

IN THE MATTER OF ARBITRATION BETWEEN

**International Brotherhood of Electrical
Workers, Local 160**

And

**Opinion and Award
BMS Case No. 12-PA-1280**

City of Welcome, Minnesota

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IBEW, Local 160

M. William O'Brien, Esq.

Miller, O'Brien, Jensen, PA

Minneapolis, Minnesota

On behalf of the City of Welcome, Minnesota

John Edman, Esq.

Edman and Edman

Fairmont, Minnesota

JURISDICTION

In accordance with the Collective Bargaining Agreement between the City of Welcome, Minnesota and the International Brotherhood of Electrical Workers, Local 160; and under the jurisdiction of the state of Minnesota Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly, on January 9, 2013, in Mankato, Minnesota. The parties did not file post-hearing briefs, but requested the arbitrator to delay a decision pending attempts to resolve this matter. The parties were not able to mutually resolve the matter. The decision was rendered by the arbitrator on February 21, 2013.

ISSUES AT IMPASSE

The union states the issue as:

1. Whether the employer violates the Collective Bargaining Agreement by assigning Bargaining Unit work to a supervisor/director? [Pre-hearing Brief of Union]

The City of Welcome defines the issue as:

1. Is the newly created Public Works Director position a management position and thus not covered by the Collective Bargaining Agreement or is the Public Works Director position a position covered by the Collective Bargaining Agreement?
2. If the Public Works Director position is a position which is covered by the Collective Bargaining Agreement, is it a new job classification and department created in the Collective Bargaining Agreement and, if so, under Paragraph 8B of the Contract there is no employee with department seniority and the City Council can hire based on its determination of the applicant's ability and qualifications?[Pre-hearing Statement of City of Welcome]

Relevant Contract Language

Article 8. Seniority

A. Department seniority of an employee shall be the governing factor with reference to layoffs and choice of vacation periods. Department seniority shall be defined as an employee's length of service in the departments of Public Works and City Clerk/Treasurer.

B. Promotions and filling of vacancies shall be based upon department seniority, ability and qualifications. Vacancy notices will be posted by the Employer setting forth job qualifications for a period of five (5) working days. In the event a vacancy occurs in a classification, as referenced in the seniority list attached as Exhibit B, where no employee with department seniority rights and qualifications is available, then such vacancy shall be posted in all the departments and filled on the basis of ability and qualifications.

Article 17

E. ARBITRATION'S AUTHORITY

1. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION and shall have no authority to make a decision on any other issue not so submitted.

2. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying in any way the application of laws, rules, or regulations have the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

FINDINGS OF FACT

1. On March 13, 2012, the union filed a grievance on behalf of Public Works Worker, Max Longley, stating "violation of section eight (8) subsection B job entitlement of advancement position not posted internally for required time, & seniority of employee not taken into account. Decision of City Council to hire another employee from outside current employees. All accusations have been opinions & personal assumptions."

2. The job description of Public Works Worker since December 27, 2007 is

City of Welcome, MN
12-27-07

TITLE OF POSITION: Public Works Worker

TITLE OF IMMEDIATE SUPERVISOR: City Hall

HOURS OF WORK: Position involves 40 hours of work per week. Work hours are generally 7:00 a.m. to 4:00 p.m. Monday through Friday and four hours every other weekend (2 hours Saturday and 2 hours Sunday) to check water and wastewater facilities. Occasional overtime work may be required due to snow emergencies, sewer backups, water main breaks etc.

MINIMUM REQUIREMENTS FOR POSITION: High school graduate or GED. Valid Minnesota driver's license to be acquired within 30 days of employment. Valid Minn. Class B or higher Commercial Drivers License to be acquired within 150 days of employment. Applicant must be willing to acquire Class D & C wastewater licenses and Class D & C water licenses as required by the Minnesota

Pollution Control Agency and Minnesota Department of Health as soon as qualified to do so. Must also obtain the Class IV sludge applicator's license.

DESIRABLE QUALIFICATIONS: Class D & C wastewater licenses, one year of experience in general maintenance work in sewer, water, street, or park facilities.

KNOWLEDGE, SKILLS, AND ABILITIES

- **These items are essential to the job**
- Considerable knowledge of street maintenance and repair operations.
- Considerable knowledge of vehicle and equipment maintenance and repair.
- Considerable knowledge of materials, methods, and practices used in street, sanitary sewer, storm sewer, grounds maintenance including snow removal.
- Considerable knowledge of traffic laws as applied to operating trucks and heavy equipment.
- Considerable ability to operate heavy and light equipment to maintain and repair streets, haul material, removal of snow, clean streets, mow grass, and apply salt and sand to city streets.
- Considerable ability to perform heavy manual labor requiring continual use of large motor skills, standing or walking for long periods, climbing, and frequent bending, stooping, shoveling, twisting, turning, crouching, stretching, and reaching to perform work.
- Considerable ability to regularly lift and carry objects weighing up to 56-60 pounds and occasionally lift and carry objects weighing 80-100 pounds.
- Considerable ability to work with exposure to loud noises from operating equipment.
- Considerable ability to see, hear, and manipulate objects requiring fine motor coordination to perform the work.
- Considerable ability to work outside year-round, including during inclement weather.
- Considerable ability to read and interpret technical manuals and to analyze vehicle and equipment repaired problems.
- Working ability to work with or around fumes when repairing streets, cleaning storm sewers, operating and repairing heavy and light equipment, welding, and painting.
- Working ability to work in confined spaces and to operate a jackhammer.
- Working ability to communicate effectively with City Staff and the Public.
- Working ability to follow verbal directions and work independently.

MAJOR JOB FUNCTIONS:

Duties: Skilled work in operation and maintenance of wastewater treatment facility, including establishing priorities, plans, and review work performed in or related to the wastewater treatment facility. Sludge processing and disposal equipment. Skilled work in operating and maintenance of water treatment facility. Maintenance of buildings, streets, working knowledge of water system, parts, and/or cemetery. Reads water meter readings as required. Locates curb

boxes, valve boxes, water mains, taps water main, sewer lines, and manholes when necessary. Installs new utility meters and replaces worn out meters. Assists in installing and removing holiday decorations. Responsible for carry out OSHA standards and complying with city policies. Serve on Safety Committee when required.

Clerical Skills: Maintain any and all daily, monthly, and yearly records and files related to areas of responsibilities. Engage in public and interdepartmental correspondence. Receives, records, and resolves customer complaints and problems related to the department. Complies and sends in all necessary reports to appropriate organizations and agencies whether county, state, or federal.

Inventory Control: Maintains a sufficient inventory of material and supplies to service the equipment and operations of the water and wastewater treatment facilities. Maintains any and all records pertinent to city shop, maintenance of vehicles, city streets, and parks. Stocks appropriate inventory for equipment, organizes inventory, purchases items as required.

Operate Variety of Equipment: Operate tractor, grader, street sweeper, dump truck, pick-up truck, riding lawnmower, roller packer, welder, jetter vac, paint stripper, camera for infrastructure. List not meant to be all inclusive.

Advise on Equipment Purchases: Meet and confer with City Council on replacements, evaluate new and used equipment on the market for purchases, assists in writing specifications for equipment needed, review equipment upon arrival to ensure it meets specifications.

Maintain Streets: Participate in snow removal activities, applying salt and sand to city streets, grading, patching, and sealcoating of roads. Maintain alleys and parking lots. Painting of crosswalks, parking stalls, and no parking curb areas as needed. Maintaining flower boxes.

Maintaining Parks and Cemetery: Control weeds, mow lawns, seed graves, remove snow and blow paths to grave sites, stake grave sites.

On-Call Status: Must be available 24 hour on-call status for any problems and emergencies that occur outside of normal working ours and at work-site within 30 minutes of direct contact. Note: On-call applies only to the on-duty person. i.e.: The person on duty for the weekend is considered the on-call person from Friday at 4:00 p.m. to the following Friday at 4:00 p.m.

Assist Public Works Worker: Assist with any tasks that require two or more individuals to complete

Other Duties: Perform all other duties as assigned.

This description is intended to describe the kinds of tasks and level of work difficulty being performed by people assigned to this classification. The list of responsibilities is not intended to be construed as an exhaustive list of all responsibilities, duties, physical demands, or equipment utilized by personnel in this classification.

