

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**SHEBOYGAN COUNTY (HIGHWAY DEPARTMENT)**

and

**LOCAL 1749, SHEBOYGAN COUNTY HIGHWAY EMPLOYEES, AFSCME, AFL-CIO**

Case 339  
No. 60667  
MA-11683

(Black Grievance)

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Appearances:

**Ms. Louella Conway**, Personnel Director, Sheboygan County, 615 North Sixth Street, Sheboygan, WI 53081, on behalf of the County.

**Ms. Helen Isferding**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, WI 53083, on behalf of Local 1749.

**ARBITRATION AWARD**

According to the terms of the 2001-2002 labor agreement between Sheboygan County and Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO, the parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as impartial arbitrator to hear and resolve a dispute between them regarding overtime payments allegedly due to David Black during the 2000-2001 summer seasons. The Commission designated Sharon A. Gallagher. A hearing was scheduled and held at Sheboygan, Wisconsin, on April 15, 2002. No stenographic transcript of the proceedings was made. The parties agreed to postmark their initial briefs to the Arbitrator for her exchange on May 17, 2002. The parties also agreed to file their reply briefs directly with each other with a copy to the Arbitrator on June 7, 2002.

**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.**

## ISSUES

The parties were unable to stipulate to the issues for determination in this case. The Union suggested the following issues for determination:

Did the Employer violate the contract and past practice when it did not treat David Black as a member of the Grading Crew and assign him overtime, as other Grading Crew members? If so, what is the appropriate remedy?

The County suggested the following issues for determination:

Did the Employer violate the contract when assigning work to David Black? If so, what is the appropriate remedy?

The parties stipulated and agreed that the Arbitrator could frame the issues based upon their suggestions as well the relevant evidence and argument in this case. Based on the relevant evidence and argument in this case as well as the parties' suggestions, the Arbitrator finds that the County's issues reasonably state the controversy between the parties.

## RELEVANT CONTRACT PROVISIONS

### **ARTICLE 3**

#### MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or 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. If any action taken by the Employer is proven not to be justified the employees shall receive all wages and benefits due him [sic] for such period of time involved in the matter.

The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes. But in the event the Employer desired to

subcontract any work which will result in the layoff of any county employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided the Employer shall have the exclusive right to determine the hours of employment and the length of the work week, and to make such changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Highway Department. The Union agrees at all times, as far as it has within its powers, to further the interest of Sheboygan County.

In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time and the Employer and the Union will cooperate in the enforcement thereof. Illegal substances, intoxicating liquors, including beer and wines, shall not be consumed by any Highway Department employees during working hours either on or off County premises. To the end that there may be no misunderstanding with regard to the above, all employees are directed to refrain from entering upon any premises wherein intoxicating liquors are sold during working hours, except in extreme emergency situations.

## **ARTICLE 12**

### **TIME AND ONE-HALF**

All authorized overtime services worked in excess of eight (8) hours per day or forty (40) hours per week or on Saturday or Sunday shall be paid for at the rate of one and one-half (1-1/2) times the employee's regular hourly rate of pay.

All authorized work performed on a holiday recognized in this agreement (in addition to holiday pay therefor) shall be paid at a rate of two (2) times the employee's regular hourly rate of pay.

If time is lost during the regular work week for unexcused absences, then overtime pay shall not be made until forty (40) hours is exceeded.

Whenever overtime work is required it must first have been approved by the employee's immediate supervisor.

## **APPENDIX "A"**

### **1. Job Classifications/Wage Rates**

Rate Class Five 5)

01-01-2001

01-01-2002

Foreman +	17.75	18.26
Temp. Foreman		

Rate Class Four (4)

Asst. Shop Supt.	17.00	17.51
Highway Program Coordinator		

Rate Class Three (3)

Blacktop Plant Operator	16.77	17.27
Bridge Crew		
Center Liner		
Grading Crew/ Base Crew/ Patching Crew/ Crushing Crew		
Equipment Operator*		
Machinist		
Mechanic 1 <sup>st</sup> Class		
Sign Erector		
Sign Painter		
State Patrolman		
Stockroom Man		
Timekeeper/Clerk		
Welder 1 <sup>st</sup> Class		

Rate Class Two (2)

County Patrolman	16.61	17.11
Mechanic 2 <sup>nd</sup> Class		
Park Maintenance Man		
Paver Operator Helper		
Rope Man		
Stockroom Assistant		
Stump Cutter		
Truck Driver/Tadem/ Snow Removal		
Welder 2 <sup>nd</sup> Class		
Shop Janitor		
Surveyor Helper		

Rate Class One (1)

County Maintenance\*\*\* 16.47 16.96

	<u>01-01-2001</u>	<u>01-01-2002</u>
<u>Miscellaneous Rate Class</u>		
Bookkeeper	16.15	16.63
Office Clerk	15.44	15.90
Secretary-Stenographer	16.15	16.63
Bridge Inspector	17.92	18.46
Student (Summer)	9.00	9.00

+ Effective 01-01-98 – Foreman will receive an additional fifty cents (\$.50) per hour add on and effective 01-01-99 – Foreman will receive an additional twenty five cents (\$.25) add on for a total of seventy-five (\$.75) per hour. The rates listed include the above adjustment.

SPECIFIC POSITIONS INCLUDED UNDER CERTAIN JOB TITLES

\* Equipment Operator

\*\*\*County Maintenance

Backhoe Operator  
Chip Spreader  
Crusher Operator  
Distributor Operator  
Grader Operator  
Loader Operator  
Paver Operator  
Roller Operator  
Scraper Operator  
Tractor Operator

Bin Man  
Chain Saw Operator  
Heater/Boiler Operator  
Mower Operator  
Power Broom Operator

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**BACKGROUND**

The County posted a backhoe position on February 28, 1998, at the Plymouth Shed. That posting, which was awarded to Randy Pfrang, read in relevant part as follows:

**Job Posting for BACKHOE OPERATOR**

**REQUIREMENTS**

This position, under supervision of the patrol superintendents, requires the ability and desire to operate the equipment efficiently and safely, observing and complying with all safety precautions and maintaining and servicing the

equipment according to the requirements and instructions in the service manual. The applicant must have considerable knowledge of construction plans, grading, excavation principles, and underground utility notification practices and procedures. The operator will be assigned according to job and work location as required.

This description has been prepared to assist in properly evaluating various classes of responsibilities, skills, working conditions, etc., present in the classification. It is intended to indicate the kinds of tasks and characteristic levels of work difficulty that will be required of positions that will be given this title. It is not intended as a complete list of specific duties and responsibilities. Nor is it intended to limit or in any way modify the right of any supervisor to assign, direct and control the work of employees under this supervision. The use of a particular expression or illustration describing duties shall not be held to exclude other duties not mentioned that are of a similar kind and level of difficulty. If there are any questions regarding this job posting, please contact the Highway Commissioner.

In accordance with the 1998-2000 Employees' Labor Contract Article 27 Seniority (d), the employee awarded the position will be on a trial period for ten (10) working days and also (b), employees having completed the trial period will be ineligible to sign or be awarded any other position for two years without the joint consent of the Highway Committee and Union Officials. The above contract terms will apply from the first day of that the employee is assigned to that position.

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### **FACTS**

In June of 2000, the Highway Department acquired a small backhoe so that the County then had four backhoes, two small backhoes and two large (rubber-tired) backhoes. Highway Commissioner Lanning stated that the small backhoe was purchased with the idea of adding an additional backhoe to the County's operations to be used and/or kept available for the Grading Crew on a priority basis. The two large backhoe operators (who bid onto that equipment prior to Black) are Wade Weis and Mark Stuckman. Pfrang (a senior small backhoe operator), Weis and Stuckman are not assigned to any specific crew, but they are assigned from time to time to work with various crews using their backhoe equipment. On June 7, 2000, the County posted an opening for "one backhoe operator." That posting read in relevant part as follows:

**REQUIREMENTS** 1/

This position, under the supervision of the grading crew foreman and patrol superintendents, requires the ability and desire to operate the equipment efficiently and safely, observing and complying with all safety precautions and maintaining and servicing the equipment according to the requirements and instructions in the service manual. This piece of equipment will primarily be assigned to the grading crew. The applicant must have considerable knowledge of construction plans, profile details, grading, excavation principles, and underground utility notification practices and procedures. During the course of grading construction, the applicant may be required to operate other construction related equipment. The operator may be assigned to other work locations as required. The successful applicant must have a commercial drivers license.

This description has been prepared to assist in properly evaluating various classes of responsibilities, skills, working conditions, etc., present in the classification. It is intended to indicate the kinds of tasks and characteristic levels of work difficulty that will be required of positions that will be given this title. It is not intended as a complete list of specific duties and responsibilities. Nor is it intended to limit or in any way modify the right of any supervisor to assign, direct and control the work of employees under his supervision. The use of a particular expression or illustration describing duties shall not be held to exclude other duties not mentioned that are of a similar kind and level of difficulty. If there are any questions regarding this job posting, please contact the Highway Commissioner.

In accordance with the 1998-2000 Employees' Labor Contract Article 27 Seniority (d) the employee awarded the position will be on a trial period for ten (10) working days and also (b) employees having completed the trial period will be ineligible to sign or be awarded any other position for two years without the joint consent of the Highway Committee and Union Officials. The above contract terms will apply from the first day that the employee is assigned to that position. Also, on page 25, Item 5K, "employee shall receive the rate of pay of the classification that they are normally assigned to above the County Maintenance Classification.: This rate of pay will be received for eight (8) months of the year. (April 1 to November 30)."

. . .

Fifteen employees signed the posting. The Grievant, David Black, was the most senior employee who signed the posting and on June 26, 2000, he was awarded the posting "based on seniority." Black was to start his trial period on July 5, 2000. However, Black was on an

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approved vacation July 5-7, 2000, so that he served his ten-day trial period in the backhoe operator position from July 10-25, 2000. From July 10-24, Black worked in various locations under two different foremen, Stan Sixel and Dennis Teumissen. Neither of these foremen was assigned to the Grading Crew. On July 25, Grading Crew foreman Tom Grasse, supervised Black on the Grading Crew and on that day Black drove the small backhoe to which he had been assigned. 2/

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*1/ Jerry Thiels was Union President at the time this job posting was drafted. He and Highway Commissioner Lanning discussed and agreed upon the language of this posting. Only Superintendent Lanning addressed this issue for the County herein; Thiel was not called as a witness.*

*2/ During the year 2000 summer season, when employees of the Highway Department worked four 10-hour shifts (by agreement between the parties), the County did not have overtime work to perform. However, during the 2001 summer season, a small amount of overtime work was performed on the Grading Crew.*

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At the beginning of the Summer, 2001, Black was invited to attend a preconstruction meeting to go over the jobs in 2001 which would be handled by the Grading Crew. Gary Mentink, Patrol Superintendent, directed Black to attend this meeting and the entire Grading Crew was in attendance (except for one employee who was on vacation). Foreman Stan Sixel told Black at this time that he was not on the Grading Crew and should not attend the meeting. However, Black did attend the meeting.

The County Highway Department's workload includes not only County projects but also projects in the towns and villages in the County which the County contracts to perform. Highway Commissioner Lanning also stated that there was never any intention to assign the new small backhoe which Black bid onto to the Grading Crew by the wording of the posting. Lanning stated that the Highway Department has six district sheds which cover state, county, town and village work. Lanning stated that none of the four backhoe operators is assigned to a crew and that they are generally assigned out of different sheds to cover crew work on an as-needed basis. All of the backhoe operators do maintenance, ditching and have worked on crews in their districts as well as outside their districts. Black was consistently assigned to work with the small backhoe (on straight time) during the summer of 2001 and he regularly worked at least 40 hours per week during this time period.

The evidence showed that if there is overtime for a crew, the crew does that overtime. The County also usually assigns employees who are assigned to certain equipment to overtime work as needed on that equipment. This is done by seniority on the piece of equipment

needed. Foremen sign employee time sheets to assure that the proper accounts are billed. If not enough employees who are assigned to equipment volunteer for the available work, supervisors are then told to solicit volunteers which they do, but not by seniority. Employees

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can make themselves available for all overtime by speaking to their foreman in advance. There is no evidence that Black ever spoke to his foreman to request such treatment. In addition, when the Patrol Superintendent determines that he needs extra truck drivers he will call his foremen in the various sheds and indicate to them that they should solicit volunteers to drive trucks. As all County Highway Department employees can drive a truck and have CDL licenses, all are given an equal opportunity (regardless of seniority) to volunteer for that work.

During the summer of 2001, employees were working four 10-hour days (pursuant to a memo of understanding between the parties), so that Friday's were normally unscheduled in the summer. At some point, the Grievant noticed that he was not being offered Grading Crew overtime. On September 5, 2001, Black filed the instant grievance in which he alleged that his assignment to the small backhoe meant he was on the Grading Crew and that he therefore should have received overtime along with the rest of the Grading Crew. In the grievance, Black noted that the position posting indicated that he would be under the supervision of the Grading Crew foreman and that his backhoe was intended to be primarily assigned to the Grading Crew. Black did not cite any contractual provisions as being violated in his grievance, but stated as follows:

I feel that the grading crew's foreman's attitude toward me shouldn't but is effecting [sic] my pocketbook. The grading crew has worked a lot of fridays this summer. I've volunteered for such work but was not called once. While people from other crews were working the overtime.

Black requested to be compensated for overtime lost and to be treated the same as any other member of the Grading Crew by the foreman. 3/

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*3/ During his testimony, Black asserted that Grasse had bumped his backhoe while he was running it at some undesignated time or times and that he (Black) complained to the Union about Grasse's conduct. Black asserted that Grasse intentionally took this action. I do not find this evidence relevant and it has not been considered in this case, as discussed infra.*

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In its response to the grievance dated September 13, 2001, the Highway Commissioner stated the Grievant's job posting as a backhoe operator is similar to the other three backhoe positions, none of which is assigned to a specific crew. In its October 3, 2001, response to the appealed grievance, County Personnel Director Conway stated:

The job posting outlines the responsibilities of the position and that it will be

primarily assigned to the grading crew, but it further states the operator may be assigned to other work locations as required.

Conway also stated that Black's backhoe position is similar to the other three backhoe positions, none of which is considered to be part of any particular crew; that all backhoe operators have been treated the same regarding overtime assignments and pursuant to County practice. Finally, Conway noted that the contract does not provide for work or crew assignments and that the management rights clause vests the direction of the working forces exclusively in the County. The grievance was appealed to WERC. The County did not make any procedural arguments regarding timeliness of the grievance.

The evidence showed that Grading Crew overtime during the 2001 summer season began on approximately July 13, 2001. Joint Exhibit 6 (Daily Foreman Reports from Friday, 7/13/01 through Friday, 8/24/01) showed that large backhoe operator Wade Weis worked six hours of overtime on each day, July 20 and July 27, 2001. There is no indication on these reports what work Weis actually performed on July 20 and 27. Also, no other backhoe operator was listed as having worked overtime on these reports except Black, who admittedly volunteered and worked six hours overtime as a truck driver on July 27, 2001.

County records (County Exhibit 2) indicated that the following overtime was worked in 2000 and 2001 by the four backhoe operators 4/:

<b><u>2001 OVERTIME</u></b>	<b>JUNE</b>	<b>JULY</b>	<b>AUGUST</b>
<b>Randy Pfrang</b>	none	none	8/23 - 1/2 hour
<b>Mark Stuckman</b> (large BH)	none	none	8/21 - 1/4 hour 8/27 - 1/2 hour
<b>Wade Weis</b> (large BH)	none	7/20 - 6 hours 7/27 - 6 hours	none none
<b>Dave Black</b>	none	7/27 - 6 hours (as a truck driver)	none
<b><u>2000 OVERTIME</u></b>	<b>JUNE</b>	<b>JULY</b>	<b>AUGUST</b>
<b>Randy Pfrang</b>	none	none	8/16 - 3/4 hour
<b>Mark Stuckman</b> (large BH)	none	none	8/24 - 3 hours

<b>Wade Weis</b> (large BH)	none	none	none
<b>Dave Black</b>	none	none	none

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*4/ It appears from the record in this case that the Union is not contesting overtime work in the year 2000 summer season; rather only the summer season of 2001 is in question in this case.*

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### POSITIONS OF THE PARTIES

#### The Union

The Union argued that the record evidence supports a past practice that overtime is assigned by the County by crews. In this regard, the Union noted that the contract contained pay rates for specific crews. The Union observed that the Employer has contended that the Grievant was not assigned to the Grading Crew but that the Union argued that Black had been assigned to that crew and should have been included in all overtime assignments during the summer of 2001 that the Grading Crew performed. On this point, the Union argued that the job posting that Mr. Black signed was different from other backhoe job postings in the following respects:

1. Black's job posting referred to his job being placed "under the grading crew foreman" and that the backhoe "will be primarily assigned to grading crew;"
2. Black was required, unlike other backhoe operators, to maintain a CDL;
3. The job description stated that it was for "one backhoe operator," which requires a conclusion that Black's backhoe position is different from any of other backhoe positions by the use of the word "one."

The Union further noted that in the June 26, 2000 letter indicating Black had received the backhoe position, the letter was also copied to his prior foreman, Sixel, as well as his new foreman, Grasse, which the Union found significant.

In the denial of the grievance, the County had stated that Black's position was "similar to those of other (backhoe) operators" and as such, Black was "not considered a full-time member of the grading crew." On this point, the Union asserted that Black did not have to be with the Grading Crew at all times in order to be on it, as shown by the clear language of the job posting. In addition, the Union noted that other foremen have recognized Black as a member of the Grading Crew. On this point, the Union noted that Supervisor Mentink told

Black to report to Grading Crew foreman Grasse and that he was a Grading Crew member after he received the backhoe position; that in the spring of 2001, Black was invited and attended the pre-construction meeting of the Grading Crew over the objection of foreman Grasse.

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Finally, the Union urged that Grading Crew foreman Tom Grasse, who did not testify herein, clearly treated Black arbitrarily and capriciously and caused him to lose valuable overtime work. In this regard, the Union noted that Black's testimony was undisputed against Grasse, that Grasse had failed to make proper assignments to Black and had attempted to bump his backhoe with another piece of equipment. Furthermore, the Union noted that union representatives had complained to upper level supervision regarding Grasse's treatment of Black in the year 2001.

As Grasse treated Black unjustly and disparately, the Union sought backpay in the amount of 37.5 hours of overtime (paid at time and one-half), that he should have received during the summer of 2001 as a member of the Grading Crew. The Union calculated the figure of 37.5 hours of overtime by its analysis of Joint Exhibit 6. That exhibit listed Friday overtime (by foreman) from July 13 through August 24, 2001. The Union requested Black receive time-and-one-half pay for all dates that employees worked overtime for Grasse as follows:

Friday July 13, 2001 10 hours of pay at 1 ½ times rate  
Friday July 20, 2001 10 hours of pay at 1 ½ times rate  
Friday July 27, 2001 4 hours pay at 1 ½ times rate  
*(Today Black worked 6 hours as truck driver)*  
Friday August 3, 2001 5.25 hours at 1 ½ times rate  
Friday August 24, 2001 10 hours of pay at 1 ½ times rate

It should be noted that on July 20 and 27<sup>th</sup>, Wade Weis worked 6 hours each day on Grasse's crew with the large backhoe. No small backhoes were used on any of the listed days.

The Union also sought 3.25 hours of overtime for Black on Foreman Schraut's crew on August 10<sup>th</sup>. There is no record evidence to show what crew Schraut ran on August 10<sup>th</sup> or whether a backhoe was used thereon. The Union also sought an order from the Arbitrator directing the County to cease and desist from treating Black as it had in the past.

### **The County**

The County argued that the Management Rights clause of the collective bargaining agreement gives it broad discretion to manage the work force in the County. Here, the County noted that Black signed a posting for a small backhoe position and was assigned to operate that backhoe as needed by the County during the year 2000, mainly on the Grading Crew. But in 2001, the need for the small backhoe on other projects, not on the Grading Crew, required the

assignment of Black to those other projects as needed. In addition, the County noted that although the piece of equipment was primarily assigned to the Grading Crew, Black was not assigned to that crew by means of the posting. The County pointed out that the job description specifically stated that the backhoe operator could be used at any sight where needed.

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Furthermore, the County noted that none of the three other backhoe operators at the County now is assigned to any crew. Therefore, Black has been treated the same as the other three backhoe operators at the County. In the year 2001, the most overtime worked by any backhoe operator was six hours in one day, and the County noted that Black also worked six hours also during 2001 (although as a truck driver).

The County noted that the contract contains no rules regarding the assignment of overtime, requiring a conclusion that this is left to the discretion of the County. The County urged that a past practice was demonstrated on this record that members of specific crews are generally offered the opportunity to volunteer for overtime first because they are familiar with the work; that Black was aware of this because in 2001 he volunteered to work as a truck driver on overtime and was granted six hours in that position. The County argued that the Union's list of overtime showed that employees who worked overtime on Friday's in the year 2001 mostly performed truck driver work and that there was no testimony to show that Black had actually volunteered for more overtime than he got in the year 2001. Finally, the County noted that overtime on the Grading Crew is only for employees assigned to that crew. In all the circumstances, the County urged that the grievance be denied and dismissed in its entirety as no contract violation occurred and the County had discretion to act as it did in regard to the Grievant.

## **Reply Briefs**

### **The Union**

The Union asserted that Black should have received Grading Crew overtime when he was not working elsewhere, but it admitted that the County does have the right to assign work. In the summer of 2001, the Union asserted that Black did not use his backhoe on the Grading Crew but that overtime was done on the Grading Crew while Black was on vacation, which the Union urged was unfair to Black. The Union noted that the crux of Black's complaint in this case was that he was never asked to work overtime on the Grading Crew, but that others, such as floaters, probationary employees and employees not assigned to backhoes, were given overtime on the Grading Crew. The fact that Black was able to get limited overtime as a truck driver is not relevant to the issues in this case. In addition, the Union asserted that there was no evidence to show why other backhoe operators did not work overtime during the Summer of 2001.

The Union argued that Black was different from other backhoe operators due to the posting he signed. In this regard, the Union noted that unlike other backhoe operators, Black

was assigned to the Grading Crew by the posting which he signed (with the understanding that he could be assigned elsewhere to do other work as well). Therefore, Black was not treated as other backhoe operators because he received no backhoe overtime while others who were not assigned to equipment or crews received overtime.

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### The County

The County argued that the use of the word “one” in the posting which Black signed does not require a conclusion that Black’s backhoe position was intended to be unique. The County noted that it was up to the Grading Crew foreman to assign overtime on that crew and that Black was not specifically assigned to the Grading Crew by means of his posting. Indeed, Black never worked on the Grading Crew during the summer of 2001.

Under the second paragraph of the posting which Black signed, the County urged that it reserved specifically to itself and its supervisors the right to assign, direct and control the work of employees without limitation or modification by the posting language itself. Due to the fact that Black signed this posting, it demonstrated his agreement to this specific language and the County’s rights there under.

In addition, the Union noted that other County foremen directed Black’s work during his trial period as well as thereafter, not just Grading Crew foreman Grasse. The letter announcing Black’s appointment to the small backhoe position proved nothing in the County’s view. The County noted that in the year 2000, the Grievant made no contention of loss of overtime although there was backhoe work available which Black performed during the year 2000.

Finally, the County urged that whether Sixel, Grasse and Black got along is not relevant to this case and not an issue here. Rather, the true issue is whether Black was properly assigned overtime work during the summer of 2001. Therefore, the County urged that the Union’s grievance be denied and dismissed in its entirety as the Union’s complaints in this case were unfounded.

### DISCUSSION

The Union has argued that Grievant Black should have been able to rely upon the unusual wording of the small backhoe posting he signed which, the Union argued, indicated that he had been assigned to the Grading Crew when he successfully posted into that position. Based on the following analysis, I do not believe the parties’ labor agreement or the evidence of record in this case support such a conclusion.

As a preliminary matter, I note that Article 3 of the labor agreement states that the County has the right to manage the work and direct the work force and that it has the

“ . . . exclusive right to determine the hours of employment and the length of the workweek, and to make such changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Highway Department.”

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In addition, Article 12 of the labor agreement requires that overtime be “authorized,” presumably by the County. Appendix “A” of the labor agreement lists “Backhoe Operator,” as an “Equipment Operator”, separate from “Grading Crew.” Furthermore, I note that Article 27 - Seniority states that “job requirements, qualifications and experience shall be a part of the posting. . . .” This language constitutes the only reference in the labor agreement to the contents of job postings. Significantly, there is no reference in the contract to how job postings should be worded, which would lead to a conclusion that the details of such posting language are likely governed by the parties’ past practice and Articles 27 and 3, quoted above.  
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*5/ There is no issue before me regarding the content of the posting Black signed.*

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The Union argued that the specific language contained in the posting supported its argument in this case. I disagree. The title of the posting states that it is for “one Backhoe” position, not one Grading Crew position. The use of the word “one”, the reference to the equipment being primarily assigned to the Grading Crew and the statement that the operator would be supervised by the Grading Crew foreman and the patrol superintendents, are insufficient evidence to base a conclusion that this “Equipment Operator” position thereby became a “Grading Crew” position. In this regard, it is significant that the posting states that the equipment, not the operator thereof, will be primarily assigned to the Grading Crew. In addition, the posting signed by Black also states:

. . . During the course of Grading construction the applicant may be required to operate other construction related equipment. The operator may be assigned to other work locations as required.”

The second sentence of the posting language quoted above indicates that the County has reserved to itself the right to assign the operator to locations other than the location of Grading Construction. Furthermore the posting goes on to specifically state that the language of the posting “. . . is not intended as a complete list of specific duties and responsibilities. Nor is it intended to limit or in any way modify the right of any supervisor to assign, direct and control the work of employees under his supervision. . . .” In these circumstances, the posting language supports the County’s arguments. Finally, very little can be concluded from the fact that Black’s former foreman Sixel and new foreman Grasse received copies of the June 26, 2000 letter appointing him as the Operator of the small Backhoe, given that both Sixel and

Grasse supervised Black's work after he received the backhoe posting.

Furthermore, none of the Backhoe Operators, including Black, has been specifically assigned to a crew. Thus, the fact that Black was invited to attend a pre-construction meeting

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of the Grading Crew does not necessarily mean that Black thereby became a member of the Grading Crew. As Highway Commissioner Lanning stated, without contradiction, there was never an intention to assign the successful applicant for the small Backhoe position to the Grading Crew by means of the wording of that posting.

It is also important that Black was consistently assigned to work with the small backhoe during the Summer of 2001 and that he regularly worked 40 hours per week during this time. In addition, the evidence showed that overtime for a crew is generally assigned to that crew; that the County assigns employees who are successful equipment applicants to overtime work as needed on their equipment; and that employees can otherwise volunteer for any available overtime by speaking to their supervisors. There is no evidence on this record to show that Black ever spoke to his foreman to request that he be considered for all available overtime during the Summer of 2001. 6/

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*6/ The one exception to the above-described practice regarding overtime is that any unit employee can pick up overtime driving truck for the County, without regard to seniority, as all unit employees have CDL licenses and there appears to be a shortage of County truck drivers.*

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The Union argued that Grading Crew Foreman Tom Grasse treated Black arbitrarily and capriciously and caused him to lose valuable overtime work during the Summer of 2001. Given the fact that Grasse did not testify herein, I credit all of Black's assertions regarding Grasse's treatment of him. Even assuming the veracity of Black's statements on this point, I cannot find that the evidence herein showed that Black was treated arbitrarily or capriciously or that he was in any way discriminated against. A close analysis of both Joint Exhibit 6 and County Exhibit 2 demonstrates that Randy Pfrang received one-half hour of overtime on August 23, 2001, operating the small Backhoe. The work performed by Pfrang was certainly *de minimis*. The evidence showed that the large Backhoe operators, Weis and Stuckman, did receive more overtime than did Black, but the work performed by Stuckman and Weiss was presumably performed on large the Backhoes, equipment that Black had not posted onto.

The listing of overtime hours compiled in Joint Exhibit No. 6, indicates that from July 13, 2001 through August 24, 2001 certain overtime was worked by various foremen and their crews. There was no indication that any backhoe work was done on crews that worked July 13, August 3, August 10, and August 24, 2001. On July 20 and 27, Wade Weiss, Large Backhoe Operator, worked six hours of overtime each day. The fact that there may have been other employees, who had less seniority than Black, working on various crews doing work not

involving backhoe work between July 13 and August 24, 2001, does not mean that Black should have received the overtime instead of those employees.

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It is also important in this case that during his trial period, Black worked for several other foremen as well as Tom Grasse, Grading Crew foreman. This evidence contradicts the Union's assertion that Black was assigned specifically as a member of the Grading Crew by means of the posting that he successfully received. Finally, based upon the limited amount of overtime work available during the Summer of 2001, and the even more limited amount of Backhoe overtime that was available that summer, Black's assertion that Grasse was out to improperly deny him overtime simply does not stand. 7/

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*7/ Black's confrontation with Grasse regarding Grasse's bumping Black's Backhoe were apparently handled informally by Black's complaint to Union representatives and their having spoken to upper level supervision about Grasse's treatment of Black, such that no grievance was filed thereon. Such a grievance, in any event, is not before this Arbitrator.*

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In all the circumstances of this case, including the fact that there are no contractual rules regarding the assignment of overtime except that overtime must be "authorized" by the County, I find that no violation of the contract occurred in this case and I issue the following

### **AWARD**

The Company did not violate the contract when assigning overtime to David Black. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 31<sup>st</sup> day of July, 2002.

Sharon A. Gallagher /s/  
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Sharon A. Gallagher, Arbitrator

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