BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CUMBERLAND CITY EMPLOYEES ASSOCIATION, CCEA	
and	Case 9 No. 42512 MA-5707
CITY OF CUMBERLAND	

Appearances:
Mr. Michael Burke, Executive Director, Northwest United Educators, appearing on behalf of the Union.
Mr. Everett Foss, Representative, appearing on behalf of the City.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and City respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. The hearing, which was transcribed, was held on December 15, 1989 in Cumberland, Wisconsin. Thereafter, the parties filed briefs and the City filed a reply brief, whereupon the record was closed February 23, 1990. Based on the entire record, the undersigned issues the following award.

ISSUES:

The parties were unable to agree upon the issues and requested the arbitrator to frame them in his award. 1/ The arbitrator hereby adopts the Union's suggested framing of the issues as his own.

1/ The Union states the issues as:

1. Is the grievance procedurally arbitrable?

2. Did the City violate the terms of the September 29, 1988 Letter of Agreement between CCEA and the City when it refused to include grievant Terry Manke in the bargaining unit despite a temporary position lasting more than 30 calendar days?

3. If so, what is the appropriate remedy?

While the City states the issues as:

1. Has Terry Manke classified as a casual employee, rights to the grievance process contained in the labor agreement between the City of Cumberland and the Cumberland City Employees Association (CCEA)?

2. If Mr. Manke is covered by the grievance procedures, did he and the Association waive their right to the arbitration process, when they failed to file the grievance at the formal step in accordance with the provision of the grievance process contained in the current labor agreement?

3. Was the City of Cumberland within its rights when it laid off Mr. Manke on June 9, 1989?

PERTINENT CONTRACT PROVISION:

The parties' 1989-90 collective bargaining agreement contains the following pertinent provision:

ARTICLE III - GRIEVANCE PROCEDURE

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Presentation of Grievance

A. Informal

A grievance shall be presented by the employee to the City Clerk within ten (10) working days of the occurrence of the event giving rise to the grievance. The City Clerk shall give an oral or written answer within five (5) working days after such presentation, and the parties shall have five (5) working days thereafter to attempt to resolve the grievance by mutual agreement.

B. Formal

If a grievance is not satisfactorily resolved through the informal procedure, and the employee wishes to appeal the grievance to the formal step in the grievance procedure, it shall be referred in writing to the Mayor within ten (10) working days after the answer by the City Clerk.

The grievance appeal shall be initiated by means of a written grievance to be signed by the employee. The written grievance shall set forth the nature of the grievance, the facts upon which the grievance is based, and the action requested.

The Mayor shall discuss the grievance within five (5) working days with the employee at a time mutually agreeable to the parties. If the grievance is resolved as a result of such a meeting, the settlement shall be reduced to writing and signed by the Mayor and the employee. If no settlement is reached, the Mayor shall give written answer to the employee within ten (10) working days following their meeting.

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Time Limit

If a grievance is not presented within the time limit as set forth previously, it shall be considered waived. If a grievance is not appealed in the next step within the specified time limit or an agreed-on extension thereof, it shall be considered settled on the basis of the last answer. If the City Clerk or Mayor does not answer a grievance appeal within the specified time limit, the employee may elect to treat the grievance as denied at the step, and immediately appeal the grievance to the next step.

Time limits on each step may be extended by mutual written agreement of the parties involved. The term "working days," as used herein, shall mean the days Monday through Friday, inclusive, exclusive of holidays.

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FACTS:

On September 29, 1988, a unit clarification hearing was held on the matter of whether casual employe Terry Manke should be included in the bargaining unit represented by the Union. The matter was voluntarily settled at the hearing and the settlement terms were read into the record. That settlement agreement, also known as the Letter of Agreement, provided in pertinent part:

With regard to employee Terry Manke and the position which he has held with the city, the parties would agree as follows:

Mr. Manke will be severed from employment as of September 30, 1988, and that in terms of his rights following severance from employment as of September 30, 1988, the

following would apply: He would be given recall rights pursuant to the layoff rule language found in Article VI of the contract for a period of up to two years for all regular vacancies.

In addition, all temporary vacancies which would occur within the bargaining unit within the next two years would also be offered to him, including summer vacancies. With regard to those temporary vacancies, Mr. Manke would have the right to reject the offered employment without loss of recall rights.

However, if the temporary vacancy, including the summer vacancy, exceeds 30 days, on or about the 30th day, Mr. Manke would be given a second opportunity to accept or reject the position. If the position is accepted or rejected by Mr. Manke at that second time, his rights under this stipulation would cease.

In other words, if he accepts it, he would be covered by his rights under the collective bargaining agreement. If he rejects it, he would lose any rights to further recall.

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If there is a temporary position that lasts for more than 30 calendar days, if that position is filled, either by Terry or by another employee or sequence of employees, at the 30-day mark the city will notify Terry that he may accept that position as a bargaining unit position. That is to say, he would be covered by the terms of the collective bargaining agreement starting on the 31st day.

At that time, Mr. Manke must accept that offer within 15 days or he will lose all recall rights, both under the contract and under this agreement. If he accepts that recall, then he will be covered by the collective bargaining agreement on Day 31.

After the above settlement was reached, Manke filled a variety of City jobs, mainly working at the waste water treatment plant. The pattern that developed over a six (6) month period was for Manke to work close to 30 calendar days and be laid off around the 30th day for one (1) day so that the 30 day period referred to in the above settlement agreement would not be completed.

In the time period applicable here, Manke worked from Tuesday, May 16, 1989 2/ till Friday, June 9, whereupon he was laid off for that one (1) day by Street Superintendent Steve Anderson at the direction of Mayor Gordon Greener. It is undisputed that two casual employes worked for the City on June 9 when Manke was laid off. Manke returned to work on Monday, June 12 and worked the remainder of that week. He apparently continued to work for the City as a casual employe for much of 1989.

Prior to the June 9 layoff, Anderson told Manke that other casual employes would be working on that day and Manke replied that was no problem. There was no discussion at that time regarding the September, 1988 settlement agreement, Manke's recall rights thereunder or the 30 day time period referred to therein.

Manke and Mike Skinner, CCEA Union Representative, met with City Clerk Dennis Rockow on June 16 and verbally advised him that the Union believed Manke was entitled to full-time employment with the City effective June 15, pursuant to the September, 1988 settlement agreement. NUE Executive Director Ken Berg confirmed this position in a letter to Mayor Greener on June 20. Clerk Rockow responded in writing that same day to Manke's verbal grievance and set up a meeting to discuss it. The grievance was discussed at a meeting on June 22 but was not resolved. Present at that meeting were Rockow and Mayor Greener for the City and Manke, Skinner and Berg for the Union. At the end of that meeting, Berg advised Greener that he had ten (10) days to respond to the grievance and Greener indicated he would respond. On June 23 Berg again confirmed the Union's position in the matter in a letter to Mayor Greener. On July 13 Berg advised the City that since no written response had been received from the Mayor regarding the Manke grievance the Union was appealing it to arbitration. On July 17 Manke notified the City in writing he was moving his grievance to the Mayor's level of the grievance procedure. That same day, Greener responded in writing to Berg's appeal of the grievance to arbitration. Berg responded to Greener in writing on July 20 and Greener responded to Berg in writing on July 26.

2/ All dates hereinafter referred to 1989.

POSITIONS OF THE PARTIES:

The Union initially contends that the City's timeliness objection is not meritorious. In this regard it acknowledges that the grievant did not actually submit a written grievance to the Mayor until July 17, which is admittedly not within ten (10) working days of the Clerk's answer to the informal grievance. However, the Association nevertheless contends the grievance should be resolved on the merits for the following reasons. First, the Association submits it raised this issue on a prompt basis. In this regard it notes that both the grievant and Association representative Mike Skinner had a meeting with the City Clerk on June 16, just two (2) days after Manke completed 30 days of uninterrupted employment with the City. Similarly, NUE Representative Ken Berg notified the Mayor in writing on June 20 that Manke was entitled to full-time employment. Further, the Union also notes that the City never raised an objection to either the timeliness issue or the fact that the grievance had not been signed by the grievant at the parties' June 22 meeting. Finally, the Association contends it assumed that the June 22 meeting with the Mayor was pursuant to the formal stage of the parties' grievance procedure. Given these circumstances, it is the Association's position that the grievance is properly before the arbitrator. Next, with regard to the City's contention that the grievant lacks standing to initiate this grievance because of his alleged casual employe status, the Union refers to the parties' stipulation from the September, 1988 unit clarification hearing to support its contention that he does. In the Union's view, that stipulation gives the grievant standing to initiate this grievance. Finally, with regard to the merits, the Union submits that Manke fulfilled the 30 calendar day requirement set forth in the parties' September, 1988 stipulation. In this regard, it notes that although Manke did not work on June 9, other temporary employes did, and in its' view, this allowed Manke to meet the 30 calendar day threshold set forth in the parties' settlement agreement. The Union argues that the grievant never waived or forfeited his recall rights during the course of his discussion with Anderson on June 7. According to the Union, the issue of the grievant's recall rights was never discussed at that time. It is therefore the Union's position that the City violated Manke's recall rights and that Manke became covered by the terms of the parties' collective bargaining agreement as of June 15, 1989. With regard to a remedy, the Union requests that the grievant be made whole, including backpay and benefits.