The positions of Public Works Worker will have work objectives that from time to time, will require joint prioritizing and planning so that these tasks are accomplished. Activities such as snow removal, water main breaks repairs, etc. are examples of tasks that will require joint effort between these two positions. Should a question arise as to how to coordinate such a project, it is the responsibility of both employees in these positions to bring any areas of confusion or questions to the attention of the City Council.

The City of Welcome is an Equal Opportunity Employer. The City of Welcome does not discriminate in employment on the basis of race, color, creed, religion, nation origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age. Managers and supervisors are required to make all employment decisions on the basis of individual ability and merit, without discrimination or favor. [Exhibit #6]

3. On July 20, 2011, the City of Welcome posted a job opening entitled "Opening for Public Works Director" it stated:

The City of Welcome is accepting applications for the position of Public Works Director. Will perform various types of manual labor and operate light or heavy equipment in the maintenance of the City.

Requires: High school diploma/GED.

Preferred at time of hiring: Class B Commercial Drivers license. Class D and C licenses for both Water and Wastewater Treatment Plants. Level IV Biosolids license.

Salary depends on qualifications and experience.

Application materials available at: Welcome City Hall, 102 Dugan Street South, PO Box 72, Welcome, MN 56181.

Phone (507) 728-8740, Fax (507) 728-8740 or at the city website: welcomemn.govoffice2.com

Application Deadline is August 5, 2011. [Union Exhibit #2]

The job description stated in its entirety:

CITY OF WELCOME, MN
7-5-11

TITLE OF POSITION: Public Works Director

TITLE OF IMMEDIATE SUPERVISOR: City Council

HOURS OF WORK: Position involves 40 hours of work per week. Work hours are generally 7:00 a.m. to 4:00 p.m. Monday through Friday and four hours every other weekend (2 hours on Saturday and 2 hours on Sunday) to check water and wastewater treatment facilities. Occasional overtime work may be required due to snow emergencies, sewer back ups, water main breaks etc.

MINIMUM REQUIREMENTS FOR POSITION: High school graduate or GED. Valid Minnesota Class B driver's license. Applicant must have a Class D & C wastewater licenses and Class D & C water licenses as required by the Minnesota Pollution Control Agency and Minnesota Department of Health. Must also have a Class IV sludge applicator's license.

DESIRABLE QUALIFICATIONS: Class D & C wastewater licenses, Class D & C Water License, three years experience in general maintenance work in sewer, water, street, or park facilities. Experience in supervising employees and organizing work flow.

KNOWLEDGE, SKILLS, AND ABILITIES

- **These items are essential to the job**
- Considerable knowledge of street maintenance and repair operations.
- Considerable knowledge of vehicle and equipment maintenance and repair.
- Considerable knowledge of materials, methods, and practices used in street, sanitary sewer, storm sewer, grounds maintenance including snow removal.
- Considerable knowledge of traffic laws as applied to operating trucks and heavy equipment.
- Considerable ability to operate heavy and light equipment to maintain and repair streets, haul material, removal of snow, clean streets, mow grass, and apply salt and sand to City streets.
- Considerable ability to perform heavy manual labor requiring continual use of large motor skills, standing or walking for long periods, climbing , and frequent bending, stooping, shoveling, twisting, turning, crouching, stretching, and reaching to perform work.
- Considerable ability to regularly lift and carry objects weighing up to 56-60 pounds and occasionally lift and carry objects weighing 80-100 pounds.
- Considerable ability to work with exposure to loud noises from operating equipment.
- Considerable ability to see, hear, and manipulate objects requiring fine motor coordination to perform the work.
- Considerable ability to work outside year-round, including during inclement weather.
- Considerable ability to read and interpret technical manuals and to analyze vehicle and equipment repair problems.

- Working ability to work with or around fumes when repairing streets, cleaning storm sewers, operating and repairing heavy and light equipment, welding, and painting.
- Working ability to work in confined spaces and to operate a jackhammer.
- Working ability to communicate effectively with City Staff, Public Works Worker, City Council, and the public.
- Working ability to follow verbal directions and work independently.
- Ability to supervise Public Works Dept. Employee(s).

MAJOR JOB FUNCTIONS:

Duties: Knowledge of work in operation and maintenance of wastewater treatment facility, including establishing priorities, plans, and review work performed in or related to the wastewater treatment facility. Sludge processing and disposal equipment. Knowledge of work in operating and maintenance of water treatment facility. Maintenance buildings, streets, working, parts, and/or cemetery. Reads water meter readings as required. Engages in collection of overdue water bills. Locates curb boxes, valve boxes, water mains, taps water main, sewer lines and manholes when necessary. Installs new utility meters and replaces worn out meters. Assists in installing and removing holiday decorations. Responsible for carry out OSHA standards and complying with city policies. Serve on Safety Committee when required. Delegates tasks to other full or part time Public Works employee(s). Follows up to assure tasks are adequately completed. Reassigns tasks not done correctly. Communicates and coordinates with City Council and clerk.

Clerical Skills: Maintain any and all daily, monthly, and yearly records and files related to area of responsibilities. Engage in public and interdepartmental correspondence. Receives, records, and resolves customer complaints and problems related to the department. Complies and sends in all necessary reports to appropriate organizations and agencies whether county, state, or federal.

Inventory Control: Maintains a sufficient inventory of material and supplies to service the equipment and operations of the water and wastewater treatment facilities. Maintains any and all records pertinent to city shop, maintenance of vehicles, city streets, and parks. Stocks appropriate inventory for equipment, organizes inventory, purchases items as required.

Operate Variety of Equipment: Operate tractor, grader, street sweeper, dump truck, pickup truck, riding lawnmowers, roller packer, welder, jetter vac, paint stripper, camera for infrastructure. List not meant to be all inclusive.

Advise on Equipment Purchases: Meet and confer with City Council and Public Works Worker on replacements, evaluate new and used equipment on the market for purchases, assists in writing specifications for equipment needed, review equipment upon arrival to ensure it meets specifications.

Maintain Streets: Participate in snow removal activities, applying salt and sand to City streets, grading, patching, and planning for sealcoating of streets. Maintain alleys and parking lots. Painting of crosswalks, parking stalls, and no parking curb areas as needed. Maintaining flower boxes.

Maintain Parks and Cemetery: Control weeds, mow lawns, seed graves, remove snow and blow paths to grave sites, stake grave sites. Act as cemetery Sexton. Keeps all records relating to cemetery. Provide clerk with grave sites sold and selected.

On-call status: Must be available 24 hour on-call status for any problems and emergencies that occur outside of normal working hours and at work-site within 15 minutes of direct contact. Note: On-call applies only to the on-duty person. i.e.: The person on duty for the weekend is considered the on-call person for the following Monday through 4:00 p.m. on Friday. Must refrain from the use of alcoholic beverages.

Assist Public Works Worker: Assist with any tasks that require two or more individuals to complete. The Public Works Director must fulfill the duties of the Public Works Worker in his absence as well as perform the duties of this position.

Other Duties: Perform all other duties as assigned.

This description is intended to describe the kinds of tasks and levels of work difficulty being performed by people assigned to this classification. The list of responsibilities is not intended to be construed as an exhaustive list of all responsibilities, duties, physical demands, or equipment utilized by personnel in this classification.

The positions of Public Works Worker and Public Works Director will have work objectives that from time to time, will require joint prioritizing and planning so that these tasks be accomplished. Activities such as snow removal, water main breaks repairs, etc. are examples of tasks that will require a joint effort between these two positions. Should a question arise as to how to coordinate such a project, it is the responsibility of both employees in these positions to bring any areas of confusion or questions to the attention of the City Council.

The City of Welcome is an Equal Opportunity Employer. The City of Welcome does not discriminate in employment on the basis of race, color, creed, religion, nation origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age. Managers and supervisors are required to make all employment decisions on the basis of individual ability and merit, without discrimination or favor. [Union Exhibit #2]

4. The union's position is that a supervisor under the Collective Bargaining Agreement and under the Minnesota Public Employment Labor Relations Act, Minn. Stat. §§179A.01-179A.40, cannot do bargaining unit work. Supervisors are not permitted to be members of the union. The union contends that the city is constrained by both the Collective Bargaining Agreement and PELRA from having a supervisor in the union.

5. The City of Welcome's position is that the supervisor position is a "hybrid position". Welcome is a small town. There has been one employee in the Public Works department who "does everything". The City realized it needed to hire somebody to be a supervisor and report to the City Council. However, since the city is so small it cannot just hire a supervisor who does not also perform work that a Public Works Worker would perform. The City of Welcome admitted that it had not done a good job on defining precisely what the supervisor would be doing in its job description. [See Union Exhibit #2]. The City wants to proceed to hire a supervisor, but it cannot afford just a supervisory role for that person. Before hiring anyone for this new position the City wants this arbitrator to resolve the above issues.

After posting the opening for Public Works Director in July 2011, the City had seven people apply. The City removed three people as not qualified. However, it interviewed four people, including the present Public Works Worker, whom the City did not choose. However, the City decided to delay the hiring of the new Public Works Director pending the decision in this arbitration.

DECISION AND RATIONALE

The facts in this case are not in dispute. In July of 2011, the City of Welcome posted for the hiring of a "Public Works Director," which the City expects to be a non-bargaining unit supervisory position. However, the job description for this position is nearly identical to that of the bargaining unit's "Public Works Worker." The City acknowledges that it expects the new Director to perform new duties but also all of the duties of the bargaining unit worker, working together with the unit employee. [Union Exhibit #3, City Attorney's letter to the International Brotherhood of Electrical Workers].

The City has identified a person to hire into the director position, but seeks a resolution of this dispute under the Collective Bargaining Agreement before hiring, as does the union. "For its part, the union is not opposed to hiring of another unit member to perform unit duties. Nor is the

union opposed to the hiring of a true director whose function is supervisory/managerial. However, the union contends that the hiring of purported manager who will be performing principally unit duties is a violation of the CBA and including the union recognition clause.” [Pre-hearing Brief of Union].

Both the City and the union seek an order from the arbitrator that resolves this dispute. Specifically the union seeks “an order sustaining the grievance and directing that the hiring of a supervisor whose duties are principally bargaining unit duties is a violation of the CBA, and further directing that the City’s option are (1) to hire another unit worker, (2) to negotiate the addition of a ‘lead’ or similar classification in the CBA, or (3) to hire a supervisor who is not to perform unit work.” [Id. at 1-2].

The City wants the arbitrator to define the job as a supervisory job in which the supervisor would spend some time “covering and helping out” the Public Works Worker when necessary. [Argument of City at arbitration hearing].

It is clear from the job description and the argument at the arbitration hearing that the new “Public Works Director” would do some type of work other than in the job description. For example, the supervisor would handle and evaluate “bids”, “make budgets”, “arrange part-time workers”, “evaluate bids”, and “report at every Council meeting.” [Argument of City at Arbitration hearing]. But it is also clear that the “Public Works Director” would spend significant time doing exactly and precisely the same work that the Public Works Worker would do. The job descriptions make that clear.

The Minnesota Public Employment Labor Relations Act does not permit supervisors to be in this bargaining unit. The Collective Bargaining Agreement itself recognizes the union and assigns to the Union the very work the City wants the Public Works Director to do. The City has agreed to this in the Collective Bargaining Agreement. As a consequence, if the “Public Works Director” does the work of the union it cannot be a supervisor but must be another unit worker. If the City Council intends to hire a supervisor only, then that person cannot perform unit work.

The union has proposed a rational method of resolving this dilemma. The City’s options are to (1) hire another unit worker, (2) negotiate the addition of a “lead” or similar classification (i.e. foreman) into the Collective Bargaining Agreement, or (3) hire a supervisor who will not perform unit work. Rather than this arbitrator telling the City what to do, I leave it to the City to

negotiate one of the three options. But under the present job description of a “Public Works Director” only options number 1 and number 2 above can be permitted.

Further, it is clear that if the job description of the new position stays the same or substantially similar the new position is not a new job classification and the Article 8 B, Seniority clause applies.

As a remedy, the three options are left open to the City Council and the union to resolve this matter by negotiation.

February 21, 2013

Date

Joseph L. Daly
Arbitrator