

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LOCAL 284, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

**THE CITY OF EAU CLAIRE**

Case 296  
No. 69962  
MA- 14818

Water Truck Grievance

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**Appearances:**

Wisconsin Council 40, AFSCME, AFL-CIO, by **Mr. Lance Nelson**, Staff Representative, appearing on behalf of the Union.

The City of Eau Claire City Attorney's Office by **Mr. Steven Bohrer**, appearing on behalf of the Employer.

**ARBITRATION AWARD**

Pursuant to the provisions of their collective bargaining agreement, Local 284 of Wisconsin Council 40, AFSCME (hereinafter referred to as the Union) and the City of Eau Claire (hereinafter referred to as the Employer or the City) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as arbitrator to hear and decide a dispute over the City's failure to assign an open service van to employee Daniel Jeske. The undersigned was so designated. A hearing was held on January 7, 2011 at the City Hall in Eau Claire, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs and reply briefs, the last of which was received by the arbitrator on June 2, 2011, whereupon the record was closed.

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

**I. ISSUE**

The parties stipulated that the following issue should be resolved herein:

1. Did the City violate the collective bargaining agreement by failing to assign Dan Jeske to a truck in the Water Department when a position became available?
2. If so, what is the appropriate remedy?

## **II. RELEVANT CONTRACT LANGUAGE**

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### **ARTICLE 3 UNION SECURITY AND MANAGEMENT RIGHTS**

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Section 2. The rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement.

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, means, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

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### **ARTICLE 8 JOB POSTING**

Section 1. All new or vacated positions shall be posted on each bulletin board in all applicable departments for five (5) working days on a form (furnished by the City) stating the job that is to be filled, the date the job is to be filled, qualifications, the rate of pay, and the name of the incumbent.

Interested employees shall sign their names to this notice. Seniority shall be the determining factor in the selection of the applicant for a trial period which may last as long as ninety (90) calendar days during which the applicant shall attempt to qualify for the position. A permanent full-time employee in the work division in which a job posting applies shall have rights over all permanent full-time employees in other work divisions as defined in Article 1, Section 2.

Section 2. The successful applicant shall be allowed up to ninety (90) calendar days to qualify for the position, and shall retain his/her status as a permanent employee. If the applicant fails to qualify for the position, the applicant shall be returned to the position formerly held, and shift if more than one shift exists, within or at the completion of the ninety (90) calendar day trial period, or the applicant may do so of his/her own volition. Upon working in the new position, after the ninety (90) calendar day trial period, the employee shall be considered as having qualified, and both the employee and the City shall lose all rights to return the employee to his/her former position.

When the job has been vacated through retrocession or disqualification, the next most senior qualified bidder shall be awarded the position. If there is no other such bidder, or sixty (60) calendar days have elapsed between the posting date (determined by the Effective Date on the Personnel action posting form) and the date the position is awarded (date the employee is asked and accepts the position), the position shall be re posted.

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## **ARTICLE 29 GRIEVANCE PROCEDURE**

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Section 6. The Arbitrator shall have no right to amend, modify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

### **III. BACKGROUND FACTS**

The City provides general municipal services to the citizens of Eau Claire. Among these services is the operation of a Department of Public Works, including a municipal Utilities Division. Brian Amundson is the Director of Public Works, Jeff Pippenger is the Utilities Administrator, and Lane Berg manages the Water System. The Union is the exclusive bargaining representative of the DPW and Parks employees.

Within the Water System section of the Utility, employees work in meter reading, service or distribution. Meter reading is typically the entry level work assignment in the Division. Service is generally regarded as a more desirable assignment than distribution, since it involves less physical labor and more inside work. The normal work progression for employees who stay in the Water System is from meter reading, to distribution, to service or the meter shop. Employees in the service area work from vans, while the distribution employees are assigned light trucks. Regardless of their work area, the bulk of the employees are classified as Service Worker I, a broadband title introduced in the last contract.

In early 2009, an opening occurred in the Water System when Steve Hollingsworth transferred from his Service Worker I position to an Operator's job. Hollingsworth worked in service, and typically drove Truck #154, a van assigned to employees in the service area. The opening was posted internally, and nine employees signed the posting. Dan Jeske was the employee signing the posting who had the greatest seniority in the Utilities Division. A junior employee, Gary Anklam, was awarded the posting and assigned to Truck #154. The instant grievance was filed, asserting that Management had violated a longstanding past practice of assigning Water Department vehicles by seniority. It was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

At hearing, eight members of the Local, including Jeske, testified to their understanding that movement to an available vehicle, and the work assignment associated with that vehicle, was always by seniority, and that before the past several years, there had not even been postings for open vehicles. Open vehicles and positions were simply assigned to the senior interested employee from within the System. Jeske testified that he was told by Berg that he would be eligible for the van, if he was the most senior applicant. This was consistent with what Berg told him years before, when he was awarded a different truck by seniority. When he didn't get the van, he asked Berg why, and Berg said that Jeff Pippenger had told him not to give it to him.

Union President Bob Horlacher testified that he works in the Streets Department, and that truck assignments there have always gone by seniority. He recalled a specific discussion with Lane Berg about a problem in the Water System with Harry Flag, an employee who was returning to a van after being removed for several years for a poor driving record, and displacing another employee, and he advised Berg to follow seniority and tell the junior employee he'd get a van when he had the seniority to get a van. Union Steward Bjorn Olson testified to a conversation he had with Jeff Pippenger when Pippenger was running the Wastewater System, in which Pippenger told him that he would not necessarily follow seniority, even though Berg did in the Water System. Harry Flag testified that he had worked in Water for 20 years until his retirement in June of 2010, and that in all of that time, people moved to service jobs based on seniority. He recalled that when he was returned to his van after losing it because of driving offenses, Berg told him he was getting it back because of his seniority. Gary Barka testified that he worked in the Water System in distribution, and that distribution was very different work than service. He recalled an incident within the past three years when he moved to an open truck, and he was told by Berg that he got it because the more senior workers turned it down. Steve Hollingsworth testified that he worked in the Water System for many years in service. He recalled that when he started in service, he was the junior man and was assigned to the van that no one else wanted. Later, in 1993 or so, a better van became available and he spoke with the supervisor at that time, Holbrooke, and was awarded it based on his seniority. He remembered meetings in which Holbrooke went down the seniority roster, asking which vehicle the workers wanted. Gary Wathke testified that he worked in service vans for 36 years until moving to the meter shop in 2002. Wathke stated that movement from distribution to service, and from one van to another, had always been done according to seniority.

Lane Berg testified that he had been in supervision and management for the Water System since the 1990's and that he never made any work or vehicles assignments by seniority, but rather made determinations day by day as to what work needed to be performed and who should perform it. Berg stated that the position for all of these employees was Service Worker I, and that anyone in that classification could be assigned to any vehicle or any job, whether it be service or distribution. He reviewed a record of employees being assigned to vehicles over the preceding 10 years, and said that none had been assigned by seniority, although he assigned vehicles to people who asked for them, when they became available. On cross-examination, Berg agreed that the examples he cited were all new employees coming in from the outside, and that none of those cases involved movement from one job to another within the Water System. He agreed with the Union's counsel that new employees would typically get stuck with whatever truck or van no else wanted. Berg also agreed that it was very rare to move someone from their vehicle to another vehicle once they had been assigned to it.

Jeff Pippenger testified that he is the Utilities Administrator and supervises Berg. Berg does the assignment of trucks in the Water System, and to Pippenger's knowledge, there has been no change in his method of making assignments. Pippenger stated that until this grievance, he was not aware that the Union thought truck assignments were done by seniority.

Brian Amundson testified that he negotiated the broadbanding of the Service Worker I position to include all positions in Water. At the time, he assured the Union that it was only intended to increase the efficiency of the City's utility locating efforts by allowing a single person to do water and wastewater locating, and that it would not lead to any other changes.

Additional facts, as necessary, will be set forth below.

#### **IV. POSITIONS OF THE PARTIES**

##### **A. The Position of the Union**

The Union takes the position that this is a straight forward case of an employer seeking to unilaterally change a binding past practice. Past practices are binding because they are the best evidence of what the parties mean by their contract. In this case, however, the contract provides that "privileges and benefits, limited to mandatory subjects of bargaining" will not be diminished by management during the term of the contract. The practice of making vehicle assignments by seniority when openings occur is a longstanding custom, and it relates to mandatory topics of bargaining.

The employee witnesses were all consistent in their experience that seniority governs movement from distribution to service, and that this occurs when someone is moved from a truck to a van. The contrary evidence consists of conclusory statements by Berg, Pippenger and Amundson. Neither Pippenger nor Amundson has any direct experience in the Water Division, and they were simply reciting their views that seniority should not govern movement, not their observations. As for Berg, his examples all dealt with people from the outside coming into the Department, and his recollections of how the vehicles were distributed thereafter

is inconsistent with the evidence that the junior people all get the worst vehicles and the senior people get the more desirable vehicles and assignments. This is not the result of happenstance, no matter what after the fact explanations the City may offer.

B. The Position of the City

The City takes the position that the grievance is without merit and should be dismissed. The parties long ago litigated the issue of the City's right to assign equipment and assign work, and Arbitrator Crowley ruled that the City has retained those basic management rights, so long as it did not exercise them in an arbitrary or capricious manner. The Crowley Award is dispositive of this issue, and the arbitrator should dismiss the Union's effort to reopen it in this case.

Even if the Crowley Award does not put an end to the matter, the City asserts that the Union's case lacks any foundation. The Union argues that a past practice exists of assigning vehicles by seniority, but the practice is in fact that vehicles and employees are assigned in accordance with the needs of the Department on a day to day basis. Lane Berg testified credibly and in detail that he has never followed seniority in assigning vehicles or work. The Union presented many witnesses, but few of them are from the Water System, and practices in other departments are irrelevant to how things are done in Water. In Water, there were a few examples of seniority based decision making according to Union witnesses, but these were overwhelmed by Berg's testimony about transactions in the past ten years, not one of which involved assigning any vehicles by seniority. If there was a consistent, binding past practice based on seniority, there should be clear proof of that practice. There is none - only a few, isolated instances of people claiming that a supervisor made a comment about following seniority. Taken by itself, the Union's evidence is not strong enough to establish a past practice. In the face of Berg's persuasive rebuttal, it utterly fails to do so. The grievance should, therefore, be denied.

V. DISCUSSION

At the outset, I would observe that the City is incorrect in arguing that this case is controlled by a prior arbitration Award. The contract provides for final binding awards, and if an arbitrator has already considered and ruled on the issues presented in this case, this arbitrator has no authority to disturb that ruling. However, the Crowley Award relied upon by the City is completely unrelated to the issues in this grievance. The issue in that case, as described by Crowley, was whether a newly acquired piece of equipment - a stump cutter - was fundamentally comparable to machines used by Light Equipment Operators or Heavy Equipment Operators. In other words, it was a question of which classification the new equipment should be operated by. While Crowley includes a sentence referring to management's general right to make and change work assignments, the City's claim that the decision is dispositive requires a somewhat contorted reading of the case.

Much of the argument in this case turns on semantics, and the balance turns on credibility. The semantic issue is the Union's insistence on referring to the practice of assigning "vehicles" by seniority, when the basic question is actually the assignment of types of jobs by seniority. Vans are associated with desirable service work, while pickup trucks are associated less desirable, dirtier and more physically taxing distribution work. Jeske sought to move from a truck to a van, not because he preferred the vehicle type but because he was getting older and, as he put it, his shoulder was breaking down. He wanted Hollingsworth's job, not Hollingsworth's vehicle. This is a work assignment case, not an equipment assignment case.

The credibility aspect of the case involves the uniform testimony of the Union witnesses that moves to open positions had been governed according to seniority on a consistent basis over the years, and that this had been acknowledged repeatedly by Lane Berg himself, against the testimony of Berg that he had never given any consideration to seniority in making assignments to jobs or vehicles. If the employees are correct, there is a consistent past practice, and given the presence of a Maintenance of Standards clause, the City cannot simply abandon that practice mid-contract. That provision guarantees continuation of "privileges and benefits" enjoyed by employees, if they relate to mandatory topics of bargaining. The use of seniority in claiming jobs is a mandatory topic of bargaining. If Berg's version is correct, there is no practice, and this case is governed by the general language of the Management Rights clause, giving management the right to "direct its employees" and to "determine the methods, means, and personnel by which the agency's operations are to be conducted."

Some of the employee testimony related to practices in the Street Department, and I agree with the City that this testimony is not particularly persuasive. The Street Department is a separate operation, albeit under the same contract, and practices there do not necessarily translate to other City departments. That having been said, I believe the weight of the record evidence supports the claims of the employees. In particular, the fact that all of the examples cited by Berg as proving that assignments were not made by seniority involved new employees coming into the Department, and none involved internal moves is striking. Equally striking is the fact that sixteen cases were cited. In four cases, the new employee was designated as a floater. In twelve cases, the new employee was assigned a specific vehicle. In six cases, it was Truck #89, in three cases it was Truck #142, and in two cases it was Truck #115. This is contrary to Berg's claim that vehicle assignments, and with them work assignments, were done on some sort of case by case basis. Instead they followed a pattern of the least senior person getting the less desirable vehicle, and less desirable assignment. As for the disposition of the trucks left open by the departure of the employees in these cases, I believe Berg when he says that he gave these vehicles to people who asked for them, and not by seniority bid, but that is not inconsistent with the testimony of the Union witnesses. The Union witnesses all said formal bids were a new development at about the time of this grievance, and that previously the available vehicles were assigned to the most senior employee who asked for them.

I have little doubt that from the Union's point of view, all of these transactions were done as they were done because of adherence to strict seniority. It may well be that in Berg's

view he did what he did because he chose to follow seniority as a convenient device for choosing among employees, and not because he had to follow seniority. Yet the record persuades me that prior to this case, seniority was regularly followed in allowing movement from distribution work to openings in service work, and that whatever the unstated rationale for that was, that was the practice understood and accepted by both sides.

In arriving at this determination, I would stress the contours of what I am, and am not, deciding. The practice exists in the Water System, and I offer no opinion as to practices elsewhere. Further, there is no evidence to suggest that employees securing a work assignment in service cannot be utilized elsewhere if a need arises, just as any employees might be called upon to occasionally perform work outside of their normal tasks. Nor am I finding that an employee cannot be moved from a particular piece of equipment if the needs of the Department require it. The parties use vehicles as shorthand for the employee's normal job assignment, and the focus of this case and this decision is on the normal job assignment.

An employee's right to move from one functional area to another by seniority, assuming the employee can complete the qualification period, is a matter of custom within the Water System. It relates to a mandatory topic of bargaining, and the contract protects "privileges and benefits" related to mandatory topics. It follows that the City violated the contract when it failed to allow Jeske to move from distribution to service where he was the most senior applicant.

As to remedy, Jeske testified that he secured a position in Service as of November 2010, as a Floater. Assuming that to be a regular assignment, no further remedy would be warranted. If that proved to be a temporary or intermittent assignment, Jeske should be assigned to a service position, as if he had been awarded the bid he placed for it in 2009. Further, the City is directed to abide by the former practice of assigning movement between the distribution and service assignments on the basis of seniority when openings occur.

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

#### **AWARD**

The City violated Article 3, Section 2 of the collective bargaining agreement when it failed to assign employee Dan Jeske to a truck when a position in the Water System became available. The appropriate remedy is assign Dan Jeske to a service position, and to abide by the practice described herein until such time as it is modified or terminated.

Signed this 7th day of October, 2011 at Racine, Wisconsin.

Daniel Nielsen /s/

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Daniel Nielsen, Arbitrator



