BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SOUTH MILWAUKEE CITY EMPLOYEES, LOCAL NO. 883, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, MILWAUKEE DISTRICT COUNCIL 48

and

CITY OF SOUTH MILWAUKEE

Case 66
No. 44237
MA-6218

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, by Ms. Monica M. Murphy, appearing on behalf of Local 883.

Murphy & Brennan, Attorneys, P.O. Box 308, South Milwaukee, Wisconsin 53172-0308, by Mr. Joseph Murphy, City Attorney, appearing on behalf of the City of South Milwaukee.

ARBITRATION AWARD

Pursuant to the terms of the collective bargaining agreement for the years 1987-1989, the City of South Milwaukee (hereinafter referred to as the City) and the South Milwaukee City Employees, Local No. 883, AFSCME, AFL-CIO, Milwaukee District Council 48 (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the appropriate wage rate to be paid to Bruce Pendzich. Daniel Nielsen of the Commission's staff was so designated. A hearing was held on September 25, 1990 at the City Hall in South Milwaukee, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post hearing briefs which were received by the undersigned on October 30, 1990, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole the undersigned makes the following arbitration award.

ISSUE

The parties stipulated that the following issue should be determined herein;

> Did the City violate the collective bargaining agreement, and specifically Article VIII and Appendix B when it reduced Bruce Pendzich's pay when he completed his 30-day probationary period?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VI
Seniority

. . .

Section 4 - Seniority when an Employee
Voluntarily Transfers Departments

When an employee transfers from one department to another department of the bargaining unit as a result of action taken under Section 10 of Article VI, this transfer shall be called a voluntary transfer.

The departmental seniority of such employee shall start from the first day such voluntary transfer is made into the new department, and the employee shall lose all departmental seniority in the department from which the voluntary transfer was made. The employee, however, shall continue to accrue Municipality-wide seniority.

. . .

SECTION 10 - Vacancies

. . .

(c) Employees desiring that they may be considered for the vacancy shall make a written request for the job to their foreman within such period. The Union will be given the results of such bidding upon request. The request shall be made in quadruplicate on a form provided by the Municipality. One copy will be retained by the employee, one by the supervisor, one given to the Union Steward, and one given to the appropriate Board, Commission, or governing body. The form provided will be the only one used.

. . .

(e) Employees covered under this Agreement who accept a different position under this Article shall have a thirty (30) working day probationary period. However, when an employee accepts said position, the employee shall have the right to return to his/her previously held position within the thirty (30) working day probationary period.

. . .

ARTICLE VIII
Rates of Pay

Section 1 - Regular Rates of Pay

The parties agree that the rates paid to the employees covered by this Agreement shall be as set forth in Appendix A and Appendix B.

Section 2 - Probationary Rates of Pay

(a) New employees in the classifications set forth in Appendix A hereof shall be compensated during their probationary period at the rate of 5% less than the regular rate of pay for such job classification as set forth in said Appendix A. Employees in these classifications transferring into a new classification shall, during their probationary period, set forth in Article VI (10)(e) be compensated at the rate of 5% less than the regular rate of pay for such job classifi-cation, or shall receive the regular rate of pay for the job classification transferred from whichever is greater. Upon

completion of a probationary period, the employee shall be paid the regular rate of pay of the job being performed.

(b) New employees in the classification set forth in Appendix B hereof shall be compensated during their probationary period at the rate set forth in Step I of the proper pay range of Appendix B. Employees in these classifications transferring into a new classification shall, during their probationary period, set forth in Article VI (10)(e), be compensated at the rate set forth in Step I of that job classification, or shall receive the regular rate of pay for the job classification transferred from, whichever is greater. Upon completion of a probationary period, the employee shall advance to the next step in that particular pay range.

APPENDIX B-3

Effective March 1, 1988 to September 14, 1988

PAY RANGE VI - ENG. AIDE I

Starting Salary	per mo.	$1873.73
	bi-weekly	$864.80
	per hr.	$10.81
After 3 mos.	per mo.	$1908.40
	bi-weekly	$880.80
	per hr.	$11.01
After 9 mos.	per mo.	$1937.87
	bi-weekly	$894.40
	per hr.	$11.18
After 18 mos.	per mo.	$1970.80
	bi-weekly	$909.60
	per hr.	$11.37
After 30 mos.	per mo.	$2002.00
	bi-weekly	$924.00
	per hr.	$11.55

FACTUAL BACKGROUND

The facts are largely undisputed. The City is a municipal corporation providing general governmental services to the people of South Milwaukee in Southeastern Wisconsin. The Union is the exclusive bargaining representative for certain employes of the City, including those in the classifications of Laborer and Engineering Aide I. The Grievant, Bruce Pendzich, was hired on February 11, 1986 as a laborer. In early 1990, he posted for an Engineering Aide I opening and began work in that classification on February 12, 1990. He completed his probationary period on March 27, 1990. As a laborer, and during his probationary period as an Engineering Aide, he was paid $11.11 per hour. Upon successfully completing his probationary period, his pay was reduced to $11.01 per hour.

The instant grievance was thereafter filed contending that the pay cut was in violation of the collective bargaining agreement. The City denied the grievance, contending that while the collective bargaining agreement required the Grievant be paid at his former rate during the probationary period, it also required that he be placed in the first pay step above the minimum for his new job upon successfully completing probation. The matter was not resolved in the lower steps of the grievance procedure, and was referred to arbitration for resolution.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the City violated the collective bargaining agreement by placing the Grievant at a lower pay rate than that which he received in his previous classification. Article VIII, Section 2 (b) is designed to insure that employes switching classifications do not take a cut in pay. This is accomplished in two ways. First, employes are guaranteed the higher of either the Step One pay rate for their new classification or the regular rate of pay for their previous classification during the probationary period. After probation, the contract provides that they are to "advance" to the "next step" in the pay range. While the City honored the first portion of this contractual design, it completely ignored its obligation to "advance" the Grievant on the pay schedule upon completion of probation.

It is a familiar axiom of contract interpretation that all words and phrases in the contract must be given meaning, if such a construction is possible. The City's view of Article VIII, Section B (2) is that the sentence "Upon completion of a probationary period, the employee shall advance to the next step in that particular pay range" has no independent meaning. Both the word "advance" and the words "next step" indicate a progression to a higher pay scale. By actually reducing the Grievant's pay rate, the City has contorted the plain meaning of the contract.

The Union also points to the case of employe Loretta Hegg, who was reclassified from a Clerk III to a Clerk IV and was immediately placed at the top of the pay range for the Clerk IV. This placement was consistent with her years of service with the City. The City explains the different treatment of Hegg by pointing to her work experience and job performance, suggesting that the placement was a reward for superior service. This rationale ignores both the City's obligations under the collective bargaining agreement which establishes uniform pay rates for employes, and Pendzich's own length of service and job performance. The Union asserts that there is no justification for treating the Grievant in this case any differently than Hegg was treated in an almost identical case.

For all of the foregoing reasons, the Union asks that the grievance be granted and that Pendzich be advanced to his proper place on the pay scale as well as being made whole for his losses.

The Position of the City

The City takes the position that it has fully complied with the collective bargaining agreement in establishing the pay rate for the Grievant. While acknowledging that the Grievant received a ten cent per hour pay cut upon completing his probationary period, the City asserts that this result is required by the clear language of the collective bargaining agreement. While the contract guarantees the Grievant his former higher rate of pay during the probationary period, it also provides that upon completion of his probationary period, he is to be placed in the pay range applicable to employes in that position. The pay rate for an employe in the Engineering Aide I classification with three months of experience is $11.01 per hour. Based upon his experience in the job the Grievant was entitled to no more.

The City disputes the Union's claim of a contrary past practice, noting that Loretta Hegg's advancement within the Clerk classification was a case of an employe being promoted in recognition of her superior job performance. This is distinct from a transfer under the collective bargaining agreement, which is the provision in issue in this case. Furthermore, Hegg's backpay was negotiated between the City and the Union. As such, it is the voluntary resolution of a dispute and should not be cited as precedent in a case where no such voluntary resolution has occurred.

For all of the foregoing reasons, the City asks that the grievance be denied.

DISCUSSION

The first reference point for an arbitrator must be the language of the collective bargaining agreement. If the contract's language is susceptible to only one interpretation, external evidence of intent such as past practices and negotiating history will not overcome the clear language. Contrary to the contentions of both parties to this dispute, however, the language of Article VIII, Section 2 (b) cannot be said to be clear and unambiguous. The final sentence: "Upon completion of a probationary period, the employee shall advance to the next step in that particular pay range" forecloses neither the argument that the "advancement" should be from the probationary rate to the three month rate, as urged by the City, nor the Union's claim that the employe "advances" in terms of real earnings to the step on the new pay range providing an immediate raise. The question is what starting point one employs to measure an "advance" to the "next step," and the answer to that question is not absolutely clear on the face of the contract. Therefore the meaning of the language must be determined by reference to the accepted standards of contract interpretation.

