

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LA CROSSE

and

LA CROSSE CITY EMPLOYEES UNION, LOCAL 180, SEIU, AFL-CIO

Case 339

No. 66191

MA-13452

Appearances:

Stephen F. Matty, Assistant City Attorney, City of La Crosse, 400 La Crosse St., La Crosse, WI 54601, appearing on behalf of the City of La Crosse.

James G. Birnbaum, Birnbaum Seymour Kirchner & Birnbaum LLP, 300 North Second Street, Suite 300, P.O. Box 308, La Crosse, WI 54602-2740, appearing on behalf of La Crosse City Employees Union, Local 180, SEIU, AFL-CIO.

ARBITRATION AWARD

The City of La Crosse, hereinafter City or Employer, and Local 180, SEIU, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on January 27, 2007 in La Crosse, Wisconsin. The hearing was not transcribed. The record was closed on May 2, 2007, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided, and agreed to allow the arbitrator to frame the issue based upon the parties' proposed issues and the evidence and arguments presented. The Union's suggested statement of the issue is:

Did the City violate the City's Collective Bargaining Agreement and Past Practice when, on May 28, 2006, Supervisor Mike Pederson performed Bargaining Unit work thereby denying the Grievant call out pay? If so, what is the appropriate remedy?

The Employer suggests that the issue to be decided is:

Did the Employer illegally perform bargaining unit work contrary to the collective bargaining agreement on May 28, 2006 when one bargaining unit employee was assigned to take corrective action to reflush water hydrants? If yes, then what is the remedy?

Based on the evidence and arguments presents, the undersigned adopts the following statement of the issue:

Is the Grievant entitled to call out pay for May 28, 2006?

BACKGROUND and FACTS

This case involves a long-standing dispute between the Union and the Employer regarding allegations that a supervisor has performed bargaining unit work. The essential facts involved in this grievance are not in dispute.

On the early morning of May 28, 2006, the La Crosse Water Utility performed a transmission flush to remove deposits in pipes caused by high iron and manganese levels in the wells on French Island. Mike Pederson, the Water Distribution Supervisor, had posted a flushing notice on May 22, 2006 asking that members of the bargaining unit that wished to work for approximately six (6) hours, starting at 4:00 a.m., on May 28 sign the notice. Four members of the bargaining unit, including Mark Graff and Rick Skiles, the grievant herein, signed the notice. This project was completed by approximately 9:30 a.m. that day.

Unfortunately, in the process of doing this scheduled transmission flush, a valve was left open which roiled things up. Residents on the north side of La Crosse began to notice discolored or "dirty" water. One of those north side residents was Rick Smith, Jr., the president of SEIU Local 180. Around 10:30 or 11:00 am, Smith called Tom Berendes, the Superintendent of the La Crosse Water Utility for 23 years until his retirement in July 2006. Rather than calling the water utility answering service regarding his complaint of dirty water, Smith called Berendes directly with his observations. Berendes, in turn, called Pederson who had received calls about the situation from the answering service. It was determined that a corrective flush should be performed. The on-call person, Mark Graff, was called in.

Graff is a 17 ½ year employee of the City of La Crosse, the past 16 ½ years of which he has worked for the Water Department. Graff is currently a Maintenance Worker II and has extensive experience flushing hydrants, both during his regular work schedule and outside his regular work schedule. On the morning of May 28, he was the scheduled on-call person and

he had participated in the transmission flush. He had reported to work at 4:00 a.m. as scheduled and worked with three other people, including Grievant Skiles. After the transmission flush was completed he went home. Sometime later, Mike Pederson, the Water Distribution Supervisor, called him back to work.

Graff reported to the shop and was directed by Pederson to put equipment in his truck so that two hydrants could be flushed at the same time. Over the next approximately three and one half hours, Graff opened ten different hydrants in such a manner that no more than two were opened at the same time. Graff used a wrench to open a hydrant and Pederson would remain at that site while Graff went to the next hydrant pursuant to Pederson's direction. When Pederson determined that the water flowing at the hydrant he was beside was clean, he would radio Graff to come back and close that hydrant and then Pederson would direct Graff to another location.

Pederson initially thought that only two hydrants would need to be opened, but as he and Graff were performing the corrective flush, additional calls of dirty water were received, making Pederson recognize the need to open additional hydrants. Ultimately, ten different hydrants, in three distinct segments of the neighborhood, were opened.

The ten opened hydrants were clustered: The first three (1, 2, and 3) were along Charles Street, one block from each other; the second cluster (4, 5, and 6) consisted of one on Charles Street, about eight blocks from the first cluster, with the others within two blocks of the first; the third cluster (7, 8, 9 and 10) consisted of four hydrants, about eight to ten blocks from the second cluster, and all within two blocks of each other. Hydrants 9 and 10 were located at the ends of cul-de-sacs. All were within a relatively short distance of one another, clearly within the same residential neighborhood. However, the hydrants were sufficiently far apart that no two could be visually monitored by the same person at once.

Appropriate safety precautions were utilized. In all cases as needed, when water was flowing from a hydrant, a diffuser was used to decrease the water pressure as it reached the street, a truck was parked in such a fashion as to block access to the open hydrant, and a barricade with lights was put in place to indicate that work was being performed.

Although for most of the time, Pederson or Graff was standing near each open hydrant, there were times that a hydrant was unattended. This would occur when Graff left the hydrant he was monitoring to return to the one Pederson had been monitoring in order to close the hydrant, and while Graff was proceeding to the next hydrant to open that one. At one point, Pederson was talking to homeowners rather than watching the water flow from an open hydrant. During that time, Graff observed some kids riding their bikes through the water flowing from one of the hydrants, and he also saw some kids in baseball uniforms pulling up to hydrant 7, possibly to drink the water. Graff did not report either of these situations to his supervisor, Pederson, at the time of the occurrences. No member of the public was injured during the corrective flush.

After it was clear that a third hydrant was to be opened, Graff asked Pederson if he was going to call out any other employees to assist with the work and to monitor the water flow from the hydrants. Pederson indicated that this would not be necessary. Graff did not tell Pederson that the failure to call in the most senior employee available, Skiles, was a contract violation. Graff did not tell Pederson that he thought Pederson was doing bargaining unit work at the time. Union President Smith saw Graff and Pederson working in the area. He did not tell Pederson that it was necessary to call out another employee to complete the corrective flush.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

RECOGNITION

This Agreement made by and between the City of La Crosse, through its City Negotiating Team, the Finance and Personnel Committee, acting pursuant to a resolution of the City Council of the City of La Crosse, authorizing them to enter into this Agreement, hereinafter referred to as the City, and the Service Employees International Union Local #180, hereinafter referred to as the Union.

The City recognizes SEIU Local #180, as the exclusive bargaining agent for all employees of the City of La Crosse exclusive of all department heads, supervisors, professional and confidential employees, members of the La Crosse Professional Police Officer's Association, non-supervisory bargaining unit; La Crosse Professional Police Supervisory bargaining unit; Amalgamated Transit Union Local #519 bargaining unit; Airport Fire/Police bargaining unit; all crossing guards, and all temporary, seasonal employees who are employed less than 120 calendar days in a calendar year.

The City agrees that the 120 Day Rule shall be enforced in all departments. If a violation of the Agreement is discovered, remedy includes, but is not limited to, prorata seniority, back pay and benefits as otherwise required by the contract retroactive to the date of violation regardless of when it is discovered.

ARTICLE 2

GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

. . .

Step 3. If a satisfactory solution cannot be reached, the Union may, within thirty (30) calendar days of the grievance meeting, appeal to the Wisconsin Employment Relations Commission who will appoint a neutral arbitrator. The Union shall copy the City on all requests for grievance arbitration, the findings of the arbitrator to be final and binding on the parties hereto.

...

The arbitrator shall not add to, or subtract from the terms of this agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

The grievance procedure set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement.

...

ARTICLE 12

OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1 ½) times their regular rate of pay for services rendered and hours worked over and above their regularly scheduled work week. In no case shall time and a half be authorized for services less than forty (40) hours in one week. For an employee's [sic] on a 37 ½ hour work week, overtime shall be at straight time cash or compensatory time for the first 2 ½ hours of weekly overtime.

...

ARTICLE 19

RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

OTHER CITY OF LA CROSSE POLICIES

**NON SCHEDULED AND EMERGENCY OVERTIME POLICY FOR
WATER DEPARTMENT DISTRIBUTION EMPLOYEES**

02/02/95

Whenever the events of the day make it necessary to call employees off their assigned jobs to work on a job that was not planned for that day and the work is not completed by the end of the workday employees who respond to the call and become involved with the new job will be given the opportunity to stay on the job until the work is complete. If additional employees other than those who responded to the call are needed they will be asked by seniority.

In the event that it becomes necessary to work late on a job that was assigned to a crew at starting time or any other time during the day and it was not intended for the work to involve overtime the crew working on the job will be given the opportunity to stay on the job.

Whenever a call comes in shortly before the end of the workday and only one employee is needed for the call it will be given to the employee who is on call.

Any other overtime will be by seniority with the exception of the employee who is on call, that person will always be given the opportunity to work.

AMENDMENT PERTAINING TO CALL OUT PERSON

11/20/95

There may be times when distribution employees are scheduled to work different hours.

When this happens and a person is needed for a call the people who are working will be called first.

If they are unable to take the call because of appointment scheduling or it is likely to involve overtime then whoever is on call will be called out.

EMERGENCY CALL OUT PERSON FOR WATER DEPT. EMPLOYEES

1/9/03

- ❖ Employee starts his/her week of being on call at 3:00 p.m. on the Monday of the scheduled week that they are on call. If this falls on a holiday, they are on call beginning at 7:00 a.m. that Monday. This employee is on call from 3:00 p.m. to 7:00 a.m. Mon. thru Fri. and starting at 3:00 p.m. Fri. until 7:00 a.m. Mon. morning. When an emergency call comes in during any of these hours, the operator must contact the on call employee first. The exception to this is explained in the next paragraph.
- ❖ There are times when distribution employees have different hours, such as the Meter Reader II position.
- ❖ If a call comes in when a scheduled person is working, they will be called first. If they are unable to take the call because of scheduled appointments or will result in overtime pay, the call out person will be called.
- ❖ The employee starting his/her on call week is responsible for taking the pager and cell phone with them. They must put their name and pager number on the board in the pump house and the board in the break room.
- ❖ If you are taking a utility truck home with you, you must also put the truck number on the board in the pump house.
- ❖ If employees switch calls, the regularly scheduled person is responsible for letting the operator know who is on call, and their contact information.
- ❖ Plug in both the pager and the cell phone in the break room Monday morning when you are finished being on call.
- ❖ When an emergency call comes in to the pump house, the operator will call the employees [sic] home phone number first, then the pager. If there is no response from either of these, the operator can try the cell phone number.

Mike Pederson
Distribution Supervisor

POSITIONS OF THE PARTIES

The Union contends that the failure of the Employer to call out Rick Skiles to assist with the corrective flush of the water mains on May 28, 2006 is just another example of supervisors, particularly Water Distribution Supervisor Mike Pederson, doing bargaining unit work. It is the position of the Union that both the collective bargaining agreement between it and the City of La Crosse and past practice require that supervisors perform no bargaining unit work. The Union has consistently challenged the City whenever it felt that a supervisor had engaged in bargaining unit work, and the events of May 28 fall into that category.

The work in question, flushing of fire hydrants, is more than wrench twisting. The aspect of this work involved in turning wrenches is a very small percentage of the time spent on a hydrant flush. Bargaining unit work is more than wrench twisting. While the Union acknowledges that Pederson did not turn a wrench on May 28, this does not mean that he did not do bargaining unit work. The Union contends that the opening of the hydrant is a relatively small part of the bargaining unit duties when hydrants are being flushed. The most significant responsibility of bargaining unit members is to monitor the flow of water. Water leaving the hydrant flows at approximately 100 pounds per square inch, creating a significant force that could potentially cause bodily injury and property damage, including the undermining of road surfaces and damage to neighbor's property. The most significant aspect of the responsibility is to protect citizens from the water. Additionally, it is the bargaining unit members' responsibility to determine at what point the water is clear enough to constitute a successful flush.

