

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**IOWA COUNTY MUNICIPAL EMPLOYEES UNION,  
LOCAL 1266-C, WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO**

and

**CITY OF DODGEVILLE**

Case 27  
No. 64988  
MA-13076

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**Appearances:**

**Michael J. Wilson**, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

**Attorney Eileen A. Brownlee**, Kramer & Brownlee, LLC, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the City.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "City" or "Employer," are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve the dispute set forth below. Hearing was held on September 30, 2005 in Dodgeville, Wisconsin. The hearing was transcribed and the parties completed their briefing schedule by November 18, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

**ISSUES**

The parties were unable to stipulate to the issues. The Union poses the following issues:

1. Is the assistant street foreman entitled to foreman pay when the street foreman is absent?
2. If so, what is the appropriate remedy?

The City frames the issues as follows:

1. Did the City violate the collective bargaining agreement when it did not pay foreman's wages to Jerry Weier for any hours worked between April 18 and May 6, 2005?
2. If so, what is the remedy?

Having reviewed the entire record, the Arbitrator adopts the City's framing of the issues.

### **FACTUAL BACKGROUND**

Jerry Weier ("Grievant") holds the position of mechanic/heavy equipment operator for the City. He has held that position for 18 years. In addition, the Grievant is the assistant foreman for the street department and has held that position for three or four years.

As part of his regular job duties, the Grievant repairs and maintains vehicles, operates heavy equipment and large vehicles, works on street repair, delivers materials around the City for street work and removes debris, garbage and "that sort of thing." As the assistant foreman for the street department, the Grievant assists the foreman in the performance of his duties and supervises the work of the street department crew in the absence of the street department foreman.

Between April 18 and May 6, 2005, Fred Rowe, the City's street department foreman, was absent from work. The Grievant, as assistant foreman, pursuant to the terms of his job description, became responsible for the supervision of the street department crew during Rowe's absence. During Rowe's absence, the Grievant delegated work to the street crew; answered questions from "City people;" did time cards; and "whatever else the foreman does." This included being responsible for the quality of work of the other employees; inspecting their work; and answering any questions directed to him from the employees.

Following Rowe's absence, the Grievant sought out of classification pay under the terms of the parties' collective bargaining agreement for his work in the foreman position. The City denied this request on the basis that the work performed was within the scope of the Grievant's job description.

On May 11, 2005, a grievance was filed requesting out of classification pay for the period of time in question.

Further facts will be set forth in the DISCUSSION section below.

## PERTINENT CONTRACTUAL PROVISIONS

### ARTICLE 4 – GRIEVANCE PROCEDURE

- 4.01 **Definition:** For the purpose of this agreement, the term “grievance” means a dispute between the Employer and an employee within the unit, or the Employer and the union relating to interpretation and application of this agreement.

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#### Arbitration

- B) The parties shall attempt to select a mutually acceptable arbitrator to hear the dispute within ten (10) working days after the notice in Paragraph A above is served. If they are unable to agree on an acceptable arbitrator, the parties, or one of them, shall request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The decision of the arbitrator shall be final and binding on the parties. The arbitrator shall have no authority to modify, add to, or delete from the express provisions of this agreement.

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### ARTICLE 18 – CLASSIFICATION AND COMPENSATION SCHEDULE

- 18.01 The classification and compensation schedule shall be made a part of this agreement and attached hereto as “Appendix A”.
- 18.02 **Saturday and Night Differential:** Library employees shall be paid a differential of forty-five cents (45¢) per hour for all hours worked past 5:00 p.m., and for all hours worked on Saturday.
- 18.03 **Out of Classification Pay:** Employees who work in a higher paid classification shall receive the higher rate of pay for all hours worked in that classification.

18.04 **Park Supervisor:** The Park Supervisor shall be a full-time, year-round position. From March 1 through November 30, the Park Supervisor shall receive Park Supervisor pay. From December 1 through the end of February, the Park Supervisor shall receive up to twenty-five (25) hours per week at the Park Supervisor rate of pay; for the balance of the week the Park Supervisor will be available for other work in other departments, and shall be paid at the City Crew rate of pay.

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**APPENDIX A- 3**

**Hourly Wage Rates Effective January 1, 2005**

Classification	Start	After Probation
Water Foreman Sewer Foreman	16.72	19.69
Street Foreman	15.57	18.52
Cemetery Foreman Park Supervisor	14.99	16.59
Assistant Water Foreman Assistant Sewer Foreman	14.50	17.29
Floater	13.92	16.71
Assistant Street Foreman	13.77	16.39
Mechanic Heavy Equipment Operator	13.47	15.79
City Crew Janitor	13.13	15.48
Children's Librarian	12.93	15.04
Permanent Clerical	13.20	13.94
Assistant Librarian	11.63	13.40
Cemetery Worker Park Worker	10.59	12.40
Crossing Guards	10.46	12.25
Library Technician	10.11	11.51

THERE WILL BE TWO EQUIPMENT OPERATORS.

An Assistant Foreman position in the Streets Department will be filled from among present Street Department employees. The person serving in the Assistant Foreman position will retain his/her current position and duties (i.e., no vacancy will be created by filling the Assistant Foreman position).

## **POSITIONS OF THE PARTIES**

### **Union's Position**

The Union basically argues that the clear and unambiguous contract language found in Section 18.03 provides for out of classification pay when the Grievant takes over for the foreman in the foreman's absence.

The Union adds that the Grievant is still entitled to this pay when he takes over for the foreman notwithstanding his job description which provides for that responsibility as a job duty. The Union points out that the job description came after the creation of the assistant foreman's position, and does not trump the express terms of the collective bargaining agreement providing for foreman out of classification pay.

The Union concedes that one instance of paying the Grievant at the foreman rate when the foreman was absent does not a past practice make. However, the Union notes that "the payment followed the settlement and is meaningful in establishing the existence of a mutual understanding at the bargaining table."

The Union also agrees that the City is correct in stating that core duties are often an important factor in determining whether or not out of classification pay is merited. What the City overlooks, according to the Union, is the nature of the "core" of the foreman's position. In this regard, the Union claims: "The core duty was the assumption of the overall responsibility of the foreman position and not just the signing of time cards, etc. The chain of command was significantly altered when the foreman was absent."

In the same vein, the Union argues that the very first time the Grievant ever heard that he was to report work as a foreman versus work as a mechanic was at the hearing. The Union states that prior to that date the Grievant was not given any such instructions by any City official or required to submit any report(s) delineating his work as a foreman versus his work as a mechanic during periods in which the foreman was absent.

Finally, the Union argues the fact that the Director of Public Works did not read the contract or the job description when he authorized the 2004 pay adjustment does not excuse the City's action of denying out of classification pay in the instant case.

The Union respectfully requests that the Arbitrator sustain the grievance and order appropriate remedy for all of the time the foreman was absent.

### **City's Position**

The City argues that it did not violate the agreement when it did not pay foreman's wages to the Grievant for hours worked between April 18 and May 6, 2005. In support thereof, the City claims the Grievant was not working outside of his classification during this

time period; instead, he was simply performing the job duties of his own classification. The City points out that among the duties identified in the job description for the assistant foreman is the duty to supervise the street department crew during the foreman's absence.

The City also argues that the Grievant was not required to perform any function during the foreman's absence that would constitute a significant departure from his usual and ordinary job responsibilities as assistant foreman. The City opines that an employee is not deemed to be working outside of his or her classification if he or she is performing a regular duty of his or her regular position or where the duties performed are duties which overlap job descriptions. The City cites several Commission arbitrator awards for this proposition.

The City further argues that assuming the Grievant is entitled to out of classification pay for performing supervisory functions he is only entitled to pay for actual hours worked performing those functions. In this regard, the City states the contract specifically provides that an employee is entitled to out of classification pay for the "hours worked" in that other classification and there is nothing in the contract to suggest that the Grievant is entitled to out of classification pay simply because another employee is absent. The City notes that there is nothing in the timesheets during the period of time in question to suggest that the Grievant performed any work outside of his usual work and his usual classification. The City adds that it is impossible to argue that the compensatory time and sick time the Grievant used during the aforesaid time period were "hours worked" outside his classification.

The City claims the purpose of out of classification pay is to provide a higher rate of compensation to individuals who are performing the core functions of another, higher rated position. The City states that had the parties intended to permit an assistant foreman to be compensated at a foreman's wage in the foreman's absence without more, it would have been simple enough to negotiate language in the contract that would require that out of classification pay apply in the event of a foreman's absence. The City points out that is not the language in the contract.

The City submits that there is no evidence that would indicate the Grievant performed any of the tasks that would constitute the core functions of the foreman's position during his absence. The City concludes that the Grievant is not entitled to out of classification pay for any hours worked during that period.

For the foregoing reasons, the City believes the grievance should be denied.

### DISCUSSION

At issue is whether the City violated the collective bargaining agreement when it did not pay foreman's wages to the Grievant for time worked between April 18 and May 6, 2005.

The Union argues for such a violation while the City takes the opposite position.

Section 18.03 provides for out of classification pay as follows: “Employees who work in a higher paid classification shall receive the higher rate of pay for all hours worked in that classification.” The Union argues that this clear and unambiguous contract language provides for out of classification pay when the Grievant takes over for the foreman in the foreman’s absence. However, the language does not expressly state this. It also doesn’t define what is meant by “work in a higher paid classification.” Nor does the contract define which duties belong to the assistant foreman classification and which duties are in the foreman classification. Since the disputed contract language is not clear and unambiguous, the Arbitrator turns his attention to the parties’ bargaining history and past practice to give meaning to the disputed contract language.

Bargaining history does not shed any light on the meaning of Section 18.03. For example, there is no evidence that the parties even discussed Section 18.03 when they agreed to recreate the assistant foreman position.

Furthermore, there is no evidence that, during negotiations, there was any discussion as to the nature of the duties of the assistant foreman position or whether or not an assistant foreman would take on the responsibility of the foreman in the absence of the foreman. Nor was any evidence introduced that the parties discussed out of classification pay being made available to the person acting as assistant foreman. The Grievant was involved in the negotiations that resulted in the recreation of the assistant foreman classification as reflected in the proviso set forth at the bottom of the wage appendix. (Tr. p. 14). He was present for the meetings where this proviso was discussed. *Id.* He testified that based in part on his experience bargaining with the City he is entitled to foreman’s wages when he serves as foreman. (Tr. pp. 22-23). However, no other evidence was offered to support this claim. No bargaining notes, minutes, offers or testimony that the Union or the Grievant shared this understanding with the City when they agreed to the language recreating the assistant foreman position. Consequently, bargaining history does not support the Union’s position.

During 2004 the Grievant received out of classification pay for hours he worked in the absence of the foreman. (Tr. pp. 28, 32 and 34). The Union argues that because this payment followed the settlement it is meaningful in establishing the existence of a mutual understanding at the bargaining table.

The problem with the Union’s argument is that the person who authorized the payment to the Grievant in 2004 didn’t consult the Grievant’s job description or the contract when he approved this payment. (Tr. p. 35). He wasn’t in attendance when the assistant foreman position was agreed to. *Id.* He had no knowledge of any mutual understandings reached during bargaining. His payment to the Grievant the first time around was a “mistake.” *Id.* It is not evidence of a mutual understanding regarding the issue at hand.

In addition, one instance of payment to the Grievant of foreman’s wages when he served as foreman in the foreman’s absence would not normally constitute a past practice. Consequently, past practice does not provide a solution to the instant dispute.

In the absence of clear contract language, bargaining history or past practice, the Arbitrator may look to the standards of contract interpretation and the principle of reasonableness in interpreting the disputed contract language.

