

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 WISCONSIN COUNCIL 40, CITY OF : Case 19  
 LADYSMITH EMPLOYEES LOCAL 1425-A, : No. 45931  
 AFSCME, AFL-CIO : MA-6806  
 :  
 and :  
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 CITY OF LADYSMITH :  
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Appearances:

Ms. Margaret McCloskey, Staff Representative, Wisconsin Council 40,  
 AFSCME, AFL-CIO, appearing on behalf of the Union.  
Mr. Al Christianson, City Manager, appearing on behalf of the City.

ARBITRATION AWARD

Pursuant to a request by Wisconsin Council 40, City of Ladysmith Employees Local 1425-A, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by the City of Ladysmith, herein the City, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on August 14, 1991 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on October 4, 1991 at Ladysmith, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on October 31, 1991.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate as to the issues. The Arbitrator, therefore, frames the issues as follows:

1. Are the grievances timely filed?
2. If so, did the City violate Section 18.3 of the collective bargaining agreement by denying the grievants longevity pay?
3. If so, what is the appropriate remedy?

BACKGROUND:

Prior to 1987, the City of Ladysmith and Rusk County jointly operated a library on a series of handshake agreements "because it had always been done that way." Because of concern over a high rate of turnover on their respective governing bodies, the City and County negotiated an agreement in 1987, effective January 1, 1988, which reduced these "understandings" to writing. The Joint Library Agreement called for the County's two part-time employees, grievants Jane Schimka and Donna Syples, to be shifted to City employment. The Agreement also called for said employees to "be entitled to such wages and fringe benefits as are provided by the municipality which employs them."

At the time of the change the grievants were told they would become City employees; would suffer no losses in benefits (or maybe gain benefits); and would be covered by the City's collective bargaining agreement. They were not told they would receive longevity.

On January 1, 1988, the grievants became City employees at their previous rate of pay without having to serve a probationary period. The City credited the grievants with time employed by the County in calculating sick leave and vacation benefits provided by the City. Vacation and sick leave benefits were calculated on a prorated basis based on the grievants' part-time status. The City also gave the grievants a prorated personal day in lieu of a partial holiday lost as a result of the transfer.

There are discrepancies in the "longevity" language in the predecessor collective bargaining agreement (1/1/87 - 12/31/89). In the City's version of the predecessor agreement, the longevity section appears exactly as it does in the current agreement, stating in Section 18.3 that "After five (5) years of employment, employees shall receive longevity pay of . . . ." The Union's version of the predecessor agreement, however, provides in the same section for "full-time" employees to receive longevity pay.

During negotiations for the current collective bargaining agreement, the parties worked from different contracts. However, neither side proposed a change in the language of Section 18.3 and said provision was not discussed.

Once the parties reached agreement, the City prepared a draft of the proposed successor agreement for review. After both parties made corrections, said agreement was signed. Thereafter, the grievants received a copy of the agreement and discovered they were entitled to longevity pay based on the change in language in Section 18.3 noted above. The grievants then filed the instant claims.

At no time material herein have part-time City employees received longevity pay. However, the City has credited part-time employees who moved to full-time status for time served as part-time employees when calculating longevity.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 4 - GRIEVANCE PROCEDURE

4.4 Steps in the Procedure:

STEP 1. The employee, along (sic) or with their union representative shall orally explain the grievance to the immediate non-union supervisor within (10) calendar days after the employee knew or should have known of such grievance. In the event of a grievance, the employee shall perform their assigned work task and grieve the complaint later. The immediate non-union supervisor shall, within five (5) calendar days, orally inform the employee, and the representative, where applicable of the decision.

STEP 2. If the grievance is not settled at the first step, the employee or their representative may appeal the grievance by reducing it to writing and presenting it to the City Administrator within fifteen (15) calendar days after the receipt of the decision of the immediate supervisor. The City Administrator shall discuss the grievance with the employee, and the union representative shall be afforded the opportunity to be present at the conference. Following said conference, the City Administrator shall respond within fifteen (15) calendar days in writing to the employee and the union representative.

STEP 3. If the grievance is not settled at the second step, the employee or their representative may appeal the written grievance to the Personnel Committee of the City Council within fifteen (15) calendar days after the receipt of the written decision of the City Administrator. The Personnel Committee shall discuss the grievance with the employee, and the union representative shall be afforded the opportunity to be present at the conference. Following said conference, the Personnel Committee shall respond within fifteen (15) calendar days in writing to the employee and the union representative. This step may be waived by the Personnel Committee, in its sole discretion.

4.5 Grievance Arbitration.

A. TIME LIMIT. If a satisfactory settlement is not reached in STEP 3, the Union shall notify the City Administrator in writing within fifteen (15) calendar days after receipt of either the Personnel Committee decision on the grievance or notice of its intention to waive STEP 3 that it intends to process the grievance to arbitration.

. . .

D. DECISION OF THE ARBITRATOR. The Arbitrator shall have no right to modify, nullify, ignore, add to, or delete from the express terms of the Agreement, and the decision of the Arbitrator shall be limited to the subject matter of the grievance and be based solely on his interpretation of the "express language" of the Agreement.

. . .

ARTICLE 6 - EMPLOYEE DEFINITIONS

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6.2 Regular Part-Time Employees. A regular part-time employee is hereby defined as an employee who is regularly scheduled to work in a permanently and continuously funded position, but who is not a regular full-time employee. Regular part-time employees are entitled to receive certain fringe benefits granted by this Agreement on a prorated basis, and the Employer agrees to continue its practices in this regard during the term of this Agreement.

ARTICLE 8 - SENIORITY, LAYOFF AND RECALL

8.1 Definition. The seniority of all regular full-time and regular part-time employees covered by the terms of this Agreement shall consist of the total calendar time elapsed since the date of original employment; provided, however, no time prior to a discharge or quit shall be included. Further, seniority shall not be diminished by temporary layoff or authorized leaves of absence.

ARTICLE 18 - WAGES

18.3 Longevity. After five (5) years of employment, employees shall receive longevity pay of two (2) cents per hour, added to their regular wages, for every full year of employment. Such longevity pay shall be computed from the employee's date of hire.

UNION'S POSITION:

The Union first argues the two grievances are timely filed because the grievants filed their claim as soon as they became aware of their eligibility for longevity pay under the language of the current collective bargaining agreement. In the alternative, the Union argues that the grievances are timely filed because "this is an ongoing violation of the contract."

On the merits of the case, the Union maintains that the City violated the

collective bargaining agreement by denying the grievants longevity payments based on their original date of hire with Rusk County. In support thereof, the Union cites Section 6.1 of the Joint Library Agreement which provides that "Employees shall be entitled to such wages and fringe benefits as are provided by the Municipality which employs them." The Union also notes that it is clear the grievants, as part-time employees, are covered by the collective bargaining agreement; and like all employees in the bargaining unit entitled to receive longevity. In addition, the Union points out the City utilized the grievants' hire date with the County for calculating all other benefits, and that it makes no sense to treat them differently for purposes of longevity. Finally, the Union cites promises made to the grievants at the time of transfer that they would lose nothing (or maybe gain better benefits) and be covered by the City's agreement with the Union.

For a remedy, the Union requests that the Arbitrator find the City violated the collective bargaining agreement by denying longevity to the two grievants for 1990, on the basis of their original date of hire with Rusk County; make the grievants whole for any losses or damages suffered as a result of the violation; and order said payments to be made immediately and in the future.

#### CITY'S POSITION:

The City initially raises a procedural issue arguing the grievances are not timely filed. In this regard, the City maintains they should have been filed within ten (10) days of the date on which the grievants received their first checks as City employees, or in January, 1988.

The City basically argues that it did not violate the collective bargaining agreement by its actions herein. In this regard, the City first argues that there was no agreement at the time of the library transfer to recognize the grievants' seniority with the County in calculating longevity pay. In fact, the City maintains the primary consideration at the time of transfer was to make sure the grievants would not lose the level of benefits they had accumulated as County employees; and since the grievants did not have longevity as County employees they were not entitled to it as City employees. Granting the grievants longevity as a result of the transfer, would result in an improper "windfall" according to the City.

The City also relies on Section 18.3 of the collective bargaining agreement to support its position. In this regard the City puts forward a number of different theories in order to persuade the Arbitrator that said contract provision does not cover part-time employees like the grievants. For example, the City argues that under Section 18.3 longevity is not paid until after five years of employment. Since neither grievant has five years of employment with the City, the City feels they do not qualify for longevity under said contract provision. Similarly, the City maintains that Section 18.3 requires five full years of employment with the City before part-time employees are eligible for longevity. Under this theory, because the grievants were hired by the City on January 1, 1988, and have continued to work 3/4 time since then, they would have to each "work 6 2/3 (5/.75) years with the City before they receive longevity pay, or until 8/1/94."

With respect to remedy, the City requests that the grievances be denied, and the matter dismissed. However, if the grievances are found to be timely and sustained, the City asks the Arbitrator to "deny retroactive pay prior to the date of filing of the respective grievances."

#### DISCUSSION:

### Timeliness

The City initially raises a procedural objection to the grievances arguing that said grievances were not submitted in a timely fashion. The thrust of the City's complaint seems to be that the grievants should have filed a claim back in January, 1988, when they first became City employees; received a City pay check and realized that they were not credited with longevity pay. However, at that time the grievants had a Union copy of the parties' collective bargaining agreement which on its face excluded longevity payments to part-time employees. It was not until the grievants received a copy of the current agreement which provides in Section 18.3 that employees shall receive longevity pay that they realized they might be entitled to longevity. There is no dispute that the grievants filed their claims on a timely basis upon learning of the change in said contract language. Therefore, the Arbitrator rejects this argument of the City.

### Eligibility for Longevity Pay

As evidenced by the parties' arguments, the language of Section 18.3 is ambiguous and subject to differing interpretations with respect to the issue of whether part-time employees are eligible to receive longevity. Since the contract language is unclear, the Arbitrator may look to past practice and bargaining history to interpret the disputed contract provision.

Past practice is undisputed. The City has not paid longevity to part-time employees at any time material herein. Bargaining history does not lead to a different result. In this regard the Arbitrator notes that the parties did not negotiate or even discuss the disputed contract language during negotiations leading to the instant agreement. In addition, the record supports a finding that there was no "meeting of the minds" in said negotiations with respect to the meaning of Section 18.3 as it pertains to the instant dispute. 1/

Based on all of the above, the Arbitrator finds that the City did not violate Section 18.3 of the collective bargaining agreement by denying the grievants longevity pay. However, the record is also undisputed that the City credits part-time employees who become full-time employees with time spent as part-time employees for purposes of calculating longevity. This is done on a prorated basis. If, and when, the grievants become full-time employees they should be treated in the same manner. In addition, based on the Joint Library Agreement noted above, the parties' collective bargaining agreement and the record as a whole, the grievants' part-time employment should then be credited from their original date of hire - in this instance with the County - for purposes of computing longevity.

In light of the foregoing and the record as a whole, it is my

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1/ The Union argues that part-time employees should receive longevity based on the elimination of any reference to "full-time" employees in Section 18.3. However, as noted above, the parties reached no such understanding regarding same. Therefore, the Arbitrator rejects this argument of the Union.

AWARD

That the grievances of Jane Schimka and Donna Syples are hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin this 12th day of December, 1991.

By \_\_\_\_\_  
Dennis P. McGilligan, Arbitrator