

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
VILLAGE OF GERMANTOWN
and
**VILLAGE OF GERMANTOWN TECHNICAL & SUPPORT
EMPLOYEES' UNION, AFSCME LOCAL 3024**

Case # 78
No. 69784
MA-14738

(Grievance No. 2010-02 – Tom Downing out of classification pay)

Appearances:

Kyle J. Gulya, Von Briesen & Roper, S.C., Three South Pinckney Street, Suite 1000, Madison, Wisconsin 53703-4200, appearing on behalf of the Village of Germantown.

Lee Gierke, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of the Village of Germantown Technical & Support Employees' Union, AFSCME Local 3024.

ARBITRATION AWARD

According to the terms of the 2009-11 collective bargaining Agreement between the Village of Germantown (Village) and the Village of Germantown Technical & Support Employees' Union, AFSCME Local 3024 (Union), the parties selected the undersigned from a panel of five commissioners/staff members of the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves the interpretation and application of certain provisions of the Agreement relating to the appropriate wages of Tom Downing (Downing or Grievant).

A hearing in the matter took place on September 23, 2010, at the Village of Germantown Library, N112W16957 Mequon Road, Germantown, WI 53022-3210. The parties filed written briefs on or before November 9, 2010, at which time the record was closed.

ISSUE

The parties disagreed over how to state the issue. The Union proposed, “Did the Village of Germantown violate the collective bargaining agreement with the Technical and Support Employees’ Union, AFSCME Local 3024, when it denied Tom Downing the higher pay rate for performing the work of the Building/Plumbing Inspector? If so, what is the remedy?” The Village proposed, “Did the Village violate Article 10.05, Section 4 and the Wage Schedule of the Collective Bargaining Agreement as alleged in the grievance? If so, then what is the appropriate remedy?” I conclude that the issue is properly stated as follows:

Did the Village of Germantown violate Section 10.05, the Wage Schedule, and/or any other relevant section of the collective bargaining agreement by refusing to pay the Grievant at the higher wage rate for the work he performed after the layoff of the department director on July 1, 2009? If so, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 10 – PROMOTION AND TRANSFER

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10.05 Temporary Assignments: In the event that the Village must make a temporary assignment to another classification, such temporary assignment shall be made in accordance with the following procedure:

4. When an employee is assigned in an “acting capacity” by the Village Administrator or his or her designee to perform work of a higher paid position for more than one week, he or she shall receive the higher rate of pay for all time worked in the higher position. If the position is outside of the bargaining unit, then the employee would receive the pay on the salary range that is closest to what he or she is currently receiving but affords an increase in pay. For purposes of this paragraph only, the salary range shall mean the low, medium, high or the incumbent’s rate of pay for the position for which the employee shall receive the rate of pay that is closest to what he or she is currently receiving but affords an increase in pay. This subsection shall not apply to any acting capacity assignment occurring prior to the ratification of this Agreement.

FACTS

For some years prior to July 1, 2009, the Village maintained an inspection department that included three bargaining unit positions: the Electrical Inspector (held since 1998 by the Grievant), the Assistant Building/Plumbing Inspector (held most recently by Kirk Radtke), and a Clerk/Typist II or secretarial position held by Holly Madson. For some time prior to July 1, 2009, the director of the department was Ken Voigt, who held the title Building/Plumbing Inspector and was a salaried managerial/supervisory employee. Voigt and Radtke were both laid off effective July 1, 2009. The subsequent disposition of their duties is at the crux of this dispute.

Voigt and Radtke held a variety of plumbing and building inspection certifications. Prior to July 1, 2009, they together handled most of the Village's residential and commercial building, plumbing, and HVAC inspections, and issued most building and plumbing permits.¹ Voigt and Radtke shared most of the duties related to the construction, erection, repair, alteration, demolition, removal and occupancy of all buildings and structures within the Village. Neither Voigt nor Radtke was a licensed electrical inspector.

Voigt himself was primarily responsible for several aspects of the department's work, including reviewing building plans for compliance with regulations and zoning requirements; issuing building permits and temporary use permits; approving and signing holding tank agreements; overseeing the proper execution of occupancy bonds and/or letters of credit in connection with commercial building permits; responding to most of the complaints and questions concerning hazardous dwellings, commercial establishments, and the Village building code; and enforcing erosion control rules. Voigt's erosion control duties required his attending multiple training sessions and undertaking a rewrite of the Village's erosion control ordinance. He also conducted most erosion control inspections.

Voigt's duties as department head included assigning work to, and evaluating the other three members of, the department; approving leave time; signing time sheets; attending two regularly scheduled department head meetings every month and Village Board and Commission meetings when inspection-related issues were on the agenda; reviewing and submitting monthly and annual reports regarding permits issued and other Village inspection work; preparing an annual inspection department budget; coordinating inspection work with the work of other departments; and resolving issues between his department and other departments and between citizens/businesses and the Village relating to building and occupancy code matters. Voigt was generally responsible for the efficient provision of inspection services for the Village. As a supervisor, Voigt rarely if ever encountered discipline problems with his competent staff. Overall, Voigt's managerial/supervisor activities consumed a relatively small (but not *de minimus*) portion of his work time, most of which was spent performing hands-on inspection work.

¹ The position descriptions for the Building/Plumbing Inspector, Assistant Building/Plumbing Inspector, and Electrical Inspector have not been updated recently and are inaccurate in some respects. Therefore, the description of the duties that pertain to these positions is based largely upon testimonial evidence.

As of June 2009, Voigt's annual salary was \$62,506, a salary matched by three other non-bargaining unit managerial or supervisory personnel: the Highway Superintendent, the Water Superintendent, and the Waste Water Superintendent. As a salaried employee, Voigt was expected to and did participate in work-related activities outside the regular work day without additional pay. Radtke's hourly wage at the time of his layoff was \$26.16 (\$54,412 annually). At the time of the hearing in this matter, the Grievant was earning \$28.62 per hour (\$59,530 annually).

The Grievant has been employed by the Village since mid-1998 as the Electrical Inspector. He was also a licensed Master Electrician and had been a practicing electrician prior to his Village employment. The Grievant maintained at Village expense a variety of other construction-related certifications, including commercial and residential building and plumbing certifications. He was thus qualified to handle, in addition to electrical inspections and reviews, plumbing inspections, building plan reviews, and the related permitting. His job description states, "The employee in this position is responsible for enforcement of state and village codes and ordinances, reviews plans, conducts on-site inspections, investigates complaints and maintains records."

Notwithstanding his variety of Village-funded certifications and the generalized language in his job description, prior to July 1, 2009, the vast majority of the Grievant's duties involved reviewing residential and commercial construction plans for compliance with state and local electrical codes, conducting electrical-related inspections, and issuing electrical permits. The Grievant occasionally assisted the other two inspectors in performing plumbing inspections/permitting and, less frequently, commercial building footings or foundation inspections. The Grievant was far less experienced and comfortable with the non-electrical aspects of the building code than with the electrical code. Prior to July 1, 2009, he did not review building plans or issue plumbing or building permits and seldom handled heating, ventilation, air conditioning (HVAC) inspections. While Voigt handled most non-electrical inspection-related inquiries, the Grievant occasionally responded to telephone inquiries about building code issues other than electrical. He did not assign house numbers, meet with other Village officials (such as the DPW Director, Village Engineer, Planner, or Administrator) regarding construction issues, meet with developers about projects, review or comment on Planning Commission agenda, review or approve monthly inspections reports for the Village Board, handle erosion control issues, zoning issues, or authorize temporary use permits. He had no involvement with commercial building occupancy bonds and letters of credit. He did not maintain code violation records for the Village or respond to inquiries about such records. Voigt primarily if not exclusively handled these duties.

While employed by the Village, the Grievant, at Village expense, has maintained membership in the Building Inspectors Association as well as the Electrical Inspectors Association. Prior to July 1, 2009, he rarely attended the Building Inspectors' meetings, since his work was far more concentrated in the electrical inspections area.

During fiscal year 2009, the Village experienced financial setbacks, including approximately a two-thirds decline in construction-related activity and a parallel dip in anticipated and budgeted income from associated fees. Towards the end of the fiscal year, the Village determined that it needed to reduce seventeen positions, including seven to nine seasonal positions, one vacant administrative assistant position, and several regular full time employees. The reductions included both Voigt's and Radtke's positions, and both employees were laid off effective June 30, 2009. The inspection department was reduced to two employees: the Grievant and the department secretary. The Grievant was chosen to remain because, unlike Voigt or Radtke, the Grievant held all necessary building and construction certifications. After Voigt's layoff, the Village Administrator assumed responsibility for supervising the inspection department until a second reorganization occurred on July 1, 2010.

