BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA CITY EMPLOYEES
LOCAL 1035, AFSCME, AFL-CIO

and

CITY OF MENASHA

Case 100
No. 58961
MA-11132

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Menasha City Employees Local 1035, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. James R. Macy**, on behalf of the City of Menasha.

ARBITRATION AWARD

Menasha City Employees Local 1035, AFSCME, AFL-CIO, hereinafter the Union, and the City of Menasha, hereinafter the City, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator, David E. Shaw, to hear and decide the instant dispute between the Union and the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned was designated to arbitrate in the dispute and hearing was held before the undersigned on September 21, 2000, in Menasha, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by December 6, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the substantive issue.

The Union would phrase the issue as:

"Did the city violate the collective bargaining agreement when it permanently assigned a seasonal park laborer to Jefferson Park? If so, what is the remedy?"

The City would frame the issue as follows:

"Did the City violate Article II, Section A, of the Collective Bargaining Agreement when it assigned a Seasonal Park Laborer for duties at Jefferson Park? If so, what is the appropriate remedy?"

The Arbitrator frames the issue as being:

"Did the City violate the Collective Bargaining Agreement when it assigned a Seasonal Park Laborer to Jefferson Park? If so, what is the appropriate remedy?"

The City also raises an issue as to whether the grievance must be denied for failure to comply with the contractual requirements in the grievance procedure.

CONTRACT PROVISIONS

The following provisions of the parties' 1998-2000 Collective Bargaining Agreement are cited:

ARTICLE II – MANAGEMENT RIGHTS RESERVED

A. General: Unless as otherwise herein provided, the management of the work and the direction of the working forces, including but not limited to, the right to hire, promote, demote, suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

. . .

ARTICLE XV – GRIEVANCE AND ARBITRATION PROCEDURE

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated and the signature of the grievant and the date. Matters involving a union grievance shall be signed and processed by a Union officer or representative.

. . .

F. Arbitration:

. . .

6. Decision of the Arbitrator: The powers of the Arbitrator are limited as follows: Its (sic) function is limited to that of interpreting and applying the provisions of this Agreement. It shall have no power to add to, subtract from or modify any of the terms of this Agreement. The decision of the Arbitrator shall be rendered promptly following the hearing and if exercised in accordance with the terms of this Agreement and consistent with federal, state and local laws, shall be final and binding upon both parties.

. . .

APPENDIX "A"

Hourly Paid Employees

Effective 1-1-2000

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PARK DEPARTMENT

Maintenance Mechanic	17.63
Asst. Mechanic/Pool Maintenance	16.95
Park Caretaker	16.49
Cemetery Caretaker	16.49
Park Laborer	15.92
Seasonal Park Laborer	15.92

. . .

A new employee who is hired as a Common Laborer or a Park Laborer shall be reclassified as a Truck Driver or Park Caretaker after a maximum of two (2) years as a Laborer.

An employee who posts into the position of Common Laborer or Park Laborer shall be reclassified as a Truck Driver or Park Caretaker after a maximum of six (6) months as a Laborer.

BACKGROUND

The City maintains and operates a Park Department and owns and maintains a number of parks and areas located within the City's limits. The Union is the exclusive collective bargaining representative for "all regular full-time, regular part-time and regular seasonal employees in the Department of Public Works, Park Department and Bridge Department in classifications listed on Appendix 'A'".

Appendix "A" of the parties' Agreement includes the following classifications and payrates in the Parks Department: Park Caretaker ($16.49); Park Laborer ($15.92); and Seasonal Park Laborer ($15.92). Under the parties' Agreement, an employee who posts into the Park Laborer position will automatically be reclassified as a Park Caretaker after a maximum of six months, while a person hired into the Park Laborer position will be automatically reclassified as a Park Caretaker after a maximum of two years. Employees in the Seasonal Park Laborer position, while paid the same rate and performing the same duties as a Park Laborer, do not automatically progress to the Park Caretaker position. The duties and qualifications set forth in the job descriptions for the Seasonal Park Laborer, Park Laborer and Park Caretaker positions are identical, with the exception that the Seasonal Park Laborer position generally begins in April and ends in November and therefore does not include duties related to maintaining ice rinks.

The instant case involves the assignment of the Seasonal Park Laborer, rather than a Park Caretaker, to work in Jefferson Park in June of 1999. The Union grieved the assignment as violative of the Agreement and past practice.

The grievance was first discussed orally between Union President, William Bojarski, and Superintendent of Parks, Forestry and Cemeteries, Lawrence Buck, and then submitted in writing. The written grievance stated the "applicable violation" as follows, "ARTICLE II, A; PAST PRACTICE." As relief it requested, "CEASE AND DESIST FROM VIOLATION OF CONTRACT AND PAST PRACTICE." The written response of the Director of Parks and Recreation, Brian Tungate, denying the grievance at Step 3, stated, in relevant part:

> "Management's right to direct the work force is clearly stated in Article II.A. of the collective bargaining agreement. I know of no past practice that would in any way limit a supervisor's ability to assign a seasonal person to a particular work site."

The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the City has always assigned Park Caretakers to major parks, such as Jefferson, and that therefore the City violated past practice, as well as the Agreement, when it assigned a lower classification employee (Seasonal Park Laborer) to a position previously filled by a higher classification year-round employee (Park Caretaker). The Union requests that the City cease and desist from assigning the seasonal employee to Jefferson Park and suggests that the City reclassify the Seasonal Park Laborer as a Park Caretaker if it wishes to permanently assign that individual to Jefferson Park. The Union, however, does not challenge the right of the City to assign whichever Park Caretakers it desires to the major parks.

In the past only Park Caretakers have been assigned to major parks such as Jefferson, and no Seasonal Park Laborer has ever been assigned the duties of maintaining one of the major parks. In that regard, the Union notes that there are three primary classifications of park maintenance workers – Seasonal Park Laborer, Park Laborer and Park Caretaker. According to their job descriptions, all three positions are assigned similar duties. However, for career progression, one must first be a Park Laborer before becoming a Park Caretaker. This progression suggests that Park Laborers become more proficient in their duties over a period of time and that therefore Park Caretakers are expected to handle the increased responsibility of maintaining a major park. In light of that, it is understandable why the City has never assigned an entry-level Seasonal Park Laborer to a major park.

The Union asserts that it is generally understood that employers should not be allowed to assign lower classification employees to higher classification work without compensation, as to do so would defeat the classification system. While the similarity of the job descriptions amongst the classifications might seem to suggest that the positions are interchangeable, past practice suggests that is not the case. The Union urges the Arbitrator to recognize the practice of only assigning Park Caretakers to the City's major parks, and consider the classification and pay differences between a Seasonal Park Laborer and a Park Caretaker. The Union cites the

testimony of the Union's Vice-President that there has always been a Park Caretaker assigned to be in charge of the park as long as he has been in the Department. In this case, the Park Caretaker assigned to Jefferson Park told his supervisor that he did not like it there, and he was assigned out of that park. At that point the Seasonal Park Laborer was assigned to the park. However, while there is a difference in pay between the two positions, unlike in the Streets Department, there is no provision for higher pay when doing the work of a higher-paid classification in Parks. Thus, the City is getting the higher-paid Park Caretaker work performed for lesser pay. The Union also cites the testimony of the Union's President as showing that being assigned to a major park requires more from the park employee than other park assignments, in that it requires overseeing the summer help and making sure the work is completed.

While the City may claim that at least once in the past 25 years it assigned an employee to Jefferson Park who was laid off during the winter months, that situation did not establish a past practice, since it was a year-round Park Caretaker who voluntarily accepted layoff. This differs from a Seasonal Park Laborer who is involuntarily laid off for the winter months.

Last, it is unfair to the Seasonal Park Laborer to assign him to perform the work of a higher-paid position. The Union is attempting to enforce the established classification and pay structure the parties have negotiated over the years. In that time, the Union has always maintained that the laborer positions are "entry-level" positions, and that the caretaker position is reserved for more senior employees based on experience and responsibilities. It is self-evident that maintaining a major park requires more experience, and entails greater responsibility in performing general park duties. Park Caretakers must work with the summer help and the general public to a greater extent and must answer to the Park Superintendent if the park is not maintained to his expectations. While the City has the unilateral right to assign whichever caretaker it desires to any particular park, that right does not extend to assigning seasonal laborers to that work. The Seasonal Park Laborer has no guarantee of ever becoming a Park Caretaker. It is therefore unfair to that employee, and to the Union, to permanently assign that lower-paid individual to a position consistently performed by higher-paid Park Caretakers. It is unfair to the Seasonal Park Laborer as he does not receive the same wages everyone else assigned to a major park receives. The Union is harmed in that if the City is permitted to assign lower-paid laborers to the caretaker assignments, it would disrupt the established negotiated classification system currently in place.

In its reply brief, the Union takes issue with three points raised in the City's brief. First, the City's attempt to have the grievance dismissed on a technical flaw should be rejected. While the grievance could have been written more clearly, it is clear that through the entire grievance process, the City understood the nature of the grievance and only at hearing did it make any claim that it believed there was a technical flaw. Arbitrators have held that clear notice must be given if a party intends to insist on strict compliance with previously-ignored

procedural requirements. WHITEWAY STAMPING COMPANY, 41 LA 966, 968 (Kates, 1963). Second, the management rights provision of the Agreement cannot be interpreted to permit the City to permanently assign a lower-classification employee to perform higher-classification work. The issue in this case is not whether the City has the right to make work assignments, but instead whether it has the right to assign a lower-classification employee to higher-classification work. It is nonsense to argue that since the Agreement does not specifically restrict the City from permanently assigning seasonal laborers to year-round caretaker positions, the City must have reserved that right. Such reasoning would result in nullifying the entire classification system by permitting the City to hire employees at the laborer rate to perform higher-paid caretaker work, contrary to what the parties intended when they bargained the wages for the various classifications. Third, the Union again disputes that there is any past practice of permanently assigning seasonal employees to major parks. The record shows that the employee assigned to Jefferson Park in 1973 was a full-time employee who chose to take voluntary layoffs, and the Seasonal Park Laborer was temporarily assigned to the Koslow/Clovis Park area before it was considered to be a "major park" like Jefferson. Thus, there has been no situation where a seasonal employee was ever permanently assigned to a major park such as Jefferson. Further, the Union never "consented" to having seasonal laborers permanently assigned to major parks. The argument that somehow a practice now exists because the parties agreed to upgrade one of the two seasonal employees during the last round of bargaining is not supported by the facts. While the parties did agree to upgrade a Seasonal Park Laborer, Glenn Pemrich, to a year-round position, that had nothing to do with permanently assigning seasonal employees to major parks. This is confirmed by the testimony of the Union Vice-President Agen, that this issue was never contemplated in negotiations, much less discussed. Also, the argument that the Union should be required to bargain the issue of permanently assigning seasonal laborers to major parks is incorrect. Since there is no past practice and no bargaining history supporting the claimed acquiescence of the Union, it is the City who should address the issue in bargaining. Until then, the *status quo* remains assigning only year-round caretakers to major parks. The Union requests that the grievance be sustained and that the City cease and desist from assigning the Seasonal Park Laborer to Jefferson Park or else reclassify that employee as a year-round Park Caretaker.

City

The City first asserts that since the written grievance did not state the applicable violation in a clear and concise language, as required by the Agreement, the City is denied the ability to effectively defend itself and thereby denied due process. The Agreement requires that "A written grievance shall contain. . .a clear and concise statement of the grievance, the issues involved. . ." The written grievance listed the applicable violations as "Article II(A); Past Practice." As no position was even stated, much less in clear and concise language, it must be determined that the Union does not have the ability to now state a violation upon

which relief can be granted. Further, at hearing the Union was unable to point to any actual conduct upon which relief could be granted. Thus, there is now no actionable grievance in front of the Arbitrator.

By the express terms of the Agreement, the Arbitrator cannot add to, subtract from, or modify any terms of the Agreement. At hearing, the Union suggested that the Arbitrator grant them a limitation upon the City's assignment authority and grant pay beyond that set forth in the Agreement, yet such a position was never set forth during the processing of the grievance. The parties intended to write language which would lend itself to resolving disputes at the earliest level and the language requiring grievances to include notice of provisions allegedly violated and a clear and concise statement as to the alleged violation demonstrates that intent. Failure to follow contractual requirements totally eliminates that negotiated intent. To allow such grievances to proceed would require adding to the contract and along with eliminating the negotiated language, would itself violate the Agreement. Thus, the grievance should be denied.

Without waiving the foregoing arguments, the City asserts that the clear and unambiguous language of the management rights clause in the Agreement provides the City with the discretion to assign a Seasonal Park Laborer to Jefferson Park. If language of an Agreement is clear and unequivocal, it should not be given a meaning other than that expressed, and must be enforced even though the result may be harsh or contrary to the original expectations of one of the parties. NATIONAL LINEN SERVICES, 95 LA 829, 834 (Abrams, 1990).

The language of the Agreement clearly states that the Arbitrator "shall have no power to add to, subtract from, or modify any of the terms of the Agreement." Further, Article II, A, states, "The management of the work force and the direction of the work forces. . .is vested exclusively in the Employer." There is nothing unambiguous about that language and it was undisputed at hearing that the City possesses wide discretion in managing its workforce. Thus, the discretion exercised by the City in assigning a Seasonal Park Laborer for duties at Jefferson Park deserves great deference, absent evidence to the contrary.

The City asserts that it was not an abuse of that discretion to assign a Seasonal Park Laborer to Jefferson Park. Historically, the City has reserved its right to assign persons in the position of Seasonal Park Laborer to various assigned duties within the Park Department. The Park Superintendent arranges park work in different work zones and the different assignments may vary from work zone to work zone; however, no particular work zone is more important than another. Although an employee may be primarily assigned to a work zone, the City has reserved the right to change work assignments at its own discretion. At hearing, the Union's own witnesses conceded that there is no provision or clause within the Agreement expressly prohibiting the City from making assignments of Parks personnel to different parks. The

assignment of the Seasonal Park Laborer to Jefferson Park cannot be seen as an abuse of this discretion on the part of the City, because the City has the right to assign workers to different locations in the Department, and the Union has presented no evidence to the contrary.

Even if it is determined that the language of the Agreement is ambiguous, both bargaining history and past practice demonstrate that the City has historically given assignments to Seasonal Park Laborers similar to the assignment at issue in this case. With regard to bargaining history, the Union made a request of the City that one of the Seasonal Park Laborer positions be made full-time, which would ultimately allow that worker to obtain the pay of a Park Caretaker. In response, the City made one past position full-time (8 months in Parks, and 4 months in the Street Department). This left a remaining Seasonal Park Laborer position. The ultimate resolution was to grant the request that one position become full-time, but the Union dropped the issue of an automatic increase in pay for the Seasonal Park Laborer to that of Park Caretaker. Throughout all of those discussions, the Union never proposed to limit the City's right to assign Seasonal Park Laborers to any work within the parks. A restriction on assignments, which the Union now attempts to gain through this grievance, should be dealt with in bargaining. The Union cannot now be permitted to restrict the assignment of a Seasonal Park Laborer to Jefferson Park when the Union had ample opportunity to do so in bargaining, but never raised the issue.

As to past practice, historically the Park Superintendent has exercised the right to assign laborers (both seasonal and not) and caretakers within the different parks and there has never been a distinction made between assignments just for Park Caretakers and assignments just for Park Laborers. As early as 1973, the City has had the practice of allowing Seasonal Park Laborers to perform oversight functions at Jefferson Park. Since then, there have been periodic Seasonal Park Laborers assigned to Jefferson Park and other similar parks. In 1986, there was a Seasonal Park Laborer assigned to the Koslow/Clovis Park area, and in the late 1990's a Seasonal Park Laborer was assigned to Jefferson Park. Further, historically the assignment of temporary park laborers to various positions within the park system have been based on the employee's ability to perform certain work, rather than on the position they held. Until now, the Union never grieved the City's use of this type of discretion in assigning job duties and responsibilities to Seasonal Park Laborers. By consenting to the assignment of the Seasonal Park Laborers to major parks over the years, the Union has waived its right to grieve in this instance.

In its reply brief, the City reiterates its contention that bargaining history and past practice allows the assignment of the Seasonal Park Laborer to Jefferson Park. The argument that no Seasonal Park Laborer has ever been assigned duties to maintain a major park is simply not true. The Union now claims that it is unfair to the Seasonal Park Laborer and to the Union for a Seasonal Park Laborer to be assigned to Jefferson Park, however, it cites no evidence, no bargaining history, no past practice and no legal authority to support its position. The

argument is self-serving and contrary to the evidence. The assignment of the Seasonal Park Laborer to Jefferson Park in this case cannot now been seen as unfair as the City has maintained the right to assign workers to different locations in the Park Department. The Union cannot now be permitted to restrict the assignment of the Seasonal Park Laborer when it had the opportunity in the past to do so, but never raised the issue in bargaining. The City concludes that the grievance should be denied.

DISCUSSION

At hearing, the City raised the issue of whether the grievance filed in this dispute should be denied on the basis that it does not comply with the contractual requirements that it contain a "clear and concise statement of the grievance, the issue involved. . ." Article XV, B.

The record in this matter indicates that the grievance was first discussed orally at Step 1 with the Superintendent, Parks, Forestry and Cemeteries, and subsequently submitted in writing. As shown by the Step 3 response from the Director of Parks and Recreation, the parties discussed the specific facts that underlie this grievance and management was well aware of what the Union alleges violates the parties' Agreement and past practice.

While the Agreement does state that a grievance shall contain a "clear and concise statement" of the grievance and the issue, the wording is directive in the sense that the remedy for such a technical violation would be to provide clarification as to what the Union is alleging violates the Agreement, rather than "dismissing" the grievance itself. As the City was in fact apprised in the course of the grievance procedure of the factual basis of the grievance, it is concluded that the purpose and intent of the parties with regard to Article XV, B, was satisfied.

As to the merits of the parties' dispute, three significant points are not in dispute. First, other than the reserved rights of management to the "management of the work and the direction of the working forces. . ." set forth in Article II, A, the parties' Agreement is silent on the assignment of work. Second, the essential duties and the essential qualifications of the Seasonal Park Laborer, Park Laborer and Park Caretaker positions are substantially identical, even though the Park Caretaker is a higher-paid position than the others. Third, an employee in the Park Caretaker position does not have a contractual right to a particular assignment within the Parks Department.

While conceding this last point, the Union argues that historically only Park Caretakers have been "permanently assigned" to the City's "major parks", 1/ i.e. being the person primarily responsible for maintaining the park, including overseeing summer help. The

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1/ In this regard, the record does not sufficiently establish that the parties have recognized that there are "major" parks or "permanent" assignments that are only open to certain positions, nor how they would be distinguished from other assignments.

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testimony on that point, however, is mixed at best. Long-time Parks employee and Union President, William Bojarski, testified that traditionally there was always a full-time park employee in the "major" parks, that there was a seasonal position a number of years ago and that it was eliminated for some time, then brought back, and there has been one for the last three or four years. He also testified that the Seasonal Park Laborer has been assigned whatever duties needed to be done and that not only Park employees that are assigned to a "major" park have to work with summer help. The City's former Superintendent of Parks, Forestry and Cemeteries (1981-2000), Lawrence Buck, testified that he was first hired as a Park Laborer in 1973 and was assigned to work in Jefferson Park under the direction of a "seasonal park employee." Buck could not say whether the individual was a Park Laborer or Park Caretaker, or whether he was a "full-time" employee who voluntarily took a layoff each winter, only that he was a nine-month employee. However, Buck also testified that in 1986 he had assigned a Seasonal Park Laborer to the Koslow/Clovis Park area and that for two seasons in the "late 1990's", he assigned a Seasonal Park Laborer to Jefferson Park. He also testified that he had assigned then-Seasonal Park Laborer Glenn Pemrich to the "downtown area", which he would consider to be a "major" area.

The Union also argues that it is violative of the contractual classifications/pay rates, as well as being "unfair", to assign the lower-paid Seasonal Park Laborer to perform the duties of a Park Caretaker. However, given that the positions perform the same essential duties, that argument is not persuasive.

It is also noted that the record does not indicate any evidence of abuse by the City in its use of Seasonal Park Laborers. To the contrary, the evidence regarding the parties' negotiations about the employee in one of the Seasonal Park Laborer positions shows a willingness to discuss the Union's concerns in that regard.

Given the City's right to direct its workforce, as reserved in Article II, A, and the absence of any expressed contractual restriction on that right, along with the positions having identical duties and qualifications, it is concluded that the City did not violate the parties' Agreement when it assigned a Seasonal Park Laborer to Jefferson Park.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 25th day of April, 2001.

David E. Shaw /s/
David E. Shaw, Arbitrator

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