did not volunteer for it or request it either. Since Hennes was not in the injector truck rotation for that 2 ½ year period, he did not work injector truck continuation of the workday overtime or get paid for that overtime during that period. This changed in late summer of 1998 when management put Hennes back in the injector truck rotation. After he was back in the injector truck rotation, he resumed working injector truck continuation of the workday overtime again.

The premise for the second part of the grievance is that if Hennes could be assigned to the injector truck rotation in the last part of 1998, then he should have been a part of that rotation going back to 1996. The Union reasons that if he had been part of that rotation, he would have earned overtime; however, since he was not in the rotation, he lost the opportunity to earn continuation of the workday overtime. The Union therefore argues that by not assigning the grievant to the injector truck rotation in 1996, 1997 and part of 1998, the grievant lost continuation of the workday overtime opportunities during that 2 ½ year period that he would have had if he had been part of the injector truck rotation.

It is apparent from the foregoing that the second part of the grievance deals with a situation that first arose in the summer of 1996. As just noted, this is when the grievant was first taken off the injector truck rotation. The District contends that since this part of the grievance deals, in part, with the pay he received in 1996, that is when the grievance arose and when the time lines started to run. Obviously, if what happened in 1996 is looked at as a single and completed transaction, there is no question that this portion of the grievance would be untimely.

However, while many grievances involve a single isolated and completed transaction, this is not the case with all grievances. In some situations, the act complained of may be said to be recurring or continuing from day to day. In such circumstances, arbitrators have often times applied what has become known as the continuing violation theory. Under this concept, the limitation period recommences each day; hence, the time for filing the grievance is extended. The continuing violation theory therefore construes time limits so as to permit the filing of what would otherwise be an untimely grievance.

The continuing violation theory is often used by arbitrators where the factual situation involves the pay that an employe has received over time. In the opinion of the undersigned, the second part of the instant grievance is similar in nature to the situation just noted because the grievant claims lost overtime opportunities, and thus lost overtime pay, resulting from his "non-assignment" to the injector truck rotation. This "non-assignment" continued from 1996 through September, 1998. I therefore conclude that the continuing violation theory is applicable to the second part of the instant grievance. Application of that theory here means that the second part of the grievance is timely even though it deals with a situation that first arose in 1996 – over two years before the grievance was filed.

In applying the continuing violation theory here, it is expressly noted that I am not saying that the second part of the grievance is meritorious and that a remedy is owed going back to 1996. Obviously, the merits of the grievance have yet to be reviewed. The question of how far back any remedy will go will be addressed if a contractual violation is found and a remedy awarded.

Given the foregoing, it is concluded that the grievance was timely filed. It is therefore procedurally arbitrable.

Merits

Attention is now turned to the substantive merits of the grievance. As previously noted, the first part of the grievance deals with the grievant's assignment to the injector truck rotation in September, 1998. The second part deals with the District's failure to assign the grievant to the injector truck rotation in 1996, 1997 and most of 1998. The Union contends that both of the foregoing acts violated the CBA. The District disputes that assertion.

In deciding this contract dispute, the undersigned will focus first on the contract language cited in the grievance. If that language does not resolve the matter, the rest of the agreement will be reviewed. Finally, if necessary, the undersigned will address the Union's remaining arguments.

The grievance alleged that the District's actions violated Article III and IV. That being so, those provisions will be reviewed first.

Article III deals with staffing and coverage at the District's Wastewater Treatment Plant. On its face, this provision makes no reference whatsoever to duty assignments or anything of the sort. Instead, it is limited to staffing and the schedules which employes work. As a result, it is concluded that Article III does not relate to the subject involved in this grievance.

The focus now turns to Article IV. By its express terms, that article deals with the wage schedule, job classifications and pay policies covering numerous matters including overtime. It makes no reference whatsoever to duty assignments. Accordingly, Article IV does not relate to the assignment involved in this grievance either.

Having reviewed the contract provisions noted above, the focus turns to another contract provision, namely Article II (the management rights clause). That clause specifically gives the District the right "to determine schedules of work. . . and to determine the methods, processes and manner of performing work." This clause can easily be construed to give management the right to make assignments to employes and assign them duties.

