

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN STATE BUILDING TRADES NEGOTIATING
COMMITTEE and its APPROPRIATE AFFILIATED BUILDING
TRADES COUNCIL**

and

**STATE OF WISCONSIN – UNIVERSITY
OF WISCONSIN-STOUT**

Case 489
No. 57883
SA-70

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Fred Bau, Senior Labor Relations Specialist, Division of Compensation and Labor Relations, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State.

ARBITRATION AWARD

The State of Wisconsin – University of Wisconsin-Stout, herein Employer or State, and Wisconsin State Building Trades Negotiating Committee and its Appropriate Affiliated Building Trades Councils, hereinafter Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. On August 6, 1999, the Union requested the Wisconsin Employment Relations Commission to appoint a member of its staff as arbitrator to hear and decide a grievance alleging the Employer violated the collective bargaining agreement by assigning bargaining unit work to a non-bargaining unit employee. A hearing in the matter was held in Madison, Wisconsin, on December 9, 1999. The hearing was adjourned and the parties briefed the question of whether the grievance was substantively arbitrable. Briefing was completed on February 9, 2000, and an Interim Award was issued on

July 7, 2000, finding the grievance was substantively arbitrable. Thereafter, a hearing on the merits of the grievance was held on September 22, 2000, and the parties submitted post-hearing briefs by November 23, 2000.

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

Did the Employer violate the 1997-99 collective bargaining agreement when, upon Sheet Metal Worker Metzger's retirement, it reallocated his Sheet Metal Worker position to the Maintenance Mechanic 3 – HVAC classification and assigned the work of his bargaining unit position, Sheet Metal Worker, to a non-bargaining unit position, Maintenance Mechanic 3 – HVAC?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE II

Recognition and Union Security

Section 1 – Bargaining Units

The Employer recognizes the Union as the exclusive collective bargaining agent for all Craft employees as listed below:

Asbestos Worker	Painter
Bricklayer and Mason	Plasterer
Carpenter	Plumber
Electrician	Sheet Metal Worker
Elevator Constructor	Steamfitter
Glazier	Terrazzo and Tile Setter
Lead Craftworker	Welder

“Craft employe” means a skilled journeyman craftworker, including his/her apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

Employees excluded from this collective bargaining unit are all office, blue collar, technical, security and public safety, clerical, professional, confidential, project, limited term, management, and supervisory employees. All employees are in the classified service of the State of Wisconsin as listed in the certifications by the Wisconsin Employment Relations Commission as set forth in this Section.

The parties will review all new unit classifications and if unable to reach agreement as to their inclusion or exclusion from the bargaining unit, shall submit such classifications to the Wisconsin Employment Relations Commission for final resolution.

The Employer shall notify the Union (Chairman of the Building Trades Negotiating Committee) and shall comply with the other provisions contained in s. 16.705, Wis. Stats., and Chapter ADM 10, Wis. Admin. Code when planning to engage in the procurement of contractual services. The Employer agrees to meet with the Union to discuss alternatives to the intended contracting out if the Union requests such a meeting within twenty-one (21) calendar days after notification.

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ARTICLE III

Management Rights

It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management; however, such rights must be exercised consistently with the other provisions of this Agreement.

Management rights include:

- A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.
- B. To manage and direct the employees of the various agencies.
- C. To transfer, assign or retain employees in positions within the agency.
- D. To suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause.

E. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

F. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goals or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

A. Original appointments and promotions specifically including recruitment, examinations, certifications, appointments, and policies with respect to probationary periods.

B. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation.

ARTICLE IV

Grievance Procedure

Section 1 – Definition

A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

Only one (1) subject matter shall be covered in any one (1) grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The

grievance shall be presented to the designated supervisor involved in quadruplicate (on forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

An employe may choose to have his/her appropriate Union representative represent him/her at any step of the grievance procedure. If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the appropriate Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. The appropriate union representative is the steward if one has been designated for the local job headquarters. If the steward is absent or if no steward has been designated, the appropriate union representative shall be the business agent of the employe's union local which represents the area in which the employe's job headquarters is located. Individual employes or groups of employes shall have the right to present grievances in person or through other non-Building Trades representatives of their own choosing at any step of the grievance procedure including arbitration, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

Section 2 – Grievance Steps

. . .

Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party . . .

. . .

Section 6 – Exclusive Procedure

The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure or appeal procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

. . .

ARTICLE VI

Transfers

Section 1 – General

Craft employees who have permanent status in their current classifications and desire to transfer within their agency shall file a written request as prescribed by the agency with the appropriate personnel office indicating that interest.

Section 2 – Vacancies

When a permanent vacancy occurs, in a permanent position, the Employer will consider those requests on file from any craft employees in the agency who are in the same classification as the vacancy and have indicated an interest in the specific shift or location of the vacancy. Such requests shall remain in effect for the duration of this Agreement.

Any craft employee who is selected for transfer shall have three (3) workdays in which to accept or decline the offer.

Section 3 – Inter-Agency Transfer

In the event that the vacancy is not filled by transfer of a craft employee under the provisions of Section 2 of this Article, the Employer will consider interested craft employees from other agencies within the state service who have registered with the agency. A craft employee's registration for transfer under this section shall be in effect for the duration of this Agreement.

Section 4 – Definition of Vacancy

For purposes of this Article, a permanent vacancy is created:

A. When the Employer has approval to increase the work force and decides to fill the new positions;

B. When any of the following personnel transactions take place and the Employer decides to replace the previous incumbent: terminations, transfers out of the bargaining unit, promotion, demotion, resignation, or retirement;

C. Transfers within the bargaining unit resulting from either A. or B. above.

Section 5 – Limitations

A. The applications of the procedures in this Article shall be limited to a maximum of three (3) transfers resulting from any given original vacancy.

B. Employees may not transfer under the provisions of Section 1 of this Article more often than once every six (6) months.

C. Employees transferring under the provisions of this Article shall not be eligible for payment of time or expenses incurred by virtue of a request for a transfer or the transfer itself; specifically including, but not limited to, moving expenses.

BACKGROUND

Richard Metzger was employed by the University of Wisconsin-Stout as a Sheet Metal Worker from at least 1984, until his retirement in April, 1999. Sometime in 1992, Metzger spoke with Kathleen Ingala, Human Resource Manager at University of Wisconsin-Stout and asked her if he could be reclassified from Sheet Metal Worker to Maintenance Mechanic 3. His reasoning was that he thought the fringe benefits for Maintenance Mechanic were better than those he enjoyed as a Sheet Metal Worker. Ingala told him then that she would do some research and check with UW System Human Resources to see if they would support such a reclassification. She knew that such a reclassification of Metzger's position to Maintenance Mechanic 3 would move it into a different bargaining unit and that the authority to approve that type of personnel transaction when it involved a filled position had not been delegated to the System campuses. She was told by Bradley of the UW System Human Resources Department that because of the difference in pay range and bargaining unit of the two positions it would require Metzger be laid off, create a new position to replace his vacant position, and then allow him to transfer into it. Ingala also met with Metzger and his supervisor, Don Moats, Superintendent of Buildings and Grounds, in 1993. Notwithstanding the discussions regarding Metzger's request, no action was initiated at that time to reclassify him from Sheet Metal Worker to Maintenance Mechanic.

In February 1999, Moats called Ingala and told her that Metzger had informed him that he planned to retire on April 1. Moats asked Ingala if he could fill Metzger's position with a Maintenance Mechanic 3. Ingala told Moats that she would contact the other campuses and find out what position classifications on other campuses were doing the kinds of work that Metzger's duties involved. Her contact with the other campuses persuaded her that Maintenance Mechanics were performing the same kind of duties as Metzger, and therefore she concluded there was no reason why Moats could not recruit for a Maintenance Mechanic to replace Metzger, a Sheet Metal Worker. Ingala told Moats to put together the paperwork so

that when Metzger retired work could proceed on filling the vacancy. Ingala's testimony implies she did not initially change Metzger's position description before posting his vacancy as a Maintenance Mechanic 3 – HVAC.

A . . . And it appeared to us that if he wanted a maintenance mechanic, and that's in fact the types of positions that were doing the same kinds of duties at other campuses, I saw no reason why we couldn't recruit for a maintenance mechanic. And so he then proceeded to get the paperwork together so that as soon as Rich actually did retire, then we could work on filling the vacancy.

Q All right. Was there any work done on the actual position description of the position?

A No.

Q Okay. Is that normal?

A I guess if – I would, when I sign my name on a job description, I'm saying that the classification is correct. Typically, if we're going to replace a position with the same responsibilities, same duties and responsibilities, on our certification procedure there's a box to check that says replace same duties. If that's the case, in other words, if we had a typist and we wanted a typist, there would be no reason to review the job description.

Because I had worked with this department in the past on what classification we thought this position was, and I thought we were in agreement that it was a maintenance mechanic 3, at that time I didn't see any need to change the job description other than the cover page on the actual job description form, which we then identified as a maintenance mechanic 3 – HVAC.

(Tr. 54-55)

However, Metzger's position description for Sheet Metal Worker was modified by Ingala, prior to its posting on April 19, 1999. In addition to changing the title from "Sheet Metal Worker-Richard Metzger" to "Maintenance Mechanic 3 – HVAC", the following modifications were made to the old Sheet Metal Worker position description. (Jt. Ex. #4 updated 4/13/99)

- A1. Added “dumpers, VAV boxes” to new Maintenance Mechanic 3 position description.
- B4. Added “Is proficient at welding and brazing all types of metal” to new Maintenance Mechanic 3 position description.
- D6. Added “Miscellaneous tasks assigned by Supervisor, to assure campus operates with a minimum of interruptions” to new Maintenance Mechanic 3 position description.

On May 3, 1999, the Union filed a grievance challenging the posting of Metzger’s position as a Maintenance Mechanic 3 - HVAC.

No one bid on the April posting for the Maintenance Mechanic vacancy either as an internal or external transfer. This meant the Stout campus had to do a full recruitment from an existing register or develop an exam tool and create a register of its own. As part of the full recruitment process Ingala and Moats developed a modified Maintenance Mechanic 3 - HVAC position description they signed and dated on May 28, 1999. Ingala testified this new position description was done initially “at the request of the UW System and, then later at the request of the Department of Employment Relations.” Ingala testified the reason the UW System gave her for directing her to redraft the Maintenance Mechanic position description she signed on April 19, 1999, was because:

They basically didn’t think it looked right to use what had been Mr. Metzger’s job description as a sheet metal worker, but now call it a maintenance mechanic 3 – HVAC. They would prefer, they said, if it looked, if it didn’t look identical. (Tr. 63)

She also testified that the UW System had received the Union’s grievance before it directed her to change the posted Maintenance Mechanic 3 – HVAC position description. She explained the discrepancy in dates between the cover page of the Position Description (5/28/99) and the footer on the bottom left corner “MM3-HVAC P-D.doc updated 6-28-99” by stating:

Q . . . you signed Employer Exhibit 2 on May 28th, ’99?

A Yes.

Q And the second page of it says that the actual position description was updated June 28th of ’99?

A Right.

Q What did it look like on May 28th?

A Actually, it looked the same, but my recollection is that we had faxed Owen Bradley at UW system our only copy, and then I needed to request an additional copy from the word processor at the time. So that's why it has a different date on it.

(Tr. 64)

The three position descriptions (PD) in evidence are set out below. The first is Metzger's and the next two are for Sheet Metal Worker PD and Maintenance Mechanic 3 – HVAC dated April 13, 1999, and June 28, 1999, respectively.

**SHEET METAL WORKER – RICHARD METZGER
POSITION DESCRIPTION**

35% A. Maintenance and repair of mechanical equipment

- A1. Maintains and repairs mechanical equipment, such as air movers, ventilating units, duct work, exhaust fans, etc.
- A2. Balances air movement in all campus air movers, changes fan speeds, etc., and makes all modifications for proper supply.
- A3. Does maintenance work on furnaces and boilers to insure their proper operation for combustion, efficiency, ventilation, etc.

30% B. Maintenance and repair of building components

- B1. Maintenance and repair of flashings, gutters, downspouts, expansion joints, metal roofs and buildings, metal doors and hinges, parapet walls, fascia lintels, etc.
- B2. Does repair work on stainless steel equipment as found in kitchens, on dishwashers, hoods, shelves, trays, sinks, funnels, racks, etc.
- B3. Does repair work including welding of aluminum posts, frames, tools, equipment, etc.

- 25% C. New Construction and remodeling
- C1. Installs equipment such as fans, ventilating hoods, furnaces, kitchen equipment, etc.
 - C2. Fabricates and installs duct work, dampers, grilles, special fittings, etc., for new construction and remodeling project.
 - C3. Fabricates guards, shields, hangers, supports, etc., for mechanical equipment.
 - C4. Fabricates items and parts for special needs, such as tanks, containers, sleeves, metal boxes, hangers, etc.
 - C5. Fabricates and installs metal components, such as railings, ramps, etc.
- 10% D. Associated duties
- D1. Assists in the ordering and storekeeping of all supplies and parts used in the trade.
 - D2. Is in charge of and maintains all tools and machines used in the sheet metal trade.
 - D3. Insures that codes and regulations are followed for health and safety.
 - D4. Assists and instructs building repair workers on minor repairs of mechanical equipment and building components.
 - D5. Insures that all safety procedures are followed when using machines or working on job sites.

Sheet Metal Metzger PD.doc
Updated 8/8/98

**Maintenance Mechanic 3 – HVAC
POSITION DESCRIPTION**

- 35% A. Maintenance and repair of mechanical equipment
- A1. Maintains and repairs mechanical equipment, such as air movers, ventilating units, duct work, exhaust fans, dampers, VAV boxes, etc.
 - A2. Balances air movement in all campus air movers, changes fan speeds, etc., and makes all modifications for proper supply.

- A3. Does maintenance work on furnaces and boilers to insure their proper operation for combustion, efficiency, ventilation, etc.
- 30% B. Maintenance and repair of building components
 - B1. Maintenance and repair of flashings, gutters, downspouts, expansion joints, metal roofs and buildings, metal doors and hinges, parapet walls, fascia lintels, etc.
 - B2. Does repair work on stainless steel equipment as found in kitchens, on dishwashers, hoods, shelves, trays, sinks, funnels, racks, etc.
 - B3. Does repair work including welding of aluminum posts, frames, tools, equipment, etc.
 - B4. Is proficient at welding and brazing all types of metal.
- 25% C. New construction and remodeling
 - C1. Installs equipment such as fans, ventilating hoods, furnaces, kitchen equipment, etc.
 - C2. Fabricates and installs duct work, dampers, grilles, special fittings, etc., for new construction and remodeling project.
 - C3. Fabricates guards, shields, hangers, supports, etc., for mechanical equipment.
 - C4. Fabricates items and parts for special needs, such as tanks, containers, sleeves, metal boxes, hangers, etc.
 - C5. Fabricates and installs metal components, such as railings, ramps, etc.
- 10% D. Associated duties
 - D1. Assists in the ordering and storekeeping of all supplies and parts used in the trade.
 - D2. Is in charge of and maintains all tools and machines used in the sheet metal trade.
 - D3. Insures that codes and regulations are followed for health and safety.
 - D4. Assists and instructs building repair workers on minor repairs of mechanical equipment and building components.
 - D5. Insures that all safety procedures are followed when using machines or working on job sites.

- D6. Miscellaneous tasks assigned by Supervisor, to assure campus operates with a minimum of interruptions.

MM3 – HVAC PD.doc
Updated 4-13-99

**Maintenance Mechanic 3 – HVAC
POSITION DESCRIPTION**

- 35% A. Maintenance and repair of mechanical equipment.
- A1. Maintains and repairs mechanical equipment, such as air movers, ventilating units, exhaust fans, dampers, VAV boxes, etc.
 - A2. Balances air movement in all campus air movers, changes fan speeds, etc., and makes all modifications for proper supply.
 - A3. Does maintenance work on furnaces and boilers to insure their proper operation for combustion, efficiency, ventilation, etc.
- 35% B. Maintenance and repair of building components
- B1. Performing custom fabrication and maintenance welding as required
 - B2. Does repair work on equipment in kitchens, i.e. dishwashers, hoods, shelves, trays, sinks, funnels, racks, etc.
 - B3. Work with other trades to compliment entire maintenance program.
- 30% C. Associated duties
- C1. Assists in the ordering and storekeeping of needed supplies and parts.
 - C2. Maintains all tools and machines used in performance of their job.
 - C3. Insures that codes and regulations are followed for health and safety.
 - C4. Assists and instructs building maintenance mechanic 2 on repairs of mechanical equipment and building components.
 - C5. Assists campus HVAC specialist with mechanical controls and operation of Energy Management System.

- C6. Installs equipment such as fans, furnaces, kitchen equipment, etc.
- C7. Insures that all safety procedures are followed when using machines or working on job sites.
- C8. Miscellaneous tasks assigned by Supervisor, to assure campus operates with a minimum of interruptions.

MM3 – HVAC PD.doc
Updated 6-28-99

The State, as can be seen from the above-quoted Maintenance Mechanic 3 – HVAC position descriptions, made significant changes between the first position description dated “4-13-99” and the second position description dated “6-28-99.” The following modifications were made to the “4-13-99” position description:

- 1. “Duct work” was removed from A1.
- 2. B1. was substantially modified.
- 3. B2. was changed to remove “stainless steel” and “as found.”
- 4. B3. and B4. were eliminated.
- 5. A new B3. was created that provides “Work with other trades to compliment entire maintenance program.”
- 6. Section C. was retitled from “New construction and remodeling” to “Associated Duties” which was the heading for Section “D” on the “4-13-99” position description. Also, there is no Section “D” on the “6-28-99” position description.
- 7. The “6-28-99” C1. is the “4-13-99” D1. without the words “used in the trade.”
- 8. The “6-28-99” C1. is the “4-13-99” D2. without the words “in the sheet metal trade” and in their place “in performance of their job.”
- 9. The “6-28-99” C3. is the “4-13-99” D3.
- 10. The “6-28-99” C4. is the “4-13-99” D4. without the words “building repair workers on minor repairs” and in their place “building maintenance mechanic 2 on repairs.”

11. C5. on the 6-28-99” position description is new.
12. The “6-28-99” C6., C7. and C8. are the “4-13-99” C1., D5. and D6., respectively.
13. The “6-28-99” position description eliminated the “4-13-99” C2., C3., C4., and C5.

Ingala testified that the technical term used by the Employer to describe the procedure that was utilized to re-title the Sheet Metal Worker position as a “reallocation.”

The Stout Campus received permission from the UW System in June to proceed with filling Metzger’s position as a Maintenance Mechanic 3 – HVAC – the position description signed by Moats and Ingala on May 28, 1999. The position was filled by Charles Bowe who had previously worked at UW-Madison and had reinstatement eligibility.

POSITIONS OF THE PARTIES

Employer

The State argues that it legally reallocated Metzger’s Sheet Metal Worker position to a new classification of Maintenance Mechanic 3 – HVAC. It asserts that because it is prohibited by statute from negotiating about allocation and reallocation of positions to classifications, therefore, its action in reallocating the Sheet Metal Worker position is not grievable or arbitrable.

The State acknowledges that the reallocation changed the bargaining unit of the position, the “Building Trades Crafts” bargaining unit to the “Blue Collar and Non-Building Trades” bargaining unit. However, it contends this was appropriate because, based upon the duties of the position, the Employer could not justify a 100% full-time Sheet Metal Worker position. The State argues the evidence shows that only 10% - 15% of Metzger’s replacement’s duties as a Maintenance Mechanic 3 – HVAC are similar to the duties of a Sheet Metal Worker. The State believes for the above reasons that the grievance should be denied.

Union

The Union contends that this case involves the State’s decision to replace a retiring building trades Sheet Metal Worker with an AFSCME Maintenance Mechanic and claiming its

decision to do so is not reviewable because job reclassifications are not reviewable. The Union asserts the undersigned's Interim Award held that is not the case, and therefore, the merits of the State's decision can be examined.

The Union argues that Metzger's testimony established that 99% of the work orders in evidence wherein it can be determined what work was actually performed was work falling within the sheet metal trade. The State admits Metzger's work did not go away and the Union asserts it did not just turn into Maintenance Mechanic work. The fabrication and installation of sheet metal products, and welding and repair of fixtures and equipment on which sheet metal workers are trained continues. The State claims that Metzger was not actually performing sheet metal work, but the Union insists this contention is not supported by the evidence and it is in opposition to the State's refusal to honor Metzger's request, some years earlier, to be transferred out of the building trades unit and into the blue collar non-building trades unit because he believed he would receive better fringe benefits. The Union also points to the Employer's failure to follow the requirements of Article VI, Transfers by failing to determine if there were any sheet metal workers employed by the State who had requested a transfer.

Thus, the Union believes the State's action in this case seriously undermines the meaning of the Recognition and Union Security, Article II. The Union cites a number of cases and published labor law texts that recognize that the "overarching purpose" of the recognition clause is to provide security for the unit as a whole. It concludes the State should not be allowed to "opt out" of its agreement with the building trades simply by rewriting position descriptions. If the Employer's position is upheld, the Union believes that it could systematically deplete the building trades bargaining unit by simply drawing up a non-craft position description that includes the duties of a craft. This behavior, the Union argues, emasculates the recognition clause and violates the agreement.

DISCUSSION

In my Interim Award I said that if the State could establish it had reallocated Metzger's position "to a different classification in a different bargaining unit, then, arguably, the appropriateness of that decision is outside the scope of the grievance and arbitration provisions of the parties' collective bargaining agreement." However, in my Interim Award I concluded the State had not established that a reallocation had in fact occurred. Consequently, I decided there was no basis upon which to conclude that the grievance was excluded from arbitration.

The hearing was continued after my Interim Award. After reconvening the hearing and having the parties put in their remaining proof, I am now persuaded the record does support a finding that the State did, in fact, reallocate Metzger's position, which was classified as Sheet Metal Worker, to Maintenance Mechanic 3 – HVAC. And, the Maintenance Mechanic 3 – HVAC classification is not included in the bargaining unit represented by the Union in this case.

Therefore, now that there is a complete record, the question that must be answered again is whether the State correctly asserts that the grievance is not substantively arbitrable and cannot be addressed in this arbitration. The essence of the State's argument is that State law and Article III, Management Rights, of the collective bargaining agreement have reserved to management the right to reallocate a position to a different classification in a different bargaining unit, even though that decision may result in a violation of a provision of the parties' collective bargaining agreement. It, therefore, concludes that if the Union wishes to contest the instant reallocation personnel action it can only do so before the State Personnel Commission.