Perhaps the most useful tool for interpreting ambiguous contract language is a review of the past practices of the parties. In this case, however, the evidence of a past practice is relatively weak. While the Union claims that the Loretta Hegg case provides an instance of persuasive past practice, a practice offered of proof of the correct interpretation of ambiguous language should demonstrate a consistent approach to reasonably similar situations. The Hegg case is the only instance cited by either party, and as a single occurrence falls short of showing some established and mutually accepted interpretation of Article VIII. More to the point, however, the Hegg case is distinguishable from this case on two grounds. First, it is not entirely clear that Hegg used the posting provisions of the contract to obtain her higher rates of pay. Indeed, the move from a Clerk III to Clerk IV does not appear to have involved a vacancy of any type, but was more in the nature of a reclassification. In addition to this, the exhibits in the record show that the Hegg promotion and the amount of backpay were the result of negotiations between the Union and the City rather than the direct application of Article VIII. As noted, the persuasive power of a past practice is limited to similar fact situations and issues. The Hegg case is sufficiently distinct from the instant case to render it unpersuasive.

As discussed above, the language of the collective bargaining agreement is not clear and unambiguous in supporting either party's arguments. However, a logical construction of the language lends much greater support to the Union's interpretation than to the City's. The City argues that the term "shall advance to the next step in that particular pay range" actually means "shall be placed at the three month rate." This represents an advancement only if one defines the beginning point as the Starting Salary for the pay range. Yet the preceding sentence of Article VIII Section 2 (b) defines the probationary employe's beginning point for salary in two possible ways. It may, as the City contends, be the listed Starting Salary. It may also, as in this case, be the higher salary received in the prior classification. In common parlance, an advancement in salary would be understood to be a raise, and nothing in the record suggests that the parties intended a more technical meaning in Article VIII. The phrasing of the last sentence of Section 2 (b) indicates the use of the formula to calculate the rate of pay for the employe, rather than the fixed point urged by the City, and the use of a formula is more consistent with a range of possible placements than it is with simply slotting every employe at the three month step. In this regard, the undersigned notes that Section 2 (a) of the contract calls for employes posting into jobs listed on Appendix A to receive the higher of the probationary rate or the rate from their previous classification, just as Section 2 (b) does. It goes on to say that "(upon) completion of a probation period, the employe shall be paid at the regular rate of pay of the job being performed." The jobs listed in Appendix A have only a probationary and a regular rate, and thus fewer choices are possible for placement in the pay range. The same is true, however, of the Appendix B jobs if one accepts the City's view that the only movement contemplated by the language is to the three month step. The fact that the parties did not specify the three month step, but instead called for the employe to "advance" to the "next" step indicates that a broader range of placements are possible than the City's theory would permit. In this sense, the very ambiguity of the last sentence of Section 2 (b) supports the Union's interpretation of the clause.

Finally, the undersigned is persuaded that the City's interpretation, if adopted, would lead to results which are at least arguably absurd. Under the City's interpretation, the parties must be presumed to have intended a higher rate of pay during the probationary period than after successful completion of the probationary period for a good many job transfers. A compensation scheme will generally reward employes with a higher rate of pay after they have proven themselves in the new job. It is difficult to imagine why the parties would bargain a guarantee of no lost income for the probationary period, yet not extend that guarantee - at least within the limits of the new pay range - when the probation has ended. The parties are always free to negotiate language which inevitably leads to a harsh outcome or a result which stands at odds with commonly held notions of sensibility. The usual presumption, though, is in favor of that interpretation which avoids an absurd outcome.

On balance, the construction of Article VIII, Section 2 (b), and in particular its use of a formula promising to "advance" an employe to the "next" pay step, as well as the arguable absurdity of decreasing an employe's pay in response to his successful completion of probation, persuade the undersigned that the Union's interpretation of Article VIII is correct, and that the City violated the contract when it refused to allow the Grievant to advance to the $11.18 step of the Engineering Aide I pay range upon completion of his probationary period. The appropriate remedy is a standard order that the Grievant be made whole for his losses.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The City of South Milwaukee violated the collective bargaining agreement, specifically Article VII Rate Of Pay, and Appendix B, when it reduced Bruce Pendzich's pay when he completed his probationary period as an Engineering Aide I. The appropriate remedy is to make the Grievant whole by advancing him to the placement on the pay schedule he would have had had he originally been placed at the nine month rate upon completion of his probationary period, and by paying him an amount equal to the wages lost as a result of the City's failure to so place him upon completion of probation.

The undersigned will retain jurisdiction over this grievance for the period of thirty (30) days following the date of this award, solely for the purpose of clarifying the remedy ordered herein.

Dated at Madison, Wisconsin this 7th day of December, 1990.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator