STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CONNIE A. MERKEL, Complainant, vs. CITY OF GREENFIELD and DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCAL 2, Respondents.	Case 90 No. 38744 MP-1971 Decision No. 24776-B

Appearances:

Mr. Gary M. Williams, Attorney at Law, P.O. Box 421, 12065 W. Janesville Road, Hales Corners, Wisconsin 53130, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Daniel G. Vliet, 815 East Mason Street, Milwaukee, Wisconsin 53202-4080, appearing on behalf of the City of Greenfield.

Podell, Ugent & Cross, Attorneys at Law, by Ms. Nola J. Hitchcock Cross, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202-4905, appearing on behalf of District Council 48, AFSCME, AFL-CIO, and its affiliated Local 2.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Connie A. Merkel having, on May 1, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Greenfield and Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 2 had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and (3)(b)1 and 4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on July 3, 1987, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Greenfield, Wisconsin on August 25 and September 24, 1987; and the parties having filed briefs in the matter, the last of which was received on February 12, 1988; and the Examiner having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Connie A. Merkel, hereinafter referred to as the Complainant, is an individual residing at 3633 S. 32nd Street, Greenfield, Wisconsin 53221.

2. That Respondent City of Greenfield, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and its offices are located at City Hall, 7325 Forest Home Avenue, Greenfield, Wisconsin 53220.

3. That Respondent Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 2, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and is the exclusive bargaining representative for all regular full-time and regular part-time clerical employes in the City Hall, Fire Department and Police Department, excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, supervisory, professional, confidential and managerial employes; that its offices are located at 3427 W. St. Paul Avenue, Milwaukee, Wisconsin 53208; and that Anthony F. Molter is the Union's staff representative and has served as its agent and has acted on its behalf.

4. That the City and the Union have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of employes in the bargaining unit described above in 3. including an agreement effective by its terms covering the period January 1, 1983 to December 31, 1985; and that said agreement contained the following provisions:

ARTICLE 2 - RECOGNITION

A. The City hereby recognizes the Union as the exclusive Collective Bargaining representative for the purposes of engaging in conferences and negotiatons establishing wages, hours and conditions of employment for all regular full-time and regular part-time clerical employees in the City Hall, Fire Department and Police Department, excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory, professional, confidential and managerial employees. Part-time employees shall not receive any fringe benefits under this Agreement.

B. The Union shall represent all employees in the Bargaining Unit at all conferences and negotiatons. When the term employee is used, it shall mean those employees in the Bargaining Unit.

. . .

ARTICLE 6 - SENIORITY

A. Definitions: Seniority shall be defined as the continuous length of full-time service in the bargaining unit for which payment has been received by the employee. Seniority shall commence upon the successful completion of the six (6) months probationary period of employment and shall then be retroactive to the original date of hire.

. . .

C. Probationary Period: All newly hired employees shall serve a six (6) month probationary period of employment. Upon completion of the said probationary period, the employees shall be granted seniority rights from the original date of hire. During this probationary period of employment, probationary employees may be terminated without recourse to the grievance procedure.

D. Probationary Period Benefits: During the probationary period of employment, probationary employees shall be entitled to all fringe benefits except as specified elsewhere in this Agreement.

. . .

F. Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if any employee:

1. Quits;

2. Is discharged for just cause;

3. Is absent from work for a minimum of three (3) consecutive working days without notification to and approval by the Employer, unless the employee is unable to notify the employer due to a reasonable excuse;

4. Fails to report within three (3) working day after having been recalled from layoff unless unable to do so because of notice requirement for terminating his employment with an interim employer; in that case, the employee must notify the City within three (3) working

days that he will accept the recall and that he will report to work within ten (10) working days after receipt of the recall notice. Recall notices will be sent by registered mail to the last address given by the employee to the City;

5. Accepts other employment without permission while on leave of absence for personal or health reasons;

6. Fails to report for work at the termination of a leave of absence;

7. Retires;

8. Is on layoff status for more than one (1) year.

. . .

ARTICLE 20 - REFERENCES

To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions this Agreement shall control.

. . .

Appendix A4

Effective January 1, 1985

	Enter	Proba-tionary	1 yr.	2 yrs.	3 yrs.
. . .					
Police Clerk Dispatchers and Fire Dispatcher - Secretary	$8.00	$8.15	$8.28	$8.44	$8.59

. . .

Appendix A5

Regular Part-Time Employee Wage Schedule

For all regular part-time employees the following wage schedule shall apply.

. . .

Effective January 1, 1985

	Enter	Proba-tionary	1 yr.	2 yrs.	3 yrs.
Regular Part-Time Employees	$6.42	$6.55	$6.69	$6.81	$6.95

5. That the City by ordinance has established a Civil Service Commission to conduct examinations of applicants for positions in the classified service of the City and to adopt rules and regulations governing conditions of employment and personnel policies to carry out the provisions of the ordinance; and that the Civil Service Commission did adopt Rules and Regulations in accordance with this ordinance which provided in pertinent part, as follows:

RULE IX
CONFLICT

If any provision in these Rules and Regulations conflict with the provisions in any collective bargaining agreements entered into by the City of Greenfield with its employees, the

provisions in the collective bargaining agreements shall prevail.

6. That on or about September 27, 1983, the City hired an individual by the name of Betty A. Slivon as a temporary employe to fill the position of Clerk Typist in the Police Department while the incumbent in that position was on maternity leave; that Slivon was initially paid at the entry rate specified in the collective bargaining agreement but on November 1, 1983, she was informed that her rate should have been $5.97 per hour and deductions were made from her pay for any over payment; that on November 9, 1983, a grievance was filed over the failure to pay the appropriate contractual rate; that Slivon worked until February 25, 1984, when the incumbent returned from maternity leave; that after three days, the incumbent resigned her employment and Slivon was reemployed as a temporary employe on March 1, 1984 and worked until November 29, 1984 when the position was filled from the Civil Service eligibility list; that the above grievance was processed through the grievance procedure and was appealed to arbitration; that under the date of March 8, 1985, the arbitrator issued an award which held that the City violated the agreement by failing to pay Slivon the contractual wage rate and by failing to provide her with the contractual fringe benefits; and that the arbitrator stated, in pertinent part, in his award the following:

> Employer argues that the temporary status of grievant here is provided for in the Civil Service Commission Rules and Regulations at Rule No. 5, which at Section 4 provides for emergency appointments where no eligibility lists exist, and that said temporary appointments shall be made for up to three periods not to exceed 120 days per period, in support of its position that grievant here is a temporary employee and not covered by the terms of the Collective Bargaining Agreement. The undersigned finds that argument unpersuasive because the Civil Service Commission Rules and Regulations, at Rule No. 9, clearly provides: "If any provision in these Rules and Regulations conflict with the provisions in any collective bargaining agreements entered into by the City of Greenfield with its employees, the provisions in the collective bargaining agreements shall prevail." Furthermore, the Collective Bargaining Agreement at Article 20 establishes that to the extent that the provisions of the Agreement are in conflict with existing ordinances or resolutions this Agreement shall control. From the foregoing, the undersigned concludes it is the Collective Bargaining Agreement which is to be interpreted in this dispute rather than the rules and regulations of the Civil Service Commission. Turning then to the Agreement, the undersigned finds that by reason of the grievant performing the regular and customary duties of the position of Police Clerk Typist and Switchboard Operator, a position represented by the Union, the grievant here fulfills the definition of a regular employee, nothwithstanding the fact that she was hired as a temporary employee. The Agreement provides for no exclusion of temporary employees in the recognition clause, thereby creating the presumption of coverage.
>
> Furthermore, the Agreement, while on its face establishes a distinction between part-time employees and full-time employees, fails to create such a distinction for temporary full-time employees as it pertains to fringe benefits under the Agreement. Consequently, the undersigned concludes that temporary full-time employes enjoy the benefits of the Collective Bargaining Agreement since there is no exclusion of those benefits in the expressed terms of the Agreement. The foregoing is supported when reading Article 6, Section A, which defines seniority. Said provision states: "Seniority shall be defined as the continuous length of full-time service in the bargaining unit for which payment has been received by the employee." A reading of the definition suggests to the undersigned that regular full-time employees include temporary employees since there is no provision for exclusion of seniority for temporary employees contained at Article 6, Section A.

7. That on or about November 13, 1983, the Complainant was hired as a temporary employe to fill the position of Fire Department dispatcher/secretary while the incumbent of that position was on maternity leave; that the Complainant was paid $5.72 per hour with no benefits; and that the Complainant worked until sometime in March 1984 when the incumbent returned from maternity leave.

8. That on or about January 8, 1985, the Complainant was hired as a temporary employe to fill the Fire Department dispatcher/secretary position when the incumbent of that position resigned; that the Complainant was paid $6.42 per hour with no fringes; that after receipt of the Slivon arbitration award, the City granted Complainant the contractual wages and fringes of a regular full-time employe under the collective bargaining agreement retroactive to January 8, 1985; that on or about May 8, 1985, the Union filed the following grievance on behalf of the Complainant:

TO: Chief Szalacinski
Greenfield Fire Department

FROM: C. Ann Lango
Union Steward AFSCME Local 2

RE: Grievance on behalf of Fire
Dispatcher/Secretary employee CONNIE MERKEL

SUBJ: Violation of Article 2 Section A and Section B, Article 6 Section C and Section F, and any other appropriate section of the current labor agreement with AFSCME Local 2

On January 8, 1985, Mrs. Merkel was hired to fill the position of temporary full-time fire dispatcher secretary that she currently holds.

The City of Greenfield is attempting to fill this position from the outside, with a regular full time employee, after first offering it to all presently employed regular full time employees with negative results.

It is the union's position that as a member of the bargaining unit, Mrs. Merkel should be awarded this regular full time position immediately and that she be made whole.

_____ _____

C. Ann Lango
Union Steward AFSCME
Local 2

Connie Merkel

cc; Mr. Anthony Molter
AFSCME Representative

9. That the grievance was denied by the Fire Chief who indicated that the position would be filled from a list of individuals submitted by the Civil Service Commission who had passed its test; that Complainant took the Civil Service exam for this position but failed it; that the grievance was processed to the next step of the grievance procedure on or about May 17, 1985; that Anthony F. Molter by a letter dated July 24, 1985 to the Chairman of the Civil Service Commission reiterated its position that based on the arbitrator's award in the Slivon matter and the grievant's eight months of seniority, the contract required that the Complainant should automatically receive the dispatcher/secretary position; that the grievance was not resolved and was appealed to arbitration on January 28, 1986; and that the parties were given a panel of arbitrators by the Commission on or about February 3, 1986.

10. That sometime before August 19, 1985, two individuals passed the Civil Service exam for the dispatcher/secretary position and were certified to the Fire Chief for selection; that the Fire Chief selected one of these but that person declined the offer of employment; that the Fire Chief interviewed the second person but declined to offer her the job; that the Fire Chief asked for a new eligibility list and a second test was given; that the Complainant asked Staff

Representative Molter if she should take the exam and Molter advised her to do so; that Complainant did so but she failed to meet the minimum requirements of the exam; and that sometime later, a third exam was given but Complainant did not take it.

11. That in late 1985, the City and the Union entered into negotiations for a successor to the 1983-85 collective bargaining agreement; that during the course of these negotiations, the Union presented the following proposal to change the Recognition Clause to the City at a meeting on November 27, 1985:

> 1. Article 2 - Recognition: Revise Section A. to read as follows:
>
> The City hereby recognizes the Union as the exclusive Collective Bargaining representative for the purposes of engaging in conferences and negotiations establishing wages, hours and conditions of employment for all regular full-time, regular part-time and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court and Health Department, excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory, professional, confidential and managerial employees. Part-time employees shall receive fringe benefits under this Agreement on a pro rata basis, based on 2,080 hours/year. All full time temporary help shall not receive the following benefits:
>
> a) Health Insurance
>
> b) Pension
>
> c) Vacations
>
> d) Life Insurance
>
> Full time temporary help shall receive all other benefits. All existing full time temporary help, hired before 1-1-86 shall be grandfathered for all benefits.;

that on December 18, 1985, the City responded to the proposal on Recognition with the following proposal:

> 1. Article 2 - Recognition: Add the following new paragraph D. entitled Temporary Employees:
>
> Temporary employees are those hired for a specific period of time, or for a specific project who will be separated from the payroll at the end of the time period or specific project. Temporary employees shall not include seasonal employees and student help. Temporary employees shall receive the appropriate starting rate contained in Appendix A of this agreement. Temporary employees shall receive holiday pay as defined in Article 14 and overtime and call-in pay as contained in Article 10. Temporary employees shall receive no other fringe benefits.;

that after discussions on December 18, 1985, the City submitted on January 6, 1986, the following proposal on Recognition:

> Article 2 - Recognition: Add the following new paragraph D. entitled Temporary Employees:
>
> Temporary employees are those hired for a specific period of time, or for a specific project who will be separated from the payroll at the end of the time period or specific project. Temporary employees shall not include

seasonal employees and student help which are not covered by the terms of this agreement. Temporary employees shall receive the appropriate starting rate contained in Appendix A of this agreement. Temporary employees shall receive holiday pay as defined in Article 14 and overtime and call-in pay as contained in Article 10. In addition, after thirty (30) days of employment with the City, temporary employees shall be eligible for the sick leave benefits contained in Article 12 excluding paragraph D. of the agreement. Temporary employees shall receive no other fringe benefits.;

and that on January 13, 1986, the Union countered with the following proposal:

1. Article 2 - Recognition: Revise Section A. to read as follows:

   The City hereby recognizes the Union as the exclusive Collective Bargaining representative for the purposes of engaging in conferences and negotiations establishing wages, hours and conditions of employment for all regular full-time, regular part-time and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court and Health Department excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory, professional, confidential and managerial employees. Part-time employees shall receive fringe benefits under this Agreement on a pro rata basis, based on 2,080 hours/year.

2. Article 2 - Recognition: Add the following new paragraph entitled Temporary Employees: (Reletter paragraphs accordingly)

   Temporary employees are those hired to fill a specific vacancy for a period of time, and who will be separated from the payroll at the end of the time period where the vacancy is filled from the Civil Service List. Temporary employees shall not include seasonal employees and student help which are not covered by the terms of this agreement. Temporary employees shall receive the appropriate starting rate of the position being filled contained in Appendix A of this agreement. Temporary employees shall receive holiday pay as defined in Article 14 and overtime and call-in pay as contained in Article 10. In addition, after thirty (30) days of employment with the City, temporary employees shall be eligible for the sick leave benefits contained in Article 12 excluding paragraph D of the agreement. Temporary employees shall receive no other fringe benefits. All present temporary employees to be grandfathered in on all benefits.

12. That upon receipt of the panel of arbitrators, the parties did not select one from the panel but agreed to try to settle the matter in negotiations; that by a letter dated February 14, 1986, the City proposed the following concerning the Complainant's grievance and other grievances referred to as the Kelly girl grievances:

SETTLEMENT AGREEMENT

It is hereby agreed by and between the City of Greenfield and Local 2, AFSCME AFL-CIO (Greenfield Clerical) as follows:

1. The following language will be inserted into the successor collective bargaining agreement to the 1983-85 agreement between the parties:

Article II - Recognition - Add the following new paragraph entitled Temporary Employees:

> Temporary employees are those hired to fill a specific vacancy for a period of time and who will be separated from the payroll at the end of the time period when the vacancy is filled by a regular employee from the Civil Service list. Seasonal employees and student help are not temporary employees and are not covered by the terms of this agreement. Temporary employees shall receive the appropriate starting rate contained in Appendix A of this agreement. Temporary employees shall receive holiday pay as defined in Article XIV, Overtime and Call-In Pay as contained in Article X and, after thirty (30) days employment with the City, temporary employees shall be eligible for sick leave benefits contained in Article XII, excluding Paragraph D of the agreement. Temporary employees shall receive no other fringe benefits. Current temporary employees shall continue to receive the fringe benefits currently provided them.

Article IV - Management Rights - Add the following sentence to paragraph G:

> In addition, the City may use contracted services to fill in for regular employee vacancies for up to sixty (60) days.

2. The Union agrees to withdraw all pending grievances involving contracting out to fill vacant positions and the use of temporary employees.

3. It is agreed that contracted employees currently with the City will be allowed to continue until the vacancy is filled by a regular employee.

4. Neither party admits, by the terms of the settlement agreement, that it has violated the collective bargaining agreement in any way in the past;

that by a letter dated February 19, 1986, the Union rejected the City's proposal and counterproposed the following:

TENTATIVE SETTLEMENT AGREEMENT

It is hereby agreed by and between the City of Greenfield and Local 2, AFSCME AFL-CIO (Greenfield Clerical) as follows:

The following language will be inserted into the successor collective bargaining agreement to the 1983-85 agreement between the parties:

1. Article 2 - Recognition: Revise Section A. to read as follows:

> The City hereby recognizes the Union as the exclusive Collective Bargaining representative for the purposes of engaging in conferences and negotiations establishing wages, hours and conditions of employment for all regular full-time, regular part-time and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court and Health Department

excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory professional, confidential and managerial employees. Part-time employees shall receive fringe benefits under this Agreement on a pro rata basis, based on 2,080 hours/year.

2. Article II - Recognition - Add the following new paragraph entitled Temporary Employees:

Temporary employees are those hired to fill a specific vacancy for a period of time and who will be separated from the payroll at the end of the time period when the vacancy is filled by a regular employee or from the certified Civil Service list. Seasonal employees and student help are not temporary employees and are not covered by the terms of this agreement. Temporary employees shall receive the appropriate starting rate of the position they are filling as contained in Appendix A of this agreement. Temporary employees shall receive holiday pay as defined in Article XIV, Overtime and Call-In Pay as contained in Article X and, after thirty (30) days of employment with the City, temporary employees shall be eligible for sick leave benefits contained in Article XII, excluding paragraph D of the agreement. Temporary employees shall receive no other fringe benefits. Current temporary employees shall continue to receive the fringe benefits currently provided them.

3. Because of Connie Merkel's tenure, the City agrees to permanently appoint Connie Merkel to the position of Fire Dispatcher/Secretary.

4. The Union agrees to withdraw all pending grievances involving contracting out to fill vacant positions and the Connie Merkel grievance.

5. It is agreed that contracted employees currently with the City will be allowed to continue until the vacancy is filled by a regular employee or from the certified Civil Service list but no longer than thirty (30) days from the signing of this Tentative Settlement Agreement.

6. This tentative settlement agreement is subject to ratification by both parties.

13. That under the date of February 7, 1986, nine members of the bargaining unit filed a grievance with the City asserting that Complainant's employment did not conform with hiring standards and she should be terminated; that the Union Steward and Mr. Molter were sent copies of this grievance; that the Steward and Molter did not assist in the processing of this grievance and considered the grievance not to be a grievable item; that this grievance was denied by the City Clerk on February 12, 1986 and appealed to the next step that same date; that the grievance was presented to the City's Personnel Committee on February 25, 1986 but was placed on the next agenda and Molter was to be invited to attend that meeting which was scheduled for March 12, 1986; and that at the March 12, 1986 meeting no action was taken on the grievance and it was placed on the next agenda.

14. That by a letter dated March 11, 1986, Molter informed the City as follows:

> Enclosed you will find a revised proposal to your proposal to settle all pending grievances involving contracting out to fill vacant positions and the Connie Merkel grievance.

Those changes underlined are needed to show that we bargain in good faith for the majority of our members in this bargaining unit. In addition, this agreement would resolve all grievances in the Settlement Agreement and the grievance filed by the City Hall Clerical.

If you recall, we would not be in this position had the Personnel Committee agreed to negotiate a change in the existing Contract Agreement for temporary employees in the Betty Slivon grievance. Instead the Alderman on the Personnel Committee told the Union to take the Slivon grievance to arbitration. The Union did file for arbitration and the arbitrator's decision recognized that temporary employees have the full protection and benefits under the Contract Agreement.

The Union would suggest that a meeting of the parties be held before the next Wednesday's Personnel Committee meeting and that this meeting include yourself, the Mayor, the Steward, Ms. C. Ann Lango and myself. If this is possible, please give me a call so that a date may be set.;

that the revised proposal was as follows:

TENTATIVE SETTLEMENT AGREEMENT

It is hereby agreed by and between the City of Greenfield and Local 2, AFSCME, AFL-CIO (Greenfield Clerical) as follows:

The following language will be inserted into the successor collective bargaining agreement to the 1983-85 agreement between the parties.

1. Article 2 - Recognition: Revise Section A. to read as follows:

   The City hereby recognizes the Union as the exclusive Collective Bargaining representative for the purposes of engaging in conferences and negotiations establishing wages, hours and conditions of employment for all regular full-time, regular part-time and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court and Health Department excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief and all supervisory professional, confidential and managerial employees. Part-time employees shall receive fringe benefits under this Agreement on a pro rata basis, based on 2,080 hours/year.

2. Article II - Recognition - Add the following new paragraph entitled Temporary Employees:

   Temporary employees are those hired to fill a specific vacancy for a period of time and who will be separated from the payroll at the end of the time period when the vacancy is filled by a regular employee or from the certified Civil Service list. Temporary or part-time employees who have passed the Civil Service qualifying exam shall have preference at the time the vacant position is filled. Seasonal employees and student help are not temporary employees and are not covered by the terms of this Agreement. Temporary employees shall receive the appropriate starting rate of the position they are filling as contained in Appendix A of this Agreement. Temporary employees shall receive holiday pay as defined in Article XIV, Overtime and Call-In Pay as contained in Article X and, after thirty (30) days of employment with the City,

temporary employees shall be eligible for sick leave benefits contained in Article XII, excluding paragraph D of the agreement. Temporary employees shall receive no other fringe benefits. Current temporary employees shall continue to receive the fringe benefits currently provided them.

3. Article IV - Management Rights - Add the following sentence to Paragraph G:

   In an emergency, the City may use contracted services to fill in for regular employee vacancies for up to thirty (30) days.

4. The Union agrees to withdraw all pending grievances involving contracting out to fill vacant positions and the Connie Merkel grievance.

5. It is agreed that contracted employees currently with the City will be allowed to continue until the vacancy is filled by a regular employee or from the certified Civil Service list but no longer than thirty (30) days from the signing of this Tentative Settlement Agreement.

6. This tentative settlement agreement is subject to ratification by both parties.;

that by a letter dated March 19, 1986, the City submitted a counterproposal to the Union's March 11, 1986 proposal which provided as follows:

TENTATIVE SETTLEMENT AGREEMENT

It is hereby agreed by and between the City of Greenfield and Local 2, AFSCME, AFL-CIO (Greenfield Clerical) as follows:

The following language will be inserted into the successor collective bargaining agreement to the 1983-85 agreement between the parties effective January 1, 1986.

1. Article 2 - Recognition: Revise Section A to read as follows:

   The City hereby recognizes the Union as the exclusive collective bargaining representative for the purposes of engaging in conferences and negotiations establishing wages, hours, and conditions of employment for all regular full-time, regular part-time, and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court, and Health Department, excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory professional, confidential and managerial employees. Part-time employees shall not receive any fringe benefits under this Agreement.

2. Article 2 - Recognition: Revise to read as follows:

   Temporary employees are those hired to fill a specific vacancy for a period of time and who will be separated from the payroll at the end of the time period when a certified Civil Service list is available, the vacancy is filled by a regular employee or after a six month time period. Seasonal employees and student help are not temporary employees and are not covered by the terms of this Agreement. Temporary employees shall receive the appropriate starting rate of the position they are filling as contained in Appendix A of this Agreement. Temporary employees shall receive holiday pay as defined in Article XIV, Overtime and Call-in Pay as contained in

Article X. Temporary employees shall receive no other fringe benefits. Current temporary employees shall continue to receive fringe benefits currently provided them.

3. Article IV - Management Rights: Add the following sentence to Paragraph G:

   The City may use contracted services to fill in for regular employee vacancies for up to forty-five (45) working days.

4. E1. Work In Higher Classification: A regular full time employee performing work in a higher classification which was authorized by the Mayor subject to the review of the Personnel Committee and has worked for a period of forty (40) hours or more during one week period, shall receive the rate of pay that will provide an increase over the pay rate they receive in their own job classification for each hour worked during the subject work period.

5. When a vacancy occurs or a new position is created, the vacancy or new position shall be posted on all City bulletin boards throughout the City within five (5) days after the last day that the employee worked, and all present full-time or part-time employees with the City six (6) months or more may post within five (5) days of posting for the vacancy or new position, provided they become qualified by passing a Civil Service qualifying exam. If no one passes the Civil Service qualifying exam, or no one posts for the vacancy or new position with the City, then the City shall advertise a vacancy or new position on the outside.

6. Article 6 - Seniority: Add new Paragraph G - Notification of Change:

   The City agrees to give written notice to the Union or the Union's designee concerning hirings, termination, resignations, retirements, promotions, or transfers involving bargaining unit members.

7. The Union agrees to withdraw all pending grievances involving contracting out to fill vacant positions and the Connie Merkel grievance.

8. It is agreed that contracted employees currently with the City will be allowed to continue until the vacancy is filled by a regular employee or from the certified Civil Service list, but no longer than forty-five (45) working days from the ratification of this Tentative Settlement Agreement.

9. This Tentative Settlement Agreement is subject to ratification by both parties.;

that in May, 1986, the City and the Union reached tentative agreement on essentially the language of the City's proposal of March 19, 1986 and, in particular, Item 7, as well as other items; that on or about May 27, 1986, the Union held a ratification meeting on the terms of the tentative agreement at which time the Complainant became aware of the provision withdrawing her grievance and her dismissal within 45 working days of the ratification of the Tentative Settlement Agreement; that the agreement was ratified with a vote of 18 for and 4 against; that the Complainant later approached Molter concerning her status and that Molter indicated that the Union was doing the best they could for the majority and that Complainant's grievance would be withdrawn and her employment with the City ended.

14. That the City and the Union were unable to reach agreement on two issues; holidays and residency, and this dispute went to mediation/arbitration with a decision selecting the City's final offer being issued on February 17, 1987 which was ratified by the parties thereafter; and that pursuant to said agreement, Complainant was terminated by the City on April 10, 1987.

15. That the Union's handling of Complainant's grievance and negotiating of a settlement agreement as part of the successor collective bargaining agreement which resulted in the withdrawal of her grievance and the termination of her employment was not arbitrary, discriminatory or done in bad faith; and that the Union at all times material herein fairly represented the Complainant.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That District Council 48, AFSCME, AFL-CIO and its affiliated Local 2 did not violate its duty of fair representation with respect to the Complainant by withdrawing her grievance and by agreeing to contract language providing for her termination, and accordingly did not violate Secs. 111.70(3)(b) 1 and 4 of the Municipal Employment Relations Act.

2. That having concluded that District Council 48, AFSCME, AFL-CIO and its affiliated Local 2 did not violate its duty of fair representation to Complainant, there is no jurisdiction to determine the allegations that the City of Greenfield violated Sec. 111.70(3)(a)5 of the Municipal Employment Relations.

Upon the basis of the above and foregoing Findings of Fact, Conclusions of Law, the Examiner makes the following;

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 31st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with

(Footnote 1 continued on Page 14)

(Footnote 1 continued)

the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

CITY OF GREENFIELD

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In her complaint initiating these proceedings, Complainant alleged that the Union and the City had committed prohibited practices in violation of Secs. 111.70(3)(b)1 and 4 and 111.70(3)(a)5, respectively, by the Union's violation of its duty of fair representation to Complainant by its agreement to withdraw her grievance and allow her to be terminated from her employment and by the City's violation of the Complainant's seniority rights under the parties' collective bargaining agreement. The Union denied that it committed any prohibited practice and affirmatively asserted that it acted in the best interest of the members of the bargaining unit it represented. The City answered that the complaint failed to allege that the Union breached its duty of fair representation so no action could be taken against the City, and alternatively, that the City did not violate the terms of the agreement under which the Complainant was terminated.

Complainant's Position

The Complainant contends that inasmuch as she was employed continuously from January 8, 1985 through April 10, 1987 in a position covered by the agreement and as she was paid in accordance with the terms of said agreement, she had acquired seniority rights on or after July 8, 1985, and could only lose them as provided in Article 6, Section F of the agreement. The Complainant points out that the Union's representatives supported this position by filing and processing a grievance on her behalf. She notes that her view of the merits of this grievance was supported consistently by the Union through February 21, 1986. The Complainant submits that things changed when on February 7, 1986, over a 1/3 of the members of the bargaining unit filed a grievance over her continued employment. She argues that when the Union's representative, Molter, was unsuccessful in having this grievance withdrawn, the Union decided to sacrifice her seniority rights by its proposal to the City on March 11, 1986. Complainant refers to the Union's cover letter for the March 11, 1986 proposal to the City as establishing that her seniority rights were compromised as a result of political expediency and not part of the give and take in negotiations. Complainant argues that the Union bowed to the bargaining unit faction that wanted her terminated. She maintains that the Union violated its duty of fair representation by compromising her seniority rights by carrying out the will of the majority at her expense.

Complainant contends that the City violated Article 6, Section F of the agreement by terminating her because it could not rely on the provisions of the settlement agreement which were negotiated as a result of the Union's unfair representation of her. She asks that she be reinstated, made whole and granted reasonable attorneys fees and costs.

UNION'S POSITION

The Union contends that it did not violate the duty of fair representation to the Complainant. It relies on case law that the duty of fair representation is breached only when the Union's conduct is arbitrary, capricious or in bad faith. It asserts that a union has a great deal of discretion to decide whether or not to pursue a grievance through arbitration even where the grievance has merit. It argues that the evidence presented fails to prove that the Union's conduct toward the Complainant was arbitrary, capricious or in bad faith.

It maintains that its decision was not arbitrary because it had a reasonable basis for withdrawing the grievance because it was able to secure favorable language in the agreement and to settle another grievance on favorable terms. It notes that settling grievances in negotiations is common and both sides seek to change contract language to modify the results of an unfavorable arbitration decision. It submits that the end result was part of the give and take of negotiations and was not arbitrary conduct on the part of the Union.

The Union insists that there was no discrimination against the Complainant. It claims that no animus against the Complainant was demonstrated and although the City Hall employes filed a grievance concerning the position Complainant held, this was based on her failure to pass the civil service exam and was not based on personal animosity toward Complainant. Additionally, the Union points out that the Union leadership opposed that grievance as not valid and without merit and none of the employes who signed this grievance were on the bargaining team. The Union also takes the position that it did not act in bad faith simply because her grievance was not resolved to her satisfaction. The Union alleges that prior Commission cases have held that great deference should be given the bargaining representative in negotiations when reviewing the Union's conduct to determine whether its duty of fair representation has been met. The Union contends that the bargaining representative has to make choices between conflicting interests and here the negotiating committee acted in good faith in doing the best for the majority of the unit and the mere fact the Complainant did not benefit from this choice does not mean the Union acted in bad faith. The Union urges that the facts of the case do not warrant the unusual remedy of attorneys fees even if Complainant's position is upheld. The Union concludes that the evidence fails to establish that it violated its duty of fair representation to Complainant and requests that the complaint be dismissed.

CITY'S POSITION

The City contends that the Complainant's case is premised on the mistaken belief that her seniority rights had vested. The City disputes and denies that the Slivon decision required the City to give her a permanent position, especially when the Complainant repeatedly failed the civil service exam. The City points out that it has always disagreed with the Union and the Complainant that she is entitled to the position both at the time the grievance was filed and thereafter. It distinguishes the Slivon arbitration from the Complainant's grievance on several basis including the failure of Slivon to raise any question about entitlement to the position. It insists that the decision only held that a temporary employe was entitled to back pay and fringe benefits and was not entitled to the job or seniority rights. It points out that the grievance was filed by the Complainant after only four months on the job and sought permanent job entitlement, an issue not decided by the arbitrator in Slivon and involves an area outside the ambit of fringe benefits. The City submits that its responses were consistent that the Complainant had no entitlement to the job because it would be filled by an applicant who passed the civil service exam which the Complainant failed to do.

The City claims that the negotiations with the Union were good faith efforts by which the Union secured language which included temporary employes in the bargaining unit, placed limitations on their use and resolved a number of grievances and other problems on the use of temporary employes and allowed the City to hire temporary employes without any continuing right to employment. It submits that resolving the Complainant's grievance was in the best interest of the bargaining unit given the inapplicability of Slivon and the improvement of language in the new agreement. The City posits that the Union could have lost Complainant's grievance and the bargaining unit would suffer continuing problems with the use of temporary employes. The City submits that the Union's decision to resolve Complainant's grievance was not arbitrary, discriminatory or in bad faith and the complaint should be dismissed.

COMPLAINANT'S REPLY

In reply, the Complainant disputes the City's position on the merits of her grievance and applies the principles of stare decisis to the arbitrator's award in the Slivon case arguing that the City's contention is without merit. She notes that the City treated the Complainant as an employe covered by the contract for wages and fringe benefits, dues deduction and the right to file a grievance under this arbitrator's award, and thus, these actions are inconsistent with the City's claim that the Complainant was not a member of the bargaining unit. She concludes that her grievance was meritorious.

Complainant denies that the Union dropped her grievance in exchange for concessions by the City in negotiations. She submits that the exchange of proposals by mail fails to establish any quid pro quo for the dropping of the grievance. She notes that the Union steadfastly maintained the Complainant's position until March 11, 1986 when it reversed its position to appease the meanspirited faction of employes who were jealous of the fact that the Complainant

did not have to pass the civil service exam for the position as they had to do. Complainant maintains that this is invidious discrimination because the Union sacrificed the seniority rights of the minority to appease the more politically influential faction within the bargaining unit, and violated the duty of fair representation.

DISCUSSION

The facts of the instant case are essentially undisputed. The issue presented is whether the Union violated its duty to fairly represent the Complainant. The duty of fair representation obligates a union to represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 2/ The duty applies to both the negotiation of a collective bargaining agreement and the administration of a collective bargaining agreement by processing a grievance. 3/ The scope of the duty of fair representation in the negotiation of a collective bargaining agreement allows the union a wide range of reasonableness, subject always to complete good faith and honesty of purpose, in the exercise of its discretion. 4/ The law recognizes that a union is made up of many diverse interests, each of which has its own narrow perspective. Inevitably the interests of these divergent groups will come into conflict and the union has to reconcile conflicting views, and in doing so, it may adopt a position contrary to one group or another but this does not by itself establish a breach of the duty. 5/ The union's duty to fairly represent its members is breached only when the union's actions are arbitrary, discriminatory, or taken in bad faith. 6/

The thrust of Complainant's case is that the Union violated its duty of fair representation when it withdrew the Complainant's grievance and agreed to her termination because this action was based on the grievance filed by nine other bargaining unit employes. The Complainant insists that the Union reversed its position with respect to her case simply to satisfy the nine employes because it was politically expediate to do so. A union can make seniority decisions within a wide range of reasonableness in serving the interests of the employes it represents. 7/ It cannot make a decision solely for the benefit of a stronger, more politically favored group at the expense of the minority, 8/ but it is not required to sacrifice the rights of the majority to placate the minority. The Complainant cited a number of cases including Alvey v. General Electric Co., 104 LRRM 2838 (7th Cir. 1980) and Barton Brands, Ltd. v. NLRB, 91 LRRM 2241 (7th Cir. 1976). In Alvey and Barton Brands, the established seniority rights of certain minority employes were taken away at the behest of a majority who stood to benefit by this change. 9/ In Barton Brands, employes from another plant who had been merged on the seniority list were later entailed, and in Alvey, the recall rights of employes who had been pooled from two plants, were changed to essentially entail the minority. In these cases, no other rationale was given for the change in established seniority rights and the courts held such conduct violated the duty of fair representation. The facts of the instant case are clearly distinguishable from these cases. In the instant case, the City never

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2/ Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1974).

3/ Flight Officers v. United Air Lines, 114 LRRM 3347 (N.D. Ill, 1983).

4/ Ford Motor Co. v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953).

5/ Id.

6/ Vaca v. Sipes, supra; Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

7/ Ford Motor Co. v. Hoffman, supra; Milwaukee County, Dec. No. 18112-B (WERC, 2/83).