It is the City's initial position that the grievant is a casual employe who is not covered by the labor agreement between the Union and the City. According to the Employer, it follows from this conclusion that Manke has no rights to the grievance process contained in the labor contract. Next, if it is found that Manke is covered by the contractual grievance procedure, the City contends the grievant waived his right to arbitration when he failed to file his grievance at the formal step of the grievance procedure in accordance with Article III, B. In this regard it notes that Manke's formal grievance was not filed until July 17, 16 working days after the informal meeting on June 22 and 18 days after the Clerk's written response on June 20. The Employer contends that since the formal grievance was not initiated in a timely fashion it was untimely and therefore waived. Finally, with regard to the merits, it is the City's position that it was within its rights when it laid off the grievant on June 9, 1989. In support thereof, it first argues that Manke did not work 30 consecutive days (as required by the settlement agreement) because he was laid off on June 9, 1989. Next, it contends that Anderson consulted with the grievant prior to his layoff date to determine if he (Manke) would agree to a layoff date different than the other casual employes and Manke, in fact, gave his approval to different layoff times. Thus, in the Employer's view, Manke waived the September, 1988 settlement agreement. The City therefore requests that the grievance be denied.

DISCUSSION:

Inasmuch as the City has raised several procedural objections to this grievance, they will be addressed first.

The City initially contends that Manke is a casual employe who is not covered by the parties' labor agreement and therefore has no rights to the grievance process. This argument is easily disposed of by reviewing the September, 1988 settlement agreement. That agreement specifically granted Manke certain recall rights pursuant to the contractual layoff language and it is those recall rights that are in issue herein. That being the case, there is no question that the grievant has standing to initiate this grievance to determine if his rights under the September, 1988 settlement agreement have been violated.

Next, the City contends that the grievance was not timely filed and therefore not procedurally arbitrable. The City's contention in this regard is based on the fact that although an informal grievance was filed June 16 to which the Clerk responded June 20, the grievant did not submit his formal written grievance to the Mayor until July 17, 18 working days later. Article III, B provides that appeals to the Mayor under the formal step of the grievance procedure are to be made within ten (10) working days of the Clerk's answer. If Manke's written grievance of July 17 is looked at standing alone, I would agree with the City that it was untimely since it clearly was not filed

within ten (10) working days of the Clerk's June 20 written response to the informal grievance. However, in my judgment the July 17 written grievance should not be looked at standing alone but should instead be viewed in the following context.

First, it is clear from the record that the Union raised the grievance in a prompt fashion. In this regard it is noted that Manke and Skinner filed their verbal grievance with Rockow on June 16, just two (2) days after the date the Union contends Manke completed 30 days of uninterrupted employment with the City. NUE Representative Berg confirmed this position in writing on June 20.

Second, it is evident that confusion arose from the June 22 grievance meeting concerning what step the parties were at in the grievance process, with the City believing they were at the informal step and the Union believing they were at the formal step. Since the informal step of the grievance procedure does not expressly provide that a meeting will be held at that step while the formal step of the grievance procedure does, it is certainly understandable why the Union believed the parties were at the formal step when they had a grievance meeting on June 22 even though the grievant had not filed a formal written grievance. Moreover, the Mayor's involvement at that meeting also supports the Union's view that the meeting was pursuant to the formal step of the grievance procedure because the informal step of the grievance procedure does not expressly provide that the Mayor will be involved while the formal step does. Furthermore, at the conclusion of that meeting, Berg told Mayor Greener that he had ten (10) days to file his written response, to which Greener indicated that he would. This time limit for the Mayor's written response is contained at the formal step of the grievance procedure, not the informal step.

Third, the Union's actions following the June 22 meeting were consistent with its view that the grievance was at the formal step, as opposed to the initial informal step. Specifically, it notified the City in writing on July 13 that since no written response had been received from the Mayor pursuant to Article III, B (the formal step of the grievance procedure), it was proceeding to arbitration on the matter.

Fourth, when the Mayor responded to the above letter on July 17 acknowledging the Union's appeal to arbitration, there was no mention of timeliness problems whatsoever. That issue did not arise till after Manke had filed his written grievance that same day. The Union indicated in a letter to the Mayor on July 20 that by filing the written grievance when it did, it was "only trying to be cooperative." As a practical matter though, its filing created a timeliness problem which, up until that point in time, had not existed.

The circumstances described above show that there were procedural irregularities by both sides in processing the grievance. For its part, the grievant/Union filed the formal written grievance in an untimely fashion in that it was filed more than ten (10) days after the Clerk's response to the oral grievance. On the other hand, the City arranged and held a grievance meeting outside the process specified in the grievance procedure, namely the June 22 meeting. Although the City intended that meeting to be under the informal step of the grievance procedure, it nevertheless gave the appearance of being the meeting specified for the formal step since the Mayor attended and no meeting is expressly provided for at the informal step. Furthermore, at the conclusion of that meeting, the Mayor indicated he would respond to the grievance within ten (10) days (the procedure found at the formal step). After he failed to do so, the Union processed the grievance to the arbitration step (even though no formal grievance existed at the time). Given the foregoing circumstances then, both sides failed to follow the grievance procedure in processing this grievance. That being so, it would not be fair to penalize just the Union for failing to comply with the grievance procedure. Accordingly, the undersigned declines to apply the literal language of Article III, B herein which provides that grievances not processed within the time limits will be considered waived. It is therefore held that the instant grievance is procedurally arbitrable and properly before the arbitrator.

Having thus disposed of the City's procedural objections, attention is turned to the merits. In this regard it is specifically noted that Clerk Rockow acknowledged at the hearing that if the timeliness issue were resolved, the City in fact violated the terms of the September, 1988 settlement agreement with regard to Manke's recall rights. 3/ This is because although Manke was laid off June 9, certain other casual employes worked that day. By its express terms, this situation allowed Manke to meet the 30 day threshold set forth in the September, 1988 settlement agreement and qualify for "a bargaining unit position" and coverage under the parties' labor agreement. Inasmuch as the City has thus far not complied with the settlement agreement and given Manke a bargaining unit position, it follows that the City has violated the terms of the September, 1988 settlement agreement with regard to Manke's recall rights.

The City argues that Manke nevertheless waived his recall rights under

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3/ Transcript, p. 49.

that agreement when he allegedly agreed to a layoff date different from the other casual employes. Their contention in this regard is based on a conversation Anderson had with Manke prior to Manke's June 9 layoff wherein Anderson told Manke that other casual employes would be working June 9 and Manke replied that was no problem. Other than this short exchange, there was no discussion between them concerning the September, 1988 settlement agreement, Manke's recall rights thereunder or the 30 day time period referred to therein. That being the case, I believe there is nothing to conclusively establish that Manke somehow waived or forfeited his recall rights under that agreement when he replied "no problem" to Anderson's statement. It is well established that in order to be binding, a waiver must be clear and unequivocal, and here that simply has not been shown. Consequently, the City's contention that Manke waived his recall rights under the September, 1988 settlement agreement in his conversation with Anderson is hereby rejected.

Having so found, attention is now turned to the matter of remedy. As noted above, the September, 1988 settlement agreement expressly provided that in the event Manke met the 30 day threshold he would qualify for "a bargaining unit position" and "be covered by the terms of the collective bargaining agreement starting on the 31st day." That happened as of June 15, 1989 so the grievant qualified for a bargaining unit position and became covered by the terms and conditions of the parties' collective bargaining agreement as of that date. Consequently, pursuant to the parties' September, 1988 settlement agreement, the City is directed to award Manke a bargaining unit position and pay him the difference between what he would have earned in pay and benefits under the labor agreement and what he actually earned as a casual employe from June 15, 1989 to the date of this award.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the grievance is procedurally arbitrable;

2. That the City violated the terms of the September 29, 1988 Letter of Agreement between CCEA and the City when it refused to include grievant Terry Manke in the bargaining unit despite a temporary position lasting more than 30 calendar days;

3. That in order to remedy this contractual breach, the City is directed to make Manke whole by taking the action noted above.

Dated at Madison, Wisconsin 17th day of April, 1990.

By _____
Raleigh Jones, Arbitrator