According to the Union, Pederson conceded that he was doing bargaining unit work in a brief conversation with Union President Rick Smith. For approximately 29 years, the City has had a practice and a rule that requires one bargaining unit member per hydrant when flushing is taking place. The Union agrees that there are some exceptions to that one-to-one rule, but none apply to the circumstances of May 28.

Inasmuch as multiple hydrants, separated by City blocks, were flushed on May 28, it is inconceivable that Pederson would maintain that he did not perform bargaining unit work considering the significant public safety risk posed by unmonitored gushing water in a populated area. It is uncontested that Pederson was not watching Graff during the period of time in question.

The Union recognizes that there are circumstances in which a supervisor appropriately performs bargaining unit work, in particular in an emergency situation. The dirty water experienced on May 28 was not an emergency. This view is supported by facts such as a complaint came in at 1:10 p.m. from an individual who had experienced dirty water since 8:00 a.m. In addition, the City had plenty of time to assemble its work crew to address the situation. The circumstances, upon arrival on the north side of La Crosse, were not surprising or unexpected.

According to the Union, Pederson's doing bargaining unit work appears to have been premeditated. If he did not anticipate needing more than one bargaining unit person, why did he direct Graff to load two sets of equipment into the truck? Pederson realized shortly after his arrival at the scene that there was a need for flushing multiple hydrants. He had a cell phone, and plenty of opportunity to call the Grievant to work.

Finally, the Union contends that the amount of bargaining unit work Pederson performed was not *de minimus*. While filling in for a few minutes to give a bargaining unit member an opportunity to use the bathroom would be *de minimus*, flushing 10 hydrants over a 24-block area in over two and one-half hours is not.

In its brief-in-chief, the Employer makes four basic arguments. The first is that monitoring of an open hydrant is not bargaining unit work. It contends that nothing in the record suggests that assessing public safety risks or evaluating water quality of flowing water are exclusive work of the bargaining unit. In fact, all of the evidence shows that neither of these monitoring functions constitutes bargaining unit work. Public policy requires that, necessarily, monitoring is a function of management. The Employer argues that the work performed by Pederson on May 28 was supervisory or managerial in nature, not bargaining unit work. Article 19 of the collective bargaining agreement provides that the management of the City and the direction of the workforce rest exclusively with the City. Management exercises this right by identifying whether there is work to be done; prioritizing work; assigning, allocating and deploying resources and assets; determining the means and methods of performing the work; and evaluating reasonable safety risks to both its employees and the public.

On May 28, the City made a determination on the amount of assets to deploy to the corrective flush in order to efficiently accomplish the task while also providing adequate and appropriate public safety with only a reasonable public safety risk. When Pederson was initially advised by Berendes of the need for a corrective flush, all the facts and circumstances demonstrated that only two or three hydrants required flushing. All of the initial complaints were concentrated in one small neighborhood, so that only one employee was needed.

As more complaints were received, Pederson determined that three or four more hydrants needed to be flushed. Additional complaints led to the need for additional flushing. For each hydrant, Pederson had Graff install a diffuser to ensure that the water pressure and flow from the open hydrant was reduced by at least two-thirds. In addition, the trucks were parked in such a manner as to prevent vehicular traffic from entering the hydrant's flow. Barricades were also set up to enhance visual observation and prevent persons and vehicles from approaching. No public safety concerns were raised during the corrective flush. Graff did not advise Pederson of a concern when the kids were washing their faces or riding bikes in the vicinity of the flowing water. It is the Employer's determination, not the Union's, as to whether a situation is sufficiently safe for the public and/or employees.

Checking the color of flowing water, a subset of monitoring, is a supervisory function. One purpose of checking the water color is to determine whether the planned or corrective flush is complete for the hydrant or project. This function arises from the Employer's right to direct the workforce. It is immaterial that the Employer may have delegated this task to its employees during some or many of the previous flushing events. By its very nature, the monitoring function remains managerial.

A corrective flushing, like the one performed on May 28, requires field observation, analyzing information and data, and on-the-spot decision making on which hydrants to open and how to correct the dirty water problem. Pederson created a log of the corrective flush. This serves as a planning document to provide data to calculate approximate flow volumes that

were discharged, as well as documenting the May 28 corrective action. The log serves as a future planning tool for allocating future resources, including labor. Bargaining unit employees do not create such documents.

The Employer's second argument is that there is no binding past practice requiring a one-to-one ratio of bargaining unit employees per open fire hydrant. The City contends that the Union failed to establish the existence of a binding past practice of always having one employee monitoring each open and flowing hydrant. The collective bargaining agreement is silent regarding such a staffing requirement, and the Union has failed to show there was a meeting of the minds or mutuality regarding same. Indeed, the City points to numerous circumstances where one employee monitors more than one hydrant, and a location, Indian Hill, where no person monitors the water flowing from the open hydrant. The Employer points out that consistent application of Employer managerial discretion does not create a binding past practice.

The Employer renews its objection to the admission of other acts evidence, and argues that the Union contention that Pederson is a habitual violator of the ban on supervisors doing bargaining unit work does not establish a binding past practice.

The third argument propounded by the Employer is that establishing minimum staffing requirements is not an appropriate remedy for grievance arbitration. Staffing is not a mandatory subject of bargaining, not primarily related to matters of wages, hours and conditions of employment. The City contends that the Union is seeking a declaration that there is a binding past practice of a one-to-one employee per hydrant ratio. If the Union is successful, it will have usurped Management's ability to deliberate and exercise its discretion in setting and implementing public policy. Such a declaration must, according to the City, be sought in a declaratory ruling or unfair labor practice proceeding.

Finally, the City, citing CITY OF LA CROSSE, DEC. NO. 29954-C (6/01), contends that the Union is in the wrong forum and the Arbitrator does not have jurisdiction to decide this dispute through the grievance procedure. The grievance procedure cannot enlarge the terms and staffing requirements of the hydrant flushing process.

In response to the City's arguments, the Union contends that the City's statement of the case is incomplete and inaccurate. Further, the Union argues that a grievance is the correct forum for resolving the dispute at hand. The law recognizes that a union can have both a contractual violation and a prohibited practice case arising out of the same set of facts: these are not mutually exclusive forums. The Union points to the CITY OF LA CROSSE case, SUPRA for this proposition in which the City had argued that the proper forum for resolution of claims that supervisors were doing bargaining unit work was through arbitration, not complaints of prohibited practice. The Hearing Examiner, Coleen Burns, found that both procedures, grievance arbitration and complaints of prohibited practice, were available to the Union.

The Union reiterates its basic contention that the contract between the parties prohibits supervisors from doing bargaining unit work as embodied in a Consent Arbitration Award issued by Mary Jo Schiavoni in 1985 and found to be part of the collective bargaining agreement by Examiner Burns in 2001. The Union argues vociferously that monitoring hydrant water flow is bargaining unit work. If the only part of the flushing operation that is bargaining unit work is opening and closing the hydrants, the Union asks, perhaps rhetorically, why doesn't the City have only one bargaining unit member to open up all the fire hydrants and close them in the programmed flushing phases? If 99% of the work that the bargaining unit members do is of a supervisory nature, then the majority of their work is supervisory and therefore they should not be in the bargaining unit.

The Union also contends that the record in this case supports the fact that except for a few non-relevant exceptions, the City has always assigned one bargaining unit member per hydrant for hydrant flushing. The only exceptions to that undisputed practice are circumstances where a bargaining unit member may need a short bathroom break; in the case of Red Cloud Park where the water discharge is not monitored by anyone; and in rare circumstances and locations where the hydrants are sufficiently in close proximity to permit a bargaining unit member to effectively monitor water flow. The long standing practice of the City has been to have the bargaining unit members monitor the water flow during hydrant flushing. This is what the City now seeks to change.

The Union responds to the City's objection to the introduction of the prior bad acts of Mike Pederson by citing Sec. 904.04(2), Wis. Stats., which does not prohibit the introduction of prior bad acts when offered for something other than to show the person acted in conformity therewith. Here, the evidence was introduced to establish the fact that Pederson and the City had prior notice of the Union's objection to Pederson's performance of bargaining unit work and that he knew what he was doing when he acted on May 28.

Finally, it is the Union's position that the arbitrator has full authority to award the requested remedy in this case. The Union seeks back pay for Rick Skiles and awarding of back pay is a well-established remedy that does not invade an employer's staffing authority.

Like the Union, the Employer responds by contending that the Union's statement of facts is misleading and inaccurately states the history between the Union and the Employer. The City contends that the Union improperly claims that "other acts" evidence shows a history of Employer violations of the collective bargaining agreement – the Union's use of such evidence is for an improper purpose. The Employer argues that the Union has mischaracterized the evidence at issue and that it is irrelevant to the instant proceeding.

The Employer reiterates its contention that nothing in the job descriptions shows that flushing fire hydrants is exclusively bargaining unit work. The job descriptions for the two union positions never mention anything about flushing hydrants, but do mention that the work is performed under the supervision of the department supervisor or under the direction of the

Water Distribution Supervisor and Water Superintendent. The language of the job descriptions for the Supervisor and Superintendent corroborates the history and evidence that monitoring hydrants has always been a supervisory function.

The Employer further argues that the Union fails to explain away as “non-material” and irrelevant the lack of compliance with the alleged one-to-one employee per open fire hydrant ratio. These “exceptions” are material and relevant and support the City’s contention that there is no established past practice of a one-to-one ratio.

Finally, the Employer states that assuming *arguendo* that monitoring a fire hydrant is bargaining unit work, the work performed by Pederson on May 28, 2006 was *de minimus* or minor in nature and/or the result of a special situation or emergency. The Employer argues that the fact that the Union President, Rick Smith, called the Water Superintendent directly to complain of the dirty water establishes that the situation was a terrible and calamitous emergency and/or special condition.

For all the reasons presented, the Union asks that the grievance be sustained and that Skiles be awarded 3 ½ hours pay while the Employer asks that the grievance be dismissed.

DISCUSSION

The Issue

The parties were unable to stipulate to the issue and agreed to allow the arbitrator to frame the issue based upon the parties’ proposed issues and the evidence and arguments presented. To a large extent, the parties’ proposed issues ask the same question: whether there was a violation of the collective bargaining agreement and/or past practice on May 28, 2006 such that Rick Skiles, the most senior employee not on-call, is entitled to pay for work he was not permitted to perform because the Supervisor, Mark Pederson, determined that the corrective flush to be performed on the north side of La Crosse only required one bargaining unit employee, Mark Graff, the on-call person. Each party’s statement of the issue, however, implicitly raises broader policy questions than need to be considered in order to answer the basic question. Accordingly, so as to comply with the direction found in Article 2 of the collective bargaining agreement that “[t]he arbitrator shall not add to, or subtract from the terms of this agreement,” I have phrased the issue as:

Is the Grievant entitled to call out pay for May 28, 2006?

Grievance Arbitration is an appropriate forum for resolving this issue

Although it did not raise this issue until the end of the hearing on January 27, 2007, the Employer argues that the undersigned lacks jurisdiction to hear this grievance which is based on the Union’s contention that Supervisor Pederson was performing bargaining unit work on May 28, 2006, work that rightfully should have been assigned to the Grievant. In support of

its position, the Employer relies on the testimony of Jim Geissner, the Human Resources Manager for the City of La Crosse for 17 years. Mr. Geissner testified that the Union never brought up the issue of the Employer doing bargaining unit work at the bargaining table, and that the proper forum for deciding such matters is through an unfair labor practice¹ complaint. The Employer points to the decision in a complaint of prohibited practice filed in 1999 and decided by Examiner Burns in 2001 for the proposition that the proper forum for this matter is not arbitration but, rather, before the WERC, CITY OF LA CROSSE, DEC. 29954-C (BURNS, 6/01, AFF'D BY OPERATION OF LAW, 7/01). In that case, the Union alleged that the City of La Crosse had violated Sec. 111.70(3)(a)1, 3, and 5, Stats.,² in that it had continually and repeatedly violated agreements reached in collective bargaining, interfered with, restrained and coerced employees in the exercise of Sec. 111.70 rights and otherwise discriminated against Union members regarding wages, hours and conditions of employment. Although the Examiner did not find violations of the Municipal Employment Relations Act (MERA), she did find that the Employer violated a Consent Award issued by Arbitrator Schiavoni in 1985 and ordered that the City post a notice advising its employees that:

The city will not permit its supervisors to perform bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni.

