

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF ASHLAND

and

AFSCME, LOCAL 216-A, AFL-CIO

Case 93
No. 70621
MA-15000

(Dave Wosepka Grievance)

Appearances:

Mr. Scott Clark, City Attorney, City of Ashland, Ashland City Hall, 214 West Main Street, Ashland, Wisconsin 54806, appeared on behalf of the City.

Mr. Laurence Rodenstein, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Madison, Wisconsin 53717-2900, appeared on behalf of the Union.

ARBITRATION AWARD

On February 9, 2011 AFSCME Local 216-A and the City of Ashland filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff to hear and decide a dispute pending between the parties. Following appointment, a hearing was conducted on May 16, 2011 in Ashland, Wisconsin. No formal record of the proceedings was taken. At the conclusion of the evidentiary hearing the parties made closing arguments, and the record was closed.

This dispute centers on the payment of a wage stipend to Dave Wosepka.

BACKGROUND AND FACTS

David Wosepka, the grievant, has worked for the City of Ashland since 1973 as an Operator in the Water and Wastewater facilities. Mr. Wosepka has historically received a negotiated stipend to undertake certain responsibilities. It was common for Mr. Wosepka to receive a stipend over and above his hourly wage rate to perform duties involved in managing the Water and Wastewater utilities in the absence of a Utility Superintendent or where the parties believed that the Superintendent was not appropriately certified to sign off on certain reports submitted to the Wisconsin Department of Natural Resources.

The City terminated one of the stipends in August, 2010. Subsequent to that, Mr. Wosepka was directed to continue to prepare and submit the DNR reports, which Wosepka believed formed a part of what the stipend was intended to compensate. The City regarded the preparation and sign off of the DNR reports as a part of the job for which no stipend was due.

A grievance was filed and denied, which led to this proceeding.

Mr. Wosepka has periodically been asked to perform certain administrative duties in the absence of a Utility Superintendent, and has received a negotiated stipend. Among those duties has been the preparation and signing of monthly Water and Wastewater discharge monitoring reports to be submitted to the DNR. Wosepka has prepared and submitted these forms in the absence of a Utility Superintendent and under circumstances where the Superintendent has lacked the certification believed necessary to file and sign the report.

In 1987 Wosepka was promoted to an Operator I position. The memo announcing his promotion included the following explanation:

This position has been reclassified and is now a union position. However, Dave will continue to exercise limited management authority in regards to assignment of daily tasks, directing and controlling daily activities as well as co-ordination of any special projects in operation and maintenance.

Wosepka testified that the Superintendent position was vacant for a period of approximately one to two years during this time period, and that during that vacancy he was paid \$100 per month to sign off on the DNR reports, to do a little scheduling, and to see to it that maintenance was done. Wosepka testified that he held the appropriate certification to file the report. When a new Superintendent was hired, the stipend was discontinued, and Wosepka stopped filing the reports.

When that Superintendent left Wosepka was again paid \$100 per month until a replacement Superintendent was hired. The June 7, 1999 letter confirming the change in pay status describes the stipend as follows:

You have been receiving special pay of \$100 per month over your regular wage rate for serving as the head of the wastewater treatment facility in the absence of a non-union manager.

Wosepka testified that the new manager, Nordgren, was certified to sign and submit the DNR reports. Once again, the stipend stopped. Wosepka no longer filed the reports.

In 2005 the Utility hired Ed Sindelar as the Water/Wastewater superintendent. Mr. Wosepka was once again authorized to receive a stipend. The September 20, 2005 memo authorizing the stipend reads as follows:

To: Rae Buckwheat, Personnel Director
Cherie Kurtz, Accounting
Barbara Clement, Finance Director

Cc: David Wosepka, W/WW Operator I

From: Jim Struck, DPW

Date: September 20, 2005

Re: Mr. Wosepkas' Compensation for (Temporary extra job duty)

Please include the amount of (\$100.00) one hundred per month for Mr. Wosepka as compensation for extra responsibility to certify by signature reports and other documents as required since he has been in charge of the operation of the Water/Wastewater day to day operation. This calculates to six months of retro-compensation plus the month of September for a total of seven hundred dollars to be included in Mr. Wosepkas' check issued on September 29, 2005.

The one hundred dollar per month compensation shall be included on the first check of each month and upon proper certification requirements being met by Mr. Ed Sindelar the new W/WW Superintendent the \$100.00 per month added compensation to Mr. Wosepka will end with the month previous to the month Mr. Ed Sindelar receives notice he has obtained his certification.

Thank you for your immediate attention to this matter and please contact me at any time if you have questions.

Wosepka testified that he was paid the stipend for three years while Sindelar was Superintendent.

Mr. Sindelar left the Superintendent's position. During the period when the position was vacant Wosepka continued to be paid \$100/ month for filing the DNR reports and doing light scheduling.

Ray Hyde was hired as the Public Works and Utilities Director in August of 2007. Hyde had no background with the monthly stipends, but came to understand that Wosepka

received such a stipend. Notwithstanding the text of the September 20, 2005 memo, Hyde came to believe that Wosepka was performing a substantial amount of managerial work.

Cory Margetta filled the Superintendent position on an interim basis. Margetta is certified to file the DNR reports, and did so. During this period the stipend was discontinued. Margetta left the position in late 2009. Following his departure the position was vacant and Wosepka was again provided a stipend. The memo confirming that stipend provides as follows:

Mr. Ray Hyde, the City's Director of Public Works, has negotiated a monthly stipend with Mr. David Wosepka for the interim management of the City's utilities. This has been a long established practice of the City to accomplish the work of the utilities during periods of time in which the utility superintendent position has been vacant.

Please include the amount of \$400 (four hundred dollars) per month as a stipend to reflect his increased responsibility of scheduling employees, the coordination of the completion of necessary utility tasks, and overseeing the day to day activities of the City's water and wastewater utilities. It is agreed by the employee and the City that compensation for these additional responsibilities is reflected in the stipend noted above and that overtime will not be paid for carrying out these extra responsibilities.

This monthly stipend is to be included with the last payroll check of the month. This stipend is to be effective February 1, 2010 and is to continue until such time as the new Utility Superintendent assumes his/her duties with the City.

The City hired Alan Eckstein on, or about August 2, 2010. Wosepka met with Eckstein to discuss an appropriate stipend for Wosepka to sign off on the DNR reports. The two men identified \$300 per month, subject to Ray Hyde's approval. Hyde did not approve, and the stipend was discontinued. It was Hyde's view that the preparation and signing of the DNR reports fell within the job description of Wosepka's job. He further believed that it was best practice to have Wosepka, the Operator who monitors the water and wastewater flow, prepare and sign the report.

Wosepka was directed to prepare and sign the DNR report. Wosepka has a computer in his office, where he monitors data and checks for anomalous readings. He monitors the data generated by the operation of the plant. It is this data that forms the basis for the DNR report. The report requires about 30 minutes per month to prepare. The difference to Wosepka is that if he is charged with preparing and filing the report he is more focused on the reporting data as opposed to the mechanical aspects of the job. If he is charged with preparing the report he takes the initiative in making changes to equipment. Otherwise he leaves those calls to the Superintendent. He regards taking responsibility for the report as the key difference. Wosepka

believes he is putting his professional judgment and license on the line when he files and signs the DNR report.

It was Wosepka's uncontradicted testimony that there has never been a time when he prepared and signed the DNR report, that he was not paid a stipend to do so.

Eckstein subsequently wrote to Charles Olson, an Environmental Engineer at the DNR, requesting guidance on who should be signing the DNR reports. The City understands Olson's response to be that the Operator in Charge, who they believe to be Wosepka, should sign. They further understand that it is possible to have others, who are not certified, sign in lieu of Wosepka.

Mr. Wosepka, as the Wastewater Plant Operator I Foreman is paid \$.35 hour in addition to his scheduled rate. That increase was a product of negotiations in 2004. There is no indication that \$.35 has any relationship to added duties. To the contrary, when Wosepka has received a stipend it was in addition to the \$.35.

Mr. Wosepka's job description includes the following:

...

EXAMPLES OF DUTIES

...

- Ability to complete DNR monthly discharge monitoring reports accurately and timely

ISSUE

The parties did not agree upon the issue to be decided. It is the view of the Union that the issue presented is:

Did the City violate the collective bargaining agreement when it refused to pay the grievant additional pay per past practice by requiring the grievant to perform certain regulatory duties of the Superintendent position?

If so, what is the appropriate remedy?

The City regards the issue to be:

Has it been part of the grievant's job duties since the time he became Wastewater Plant Operator I to complete reports for the DNR?

I believe the issue presented is:

Did the City violate the collective bargaining agreement when it discontinued paying the grievant a wage stipend while directing him to prepare and sign the water and wastewater discharge reports submitted to the DNR?

**RELEVANT PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

ARTICLE 6 – WAGE RATES

6:03 Additional Pay Rates

- A. The street sweeper operator shall receive an additional twenty (20¢) cents per hour differential pay for all hours worked during that period of the year when that particular job would normally be operating regardless of the job classification they happen to be working in.
- B. The Landfill Attendant position, if filled, shall receive fifty (50¢) cents per hour above his/her normal base wage.
- C. The Park Caretaker position, if filled, shall be paid at Operator II wage plus twenty (20¢) cents per hour.
- D. Utility Operator IIs performing lab technician duties shall be paid an additional ten (10¢) cents per hour when filling in during the absence of the lab technician during the regular workweek.
- E. Shift Differential: Utility employees shall receive an additional twenty-five (25¢) cents per hour for scheduled weekend and holiday hours.

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ARTICLE 21 – WORK RESTRICTIONS

21:01 The City agrees that they will not use employees from any other departments to perform work normally performed by the employees of the Public Works Department. The exceptions of the rules are police emergencies and use of City equipment by the Police Department for Halloween Patrol Duty.

21:02 Supervisory employees shall not be permitted to perform work on any hourly rated job except in the following situations and with the consent of a union steward:

- a. Emergencies
- b. When regular employees are not available for a period not in excess of 2 hours.
- c. When relieving regular employees for lunch relief periods, but only when regular employees are not available.

21:03 Supervisors shall be permitted to perform the following work on an hourly rated job during working hours:

1. Instructing employees
2. When starting and testing new equipment or processes.

21:04 No supervisory personnel may test equipment other than during the normal work week.

...

ARTICLE 26 – GRIEVANCE PROCEDURE

26:01 Should differences arise between the Union and the Employer as to the meaning and application of this Agreement, or as to any question relating to the wages, hours and working conditions or other conditions of employment, an earnest effort shall be made to settle them promptly under the provisions of this Article.

26:02 A reasonable effort shall be made to settle any differences between an employee and his/her foreman when a dispute arises. Unless the grievance concerns safety measures, the employee shall remain at his/her work and shall, if desirous, use the following procedure to resolve the dispute.

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3. Hearing – Decision. The arbitrator shall meet with the parties on a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of the review and hearing, the arbitrator shall render a written decision to both the City and the Union which shall be final and binding on both parties. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

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ARTICLE 27 - MANAGEMENT RIGHTS

27.01 The Management of the City of Ashland and the direction of the working forces is vested exclusively in the City and the City shall continue to have all rights customarily reserved to management, including the right to hire, promote, suspend, discipline, transfer or discharge for proper cause; the right to relieve employees from duty because of lack of work or other proper reasons; the right to schedule hours or require overtime work; and the right to establish rules pertaining to the operation of the plant.

27.02 The City shall have the sole right to decide the process of work, types of machinery and equipment to be used, types and quantities of work to be done, standard of workmanship required, as well as the methods and distribution of work.

27.03 The above-mentioned management rights are not to be interpreted as being all-inclusive, but merely indicate the type of rights which belong to and are inherent to management. It is understood that any of the rights, power or authority the City had prior to signing of this Agreement are retained by the City, except those specifically abridged, granted or delegated to others or modified by this Agreement.

...

ARTICLE 30 -

...

30.04 The Scope of This Agreement. This Agreement is intended to cover all matters relating to wages, hours and all other terms and conditions of employment for employees in the bargaining unit even though the same are not specifically mentioned herein.

ADDENDUM "A"
WAGE SCHEDULE

<u>Position</u>	1/1/20 06	2%	0.05%	3%	3%
		1/2/2007	7/1/2007	1/1/2008	1/1/2009
Wastewater Plant Operator I	20.23	20.63	20.73	21.35	21.99

. . .

The Wastewater Plant Operator I/Foreman shall be paid an additional .35 per hour above the current Wastewater Plant Operator I/Foreman wage rate.

. . .

POSITIONS OF THE PARTIES

It is the view of the Union that there exists a practice of paying a stipend for the performance of duties that fall beyond those of a Wastewater Plant Operator I. This is the case whether the Superintendent position was vacant or the incumbent Superintendent lacked the necessary certification. The Union reviewed the history of payments to Wosepka, and concludes that the evidence supports the existence of a practice.

It is the view of the City that the task of filing the DNR reports is a part of the grievant's job description, and that he is paid to perform those duties. The City regards past stipend payments as compensation for other managerial duties. It is the view of the City that Wosepka was paid to perform some, or all, of the duties of the Superintendent in the absence of a Superintendent. It is the view of the City that Wosepka should file the report because he is the one most familiar with the data being reported.

DISCUSSION

The grievance cites Article 6:03 as the provision violated. Article 6:03 does not specifically address this dispute. The Article lists a number of additional pay rates, but does not address payment for the submission of DNR reports, nor does it specify how much is to be paid. In its answer to the grievance the City cites Addendum 'A' and its reference to the \$.35/hour add on for the Wastewater Plant Operator rate. Nothing in the record supports the claim that this was intended as compensation for added duties. Wosepka was paid a stipend in addition to the \$.35 when he undertook other duties. The record testimony was that this was negotiated as an equity adjustment following another upgrade.

Addendum 'A' sets the pay for the position held by the grievant. The collective bargaining agreement also includes provisions reminding arbitrators that: "The arbitrator shall not modify, add to, or delete from the express terms of this Agreement." (Article 26). It further describes the scope of the agreement as ". . .intended to cover all matters relating to wages, hours and all other terms and conditions of employment for employees in the bargaining unit even though the same are not specifically mentioned herein." (Article 30.04).

While all of this is straightforward enough, it begs the question: What is the grievant expected to do to earn the contractually specified pay? This question underlies the parties' competing views as to the issue to be decided. The City responds that he is to perform the tasks identified in his position description, which includes, "Ability to complete DNR monthly discharge monitoring reports accurately and timely." This is a pretty traditional answer. However, the job description is not a part of the collective bargaining agreement, nor is it incorporated into the contract by reference. The City relies on an extra-contractual document to support its claim that the grievant should perform the described work, without added compensation.

In essence, the Union denies that the DNR report is a part of the grievant's job, and relies upon the practice of the parties to support that claim. It is the Union's view that the parties have behaved in such a way as to demonstrate that they regarded the DNR report as managerial work, for which the grievant should be paid above and beyond the contractually identified rate. Both sides to this dispute contend that it is necessary to look beyond the four corners of the agreement to understand how the agreement is to be applied.

The City contends that the stipends were limited to situations where there was no Superintendent. That claim is not supported by the record. At times, Wosepka was paid to perform various managerial tasks, including filing the reports. At times, it appears he was paid to file the DNR reports. The September 20, 2005 memo from Struck defines the \$100/month as compensation ". . . for extra responsibility to certify by signature reports and other documents as required since he has been in charge of the operation of the Water/Wastewater day to day operation." The memo goes on to provide that the payments will continue until the new Water/Wastewater Superintendent, Sindelar has obtained his certification. I read the memo as paying Wosepka to sign reports while Sindelar was the Superintendent, until such time as Sindelar was certified to do so. The memo was issued at the outset of Sindelar's tenure as Superintendent. Wosepka testified, without contradiction, that he served in this capacity for three years.

I believe that there was a practice of paying Wosepka to file the DNR reports. The parties acted in an unequivocal manner. They had formal negotiations, identified the duties and the amount of money involved, and often reduced their agreement to writing. The practice of paying Wosepka was clearly enunciated and acted upon. Wosepka performed the various tasks involved. He was consciously paid pursuant to written direction. When the circumstances changed, the pay was discontinued. This is not an instance of Wosepka being

authorized for pay under circumstances that subsequently changed. These agreements were renewed periodically.

I believe the agreement was readily ascertainable over a reasonable period of time as a fixed and established practice acceptable to both parties. The stipends began sometime around 1987. They recurred on a regular basis for 23 years. Both parties formally signed off on the series of agreements. There is currently a disagreement over whether or not the City was paying for the preparation and signing of the DNR reports. Wosepka testified without contradiction that whenever he was asked to file the DNR reports he was paid. Documents in the record corroborate that testimony. The City contends that the stipends were limited to situations where there was no Superintendent. That claim is not supported by the record.

I believe the record supports a conclusion that the parties entered into a series of bilateral agreements to pay Wosepka for the filing of the DNR reports.

Over the years there have been periods when Wosepka has filed the DNR reports. There have also been years when the Superintendent has filed the reports. Article 21 appears to restrict management in the performance of hourly rated work. The job description would appear to treat the submission of the DNR report as a part of Wosepka's job, thus making it hourly rated work. There is no evidence the parties have treated it as hourly rated work within the meaning of Article 21. It does not appear that the Union ever challenged the Superintendent's right to file the reports. Notwithstanding the job description, both parties have historically treated the DNR report as a managerial task.

I believe the parties have reconciled the various provisions of the contract by treating the contractually stated wage, Addendum 'A' as compensation for performing the basic job. I believe they have regarded the DNR report as managerial work, and so there is no violation of Article 21 when the work is performed by a manager. When the work could not be performed by a manager, Wosepka was paid a stipend to file and sign the report. When the condition changed, and the parties believed a manager had the appropriate certifications, the stipend was eliminated.

The City's view that the DNR report is a job function of the Wastewater Plant Operator I has only come to light once Hyde disapproved of the proposed stipend in August of 2010. Prior to that time, Wosepka was receiving a stipend that was believed to include the DNR report.

The City's changed view as to who is responsible for the DNR report has significant wage implications for Wosepka and serves to terminate a long standing practice. It is for this reason that parties seeking to terminate a practice have typically been required to wait until the contract has expired and to put the other side on notice of the intent to terminate the practice. (Elkouri & Elkouri, *How Arbitration Works*, 6th Edition, BNA, 2003, p. 643; Elkouri & Elkouri, *How Arbitration Works*, 2010 Cumulative Supplement, BNA, p. 248; "Past Practice

and Administration of Bargaining Agreements”, Richard Mittenthal, Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, BNA, 1961, Washington, D.C., pp. 56-57.)

I do not believe the City is free to terminate the long-standing practice during the term of the contract.

AWARD

The grievance is sustained.

REMEDY

The City is directed to pay the grievant a \$100 per month wage stipend for each month he has been directed to sign the DNR report, and for so long as he is directed to do so in the future.

Dated at Madison, Wisconsin, this 15th day of August, 2011.

William C. Houlihan /s/

William C. Houlihan, Arbitrator