An employee is not deemed to be working outside of his or her classification if he or she is performing a regular duty of his or her regular position or where the duties performed are duties which overlap job descriptions. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, Case 179, No. 52813, MA-9113 (Mawhinney, 03/06); CITY OF KAUKAUNA, Case 86, No. 52320, MA-8917 (Mawhinney, 08/95). Thus, where work performed is fairly within the scope of an employee's job description, that employee is not entitled to out of classification pay. *Id.*

Here, not only are there substantial areas of overlap in the work performed by the foreman and assistant foreman positions but their job duties and responsibilities are virtually identical. (Joint Exhibit Nos. 3 and 7). There are no readily discernable differences between the two jobs. *Id.* They are both working foremen, non-supervisory, classifications included in the bargaining unit represented by the Union. (Joint Exhibit No. 1). Consequently, when the assistant foreman performs the foreman's duties in the foreman's absence he is not entitled to out of classification pay because he is essentially performing his regular job duties.

This is especially true, where here, the Grievant has the responsibility according to his job description of managing, coordinating and supervising the work of the street department crew during the foreman's absence. (Joint Exhibit No. 3). The Grievant's position description, on its face, supports a conclusion that acting as a foreman, in the absence of the foreman, is work of the assistant street department foreman classification. CITY OF SOUTH MILWAUKEE, Case 97, No. 56092, MA-10173 (Burns, 04/99).

In looking at grievances for out of classification pay, arbitrators have often spoke of the key or core parts of a job, or the central core of a classification. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, *supra*, p. 9. Before an employee in a lower rated classification can be said to be doing the work of a higher rated classification, he/she must have engaged in work which forms the central core of that higher rated classification, not just an isolated, marginal, relatively insignificant duty. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, *supra*, p. 10.

The best evidence of the tasks the Grievant actually performed during Rowe's absence is his own time sheets. The Grievant's timesheets do not show any demonstrable difference in the work that he did prior to Rowe's absence and while Rowe was absent. (Joint Exhibit Nos. 8 and 9). The Grievant testified that he performed certain foreman duties in Rowe's absence. (Tr. pp. 21-22). However, these are duties that he also performs as assistant foreman. (Joint Exhibit No. 3).

It is true that the Grievant assumed the overall responsibility of the foreman's position in Rowe's absence. However, contrary to the Union's assertion, the assistant foreman's duties and responsibilities are not substantively different from the foreman's duties and



responsibilities. They both do basically the same work and have the same authority. (Joint Exhibit Nos. 3 and 7).

The City argues that if the parties had intended to permit a street department assistant foreman to be compensated at a foreman's wage in the absence of a foreman without some other requirement, it would have been simple enough to negotiate language in the contract that would require out of classification pay apply in the event of a foreman's absence. The City points out that is not the language in the contract. In fact, the parties know how to provide for such a specific result through contract language. For example, they have specified during what time periods a park supervisor shall receive park supervisor pay and when that position shall be paid at a different rate of pay. (Joint Exhibit No. 1, p. 10). The parties could have easily done likewise for the assistant foreman. They failed to do so. The Arbitrator is reluctant to read something into the agreement that the parties themselves have not put there.

The collective bargaining agreement provides that the assistant foreman in the street department retains his or her regular job duties while, at the same time, holding, and being compensated year round at a higher wage rate for, the assistant foreman position. According to the assistant foreman's job description, the assistant foreman assists the foreman in carrying out his/her duties and performs the duties of the foreman in the foreman's absence. (Joint Exhibit No. 3). The Union complains that the assistant foreman's job description came after the creation of the assistant foreman's position. However, there is nothing contractually improper about such a sequence. To the contrary, the management rights clause of the parties' collective bargaining agreement provides that the City has the authority to determine who performs work and to assign duties. (Joint Exhibit No. 1, p. 1). In addition, the Union did not protest the creation of the assistant foreman's job description. Nor is there any evidence that the City acted unreasonably when it created the job description for the assistant foreman classification that the parties had agreed to at the bargaining table. For the foregoing reasons, the Arbitrator rejects this argument of the Union.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the City is NO, the City did not violate the collective bargaining agreement when it did not pay foreman's wages to Jerry Weier for any hours worked between April 18 and May 6, 2005.

In view of all of the foregoing, it is my

**AWARD**

That the grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 4th day of January, 2006.

Dennis P. McGilligan /s/

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Dennis P. McGilligan, Arbitrator