Of significance to the instant matter is that in the 1999 proceeding, the City argued that where a collective bargaining agreement provides for final and binding arbitration, the WERC has no jurisdiction and should dismiss that part of a complaint alleging violations of the agreement. There was no dispute then, nor is there dispute now, that the collective bargaining

¹ Under the Municipal Employment Relations Act (MERA), unfair labor practice charges are called prohibited practice complaints. Like the parties, I will use these terms interchangeably.

² Sec. 111.70(3)(a) of MERA, reads, in pertinent part, as follows:

- (a) It is a prohibited practice for a municipal employer individually or in concert with others:
1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).
 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or to other terms or conditions of employment. . .
 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

agreement provides for final and binding arbitration. There is also no dispute that the Schiavoni Consent Award continues to be part of the collective bargaining agreement.³ Examiner Burns found that the WERC did have jurisdiction to hear the matter:

The parties' labor contract provides for final and binding arbitration of grievances. In Article 2 of this labor contract, a grievance is defined as "matters involving the interpretation, application or enforcement of this contract." Attached to and, thus, incorporated into this labor contract, are various agreements of the parties. The Consent Award issued by Arbitrator Schiavoni is not one of these agreements.

Complainant's Sec. 111.70(3)(a)5 claim is not a grievance that is subject to the final and binding grievance arbitration provisions of the parties' labor contract. Thus, the grievance arbitration procedure contained in that labor contract does not constitute Complainant's exclusive remedy.

To be sure, the Complainant grieved conduct that is also the subject of Complainant's statutory claim. These grievances, however, alleged a violation of the parties' labor contract. The Complaint before the Examiner presents a different claim, i.e., an alleged violation of the grievance settlement agreement embodied in the Consent Award issued by Arbitrator Schiavoni. By using the grievance procedure contained in the parties' labor contract to resolve a dispute regarding the interpretation, application or enforcement of the labor contract, the Complainant has not waived its right to pursue the Sec. 111.70(3)(a)5 claim presented in this case.

In summary, the Consent Award issued by Arbitrator Schiavoni is a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. It is appropriate for the WERC to assert jurisdiction over the claim that Respondent violated Sec. 111.70(3)(a)5, Stats., when its supervisors performed bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni.

DEC. NO. 29954-C, AT P. 30

The Employer previously argued that the grievance arbitration forum was the exclusive arena for the Union's claims. It was wrong then, and it is wrong now in asserting that the prohibited practice route is the only means available for the Union to pursue its claim. Neither grievance arbitration, nor a complaint of a prohibited practice, is the exclusive means for the Union to litigate its contention that the Grievant is entitled to call out pay for work performed by Mark Pederson, a supervisor.

³ See citations contained in DEC. 29954-C.

Evidence of Prior Acts was Properly Admitted at Hearing

From the time that the initial petition for arbitration was filed in this case, the City has objected to the inclusion of certain documents as either part of the petition for arbitration or as part of the record on the basis that they were irrelevant and prejudicial. The documents in question can best be described as correspondence between the Union and the Employer over a period of time from 2003 through 2006. The documents, generally, demonstrate that the Union has complained that Supervisor Mike Pederson has, from time-to-time, engaged in work that the Union deems to be bargaining unit work. The Employer complains most vociferously about a non-precedential settlement of one of those complaints.⁴

The Employer argues that by introducing the other acts evidence, the Union has tainted the grievance hearing's record of evidence. It cites Sec. 904.04(2), Wis. Stats., for the proposition that other acts evidence is not allowed to "prove the character of a person in order to show that the person acted in conformity therewith." Citing *STATE V. SULLIVAN*, 216 Wis.2d 768, 576 N.W.2d 30, 36 (1988), a criminal law case, the Employer delineates the three exceptions to this rule: it is for an enumerated statutory purpose; the other acts evidence is relevant; and the probative value is not substantially outweighed by prejudice, confusion, being misleading, or cumulative. The City then discusses how and why the evidence does not meet any of these characteristics. Finally, the City points out the single subject matter from these other acts evidence that had been pursued was settled on a non-precedential basis, and, therefore should carry absolutely no weight in the instant dispute beyond its already non-precedential status.

In its reply brief, the Union argues that Sec. 904.04(2), Wis. Stats., does not preclude admission of the questioned evidence as "This subsection does not exclude evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Union Reply Brief, at 9. The Union continues that the introduction of Pederson's other bad acts is precisely to establish the fact that "he was not mistaken or accidental" in his performance of the alleged bargaining unit work, that he had prior notice of the prohibition of supervisor's doing bargaining unit work, and that his actions in having Graff take two sets of equipment when he only called out one bargaining unit member are all exceptions to Sec. 904.04(2), Wis. Stats., which permit the introduction of such other acts evidence.

Sec. 904.04, Wis. Stats., is part of Chapter 904, Evidence – Relevancy and Its Limits, a part of the Wisconsin Rules of Evidence. Such rules do not apply to arbitration proceedings. See, generally, How Arbitration Works, Elkouri & Elkouri, 6th edition, pp. 341 – 349. The undersigned received the other acts evidence into the record for the simple proposition that the Union had repeatedly complained that Supervisor Mike Pederson performed bargaining unit

⁴ As an aside, I note that the complaint was filed as a grievance that the Employer was willing to settle without argument that the proper forum for the complaint was as a prohibited practice complaint.

work. It is true, as the Employer contends, that none of the actions in the contested evidence involved the monitoring of water flow from hydrants, the complained of behavior at issue here. It is also true that the set of facts giving rise to the settlement agreement differed significantly from the instant complaint. Further, the non-precedential settlement was for a complaint of entirely different acts on the part of Pederson.

Contrary to the Union's contention that these documents establish that Pederson was acting consistently with prior bad acts and intentionally performing bargaining unit work, and contrary to the Employer's contention that receipt of this information will have a negative impact on the Arbitrator's ability to review the merits of the instant case impartially, the other acts evidence was admitted for the sole purpose of demonstrating that there have been prior complaints regarding this supervisor and allegations that he has done bargaining unit work in the past. Inasmuch as I view this case to be simply a question of whether the monitoring of hydrants is bargaining unit work, receipt of this information does not prejudice, in any way, any finding regarding the monitoring of water flowing from hydrants. Nor, however, is it irrelevant information as it demonstrates that the Union has vigorously attempted to enforce its contractual right to bargaining unit work. The documents were properly admitted for such limited purposes.

The Union Has Failed to Establish a Binding Past Practice of a One-to-One Ratio of Bargaining Unit Employees to Hydrants.

The Union contends that there is a binding past practice of assigning one bargaining unit employee per open hydrant. Its witnesses stated that for approximately the last 29 years, the City has had a practice and a rule that when flushing hydrants it requires one bargaining unit member per hydrant. The Union acknowledges that there are some exceptions to this rule, but contends that these are immaterial and not relevant exceptions to the one-to-one rule. These exceptions include times when bargaining unit members need bathroom breaks, Red Cloud Park⁵ that is located in an uninhabited and rustic location, and rare circumstances and locations where the hydrants are sufficiently in close proximity to permit a bargaining unit member to effectively monitor water flowing from more than one hydrant at the same time. The sign-up sheet utilized by the City in scheduling transmission flushes is, according to the Union, a re-enforcement of the rule.

The Employer argues that there has never been a meeting of the minds to create a binding one-to-one employee to hydrant ratio. Employer witnesses denied the existence of such a ratio and pointed out numerous situations where such was not the case. In particular, on the morning of May 28 during the planned transmission flush, one employee monitored three hydrants at Cunningham Street that were four to five hundred feet apart. One employee

⁵ This location is alternately referred to as Indian Hill.

monitored two hydrants at Gillette Place which were about 150 feet apart. They had seven hydrants open at once with four bargaining unit employees and two supervisors working. The Employer also indicated that it is not uncommon for one employee to monitor three flowing hydrants during a routine Downtown flush.

Although the Employer does not contend that it has never utilized a one-to-one ratio, the City argues the consistent application of the Employer's managerial discretion does not create a binding past practice. The determination of the number of employees per hydrant depends on the ability of management to allocate resources to a project based on the particular facts and circumstances, not on an employee-to-hydrant ratio. Repetitiveness in the number of employees utilized relative to the number of hydrants to be flushed may have occurred, but only as a result of consistent application of management discretion, not as a result of a mutually agreed past practice.

It is well established that strong proof is generally required to establish that a past practice constitutes an implied term of a contract. There are numerous formulations utilized by arbitrators, but generally there must be a showing that the practice is unequivocal, clearly enunciated and acted upon, and readily discernible over time. There must be clarity, consistency and acceptability, incorporating concepts of uniformity, repetition and mutuality. See, Elkouri & Elkouri, 6th ed, pp. 606 – 610. Further, arbitrators often recognize the “employee benefit”/“basic management function” dichotomy in determining whether a practice has a binding effect. ID., at p. 610. “Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of traditional and recognized functions of management.” ID., at p. 612.

In the instant case, the collective bargaining agreement is silent as to staffing ratios and hydrant flushes. The agreement does reserve to the Employer

. . . the management of the City of La Crosse and the direction of the work force, including but not limited to . . . the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

Although Union members testified that there was always a one-to-one ratio of employees to hydrants, it is obvious that there are many exceptions to this, exceptions which are not irrelevant or immaterial. The hydrant at Red Cloud Park, Indian Hill, is, apparently, never monitored by a bargaining unit member, or anyone else. This is not irrelevant or immaterial. The fact that employees regularly monitor more than one hydrant during downtown transmission flushes, even though the hydrants are in close proximity to one another clearly deviates in a relevant and material way from the contention that there is a binding past

practice of a one-to-one employee to hydrant ratio. Contrary to the Union assertion that the sign-up sheet used for the scheduled transmission flush of May 28 supports the one-to-one ratio, there is nothing on the sheet that indicates the number of hydrants to be opened, nor the desired number of bargaining unit employees to successfully complete the flush. There is no record evidence as to how the Employer handles the flush if either more, or less, than the optimal number of employees sign the sheet.

A regular pattern of supervisors relieving bargaining unit employees for rest breaks, rather than utilization of a rotating bargaining unit member for this purpose, has no bearing on a finding that the asserted one-to-one ratio is not a binding past practice. The record evidence did not establish whether supervisors relieved one bargaining unit member at one hydrant, or several at the same time.

Because there are numerous material and relevant exceptions to the one-to-one ratio, there can be no finding that this is a binding past practice on the parties.

The Union has established a past practice that monitoring hydrants is bargaining unit work.

Despite all of the foregoing, this grievance is really about the question of whether or not Mark Pederson should have called the Grievant, Rick Skiles, to work on the morning of May 28 instead of monitoring the open hydrants himself. The record is clear that Pederson never opened a hydrant, never turned a valve. It is also equally clear that bargaining unit work is much more than turning valves, placing diffusers on open hydrants, watching to ensure that no public or private property is harmed, or placing barricades in the street to ensure that passing vehicles and individuals do not get too close to the water running out of the open hydrants.

It is also very obvious that most of the time during scheduled transmission flushes and corrective flushes, it is bargaining unit employees who monitor the flow of water from the hydrants, including determining when the water is clear and the hydrant can be closed. In fact, more than 95% of the work performed by bargaining unit employees during flushes of water mains involves watching the flow of the water, determining whether it is clear, making sure the water is not affecting the safety of the public and not adversely affecting nearby property, be it public or private. Although the record demonstrates that supervisors relieve bargaining unit employees from the monitoring responsibility for rest room breaks, that supervisors sometimes make the call as to whether the water flowing from a particular hydrant is clear, and that supervisors maintain records of which hydrants have been opened and for how long, the record is devoid of any evidence that supervisors stand beside open hydrants and monitor water flow and safety issues on a regular basis.

The question, then, is whether monitoring open hydrants is work reserved to members of the bargaining unit, like turning of valves, or whether it is work that is performed by both bargaining unit members and supervisors, even if it is only performed by supervisors a small portion of the time.

A review of the position descriptions for the Utility Opening Worker/Water and the Maintenance Worker II reveals no clear statement regarding monitoring of water flow from open hydrants:

Position Description: Utility Opening Worker/Water

Purpose of Position

The purpose of this position is to supervise and perform maintenance and repair tasks for water distribution system. The work is performed under the direction of the Water Distribution Supervisor and Water Superintendent.

Essential Duties and Responsibilities

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Supervises work crews, as lead worker, performing water distribution system maintenance and repair tasks. Assigns tasks and reviews work. Allocates crew members and equipment at job site. Instructs work crews regarding work assignments.
- Directs hydrant, water main valve and water service installation and repair. Develops schedules for hydrant inspection.
- Directs water main repair.
- Directs thaw of water mains.
- Inspects water mains and fire hydrants installed by contractors for compliance with Utility standards.
- Directs and taps water mains for contractors.
- Directs and inventories equipment and supplies.
- Repairs water valve manholes.
- Participates in on-call rotation.
- May respond to emergencies.

Additional Tasks and Responsibilities

While the following tasks are necessary for the work of the unit, they are not an essential part of the purpose of this position and may also be performed by other unit members.

- Repairs and maintains meters.
- Operates backhoe and dump truck.
- Maintains utility records and maps.
- Assists with utility maintenance and repair.

Position Description: Maintenance Worker II

Purpose of Position

The purpose of positions in this classification is to assist with utility maintenance and repair projects.

Distinguishing Characteristics

Incumbents perform manual labor and transport materials in maintaining and repairing utility system components. Incumbents operate dump trucks, utility vehicles, hand and power tools used in utility maintenance and repair. The work is performed under the supervision of department supervisor.

Essential Duties and Responsibilities

The following duties are normal for this classification. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Loads and transports equipment, tools and materials used for utility repairs and maintenance.
- Assists replacing and repairing utility system components such as pipes, manholes, valves, hydrants and meters.
- Assists with excavating work sites. Cleans work sites.
- Assists thawing services.
- Operates cutting torch, power saws, tapping machine, leak detector, shovels, pick ax, mechanic's tools, air hammer and other hand/power tools used in utility maintenance and repair.
- May test, read, rebuild and install meters. May establish and maintain meter test and installation records.
- May operate backhoe.
- May do light welding.
- Supervises trench excavation and bracing.
- Participates in on-call rotation.
- May respond to emergencies.
- Records materials and supplies used.

Additional Tasks and Responsibilities

While the following tasks are necessary for the work of the unit, they are not an essential part of the purpose of this classification and may also be performed by other unit members.

- Inspects hydrants, water services, manholes, etc.
- Repairs and adjusts water fountains.
- Assists with flow tests.

From the above, it is clear that manual work, including the use of various tools, is bargaining unit work. It is not clear whether the monitoring of open hydrants is work reserved to members of the bargaining unit. Nor, however, is it clear from the position description of Pederson's position, Water Distribution Supervisor, or that of the Water Superintendent, that monitoring of water flowing from open hydrants is within the domain of those positions:

Position Description: Water Distribution Supervisor

Purpose of Position

The purpose of this position is to supervise water distribution system maintenance and repair personnel. The work is performed under limited direction of the Superintendent-Water.

Essential Duties and Responsibilities

The following duties are normal for this classification. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Supervises water distribution system maintenance/repair employees. Assigns and schedules work. Creates work schedules. Authorizes overtime. Disciplines employees. Investigates work grievances and prepares grievance recommendations.
- May assist with supervision of Water Pumphouse employees in absence of Superintendent-Water.
- Reschedules work due to emergencies.
- Receives and responds to customer complaints.

- Coordinates maintenance and repair tasks with contractors.
- Maintains water distribution system records. Forwards information to Engineering Department for corrections/updates to Water Utility system maps.
- Contacts Digger's Hotline to locate underground utilities.
- Notifies Fire Department and dispatch personnel regarding street closings and water shut-off.
- Makes recommendations for budgets.
- Investigates employee injuries and prepares report.
- Conducts employee job performance and safety training.
- Interviews applicants and recommends candidates for hire or employee for promotion.
- Communicates with industry representatives regarding distribution system projects which may affect them.
- Participates in construction meetings involving water distribution system projects. Schedules distribution system work to coordinate with planned City projects.
- Responds to emergencies involving the water distribution system.

Additional Tasks and Responsibilities

While the following tasks are necessary for the work of the unit, they are not an essential part of the purpose of this classification and may also be performed by other unit members.

- Enters data to computer records.
- Completes work orders.
- Enters information to update water service records.

Position Description: Superintendent of Water

Purpose of Position

The purpose of this position is to supervise operation, maintenance and repair of all water utility wells, pumping equipment, storage facilities, meters and distribution system. The work is performed under the general direction of the Water and Sewer Utility Manager.

Essential Duties and Responsibilities

The following duties are normal for this classification. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Supervises pumping and chemical addition operations to supply quality water at appropriate pressure for distribution.
- Plans, authorizes and directs contract and department maintenance work in new construction, emergency repair, retro fitting and maintenance of water utility system.
- Creates and administers regular and shift work schedules.
- Collects and analyzes system performance information to determine operational efficiency and schedule repairs and equipment replacement.
- Directs operations to ensure compliance with all applicable federal, state and local codes.
- Plans and supervises water meter replacement and maintenance program.
- Authorizes employee overtime for shift coverage and emergency repairs.
- On-call for emergencies.
- Assists in developing utility budgets.
- Interviews prospective employees. Investigates employee grievances and prepares recommendations for grievance resolution. Disciplines employees.
- Collects, records and analyzes well and distribution system water samples for quality assurance, and regulatory compliance.
- Compiles data; prepares and submits reports and all information necessary for regulatory [sic] compliance.

- Assists customers in planning water systems to meet their needs and minimize costs.
- Assists customers with water-related service problems. Accesses need and recommends solutions.

Additional Tasks and Responsibilities

While the following tasks are necessary for the work of the unit, they are not an essential part of the purpose of this position and may also be performed by other unit members.

- Supervise and directs records, amps and operation report development.
- Oversees water distribution system operation and maintenance needed to convey safe water to customers.
- Evaluates water system performance using modeling software.
- Sets-up and maintains system records, operating reports, maps, hydraulic model, schematics and operation manuals.
- Creates data base forms, tables, spreadsheets forms, charts and records. Enters data into computer records.
- Sets-up and adjusts SCADA system to operate wells and log data.
- Supervises and directs crew operations that include shoring and confined space entry.

The Union is absolutely correct that Pederson was doing more than supervising Graff during the corrective flush on the morning of May 28. Pederson was monitoring open hydrants for an extended period of time, an activity that the clear testimony of all witnesses, including Pederson and Berendes, is not an activity regularly performed by supervisors. While the Union has not established a past practice of one employee per hydrant during either a scheduled or a corrective flush, it has established that bargaining unit employees are the people who regularly stand beside (or sit in a truck) and monitor flowing hydrants. Berendes' testimony was clear that the practice was for the supervisors, including Pederson, to go "around monitoring" the color of the water, going from hydrant to hydrant. The Employer failed to provide any evidence that supervisors had previously addressed the flushing of hydrants in the manner Pederson did on May 28. The clear practice of the Employer was to have bargaining unit members monitor hydrants, while supervisors did their job: supervising the work, troubleshooting, determining how the work should proceed, and maintaining records of the work done.

As discussed above, to establish a past practice it is necessary to demonstrate clarity, consistency and acceptability, along with uniformity, repetition and mutuality. The individuals who testified at the hearing in this matter are all long term employees of the La Crosse water utility. The grievant, Skiles, is a 32 year employee; Graff is a 17 ½ year employee; Berendes was the Superintendent for 23 years; Pederson has been with the Utility since 1990 and has been a supervisor since 2002. The testimony of each was consistent in that bargaining unit members were the ones that stood by open hydrants. In fact, Pederson testified that on May 28, he "stood there and monitored the hydrant like Mark would normally do." Berendes described his role as "going around" and monitoring the color of the water, not standing by a hydrant except when giving someone a rest break. Union and management agreed as to the manner in which the tasks were done.

In addition, there was no indication in any testimony that open hydrants, except on Indian Hill, were ever left unattended.⁶ While one employee might have been assigned to more than one open hydrant, they were able to simultaneously visually monitor the two or three to which they were assigned. On May 28, when Pederson went to speak with a citizen, part of his responsibility as the supervisor on site, he left a flowing hydrant unsupervised because another bargaining unit member, Skiles, had not been called in.

During the course of the corrective flush on May 28, in addition to monitoring water flow, Pederson received additional complaints of dirty water and determined which additional hydrants were to be opened, he spoke with at least one resident regarding the situation, and he kept a log of which hydrants had been opened, as well as when they were opened and closed, all of which clearly constitute supervisory and managerial duties as outlined in his job description.

In a conversation with Union President Rick Smith regarding the events of May 28, Pederson indicated “This isn’t the way we’re going to do this all the time.” This, according to the Union, is an admission against interest by Pederson, an acknowledgement that he should have called in another bargaining unit member, Skiles, to assist in the corrective flush. Pederson’s credible testimony is that he meant that each situation is different, and that he would not do exactly the same thing in the future. The undersigned does not view this statement to be an admission by Pederson that he had been performing bargaining unit work, although he was.

The practice of having bargaining unit members monitor open hydrants was a mutually consistent practice of long standing. It is a past practice that is binding on the Employer.

The Employer violated the collective bargaining agreement when Pederson failed to call in Skiles on May 28.

The Employer argues, assuming *arguendo*, that monitoring a fire hydrant is bargaining unit work, the work performed by the Employer on May 28 was *de minimus* or minor in nature and/or the result of a special situation, need or emergency. The Employer is correct that under any of these circumstances, it would be appropriate for a supervisor to perform bargaining unit work. However, none of these circumstances existed on the morning of May 28. The Union is correct that the time Pederson spent monitoring the flow of water from open hydrants was not *de minimus* inasmuch as he monitored water flow for most of the two and one-half to three hours that he and Graff were on site on the north side of La Crosse. Pederson had plenty of time to plan how to handle the situation, how many people to call out, and could easily have delayed the flushing operation until Rick Skiles had been called to, and arrived at, the site. There was no emergency that would warrant a supervisor to perform the work in question. While dirty water is undesirable, and must be corrected as soon as possible, it is not an emergency in the sense that a fire or even a broken water main is an emergency.

⁶ The existence of one hydrant that is not monitored, where there are significantly different physical attributes to the location, is not the exception that proves the rule for the Employer.

Conclusion

It is clear that the Union has, on numerous occasions, complained that Pederson performed bargaining unit work. The other acts evidence that the Employer has vehemently objected to demonstrates that Pederson is not terribly sensitive to where the line is drawn between his work as a supervisor and work that is reserved to the bargaining unit. While the record in this case fails to establish a past practice of a one employee to one hydrant ratio that the Union espouses, the record does establish a clear past practice of bargaining unit employees monitoring the flow of water from open hydrants.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is sustained.

The Grievant is entitled to call out pay for May 28, 2006. The undersigned will retain jurisdiction for a period of 30 days to resolve any issues as to the amount of pay to which the Grievant is entitled.

Dated at Madison, Wisconsin, this 25th day of June, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator