

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEE UNION,
LOCAL 796, AFSCME, AFL-CIO**

and

CITY OF OSHKOSH

Case #353

No. 65697

MA-13293

(Additional Testing Duties)

Appearances:

William Bracken, Coordinator of Collective Bargaining Services, Davis & Kuelthau, Post Office Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 807 Saunders Road, Apt. 1, Kaukauna, Wisconsin 54130, appearing on behalf of the Oshkosh City Employees Union, Local 796.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the City of Oshkosh (hereinafter referred to as either the City or the Employer) and the Oshkosh City Employees Union (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the assignment of additional testing duties to Solids Operators at the City's Wastewater Treatment Plant. The undersigned was so designated. A hearing was held on June 20, 2006 at the City's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted the case on oral arguments at the end of the hearing, and authorized the arbitrator to issue an expedited decision.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The issues before the arbitrator are:

1. Was the grievance timely filed? If so,
2. Did the City violate the collective bargaining agreement when it required Solids Operators at the Wastewater Treatment Plant to perform the total solids tests on the schedule announced in May, 2005? If so,
3. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this agreement, the City reserves and retains solely and exclusively all of its common law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Union.

...

ARTICLE XIX

GRIEVANCE PROCEDURE

Both the Union and the City recognize that grievances and complaints should be settled promptly and the earliest stage and that the grievance process must be initiated within 10 work days of the incident or knowledge of the incident. A grievance shall be defined as a dispute which involves the interpretation, application or compliance of the provisions of this Agreement. The written grievance shall include the facts upon which the grievance is based, the articles alleged to be violated and the relief sought. The grievance shall be signed and dated by the grievance. All grievances which arise shall be processed in the following manner:

...

Step 5. . . . If a grievance is not presented within the time limits set forth above, it shall be considered waived. If the City does not answer within the specified time limits, the Union may appeal the grievance to the next step. Time limits in each step may be extended by mutual written agreement between the parties.

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BACKGROUND

The facts of this case are straightforward. For nine years, the Solids Operators at the Wastewater Treatment Plant have taken blended sludge samples, centrifuge feed samples and solid cake samples at those three stages of the treatment process. These samples were labeled and dated. A portion of the sample was placed in an oven, which weighed the sample, then baked it for 70 minutes. At the end of the baking period, the oven reweighed the sample. The ratio of the weight after baking to weight before baking – the percentage of total solids – was displayed on the oven, and recorded by the operator. The collection of the sample and placement in the oven takes about ten minutes.

On May 19, 2005, Wastewater Superintendent Bob Kruzick sent a memo to the Solids Operators at the treatment plant, advising them of a new system and schedule for entering readings into the plant's database. A day or two later, Kruzick verbally advised the Operators that they would also be taking responsibility for the Total Solids Tests at the main digester. While the Operators had always drawn this sample once per week, the sample was sent to the lab, and the test was performed by the Chemist or someone under his direction. The Chemist is represented in the professional employees' bargaining unit. Under the new system, the main digester was sampled two to three times per day, three days per week, on the same schedule as the other solids tests. These samples and results are not labeled or dated, and the results are not reported to the DNR. An anomaly in the reading might cause the Operators to adjust the process, but generally the information is simply averaged and added to the real-time database of conditions within the plant.

The Chemist continued to perform the solids test at the digester once per week. When the Chemist performs the test, the sample is still labeled and dated for DNR reporting and sent to the lab. The Chemist conducts the Total Solids Test on the sample, but he also performs an additional test, referred to as the ash test. After the total solids test is done, the sample is placed in another oven, and burned to ash. The result of this test is the solids volatility report, and the outcome is provided to the DNR. The Chemist has always performed the ash test in conjunction with total solids test on samples drawn from the digester.

This grievance was filed on June 13, 2005, protesting the assignment of Chemist duties to the Solids Operators. It was denied at the lower stages of the grievance procedure, and was referred to arbitration. Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that this is a classic continuing violation, in that work is improperly assigned to employees in a lower paid classification, in a different bargaining unit. The City's timeliness challenge does not affect the validity of the grievance, although it may have some bearing on the scope of the remedy.

As to the merits, the Union argues that this work has uniformly been performed by the Chemist since solids testing was introduced in 1997. The Chemist is a position with considerably different qualifications, responsibilities and compensation than the Solids Operators who now must perform the work. There is no authority under the contract for the City to shift work from one bargaining unit to another, and particularly not work which has been the exclusive responsibility of the professional employees bargaining unit. While the procedures for taking the test at the digesters may be the same as that for the testing of the blended sludge, the centrifuge and the solid cake, the basic purpose of the testing at the digesters is not operational. It is a data collection test, which has been performed exclusively by the Chemist. The arbitrator should therefore conclude that this transfer of work was not legitimate, and should direct the City to cease and desist from requiring Solids Operators to perform these tests.

The Position of the City

The City takes the position that the grievance is plainly not arbitrable under the time limits set forth in the collective bargaining agreement. These parties have clearly and expressly stated their agreement to the effect that time is of the essence in grievance filing, and that late grievances are considered waived. The contract sets 10 work days for the filing of a grievance. The directive to do the Total Solids Testing was given on either May 20 or 21. The grievance was filed on June 13. The Wastewater Treatment Plant is a seven day per week operation. Even if one were to measure timeliness on the normal five day per week basis, excluding Saturdays and Sundays, the last day for a timely filing would have been June 6.

If the arbitrator were to conclude that the grievance is timely, the City notes that there is absolutely nothing in the collective bargaining agreement which prohibits the order given to the Solids Operators. The job description of the Solids Operators includes sampling and testing. This test is precisely the same test which the Operators have been performing for years. The only difference is that the sample is being drawn from a different point in the pipe within the plant, and that the test is done with greater frequency. Contrary to the Union's claim that this is the test that was previously performed by the Chemist, the record shows that the Chemist performed, and still performs, this test only as a prelude to the volatility test, or ash test, which requires a high intensity oven the Operators do not have. The results of the Chemist's Total Solids Test and volatility test are reported to the DNR. The test results for the

Operators' version on the Total Solids Test is used merely as additional information on plant operations. In summary, there is no basis for any remedy to the Union or these employees, and even if there were, the requested remedy of a ban on assigning work is outside of the arbitrator's authority. For all of these reasons, the City asks that the grievance be denied.

DISCUSSION

The City raises the threshold issue of procedural arbitrability, in that it alleges that the grievance was not timely filed. The contract specifically calls for filing within ten work days of the incident giving rise to the grievance, and provides that grievances not raised within the ten day window are waived. This grievance was filed on June 13, while the order to conduct the Solids Tests was given verbally on May 20 or 21. Even allowing several days for the Operators to actually start collecting and testing the samples from the digesters, and using a five work day per week standard,¹ it is clear that the grievance falls outside of the ten day window. Having said that, if as the Union alleges, the order constitutes a shift of professional work from the professionals bargaining unit to the blue collar unit, it presents a continuing violation of the agreement. That is not to say that it could never be rendered untimely. Without purporting to define a standard for how long a continuing violation might remain viable in the face of inaction, I conclude that the additional week or so in this case before the Union's claim was filed does not affect the validity of the grievance. It would, however, preclude any remedy for the period beyond ten work days prior to filing.

Turning to the merits, the Union claims that requiring Solids Operators to perform the Total Solids Test at the digesters is a shift of work from the Chemist to the Solids Operators. In fact, it does not appear that the Chemist's work load has changed. Prior to May of 2005, the digester sample was collected by the Operators, and provided to the Chemist once per week. The Chemist then conducted the Total Solids Test and the so-called ash test for volatility. After May, 2005, the Chemist continued to perform those tests once per week in exactly the same way. What has changed is that the Solids Operators themselves are now required to run the Total Solids Test on samples drawn from the digesters several times per day, three days per week.

The Solids Operators' position descriptions describe their essential duties and responsibilities as including, among other things, "maintains proper process control; collects samples; performs some physical and chemical analyses at various points in the process." The objection of the Operators seems to focus on the purpose of the testing, which is not directly related to operations, or "proper process control." However, the purpose of the testing is not determinative. Management has the right to manage, and part of that is deciding what data managers need about the operations and how often they need it. The question for contract

¹ I do not find it necessary to determine whether the "10 work days" standard referred to in the labor agreement would exclude weekends in the treatment plant, which is a seven day per week operation.

purposes is whether the actual work being demanded of them is outside of the job description. The Total Solids Test is not technically complex so as to be beyond the Solids Operators' capabilities. In fact, this test is identical to the tests that are run at three other points in the process, and those tests have been performed by the Solids Operators for the approximately nine years that the plant has been in its current configuration. The frequency of the testing has changed, but not so much as to make any material difference in the Operators' jobs.

The work of conducting the Total Solids Test is clearly work that falls within the scope of the Solids Operator's job descriptions, both as they are written and as they have historically been understood. The requirement that the samples be drawn from the digesters, in addition to the other three locations the Operators have customarily sampled and tested, is nothing more than a minor evolution and extension of their current duties, and does not violate any provision of the contract.

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

AWARD

1. The grievance asserts a continuing violation of the agreement and was timely filed.
2. The City did not violate the collective bargaining agreement when it required Solids Operators at the Wastewater Treatment Plant to perform the total solids tests on the schedule announced in May, 2005.
3. The grievance is denied.

Dated at Racine, Wisconsin, this 29th day of June, 2006.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator