

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 PRAIRIE DU CHIEN POLICE DEPARTMENT :
 EMPLOYEES UNIT OF LOCAL 1972, AFSCME :
 :
 and : Case 42
 : No. 41803
 : MA-5464
 CITY OF PRAIRIE DU CHIEN :
 (POLICE DEPARTMENT) :
 :
 :

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, on behalf of Prairie du Chien Police Department Employees Unit of Local 1972, AFSCME.

Mr. Thomas F. Peterson, City Attorney, on behalf of the City of Prairie du Chien.

ARBITRATION AWARD

Prairie du Chien Police Department Employees Unit of Local 1972, AFSCME, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Prairie du Chien, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on May 3, 1989 in Prairie du Chien, Wisconsin. 1/ There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 6, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties did not formulate a statement of the issues. Based upon the positions of the parties, it is concluded that the issues to be decided may be stated as follows:

Did the City violate Section 9.04 of the parties' Agreement by not filling the 2nd Sergeant position until October 14, 1987? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1986-1987 Agreement are cited:

ARTICLE IX - JOB POSTING AND TRANSFERS

9.01 A vacancy shall be defined as a job opening within the bargaining units (sic) not previously existing or a job opening of within the bargaining units (sic) created by the termination employment, promotion or transfer of existing personnel.

. . .

9.04 The Employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined. However, all vacancies, as defined in 9.01, shall be filled in not more than thirty (30) calendar days, unless it can be established that the need for the job no longer exists.

BACKGROUND

The parties stipulated that the evidence presented in the other cases heard on January 19 and 27, 1989 is included as evidence in this case as well. The parties also stipulated to the following facts:

1/ The instant grievance was originally one of five grievances that were to be heard and was tentatively settled at the hearing, but that settlement was subsequently rejected by City and the grievance proceeded to arbitration.

- (1) 1st Sergeant Weber retired June 1, 1987.
- (2) The Chief posted the 1st Sergeant position June 2, 1987 and the posting was taken down June 15, 1987.
- (3) The Chief made his recommendation to the Police and Fire Commission (PFC) on July 2, 1987 that 2nd Sergeant Randall Schmidt be promoted to the position of 1st Sergeant.
- (4) The PFC approved the promotion of Schmidt to 1st Sergeant on July 13, 1987.
- (5) Schmidt was notified by letter of July 15, 1987 from the Chief that he had been promoted to the position of 1st Sergeant.
- (6) Schmidt passed his probation period after sixty (60) days in the position of 1st Sergeant.
- (7) The 2nd Sergeant position was posted on September 2, 1987 and the posting was taken down on September 9, 1987.
- (8) The Chief made his recommendation to the PFC on September 9, 1987 that Patrolman Gerald Ostrander be promoted to the position of 2nd Sergeant.
- (9) The PFC approved the promotion of Ostrander to the position of 2nd Sergeant on October 14, 1987.
- (10) The Chief notified Ostrander by letter of October 16, 1987 that he had been promoted to the position of 2nd Sergeant.
- (11) Ostrander was a "Patrolman" and the position in question is "Sergeant" with a difference in pay rate of 41 cents per hour.
- (12) Ostrander satisfactorily passed the 60-day probation period 60 days from the date of his promotion (October 14, 1987).

Prior to Weber's retirement, the Chief had made a request to the City Council for an Assistant Chief position. The Council began debating in June of 1987 whether to create and fill an Assistant Chief position or to fill as a Patrol position or whether to fill the vacancy at all. The Council sent the question to the PFC and the question went back and forth between the Council and the PFC. Thomas Lessard, a part-time officer, began to work Weber's spot in the rotation on a regular basis on July 4, 1987 as a Patrolman, initially being hired on a temporary basis for thirty days. As the debate continued, the Chief sought and received approval from the Council every thirty days to continue hiring Lessard. Near the end of August or the first part of September of 1987

the Council decided to abandon the idea of creating an Assistant Chief position and on September 2, 1987 the 2nd Sergeant position was posted and the position was ultimately filled by Officer Ostrander, as noted in the stipulations set forth above.

The Union grieved the City's action in not posting and filling the 2nd Sergeant position as soon as Schmidt was promoted to the 1st Sergeant position.

The parties attempted, but were unable, to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the City violated the parties' Agreement by failing to fill the 2nd Sergeant position in a timely manner. According to the Union, the position became vacant when Schmidt was promoted to 1st Sergeant on July 13, 1987. Section 9.04 of the Agreement provides, in relevant part, that "all vacancies, as defined in 9.01, shall be filled in not more than thirty (30) calendar days, unless it can be established that the need for the job no longer exists." Section 9.01 defines vacancy ". . . as a job opening within the bargaining units (sic) not previously existing or a job opening within the bargaining units (sic) created by the termination of employment, promotion or transfer of existing personnel." By not filling the 1st Sergeant vacancy before July 1, 1987, the City violated the Agreement; however, this was not grieved. Under the terms of the Agreement, the City should have filled the

2nd Sergeant position no later than August 12, 1987, i.e., thirty days from when Schmidt was promoted from 2nd Sergeant to 1st Sergeant on July 13, 1987. In fact, the 2nd Sergeant position was not filled until October 14, 1987.

The Union also asserts that the City acknowledged in its responses to the grievances that it violated the contract in this matter. In response to any argument from the City that the position was not filled because the Council was considering creating an Assistant Chief position and because of the unfortunate personal problems of the Chairman of the Personnel Committee, the Union asserts that such matters did not diminish the City's obligation to comply with the terms of the Agreement, specifically Section 9.04. The discussions regarding the creation of an Assistant Chief position were long term and neither argument overcomes the "strict contractual requirement that vacancies be filled within thirty (30) days." Further, the City never requested an extension on the time period from the Union.

The delay in filling the position resulted in a loss in pay for Ostrander of 41 cents per hour from the time the position should have been filled per the contract and when Ostrander was actually promoted to the position. The Union requests that the City be found to have violated the Agreement and that it be ordered to make Ostrander whole for his losses in pay.

City

The City takes the position that it did not violate the Agreement for the following reasons: "Section 9.01 of the contract specifically states what a vacancy consists of and how a vacancy is created and thereafter Sections 9.02, 9.03 and 9.04 go into the specifics of posting for and filling of a vacancy."

The City concedes that Weber's retirement created a vacancy and that the promotion of Schmidt to the 1st Sergeant position in turn left the 2nd Sergeant position open; however, the City contends that the Council was debating whether there was a need for the 2nd Sergeant position and that, therefore, it was within its rights under Section 9.04. Section 9.04 of the Agreement states, in part, that all vacancies, as defined in Section 9.01, shall be filled within thirty days, unless it can be established that the need for the job no longer exists. That decision does not set forth the procedure of how the determination of "no need" is to be arrived at, but a determination by the Council to that effect "would certainly suffice to meet the language set forth in Section 9.04." The Council entered into a debate as to whether or not to create an Assistant Chief position or whether to fill the positions vacated by Weber and Schmidt. According to the City, at least for that period of time it was established that the position of 2nd Sergeant was not needed. Hence, the City was within its rights not to promote Ostrander to the position until the Council determined that the position was still necessary.

DISCUSSION

Section 9.01 of the Agreement includes within the definition of a "vacancy" "a job within the bargaining units (sic) created by the termination of employment, promotion or transfer of existing personnel." Section 9.04 in turn provides that:

The Employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined. However, all vacancies, as defined in 9.01, shall be filled in not more than thirty (30) calendar days, unless it can be established that the need for the job no longer exists.

In this case the initial "vacancy" was created by Weber's retirement and when Schmidt was promoted to the 1st Sergeant position on July 13, 1987, that created a "vacancy" in the 2nd Sergeant position within the meaning of Section 9.01. Pursuant to Section 9.04, the City then had thirty calendar days to fill the 2nd Sergeant position unless it could be established that "the need for the job no longer exists."

The City argues that the City Council's and the PFC's debate over whether to create an Assistant Chief position established, at least for that period of time, that the need for the job no longer existed. There are a number of problems with that argument. First, the debate appears to have been over whether to create another management position in the Police Department which would include the duties performed by the 2nd Sergeant. In other words, the debate was in part over whether the need for a 2nd Sergeant position would continue or whether the job's duties would be subsumed into the duties of an Assistant Chief position. The debate/consideration of the question did not establish that the need for the job no longer existed, as that was part of the question being debated. Section 9.04 gave the City thirty calendar days to make that decision and to fill the vacancy if it decided the job was still needed. While that might not seem like enough time to properly consider the issue and take appropriate action, that is the time period that was expressly

agreed to by the parties and set forth in their Agreement. 2/ It is also noted that in this case the City had more than thirty days to consider the issue, since Weber informed the City in early May that he was retiring as of June 1st. Thus, the City had almost three months to consider the question and reach a decision within the contractual time limit. Further, the City did not attempt to obtain an extension of the time limit from the Union. Secondly, it appears that the duties of the 2nd Sergeant position continued to be performed after Schmidt was promoted out of the position, as was indicated in the Chief's letter of July 15, 1987 to Schmidt advising him of his promotion to 1st Sergeant. That letter stated, in relevant part, that:

Since the City Council directed me not to fill the Sergeant of Police position, I am assigning you the responsibility for all Police personnel under your rank. This will be until the City Council takes further action on the Sergeant position.

On the basis of the above, it is concluded that under the terms of Section 9.04 of the parties' Agreement, the City had thirty calendar days from the date of Schmidt's promotion to 1st Sergeant (July 13, 1987), i.e., until August 12, 1987, to post and fill the 2nd Sergeant position or it had to establish that the position was no longer needed. Since the City decided to keep the position, it was required to post and fill the position within the contractual time limit. Therefore, it is further concluded that the City violated Section 9.04 of the parties' Agreement by not filling the 2nd Sergeant position until October 14, 1987 when Ostrander was promoted to the position.

Based upon the above and foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The City violated Section 9.04 of the parties' 1986-1987 Agreement by not filling the 2nd Sergeant position until October 14, 1987. Therefore, the City is directed to pay to Ostrander the difference in the pay he would have received if he had been promoted to 2nd Sergeant on August 12, 1987 and the pay he received as a result of the City's actions in waiting until October 14, 1987 to promote him to that position.

Dated as Madison, Wisconsin this 7th day of August, 1989.

By _____
David E. Shaw, Arbitrator

2/ The City more or less acknowledges that this is the case in the Personnel Committee's response to the grievances. Grievance 87-3 pertained to the City's alleged failure to post and fill a Patrolman position and grievance 87-5 is the instant grievance. The Personnel Committee's response read, in relevant part:

1. Grievance 87-3. Same is denied by the Committee. It is the Committee's feeling that though the contractual language was not met the City moved as fast as it possibly could under the circumstances and would also request that in the future that language be amended to a longer period of time, specifically, 120 days.

. . .

3. Grievance 87-5. Same is denied. As to reasoning please refer to No. 1 above.