Since the management rights clause gives the District the authority to assign work duties, the next question is whether any other portion of the CBA restricts this right. After reviewing the CBA, I find no language therein which restricts or limits the District's ability to assign duties to employes. More to the point, I find no contract language which prevents the assignment of the grievant to the injector truck rotation.

Having so found, the next question is whether Hennes' job description includes the task at issue (i.e. working on the injector truck). If it does, then this job description does not prevent the assignment either. However, if the job description does not cover working on the injector truck, then that particular assignment is outside of the grievant's job description. If a duty is not in an employe's job description, that can be a limitation on the employer's right to assign that particular duty to the employe.

On its face, the grievant's job description does not say anything about working on the injector truck. However, it does so by inference. The following shows this. While the position which Hennes fills is known informally as the Lab Tech, the formal title is "Lab Tech/Process Control Technician". It is apparent from the job's formal title that it is a dual position. Since it is a dual position, the incumbent has to perform the duties of both the Lab Tech and the PCT. The Lab Tech job description states in this regard: "A Lab Tech must have the knowledge and skills necessary to perform all duties of the Process Control Technician as stated in the. . . job description of a Process Control Technician (PCT)." One of the duties which is listed on the PCT job description is this: "Technicians will have to be able to operate. . .all. . . motorized vehicles. This includes any equipment that may be needed in the disposal of sludge. . ." The injector truck is one piece of equipment that is used in sludge hauling and disposal. The statement just quoted from the PCT job description clearly indicates that the operation of sludge hauling equipment is a duty which the PCTs are expected to perform. Since the Lab Tech has to perform all the duties of a PCT, and a PCT has to operate the injector truck, the obvious inference is that the Lab Tech has to operate the injector truck too. That being so, I am satisfied that the grievant's job description covers working on the injector truck.

Having held that neither the CBA nor the Lab Tech's job description preclude the District from assigning the grievant to the injector truck rotation, attention is now turned to the Union's remaining arguments. The Union contends that notwithstanding the foregoing, the assignment was still inappropriate for the following reasons.

First, the Union relies on an alleged past practice concerning the assignment to the injector truck rotation which it asks the arbitrator to enforce.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: (1) to clarify ambiguous language in the parties' agreement; (2) to implement general contact language; (3) to modify or amend apparently unambiguous language in the agreement; or (4) to establish an enforceable condition of employment concerning a matter which is not specifically addressed in the agreement. Circumstances (1), (2) and (3) are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently, this is a category (4) case since the Union seeks to have the alleged "practice" supplement the contract so as to be binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of a contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

That said, the focus turns to whether the Union established the existence of a practice governing assignment to the injector truck rotation. To support its contention that a practice exists, the Union relies on the fact that the grievant was not assigned to the injector truck rotation in 1996, 1997 and most of 1998. The Union believes this action established a binding past practice concerning the assignment to the injector truck rotation which the District was obligated to continue. The District obviously disagrees.

Based on the rationale which follows, I find that the fact that the grievant was not assigned to the injector truck rotation in 1996, 1997 and most of 1998 is not sufficient to establish a binding past practice which is entitled to contractual enforcement. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly where the pattern of conduct arises from the exercise of a management right. That is precisely the case here. Previously, employe placement on the injector truck rotation was not the result of bargaining but rather the District's unilateral act. The District had previously decided that the grievant would be exempt from the injector truck rotation. That was its contractual right. The District had the right to make this decision and take this action because it had reserved to itself, via the management rights clause (Article II) the right to manage its operations and determine schedules of work. This means that the previous assignment of employes to the injector truck rotation prior to September, 1998 was the product of the Employer's management prerogative. Said another way, it arose from the exercise of a management right.

Since the grievant's prior exemption from the injector truck rotation arose from the District exercising its management function, the Union had the burden of showing that the District knowingly waived its management rights and agreed to be bound in the future by a

practice which restricted its management rights. I find no proof in the record of same. Accordingly, it is held that the Union did not prove that the District waived its management right to change who it assigned to the injector truck rotation. Since the District never waived its right to do so, it could change same.

Next, the focus turns to the Union's contention that by assigning the grievant to the injector truck rotation, the District has "broken the covenant of good faith" which is implicit in the parties' CBA. To support this contention, the Union relies on its assertion that the grievant had an "understanding" with management that he would not work on the injector truck again. Building on this premise, the Union asserts that the District reneged on same when it put the grievant back in the injector truck rotation. I find that the record evidence does not support this assertion. The only evidence which the Union offered to support this assertion was the grievant's testimony. When the grievant testified in his own words, as opposed to responding to a leading question, what he said was that when he became a Lab Tech in 1996, the then-District Manager told him that his major job duty would be working in the lab. Assuming for the sake of discussion that this statement was made, I conclude it proves little and specifically does not establish that there was an "understanding" that Hennes would never work on the injector truck again. Besides, the grievant's major job duty as the Lab Tech is working in the lab, and placing him on the injector truck rotation did not change that. Aside from that, there is nothing in the record which proves that the District put the grievant back in the injector truck rotation for arbitrary or capricious reasons. The District's stated reasons for doing so were 1) because the circumstances in the lab had changed by 1998, namely that there were less tests to perform than had been the case previously; and 2) adding a fourth person to the rotation would reduce the work load of the three employes who were then on the injector truck rotation. Nothing in the record shows these reasons were illegitimate or proves there were ulterior motives.

Finally, the focus turns to the Union's argument that the grievant's assignment to the injector truck rotation was inappropriate because it constituted a failure to bargain on a mandatory subject of bargaining. According to the Union, the assignment of the grievant to the injector truck rotation was a mandatory subject of bargaining which the District could not implement unilaterally as it did. This particular claim involves Wisconsin's Municipal Employment Relations Act (MERA). As such, it involves a statutory claim as opposed to a contractual claim. Statutory claims involving MERA are resolved by the WERC through prohibited practice complaints. The foregoing is noted because this case is not a prohibited practice complaint; it is a grievance arbitration. In the context of this case, my authority is limited to interpreting the instant labor agreement and resolving questions of contractual rights. Any alleged statutory violation of MERA is separate and distinct from an alleged contractual violation. Consequently, the undersigned will not decide whether the grievant's assignment to the injector truck rotation is a mandatory subject of bargaining under MERA, or whether the

District failed to bargain with the Union on a mandatory subject of bargaining. Accordingly, no further comments are made concerning same.

Having found none of the Union's arguments concerning the assignment in question persuasive, it is held that the District did not violate the CBA by assigning the grievant to the injector truck rotation in late 1998.

The Union argues in the alternative that if management had the right to assign Hennes to the injector truck rotation in late 1998, then he should have been a part of the rotation going back to 1996. Building on this premise, the Union reasons that if Hennes had been in the rotation, he would have earned overtime; however, since he was not in the rotation, he lost over two years of continuation of the workday overtime. Based on the following rationale, the undersigned does not find this contention persuasive. Earlier in the **DISCUSSION**, I found that the District was not prevented from assigning the grievant to the injector truck rotation, in part, because 1) the management rights clause gives the District broad control of the assignment of work to its employes, and 2) nothing in the CBA restricts this right. The reason I have noted these findings again is because it logically follows from them that the converse is also true. The following shows this. Since the management rights clause gives the District the discretion/right to assign work to employes, that same clause also gives it the discretion/right to not assign work to employes. Figuratively speaking, the door swings both ways. Just because the District has the right to assign Hennes to the injector truck rotation does not mean that it has to do so. Furthermore, since nothing in the CBA restricts the District's right to assign work to employes, nothing therein restricts the District's right to not assign work either. In point of fact, the CBA does not contain a requirement that the grievant, or any other employe for that matter, must be assigned to the injector truck rotation. In other words, nothing in the CBA specifies that assignment to the injector truck rotation is mandatory. The Union characterizes the foregoing result as allowing the District to "have its cake and eat it too". The undersigned does not disagree with that characterization. Be that as it may, the foregoing result is mandated by the management rights clause and the lack of a restriction on the District's right to assign work. It is therefore concluded that the District did not violate the CBA by not assigning the grievant to the injector truck rotation in 1996, 1997 and most of 1998.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

1. That the grievance was timely filed;

2. That the District did not violate the CBA by assigning the grievant to the injector truck rotation in 1998; and

3. That the District did not violate the CBA by not assigning the grievant to the injector truck rotation in 1996, 1997 and most of 1998. The grievance is therefore denied.

Dated at Madison, Wisconsin this 25th day of October, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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