8/ Alvey v. General Electric Co., 104 LRRM 2838 (7th Cir. 1980); Barton Brands, Ltd. v. NLRB, 91 LRRM 2241 (7th Cir. 1976).

9/ Id.

recognized any accumulation of seniority on the part of the Complainant and always considered her a temporary employe. The Union's initial position, which coincided with that of the Complainant, was based on an arbitration decision, the result of which the City and Union were in disagreement. It is clear that the Union and the City did not agree that the Complainant had any seniority rights to her position as this was the subject of the grievance filed on May 8, 1985 and appealed to arbitration. Reasonable minds could differ as to the interpretation of the arbitration award. The decision could be interpreted as espoused by Complainant. On the other hand, there is support for the City's position. The issue stipulated to by the parties in that case was whether the City violated the agreement when it failed to pay Slivon the entry rate in Appendix A and failed to provide her with contract fringe benefits. This could be interpreted as simply involving an issue of money and fringe benefits which did not include seniority as Slivon was not employed past November 29, 1984. The arbitration can be reasonably interpreted as simply determining the monetary payment owed to an employe hired to temporarily fill a regular full-time position in the bargaining unit and not to determine the seniority rights of an employe. The arbitrator did not discuss probationary periods or the term "newly hired employees" in Article 6, Section C. The Complainant's present theory that she gained seniority on or about July 8, 1985 does not explain the basis for her filing a grievance on May 8, 1985, two months prior to this date. It must be noted that under the terms of that agreement seniority is retroactive to the original date of hire only after completion of a six month's probationary period. Although the Complainant has argued that the principles of stare decisis should be applied to the arbitration award, the traditional arbitral rule is that a prior arbitration decision only has persuasive force which is always a question of degree. 10/ Thus, the Complainant's grievance may not have been upheld by another arbitrator on the basis of the Slivon arbitration. The Union's representative, Molter testified that there was always a risk of losing the Complainant's case in arbitration. 11/ But as noted above, the arguments espoused by the Complainant are also reasonable and logical and may have carried the day. The point here is that reasonable minds could disagree that Complainant ever gained any seniority. This is different than an undisputed agreement to provide for such seniority which is then taken away solely to benefit the majority of the Union. Here, there was no showing that the majority would benefit from the Complainant's termination. The nine employes who filed the grievance may have satisfactory reasons for their position. They may object to the City's long term use of an employe hired for a short term without filling it by civil service rules. They may have questioned whether a temporary employe who was hired to replace another employe on maternity leave for a period of seven months would be entitled to the position after the employe returned from maternity leave. They may believe that the City is using unqualified employes which might increase their workload or they might simply disagree with merits of the grievance and believe that arbitrating the grievance would result in a loss by which the City would be able to exclude temporary employes from any limitations by the Union and thereby dissipate the bargaining unit.

Even if the Complainant's grievance was meritorious and valid, the Union is free to resolve legitimate differences between members of the bargaining unit. The evidence fails to establish that the Union did anything other than that in this case. The evidence establishes that the City steadfastly refused to accept the Union's position that the Complainant had seniority rights to the job. A union does not necessarily breach its duty of fair representation where it acquiences in an employer's demand for a contract provision which abrogates previously established seniority rights of employes. 12/ Even prior to the filing of the grievance by the nine employes, the Union had proposed contract language which provided for the termination of temporary employes. 13/ In its proposal which provided for the separation of temporary employes, the Union tacitly

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10/ Elkouri & Elkouri How Arbitration Works, (4th Ed., 1985) at 430.

11/ Tr. - 264.

12/ See Strick Corporation, 241 NLRB No. 27 (1979).

13/ Ex. - 41. (January 13, 1986 Union proposal to the City).

conceded its argument on Complainant's grievance which was that a temporary employe gained seniority and could not be terminated without meeting the requirements of Article 6, Section F. The provision allowing separation of a temporary employe inferred the temporary employe earned no seniority. By other language the Union had attempted to secure the job for the Complainant without taking and passing the exam. The City was strongly opposed to this. The agreement was silent on temporary employes and the City was proposing with clear language that it would recognize the Union as representing them plus their benefits and rights were spelled out. This benefitted the Union and all that remained was the clause grandfathering the Complainant in the position. How far the Union should go in pursuing this is something within the Union's discretion. It might have gone to mediation/arbitration with this issue. The Union did not prevail on the issues it took and had this issue been also taken to arbitration without success, the language of the agreement may have stayed the same. The result could have been that the issue of temporary employes being represented by the Union would arguably have been waived in bargaining. Furthermore, had the Union taken the Complainant's case to grievance arbitration and lost, there would be no pressure on the City to make any concessions to the Union with respect to temporary employes.

The evidence fails to prove that the Union did anything other than consider the legitimate concerns of its members and do what it thought was the best for the majority. The Complainant's arguments based on the principles set forth in Alvey and Barton Brands are not applicable here. The facts in the instant case are distinguishable from those in Alvey and Barton Brands and there is no basis to conclude that the Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith. Thus the Union did not violate its duty to fairly represent the Complainant.

Having concluded that the Union did not breach its duty of fair representation toward Complainant, the Examiner has no authority to consider her breach of contract claims against the City. 14/ Therefore, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 31st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

14/ Mahnke v. WERC, 66 Wis.2d 524 (1975) at 532.