BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**FOND DU LAC CITY EMPLOYEES UNION,
LOCAL 1366, AFSCME, AFL-CIO**

and

CITY OF FOND DU LAC

Case 157
No. 58217
MA-10885

(Osgood Grievance)

Appearances:

Mr. Lee W. Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of Fond du Lac City Employees Union, Local 1366, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C. by **Attorney William G. Bracken**, Employment Relations Services Coordinator, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Fond du Lac.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Fond du Lac City Employees, Local 1366, AFSCME, AFL-CIO (hereinafter referred to as the Union) and the City of Fond du Lac (hereinafter referred to as the Employer or the City) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the County's decision not to pay out of class pay to Pam Osgood. The undersigned was so designated. A hearing was held on March 21, 2000, in Fond du Lac, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged on May 4, 2000, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The issues before the arbitrator are:

1. Did the City of Fond du Lac violate Article IX Differential Pay and the Memorandum of Understanding dated October 23, 1995, when it denied "Out of Class" pay to grievant, Pam Osgood on May 13, 1999?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE III

PROBATIONARY PERIOD • EMPLOYMENT STATUS

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Section 2 – A permanent employee is hereby defined as a person hired to fill either a permanent full-time or permanent part-time position. A temporary/ seasonal employee is one who is hired for a specific time or for a specific project (not to exceed 4 months) except in the Parks Division (or other divisions or projects when specifically agreed to by the Union and the City) where temporary/seasonal positions of up to eight (8) months duration will be permitted between April 1 and December 1. A temporary/seasonal employee will be separated from the payroll at the end of such of period or project. The intent of this section is to permit the use of temporary/seasonal employees during periods of increased work, but temporary/seasonal employees, after completing their employment, will not be replaced until the next season or project. The City shall inform the Union of the status at the time of hire of all temporary/seasonal employees and shall indicate to the Union when such employees have been removed from the payroll. Temporary/seasonal

employees, of less than six (6) months duration, are not subject to the terms and conditions of this Agreement; however, temporary/seasonal employees will not be utilized to displace regular employees but rather to augment the work forces. Seasonal/temporary employees of six (6) months duration in the Parks Division shall be given first preference for re-hire for the following year.

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ARTICLE IX

DIFFERENTIAL PAY

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Section 2 - Work Out of Class - Whenever an employee works at a higher rated job for three (3) consecutive hours or more, he shall receive the higher rate of pay for those hours worked in the higher rated job. Such higher base rate will be the wage step in the wage scale for the higher rated job which is commensurate with his years of service with the City.

. . .

ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, 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, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

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APPENDIX A

1999 Wage Rates Effective January 1 – December 31, 1999	Hire	. . .	30 Mos.

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Park Caretaker I	$12.20	$15.67

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APPENDIX E

SEASONAL WAGE RATES

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1999 Rates

Seasonal Employee	Year 1	Year 2	Year 3
January 1 – December 31, 1999	$ 6.72	$ 6.99	$ 7.29

BACKGROUND

The Employer provides general governmental services to the people of Fond du Lac, Wisconsin. Among these services is the operation of a Parks Division. The Union is the exclusive bargaining representative of the City's non-exempt employes, including those in the Parks Division. Prior to 1995, the bargaining unit did not include any Long Term Seasonal employes (LTS). In that year, the parties agreed to allow the use of LTS's for up to four months, except in the Parks division, where LTS's could be used for up to eight months between April 1 and December 1. The parties agreed that LTS's would be used to augment, rather than displace, the permanent work force. Certain questions remained after the negotiation of the contract language permitting the use of LTS's, and in October of 1995, the parties negotiated a Memorandum of Understanding addressing the payment of out of class pay to LTS's. The Memorandum, which was retroactive, read:

> This Memorandum of Understanding between the City of Fond du Lac and Fond du Lac Employees Union Local 1366 is to be effective April 1, 1995.
>
> The City and the Union agree that additional clarification is needed regarding "Out of Class" pay for seasonal employees in the Parks Division of six (6) months or more duration. Seasonal employees in the Parks Division of six (6) months or more duration shall receive out of class pay as follows:
>
> 1. The above employees shall receive the Laborer I rate when performing duties of operating a riding mower of five (5) to seven (7) feet in width or operating a sweeper.
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> 2. The above employees shall receive the Caretaker I rate when performing duties of operating a riding mower of eight (8) to nine (9) feet in width;

when operating a tractor; when operating a boom lift or operating a truck requiring a Commercial Drivers License.

3. The above employees shall receive the Equipment Operator I rate when performing duties of operating a riding mower of ten (10) feet or more in width.

4. The above employees shall receive out of class pay when performing the duties required of any permanent bargaining unit position when assigned to perform the duties of that position in the absence of a permanent employee in accordance with the Labor Agreement.

For purposes of placement of these employees in the appropriate salary step as outlined in the labor agreement, all continuous time worked as a seasonal employee shall be used to determine the proper step placement on the salary schedule and the appropriate out of class rate.

As of the time of this grievance, the City had eight LTS's in the Parks Division, including Pamela Osgood. Bev Kindschuh is a Caretaker I in the Parks Division and is a permanent employe. The job description for Caretaker I defines the work and qualifications required as:

Characteristic Work of the Class

Nature: Under general supervision to perform maintenance work on buildings and grounds and equipment assigned to the Parks Division and to perform related work within the Department of Public Works as required.

Examples:

1. Repairs and maintains buildings and recreational area:
2. Operates tractor, mowers, power saw, trucks, etc.
3. Cleans shelter houses, comfort stations, and boat docks.
4. Directs individuals to picnic areas.
5. Waters and cuts grass, rakes leaves, and collects litter.
6. Plants grass, flowers, shrubs and trees and lays sod.
7. Prunes and sprays shrubs and trees.
8. Shovels snow and sands sidewalks.
9. May operate filter plant and swimming pools.
10. Performs mason, plumbing, painting, and carpentry related maintenance and construction tasks.
11. May operate boilers.
12. Notes violations of Park Ordinances and notifies proper authorities.

13. Keeps records and makes reports.

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Essential Knowledge Abilities:

1. Graduation from high school or equivalent.
2. Previous experience in gardening, building and yard maintenance work.

Special Requirement:

1. Possession of a valid Wisconsin Commercial Driver's License with B, C, D and Endorsement N, air brakes required.

There is no job description for a LTS. They are assigned to parks and green spaces to perform minor painting and maintenance, open restrooms, clean restrooms, docks and shelters, pick up litter, do small mowing and gardening jobs and general clean-up. These tasks overlap some of the duties of the Caretaker I.

On May 13, 1999, Kindschuh took eight hours of vacation. Osgood worked at Kindschuh's normal work location downtown and was paid her normal hourly rate. She did not operate any large equipment or perform tasks that she did not normally perform in her LTS position. The top hourly rate for a LTS is $7.29, while the top rate for a Caretaker I is $15.67. The instant grievance was filed, seeking out of class pay for Osgood pursuant to Section #4 of the Memorandum of Understanding: ". . . performing the duties required of any permanent bargaining unit position when assigned to perform the duties of that position in the absence of a permanent employee. . . ." The grievance was denied in the lower steps of the grievance procedure and was referred to arbitration.

At the hearing on March 21, 2000, in addition to the facts recited above, the following testimony was taken:

Jennifer Barrett testified that she is a steward and former President and Vice-President of Local 1366, and has been involved in contract negotiations since 1981. She was a member of the Union's bargaining team when the 1995 Memorandum of Understanding was negotiated. The first three points of the Memorandum addressed the use of specific pieces of equipment. The fourth was aimed at payment for those duties which are not easily identified by pieces of equipment. According to Barrett, that section applies when permanent employes are absent, and does not require that the LTS do anything beyond their normal duties to receive out of class pay, since there is a great deal of overlap between the duties of LTS's and permanent employes. Barrett reviewed other instances in which she felt that LTS's were receiving out of class pay for their normal work when the permanent employe was absent. She cited July 9 and 10, 1998, when Caretaker III Jay Furlong was absent and LTS Michael Stoffel worked in his absence. Stoffel received six hours of Caretaker III pay for Friday, July 10th. Barrett also

referred to August 17-19, 1998, when Kindschuh was off work and Osgood received 24 hours of Caretaker I pay. In June of 1999, after this grievance was filed, Kindschuh was absent on 17th and 18th, and Osgood received four hours of Caretaker I pay on the 18th. Barrett also testified that the seasonal clerical who replaced her when she was gone was paid out of class pay, even though she was only trained to perform the most basic functions of the job, tasks that the seasonal also performed when Barrett was there.

On cross-examination, Barrett agreed that in the case of Jay Furlong's 1998 absence, the LTS received only six hours of out of class pay, even though Furlong was gone for two days, and that the LTS had performed Furlong's actual duties on the day he received the Caretaker III pay. With respect to Osgood's receipt of Caretaker I pay for Kindschuh's August, 1998, absence, she had no idea whether Osgood might have been working with a mower or other equipment that would have entitled her to out of class pay under some other section of the Memorandum. Barrett also said she did not know whether Osgood was working with a mower on June 18, 1999, but she doubted it, because she had asked employes to provide examples of payment under Section #4 of the Memorandum. When shown an equipment record for that day, she conceded that Osgood had used a riding mower for four hours on that day, and this was the reason she received the Caretaker I rate.

Human Resources Director Ben Mercer testified that he negotiated the 1995 Memorandum of Understanding. He expressed the opinion that Section #4 required both the absence of the permanent employe and the performance of that employe's duties. He said that he denied this grievance because Osgood was performing only her regular work and did not do any of the distinguishing tasks of the Caretaker I position. On cross-examination, Mercer reviewed the collective bargaining agreement and agreed that the regular out of class pay language was applicable to LTS's: "Whenever an employee works at a higher rated job for three (3) consecutive hours or more, he shall receive the higher rate of pay for those hours worked in the higher rated job. Such higher base rate will be the wage step in the wage scale for the higher rated job which is commensurate with his years of service with the City." Asked what the need was for Section #4 of the Memorandum, Mercer noted that the Memorandum differed because it required the absence of the permanent employe and did not mention the three consecutive hour threshold. He conceded, however, that the three-hour threshold was applied to LTS's and that a LTS could receive out of class pay even if the permanent employe was present, if the LTS performed the work of the higher rated job.

Parks Foreman Michael Boede testified that Osgood was normally assigned to Lakeside Park, but that he assigned Osgood to work downtown on May 18, 1999, to pick up litter and pull weeds because Kindschuh was gone. This was the same work she performed at the park. He noted that he used LTS's interchangeably with permanent employes at some locations. He cited the Pavilion, staffed by a full-time employe from December 1st through the end of March, and staffed by LTS's during the April 1 – November 30th period. He also cited the downtown parking lots and mini-parks, a year round job normally worked by Kindschuh, where he assigned LTS Chris Katz from July through November in 1999. He said he generally approved out of class pay for LTS's only when they used a large piece of equipment, such as a

boom truck or a riding mower. In the case of Osgood's work on June 18, 1999, he paid the Caretaker I rather than Laborer I as specified in the Memorandum, because Kindschuh would have done the job if she was there, and the use of the mower is one distinguishing feature of the Caretaker I class.

On cross-examination, Boede conceded that the work at the Pavilion in the summer probably only took four hours per day on Mondays, when there was accumulation from the weekend's activities, and less time on other days.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the Grievant is entitled to out of class pay for working in the absence of a permanent employe. The Memorandum of Understanding struck a balance between the interests of the parties. The City wanted flexibility in its work force during peak periods. The Union wanted to protect full-time jobs from erosion. This is a particular concern where the LTS's are paid less than half of the permanent employes' rate. Thus, the Union sought, and got, a provision that required the City to pay the full-time rate for the work any time the permanent employe was gone and a LTS worked. This eliminated the City's incentive to displace permanent employes with LTS's.

That this is the proper interpretation of Section #4 of the Memorandum is demonstrated by the City's payment of out of class pay in past instances. In 1998, Michael Stoffel worked for six hours in the absence of other permanent employes and was paid at the Caretaker III rate. Likewise, the Grievant, Pam Osgood, received three days of Caretaker I pay in August of 1998 when Kindschuh was absent, precisely the same situation as that which gave rise to this grievance. Again in June of 1999, Kindschuh took June 16th off and Osgood filled in for her for four hours, receiving out of class pay. While the City claims this was due to her operation of a riding mower, the mower in question is specifically mentioned in Section #1 of the Memorandum. If it was the operation of the mower that triggered out of class pay, she should have received Laborer I pay. The fact that Osgood was paid at the Caretaker I rate demonstrates that it was her replacement of Kindschuh that triggered the payment. Further, when Clerk/Stenographer II Jennifer Barrett was absent from her job, the LTS's who replaced her were paid at her rate, even though they had only limited training and skills, and even though they did nothing more than they did when Barrett was present. All of these cases support the Union's interpretation of the 1995 Memorandum of Understanding.

The Arbitrator should reject the opinion of Mercer that Section #4 of the Memorandum only applies when LTS's are performing the core functions of the permanent employe's job. If that were the case, there would be no need for the Memorandum. The collective bargaining agreement already requires out of class pay for any employe, including LTS's, who performs

the core functions of a higher rated job. It is a basic rule that language is not to be read so as to be meaningless, and this principle reinforces the Union's argument that the Memorandum provides for more protection of the workers and the bargaining unit than does the contract's out of class pay provision. It is the language of the Memorandum that is in issue here and that document plainly provides for out of class pay whenever a permanent employe is absent and a LTS is working at the site and performing the same general duties. Pam Osgood met the requirements of this language when she worked in Bev Kindschuh's absence. Accordingly, she should have received out of class pay for May 18, 1999.

The Position of the Employer

The City takes the position that the grievance is without merit and should be denied. The issue here is the Grievant's entitlement to out of class pay. As Arbitrator Richard McLaughlin ruled in a recent Award involving these same parties, out of class pay is only warranted when an employe performs the core, distinguishing functions of a higher rated job. Here, the Grievant did nothing more than do her normal job in the normal way. She was not assigned to a different or more difficult set of duties. Thus, under the precedent set by Arbitrator McLaughlin's Award, there can be no contract violation.

The contract requires work in a higher rated job before out of class pay is owed to a worker. While there is overlap between jobs, here the Grievant did nothing that a seasonal worker would not ordinarily have done. The Union presented no evidence whatsoever that Osgood was assigned to Kindschuh's job, nor even any evidence of what Osgood actually did during the day on May 18th. Their evidence established only that Kindschuh was gone that day and that Osgood was at work. That cannot be the basis for granting out of class pay. In prior instances, seasonal employes have worked in the absence of permanent employes without receiving any additional compensation. Thus, when Stoffel worked in the absence of Furlong for two days, he received the higher Caretaker III rate only for the six of the sixteen hours when he actually did the higher rated work. When Kindschuh was gone on June 17 and 18, 1999, Osgood received only four hours of Caretaker I pay, the four hours she spent operating a mower. When Chris Katz worked alone downtown for several months in 1999, he did not receive out of class pay, even though the downtown assignment is a year round job that is normally staffed by permanent employes. Osgood did receive out of class pay for three days in 1998 when Kindschuh was gone, but the most reasonable inference is that she was performing the distinguishing work of the Caretaker I job. The record clearly establishes that the Union is wrong when it claims that the mere absence of a permanent employe gives rise to a right to out of class pay.

The City's position is also supported by the Memorandum of Understanding. Section #4 of the Memorandum must be read in conjunction with the contract and reading those two together yields the following conditions before out of class pay is received:

1. A seasonal employe must be assigned to perform the duties of an absent permanent employe;

2. The seasonal employe must actually perform those duties for three hours or more.

Here, there is evidence neither of Osgood's assignment to Kindschuh's duties nor her performance of those duties on May 18th. Foreman Boede testified that he assigned Osgood to the downtown on that day, but that her assignment was to her normal tasks. There is no evidence of the work she actually performed, but it is fair to assume that she performed only her normal tasks. Thus, she met neither of the criteria and cannot receive out of class pay.

The Union bears the burden of proving its case and it has provided no evidence on which the Arbitrator could possibly grant this grievance. It has not proved what the employes who did receive out of class pay were doing to merit the pay, and it has not proved that Osgood did anything on May 18th to merit the pay. Its theory that simply being at work when a permanent employe is absent triggers out of class pay is refuted by the language of the contract and the Memorandum, and by the history of not paying out of class pay in such cases. Given this, the Arbitrator must conclude that the City's position is correct and he must, therefore, deny this grievance in its entirety.

DISCUSSION

The grievance seeks out of classification pay for a seasonal employe who performed her normal work duties in the absence of a permanent employe. The central question that controls this case is whether Section #4 of the 1995 Memorandum of Understanding creates an entitlement to out of class pay for seasonals solely on the basis of the absence of a permanent employe having similar duties. There is no evidence that Osgood was specifically assigned to perform Kindschuh's duties on the day in question nor that she performed any duties other than the relatively simple litter control and weeding normally required of her position, tasks that are common to both jobs. Thus, no claim can be made out under the general out of class pay provisions of Article XIV which, as Arbitrator McLaughlin noted, requires performance of the core duties of another classification – those that are "key and relatively exclusive" to the higher rated position. At the most, the evidence here stands for the proposition that on May 13, 1999, Osgood went from Lakeside Park where she normally worked to the downtown locations normally worked by Kindschuh and there performed her normal duties.

Ambiguity

The familiar rule is that clear language is to be applied, while ambiguous language must be interpreted. The Union asserts that the 1995 Memorandum of Understanding covering out of classification pay for seasonal employes was clearly intended to prevent the substitution of seasonals for permanent employes by requiring out of classification pay whenever the permanent employe is gone. That is not an unreasonable thesis, and the language of the Memorandum can be read broadly enough to encompass this interpretation. Section #4 of the Memorandum says:

> 4. The above employees shall receive out of class pay when performing the duties required of any permanent bargaining unit position when assigned to perform the duties of that position in the absence of a permanent employee in accordance with the Labor Agreement.

Both parties agree that the absence of a permanent employe is a pre-condition to out of class pay under this particular provision, but they disagree as to the remaining requirements. According to Article III of the collective bargaining agreement, the purpose of these positions is "to augment the work forces" and given the nature of the jobs a seasonal's duties will necessarily also be the duties required of a permanent bargaining unit position – just not all of the duties. The City argues that this means the core duties and that is consistent with the normal meaning given provisions of this sort. However, the Union's interpretation can certainly be made to fit with this language. The other point of disagreement is whether by working at a site in the absence of a permanent employe normally assigned there, the seasonal is effectively assigned to the absent employe's job. The Union asserts that the seasonal is thereby assigned, and in this case, Osgood was specially moved from her normal assignment at Lakeside Park to the downtown area left vacant by Kindschuh's absence. The City asserts that the employe must be specifically "assigned to perform the duties of that position," meaning clearly directed to perform the permanent employe's job. Again, either argument is supportable simply by reading the language. It is ambiguous on its face and understanding it requires the Arbitrator to apply the customary principles of interpretation.

Surplusage

The Union argues that if Section #4 of the Memorandum merely restates the requirements of Article IX, it is surplusage, and thus, runs afoul of the normal rule that arbitrators disfavor interpretations rendering negotiated provisions surplusage. The Union correctly cites the rule, but the Memorandum's terms are not precisely the same as Article IX. That provision states, in pertinent part: "Whenever an employee works at a higher rated job for three (3) consecutive hours or more, he shall receive the higher rate of pay for those hours worked in the higher rated job." Section #4 of the Memorandum requires, in addition, that the permanent employe be absent and that the seasonal employe be assigned to perform the duties of the absent employe. Neither is a specific requirement of Article IX. These additional requirements make sense in the context of seasonal employes because, as previously noted, the nature of their job duties is such that they will always be "[working] at a higher rated job," which is the only substantive requirement in Article IX. Without the clarification provided by the Memorandum, the possibility exists that seasonal employes would have an arguable claim for out of class pay every time they performed their normal jobs. /1

1/ Having made this observation, I would note that the requirement that the employe be "assigned" to perform the work of another position does not necessarily require the saying of some set of magic words. An employe can be placed in a position where the performance of an absent employe's duties is

logically and forseeably required in order for them to function, and the fact that no one specifically said "You are to perform Employe X's job today" would not prevent the employe from claiming he or she was "assigned" to do the work.

Past Practice

Each party cites past instances in support of its interpretation of the Memorandum. The evidence concerning these instances is mixed. Barrett testified without contradiction that a seasonal clerical employe in the Parks Division receives her Clerk/Stenographer II rate when she is absent, even though the seasonal performs only the simple tasks of answering the phone and taking reservations and does not do the more involved record keeping aspects of her job. This supports the Union's view that the absence of the permanent employe is all that is required for the seasonal to receive out of class pay. The practice for the field personnel of the Parks Division is more favorable to the City's interpretation. Four instances were cited. The Union pointed to the July, 1998, absence of Jay Furlong; the August, 1998, absence of Bev Kindschuh; and the June ,1999, absence of Kindschuh. The City pointed to the assignment of seasonal Chris Katz to work alone at the downtown lots and mini-parks from July to November in 1999.

In the Furlong absence and the June, 1999, absence of Kindschuh, the seasonal employes received the higher rate of pay, but only for a portion of the time the permanent employe was absent. Furlong was gone for two days and the seasonal received only six hours of out of class pay. The record does not reflect the specific work that the seasonal performed. Kindschuh was also gone for two days and the seasonal received only four hours of out of class pay. In that case, the evidence shows that Osgood ran a mower for four hours and that this was the reason for the out of class pay. In both instances, if the Union was correct that the absence of a permanent employe was the only pre-condition to receiving out of class pay, the seasonals should have received 16 hours of out of class pay. In the case of the August, 1998, absence of Kindschuh, Osgood received out of class pay for all three days. However, the record is again silent as to the work that Osgood performed on those days, and it is not possible to say with any certainty what the basis for the higher pay was.

The use of Chris Katz to work alone at the downtown lot and mini-parks for five months in 1999 with no payment of out of class pay, can be read as supporting the City's position. It is a case of a seasonal working in a job usually done by a permanent employe without the presence of any permanent employe. Whether this implicates Section #4 of the Memorandum depends upon whether one views the phrase "absence of a permanent employee" as meaning that the seasonal is working alone at a site usually manned by a permanent employe, or as meaning that a permanent employe must be absent from work. There is no evidence that the City did not have its full complement of permanent employes during the time Katz worked downtown – merely that they were assigned elsewhere. I do not find it necessary to resolve this question in order to conclude that the bulk of the past practice evidence does not support the Union's overall argument.

Barrett testified that Section #4 of the Memorandum was negotiated because the parties felt that the situation of a seasonal working in the absence of a permanent employe would be a frequent occurrence. The Memorandum was negotiated in 1995, and took effect at the beginning of that season. There are eight long-term seasonals working in the field for the Parks Division. Each permanent bargaining unit employe in the Parks Division is entitled to sick leave (Article XV), compensatory time (Article VIII), two to three floating holidays (Article XIV) and between 80 hours and 200 hours of vacation (Article XIII) per year. Yet in the five seasons that Memorandum has been in effect prior to this hearing, only three instances have been cited to show that the absence of a permanent field employe entitles a seasonal to out of class pay. Two of those instances do not, in fact, stand for that proposition, and the third is ambiguous.

Given the limitations of this record, it is not possible to say with absolute certainty what the parties intended by Section #4 of the Memorandum of Understanding. Each party has put forward a plausible interpretation and has offered some proof of past practice in support of its position. The issue before the Arbitrator is whether the City violated the contract by not paying Pam Osgood out of class pay on May 13, 1999, and the Union bears the burden of persuasion on that issue. On the state of the record, I conclude that the Union has not borne its burden of persuasion, and accordingly that this grievance cannot be granted.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The City of Fond du Lac did not violate Article IX Differential Pay and the Memorandum of Understanding dated October 23, 1995, when it denied "Out of Class" pay to grievant, Pam Osgood on May 13, 1999. The grievance is denied.

Dated at Racine, Wisconsin, this 7th day of August, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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