Since July 1, 2009, the Grievant has assumed most of the duties formerly performed by both Voigt and Radtke and those duties predominate the Grievant's work load. He reviews all building plans for compliance with regulations and zoning requirements, issues all building permits (residential and commercial), approves and signs holding tank agreements, conducts commercial HVAC inspections, assigns house numbers, is involved in certain zoning issues, and meets from time to time with other Village officials (such as the Engineer, Planner, and Administrator) to provide building code-related information regarding commercial projects in the Village. He responds to most of the complaints and questions concerning hazardous dwellings, commercial establishments, and the Village building code, and he handles erosion control duties. He also maintains all inspections records.

Until approximately July 1, 2010, the Grievant was responsible for reviewing Planning Commission agenda to determine whether there were issues pertaining to the inspection department, submitting to the Village Board an accurate monthly report of code inspections and violations found, handling occupancy bonds and letters of credit, overseeing the issuance of temporary use permits and certain other zoning-code matters, attending Village construction oversight committee meetings, and handling weed inspections for the Village.² On or about July 1, 2010, the Village implemented another reorganization, pursuant to which it placed inspection work in the Zoning and Planning Department. In that connection, the Village reassigned the duties described earlier in this paragraph from the Grievant to other Village personnel.

Subsequent to July 1, 2009, the Grievant has not supervised or evaluated any employees, nor has he attended department director meetings or meetings of the Village Board. He has not prepared any portion of the Village budget. His schedule has remained the same as it was before the reorganization and layoffs, i.e., 7:30 a.m. to 4 p.m., and his work day includes approximately the same proportion of office vs. field work.

² The Village had a Weed Inspector position that was also eliminated as a result of the July 1, 2009, reorganization.

Also on or about July 1, 2009, the Village eliminated the position of Director of the Senior Center, which had been excluded from the bargaining unit as a managerial and supervisory position. The Village shifted her budgetary and supervisory duties to the Village Administrator and the reorganization increased the work load of the bargaining unit position of Assistant Director of the Senior Center. The Union has not grieved that situation.

Some time ago, the Village Clerk retired and the deputy clerk (Ms. Micka), a bargaining unit member, was appointed as the Acting Clerk until a new Clerk took office. She was assigned to all the tasks the Clerk normally performed, including attending Village Board meetings, department director meetings, hiring certain part-time clerks, and supervising one or two employees. She was paid at the Clerk's level of pay for performing this work on a temporary basis.

POSITIONS OF THE PARTIES

Union

The Union argues that Voigt's position as Building/Plumbing Inspector existed primarily to perform building and plumbing inspections, as reflected in Voigt's actual duties as well as his job description. Inspection work was the core work of Voigt's position. Any administrative functions that Voigt performed were incidental to his inspections duties and *de minimus*, as Village Administrator Schornack testified that "these duties required a few minutes of actual time each week." Hence, when Downing assumed Voigt's inspection duties, he took over the principal function of Voigt's job and should have received the higher rate of pay that Voigt had been receiving prior to his layoff. This is especially so since Downing also performed "all but some peripheral administrative duties" (such as signing time cards) that Voigt previously had performed.

The Union also argues that contrary to the Village's point of view, the Grievant's work changed substantially after Voigt's layoff on July 1, 2009. Prior to that time, the Village had bifurcated the inspection work into two distinct areas: Voigt's and Radke's jobs in the plumbing and building inspection areas, and the Grievant's job in the electrical inspection area. That the Grievant was certified to perform the full gamut of certifications and his duties are described in general language in his job description does not outweigh the reality that his duties changed dramatically after Voigt was laid off. Prior to Voigt's layoff, the Grievant had performed building and plumbing inspection work only sporadically and had never issued plumbing permits, had not "clarified" or "interpreted" code regulations beyond electrical, and had not maintained all inspection records. Since Voigt's July 1, 2009 layoff, the Grievant has done all of these things. The fact that the Village, the Union argues, now uses against Downing his versatility and willingness to help out in the department should be viewed for what it is: a subterfuge to continue to violate the clear language in the contract. In support of its position, the Union cites *Northwestern University*, 118 LA 44 (Kenis, 2002).

Village

The Village contends that the clear language of Section 10.05 does not apply to this situation, because the Village retains the right not to fill a managerial position (the inspection department director position) and/or to decide whether to assign someone to such a position on an acting basis. The Management Rights clause (Article 2 of the contract), among other things, reserves the Village's right to fill or not fill a position for purposes of efficiency and to decide the "positions and job classifications to perform such services." In this case, the Village restructured its operations and made them more efficient by eliminating the department director position as well as one bargaining unit inspector position. It chose not to fill the inspection department director position permanently or on an acting basis. As a result, the Village argues, there was no "acting capacity" subject to assignment within the contemplation of Section 10.05 and that provision could not have been violated. The Village contrasts the earlier Village Clerk situation, in which the Village had officially appointed Ms. Micka as Acting Clerk with all of the managerial and supervisory duties thus entailed.

The Village further contends that it did not violate Section 10.05, the wage schedule, or any other contract provision by assigning the Grievant inspection duties beyond the electrical inspection duties he had primarily performed prior to the reorganization, nor does anything in the contract require additional pay for those duties. The Village argues that the Grievant's job description does not restrict him to electrical inspection work. The Village also notes that it had paid the costs associated with the Grievant's maintaining the additional inspection licenses that allow the Village to assign him building inspection and permitting duties. In fact, asserts the Village, much of the additional inspection work the Grievant is performing was previously performed by Radtke at a lower contractual wage rate than the Grievant's. The Village contends that the Grievant had been performing virtually all of the same duties after the reorganization as before, though in different proportions. According to the Village, arbitrators generally uphold employers' decisions to rearrange work assignments in the interest of efficiency, so long as the assignments are generally within the purview of the job description, even if they also overlap with the work of other classifications. The Village distinguishes *Northwestern University* (cited by the Union), because unlike the grievant in that case, Downing has not been assigned *de facto* managerial or supervisory duties performed by the department director prior to the reorganization.

The Village contends that the additional pay that had attached to the now-defunct department director position was attributable entirely to those supervisor/managerial duties, which have now been reassigned to other department managers rather than the Grievant. The Village believes that conferring Acting Director pay upon the Grievant would "open the floodgates" to other employees whose workloads have been affected by the elimination of other managerial/supervisor jobs – for example, the situation pertaining to the Senior Center.

DISCUSSION

It is of course axiomatic that an arbitrator must focus first and foremost upon the language and intent of the parties' agreement. In this case, the only provision that addresses an increase in pay for "working out of grade" and/or in a higher classification is Section 10.05, set forth in relevant part above. Does that language reflect an intention to increase the Grievant's pay for the duties he has performed subsequent to the July 1, 2009 reorganization? I agree with the Union that, contrary to the Village's argument, the Grievant's duties have changed materially and that he has assumed significantly more responsibility since the reorganization. He might well deserve more pay. Nonetheless, I conclude with some reluctance that the contract does not require the Village to increase his pay, because he was not "assigned in an 'acting capacity'" to fill the position of department director previously held by Voigt.

I question initially whether Section 10.05 on its face applies to a situation like the instant one, where it is alleged that an employee has been placed into a higher level position on a permanent or at least an open-ended basis. That section is entitled Temporary Assignments, and the concept of temporariness is carried forward in subsection 4's reference to assignments in an "acting capacity." Because this question was not squarely addressed by the parties, I am disinclined to hinge the outcome of the case on it. I will therefore assume for purposes of analysis that Section 10.05(4) covers this situation.

I agree with the Union, contrary to the Village, that the Grievant is performing much of the work previously performed by Voigt and that work has materially changed the Grievant's job. Neither the Grievant's prior duties nor his job description encompassed the range of duties or degree of responsibility he now holds. The Grievant's prior work consisted almost exclusively of electrical inspection work. He was not responsible for building inspection, plumbing inspection, issuing building permits, or providing the extensive inspection support for the Village's commercial projects that are now the bulk of his work. He is now, but was not previously, responsible for maintaining accurate overall inspections records, ensuring compliance with all codes, meeting with commercial developers over permitting issues, overseeing erosion control, assigning house numbers, handling zoning matters, commenting upon Planning Commission matters, and authorizing temporary use permits. He now interprets and advises other officials and the public as to all building code issues, and he does so without substantive oversight. While it is true that he had maintained his licenses and basic skills in these areas at Village expense, that his hours have not changed; that he does not complain of overwork, and that some of his work was previously performed by the lower-paid Radtke, the level of responsibility attached to his work has increased considerably, now that he is the one and only Village inspection official. The increased breadth and responsibility of these additional tasks, if not their aggregate amount, have changed the Grievant's job in an essential way. Just as Voigt had been responsible for ensuring efficient provision of inspection services for the Village, now the Grievant has that responsibility. Whether the Village labels the Grievant "Village Building Inspector," that, in fact, is what he now is. In short, the Grievant is performing a higher-level job than he was prior to July 1, 2009.³

³ Contrary to the Village's argument, it is not apparent that other bargaining unit employees were similarly affected by the elimination of other management positions, *e.g.*, the Senior Center Director.

That said, there is also no real dispute that, except for a few sporadic occasions during the first year following the reorganization, the Grievant has not been assigned any of the supervisory or managerial tasks that Voigt had performed in his non-bargaining unit position of department director. The Grievant does not hire, fire, evaluate, approve vacations, sign time sheets, or otherwise supervise any employee. He does not prepare a department budget, attend meetings of Village department directors, or attend Village Board meetings – all managerial tasks that Voigt had performed, even though they were not the preponderance of his job.

Since the Grievant is doing most of what Voigt did before and carries much of Voigt's prior higher-level inspection responsibilities but not his managerial/supervisory duties, the question is whether the Grievant can be said to be filling substantially the same position that Voigt had filled. The Union relies on *Northwestern University*, 118 LA 44 (Kenis, 2002), a relevant but ultimately unconvincing authority. In that case, a lead worker in the university's auto repair shop began running the shop after the only other full-time employee in the department, an assistant foreman, retired. The university decided not to fill the assistant foreman position (and not to give that position to the grievant) and argued that an assistant foreman in a different department was handling supervisory duties for the auto repair department as well. The arbitrator found that, in fact, the retired assistant foreman had never performed supervisory or budgetary duties and consequently that those duties were not actually part of the auto shop assistant foreman job. Instead the assistant foreman's job had consisted of myriad activities associated with "running the shop," such as ordering parts, approving payment of bills, estimating repair costs, and arranging and scheduling vehicle servicing and maintenance. The university did not reassign those duties after the assistant foreman retired, but rather allowed the remaining employee to add them to his work load but without the pay or title. The arbitrator concluded that, in effect, the university had not eliminated the assistant foreman job but had de facto reassigned the grievant lead worker to that job. She therefore ordered that the employee's pay be increased accordingly.

Two important elements distinguish *Northwestern University* from this case. First, the assistant foreman was a bargaining unit employee, making it unlikely that purely supervisory duties were essential elements of his job. Second, the retired assistant foreman and at least two other assistant foremen in other departments did not perform any of the supervisory duties that the university had claimed were essential to the position. In contrast, Voigt unquestionably carried out a variety of real supervisory and managerial duties. Voigt's inspection duties, like Radtke's and the Grievant's, would not have removed him from the bargaining unit. Hence, Voigt's non-unit status likely correlated to those managerial and supervisory duties, however small in amount. Those managerial/supervisory duties were sufficiently significant to warrant his moderately higher rate of pay (approximately \$3,000 per year more than what the Grievant earned at the time of the hearing in this matter), a rate that applied to three other supervisory/managerial employees in the Village. Unlike what occurred in Northwestern University, Voigt's managerial and supervisory duties were in fact dispersed to other director-level employees and not passively conferred upon or undertaken by the Grievant. Therefore, even though the Grievant is performing much the same work that Voigt had performed prior to

his layoff, I conclude that he did not perform that portion of Voigt's work that was pivotal to Voigt's non-bargaining unit position of department director. The Village did not assign the Grievant to Voigt's former position on an "acting" basis or otherwise, for purposes of Section 10.05(4).

It is not uncommon for collective bargaining agreements in large, industrial bargaining units to provide for an increase in an employee's pay where, as here, the employee has been assigned substantially new duties. *See, e.g., Arizona Chemical Company*, 107 LA 836 (Grooms, 1996). There, the contract specifically required the Company to apply a new rate of pay where "new jobs [are] created or when the duties of existing jobs are modified substantially." The employer had eliminated two supervisor positions, did not assign the supervisory duties to any bargaining unit employees, but did assign them a set of reporting, documentation, and safety duties that the eliminated supervisors had previously performed. The arbitrator concluded that discontinuing the supervisor positions and transferring their work to the bargaining unit did not violate the contract, but that the employees were entitled to a higher rate of pay for the additional responsibilities newly assigned to them based upon the specific contract language. *See also, Cleveland Electric Illuminating Co.*, 108 LA 121 (Franckiewicz, 1997); *Cooper Industries, Inc.*, 104 LA 383 (Imundo, 1995); *Union Tank Car Co.*, 122 LA 876 (Cohen, 2006).

Agreements covering bargaining units of the size and nature of this one seldom give arbitrators authority to determine new classifications and set their pay. So it is here. The Grievant might very well deserve a pay increase reflecting his upgraded responsibilities, but there is no provision in the contract authorizing such an award in this case.

AWARD

For all of the foregoing reasons, the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of February, 2012.

John C. Carlson, Jr., /s/

John C. Carlson, Jr.

Arbitrator

JCC/dag
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