This case, in the undersigned's opinion, is not as straight-forward as the State would have me believe. First, I do not find it axiomatic that merely because the parties cannot bargain about reallocations that any consequence resulting from the Employer's decision to reallocate, even though it arguably violates the collective bargaining agreement, cannot be challenged through the contractual grievance and arbitration procedures. It is clearly the case that both the statutes and the contract prohibit the State and Union from bargaining about reallocations. 1/ However, the State's insistence that therefore the contract grievance and arbitration procedures are not available to the Union in this case seems to ignore other contract and statutory language. The language of Section 111.93(3), Wis. Stats., provides:

Except as provided in ss. 40.05, 40.80 (3), 111.91 (1) (cm), 230.35 (2d), 230.35 (3) (e) 6., and 230.88 (2) (b), if a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes, as well as rules and policies of the board of regents of the university of Wisconsin system, related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and policies are set forth in the collective bargaining agreement. 2/

Additionally, Section F of the same Article III, Management Rights, provides that the provisions of Article III will not be used "for the purpose of undermining the Union." That is exactly the Union's claim in this case – the Employer's action in reallocating Metzger's position to Maintenance Mechanic 3 – HVAC has the effect of emasculating Article II, Recognition and Union Security, and thus undermines the Union by permitting the transfer of bargaining unit work to a non-bargaining unit position in violation of Article III, Section F.

1/ The language of Article III is lifted directly from the SELRA, Wis. Stats., 111.91(2)(b)2.

2/ None of the statutory references in the above-quoted section pertain to reallocation of positions. 40.05 deals with retirement and insurance, 40.80 is concerned with deferred compensation, 111.91(1)(cm) deals with subjects of bargaining, 230.35 deals with hours of work, leaves of absence, etc., and 230.88(2)(b) is concerned with the effect of collective bargaining agreements on the rights of individual employees.

A grievance is defined in Article IV, Grievance Procedure, Section 1 – Definition as “a written complaint involving an alleged violation of a specific provision of this Agreement.” Because the Union’s complaint/grievance alleges a violation of Article II and Article III, Section F, it falls within the contractual definition of a grievance.

In deciding whether a grievance is prima facie substantively arbitrable, the Wisconsin Supreme Court has said:

When the court determines arbitrability, it is limited to considering whether the arbitration clause can be construed to cover the grievance on its face and whether any other provision of the contract specifically excludes it. MILWAUKEE V. MILWAUKEE POLICE ASSOCIATION, 97 WIS.2D AT 22 (1980); JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D AT 111 (1976); DEHNART V. WAUKESHA BREWING CO., 17 WIS.2D AT 46 (1962).

Thus, the question for the undersigned is can the parties’ arbitration clause be construed to cover the grievance? The language of Article IV, Section 2, Step 4 sets forth what can be arbitrated – “grievances which have not been settled under the foregoing procedure.” Because the Union’s grievance alleges a violation of the collective bargaining agreement, and because Article IV, Section 2, Step 4 does not exclude any grievances from arbitration, it follows that the instant grievance is prima facie substantively arbitrable. 3/

3/ “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION Co., 363 U.S. 574, 582, 583 (1960); JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D AT 112 (1976).

This grievance presents the substantial question of whether the State's decision in this case to reallocate Metzger's Sheet Metal Worker craft position to another classification in another non-craft bargaining unit, and then assigning the duties of the Sheet Metal Worker craft position to the non-craft employee in the other bargaining unit, violated the collective bargaining agreement. It is the arbitrator's job to attempt to resolve disputes over the meaning of contract provisions in such a way as to give meaning to all of the language of the agreement and not construe one provision of the agreement so as to nullify another. It is also the case that where there is a statutory provision that deals with a topic covered in the parties' agreement, when possible, the arbitrator should attempt to harmonize the statute and the contract language. In this instance, the State advances an interpretation of Wis. Stats. 111.91(2)(b)2 and Article III, Management Rights, that would render Section F of the same Article III meaningless. For if the reallocation of a position had the effect of undermining the bargaining unit, as is argued by the Union in this case, applying the State's interpretation of Wis. Stats. 111.91(2)(b)2 and Article III would render the Section F language unenforceable through the grievance and arbitration procedure and therefore meaningless or superfluous. Clearly, such a construction of Article III should be avoided, if at all possible, because it must be presumed that the parties intended all of the language they bargained for to have meaning, and every effort should be made to harmonize Wis. Stats. 111.91(2)(b)2 and the parties' contract. The Union asserts the resulting effect of the State's decision to reallocate in this case can be grieved, arbitrated, and found to violate the contract. 4/

4/ There is no dispute that the parties are prohibited from bargaining over the procedures relating to the allocation and reallocation of positions to classifications, or the authority of the Secretary of DER to allocate and reallocate positions to classifications. Section 230.09, Wis. Stats.

The undersigned believes that the most appropriate interpretation of Article III is one that gives meaning to all of its provisions and does not conflict with Wis. Stats. 111.91(2)(b)2. In this instance, that results in the conclusion that even though allocation and reallocation of positions to classifications is a prohibited subject of bargaining, and the decision to allocate or reallocate can only be reviewed before the Personnel Commission, the effect(s) of the reallocation, if alleged to violate the collective bargaining agreement, can be grieved and arbitrated. Here the grievance is that the reallocation of the Sheet Metal Worker position out of the Union's bargaining unit and subsequent assignment of those duties that fall within the generally accepted duties of a skilled trades Sheet Metal Worker to another position in a non-craft bargaining unit violated Articles II and III.

If the majority of the duties of Metzger's position were those generally recognized as belonging to the Sheet Metal Worker craft, then reallocating the position to a classification in a non-craft bargaining unit and assigning the craft duties to that position arguably undermines

this Union. The term “undermine” has been defined as “to weaken, injure, or destroy.” If the State arbitrarily and without justification removed a position and its duties from the Union’s bargaining unit, it would have the effect of weakening or injuring the Union. And, taken to the extreme, as argued herein, this could ultimately lead to the eventual depletion of the building trades bargaining unit. Thus, the question on the merits now before the undersigned is whether the State’s decision to reallocate Metzger’s position to a classification in a non-craft bargaining unit and assigning the duties to a non-craft non- bargaining unit employee was justified.

The State argued that only 10 – 15% of Metzger’s duties and that of his replacement were similar to the duties of a Sheet Metal Worker. Therefore, it concluded it could not justify a 100% full-time Sheet Metal Worker. The Union, on the other hand, argued that Metzger’s work did not just go away or turn into Maintenance Mechanic work and it insists that the skilled trades Sheet Metal work continues to exist, but is performed by a non-craft employee.

The Union introduced several exhibits to show the types of work generally associated with the sheet metal worker craft. The Wisconsin Department of Workforce Development Dictionary of Occupational Classifications and Work Descriptions for Sheet Metal Worker (dated 1/5/98) provided:

Sheet Metal Worker

CODE: 134

PRIMARY PURPOSE:

Fabricates, assembles, installs and repairs sheet metal products and equipment such as control boxes, drain pipes, ventilators, furnace casings, duct work and other ferrous and non-ferrous products of varying (sic) degrees of gauge thickness, including PVC or fiberglass duct work.

TYPICAL DUTIES:

Assembles, installs, repairs and alters the duct work for the heating, ventilation and air-conditioning systems regardless of the materials used and sets all equipment and all supports and reinforcements in connection with such systems. Installs expansion and discharge valves, air filters and water filters in heating, ventilation and air-conditioning systems. Tests and balances air-handling equipment and duct work. Forms, rolls, draws, stamps or presses sheet metal shingles, sheet metal tile, sheet metal brick, sheet metal stone and sheet metal

lumpers, when specified for use as roofing, siding, waterproofing, weatherproofing, fire proofing or for ornamental or any other purpose. Performs sheet metal work specified for use in connection with or incidental to steeples, domes, minarets, lookouts, dormers, louvers, ridges, copings, hips, valleys, outlets, roof flanges, flashings, gravel stops, leader heads, wall cap, mansards, balustrades, skylights, cornice moulding, columns, capitals, panels, pilasters, mullions, spandrils (sic) and any and all other shapes, forms and design of sheet metal work specified for use for waterproofing, weatherproofing, fireproofing, ornamental, decorative or display purposes or as trim on the exterior of buildings or structures. Installs sheet metal ceilings with cornices and mouldings whether plain, ornamental, enameled, glazed or acoustic type. Installs side walls and wainscoting of plain, ornamental, enameled or glazed types, including sheet metal tile.

Applies all necessary wood or metal furring, plastic or other materials, to which they are directly applied. Performs sheet metal work specified for use in connection with or incidental to direct, indirect or other types of heating, ventilating, air-conditioning and cooling systems including risers, stacks, ducts, S-strips, fittings, dampers, casings, recess boxes, outlets, radiator enclosures, exhausts, ventilators, frames, grisses, louvers, registers, cabinets, fans, motors, air washers, filters, air brushes, housings and air-conditioning chambers. Sets and hangs air-conditioning units, unit heaters or air-veyor systems and air handling systems regardless of material used. Assembles and sets up all cast iron parts, warm air furnaces, stokers, gas and oil burner equipment used in connection with warm air heating, all sheet metal hoods, casings, wall stacks, smoke pipes, truck lines, cold air intakes, air chambers, vent pipes, frames, registers and dampers. Installs equipment utilized in the operation of kitchens including ranges, canopies, steam tables, work tables, dishwashers, coffee urns, soda fountains, warming closets, sinks, drainboards, garbage chutes, incinerators and refrigerators. Installs tubing, pipes and fittings used in connection with or incidental to coppersmithing work. Installs fume hoods, metal toilet partitions and metal lockers. May erect metal roof decking and standing seam metal roofs.

LAST UPDATE: 01/05/1998

The Wisconsin Apprenticeship Bureau of Apprenticeship Standards "Exhibit A Sheet Metal 804.281.010" under the "Schedule of Processes to be Worked" provides:

SCHEDULE OF PROCESSES TO BE WORKED – The apprentice shall be given such instruction and experience in the sheet metal working trade as will enable them to qualify as a competent mechanic at the completion of this apprenticeship. This instruction and experience shall include the following operations and processes but not necessarily in the sequence given, nor need the time for a specific operation be continuous:

	<u>Approx. Hours</u>
A. Layout, measuring, detailing, drafting	9%
B. Fabrication	25%
C. Construction Installation	40%
1. Architectural and/or General Outside Metal Work	
2. Commercial Installation	
3. Industrial Installation	
4. Residential Installation	
5. Residential Gutter, flashing, etc.	
D. Welding or Soldering	5%
E. Special Processes and Miscellaneous	16%
F. Related Instruction	<u>5%</u>
	100%

It is to be understood that substantial variations will occur in different shops due to the varying natures of the work in the shops. The above hours are recommended and may be adjusted by local committees.

The undersigned agrees that craft Sheet Metal work cannot appropriately or contractually be converted to non-craft work merely by reallocating the craft position to a non-craft classification. From an examination of the non-blanket work orders issued before Metzger retired, as well as those issued after he retired, from which it can be determined what duties were involved, it is clear there was and is sheet metal work/duties being performed. It is also clear from the non-blanket work orders assigned to Metzger prior to his retirement that there were many assignments that required the performance of duties normally associated with the Sheet Metal Worker trade/craft, e.g. “build and install metal shelf,” “modify the duct work that serves the exhaust hood,” “repair duct work,” “repair duct work where another let loose and ducts have separated,” “extend the roof gutter over the Northwest entrance of the Price Commons,” and “fabricate and install stainless steel corner protector.” (Union Exhibit #5) The evidence shows, as the Union argued, that type of work just did not go away. However, because there was no longer a Sheet Metal Worker available to perform the work, based upon

the record evidence, the most reasonable presumption is that those duties/work are now being performed by Bowe, the non-craft employee who filled Metzger's position after it had been reallocated to the Maintenance Mechanic 3 – HVAC classification. Indeed, the non-blanket work orders in evidence that pertain to the period subsequent to Metzger's retirement show that work involving duties normally associated with the sheet metal trade continued to be performed and were done by Bowe, e.g. "connect additional duct work to existing to vent new screen dryer," "repair/replace damaged and missing alum. railing parts," "weld the stainless steel rack," "install exhaust," and "replace the aluminum snow guard." (Union Exhibits Nos. 5 and 6)

The defense raised by the State to the alleged breach of contract that only 10-15% of the work orders involve sheet metal work and therefore, a full-time Sheet Metal Worker position is not warranted, does not justify assigning the work out of the bargaining unit. If that defense is accepted, the logic would, as the Union argues, potentially lead to elimination of a craft position any time the percentage of work performed involving duties normally associated with the particular craft fell below 50% of the hours of a full-time position. Also, flowing from that logic would be the conclusion that a non-craft worker can perform craft work so long as he/she does not spend more than 50% of his/her time performing those duties. This would, and in this case, did, result in the elimination of a Sheet Metal Worker position, while at the same time having a non-craft worker perform the available craft work.

Thus, the sequence of events, testimony of witnesses and amount of available sheet metal work leads the undersigned to the conclusion that the State's actions herein have undermined the Union. Craft bargaining unit work was assigned to a non-bargaining unit employee under the guise/subterfuge of reallocation and as such violated Article III of the parties' collective bargaining agreement.

The undersigned does not have the authority to order the State to undo the reallocation which was an exercise of its statutory authority to reallocate a position to another classification. However, even though the State can reallocate a position to a different classification, it is not able under this collective bargaining agreement to unilaterally transfer craft work/duties to a non-craft employee in another bargaining unit. Therefore, the State must cease and desist assigning duties/work generally understood/accepted as Sheet Metal Worker duties/work to the Maintenance Mechanic 3 – HVAC or other non-bargaining unit position.

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

AWARD

The Employer violated the 1997-99 collective bargaining agreement when, upon Sheet Metal Worker Metzger's retirement, it reallocated his Sheet Metal Worker position to the Maintenance Mechanic 3 – HVAC classification and assigned the work of his bargaining unit

position, Sheet Metal Worker, to a non-bargaining unit position, Maintenance Mechanic 3 – HVAC. Therefore, the State shall cease and desist from assigning Sheet Metal Worker duties/work to the Maintenance Mechanic 3 – HVAC or other non-bargaining unit position.

Dated at Madison, Wisconsin, this 6th day of July, 2001.

Thomas L. Yaeger /s/

Thomas L. Yaeger, Arbitrator