BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TOWN OF VERNON MUNICIPAL EMPLOYEES UNION, LOCAL 97, DISTRICT COUNCIL 40, AFSCME, AFL-CIO	Case 9 No. 46444 MA-6983
and	
TOWN OF VERNON	

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

Adelman, Adelman & Murray, S.C., Attorneys at Law, 308 East Juneau, Milwaukee, Wisconsin 53202, by Mr. Jeffrey S. Hynes, appearing on behalf of the Employer.

ARBITRATION AWARD

Town of Vernon Municipal Employees Union, Local 97, AFSCME, AFL-CIO, hereafter the Union, and Town of Vernon, hereafter the Town or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff arbitrator as single, impartial arbitrator to resolve the instant grievance. On December 13, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on February 14, 1992, in Big Bend, Wisconsin. The hearing was transcribed and, following the receipt of posthearing written argument, the record was closed on May 18, 1992.

ISSUE:

The parties were unable to stipulate to a statement of the issue. The Town submits the following statement of the issue:

> 1. Did the Grievant, a probationary, seasonal employee have recourse to the grievance procedure?
>
> 2. Did the Town's decision to terminate the Grievant and hire its Weed Commissioner into a full-time recycling position violate the contract?
>
> 3. Is the Grievant entitled to a remedy?

The Union frames the issue as follows:

> 1. Did the Employer violate the contract by failing to award the position of Recycler to bargaining unit member Annette Gerick?
>
> 2. Did the Employer violate the contract by discriminating against Ms. Gerick by refusing to promote her based on their knowledge of her pregnancy?

3. And for each of the above, if so, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Is the grievance arbitrable?

2. Did the Employer violate the collective bargaining agreement in its selection of Terrance Pisarek for the position of Recycler?

3. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 1 - Recognition

1.01 The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all regular full-time and regular part-time employees of the Town of Vernon including, but not limited to, the Public Works Secretary, Department of Public Works Employees, and seasonal employees, excluding all supervisory, managerial, casual and confidential employees, the Deputy Town Clerk, the Deputy Treasurer, the Umpire, and the Assessor, for the purpose of collective bargaining on matters concerning wages, hours, and all other conditions of employment, as certified by the Wisconsin Employment Relations Commission on April 4, 1988 (Case 1, No. 38888, ME-2703, Dec. No. 24967), or as stipulated by the parties.

Article 2 - Management Rights

2.01 The town possesses the sole right to operate the Town and all management fights (sic) repose in it. The Town of Vernon agrees that it will not exercise those rights for the purpose of undermining the Union or discriminating against its members. These rights include but are not limited to the following:

2.01.01 To direct all operations of the Town; to determine its general business practices and policies; to utilize the personnel, methods, and means it deems necessary; and to maintain and improve the efficiency of Town operations.

2.01.02 To determine the method, means and processes and personnel by which, and the location where the operations of the Town are to be conducted.

2.01.03 To establish reasonable work rules and hours of work.

2.01.04 To hire, promote, transfer, schedule and assign employees to positions within the Town.

2.01.05 To schedule and assign work and overtime work.

2.01.06 To reprimand, demote, discharge and otherwise discipline employees for just cause.

2.01.08 To relieve employees from their duties because of lack of work or other legitimate reason.

2.01.09 To take whatever action is necessary to comply with State of (sic) Federal law.

2.01.10 To introduce new or improved methods of operations, equipment and facilities; and to change existing methods of operation, equipment and facilities.

2.01.11 To determine and establish job qualifi-cations and competency of employees to perform available work.

2.01.12 To manage and direct employees; to assign work and job tasks; to determine the size and composition of the work force and the kinds and amounts of service to be performed; to determine the number and kinds of job classifi-cations used by the Town; and to create, modify, and eliminate jobs and positions.

. . .

Article 5 - Definitions of Employees

5.01 Full-Time Employee: A regular full-time employee is hereby defined as an employee hired to fill a full-time (40 hour per week) position on a year-round basis.

5.02 Part-Time Employee: A regular part-time employee is hereby defined as an employee hired to fill a regular position consisting of less than forty (40) hours per week on a year-round basis. [It is understood that David Guthrie is a part-time employee.]

5.03 Seasonal Employee: A seasonal employee is an employee hired to work (full-time or part-time) for a specified number of months in the season in which their services are required.

Article 6 - Probationary Period

6.01 Probationary Period: All newly hired employees shall be considered probationary for the first six (6)

months of their employment. Probationary employees shall not have recourse to the grievance procedure if dismissed during the probationary period.

6.02 Continued Employment: Continued employment beyond the first six (6) months of employment shall be evidence of satisfactory completion of the probationary period.

6.03 Seniority: Upon completion of the probationary period, the employee's seniority shall relate back to the employee's latest date of hire.

6.04 Holidays: Probationary employees shall be eligible to receive paid holidays.

6.05 Insurance: New employees who are entitled to the insurance benefits set forth in this Agreement shall receive coverage of all insurances in accordance with the waiting period specified in the insurance contracts, regardless of whether it falls within the probationary period.

. . .

Article 8 - Arbitration

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8.05 Decision of Arbitrator: The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

Article 9 - Seniority

9.01 Definition: The date an employee is employed or re-employed in a regular full-time or part-time position shall become his or her seniority date. The seniority date shall be used in all computations that involve length of service in other articles of this Agreement.

9.02 Application: Consistent with Article 10 and Article 11, seniority shall apply in promotions, layoffs, recall from layoffs, filling vacant positions, and vacation selection. Seniority shall be applied on a bargaining unit-wide basis.

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Article 10 - Promotion and Transfer

10.01 Posting: When the Employer deems it necessary to fill a vacancy caused by retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be made known to all employees through job posting.

10.02 Procedure: Job vacancies shall be posted on bulletin boards in convenient locations for at least

(5) working days in overlapping weeks. The job posting shall set forth the job title, work location, scheduled hours, rate of pay and a brief description of the job requirements and necessary qualifications.

10.03 Eligibility: Any employee interested in such vacancy may sign the job posting. Any employee shall be eligible to apply for a vacancy.

10.04 Selection: Selection shall be based on qualifications, relevant experience and seniority. When the qualifications and relevant experience of two or more applicants are relatively equal, the employee with the greatest seniority shall be given the position. The employee shall have a thirty (30) calendar day trial period in which to prove his or her ability to satisfactorily perform the job. If during the thirty (30) day trial period, the Town determines that the selected employee is unable to satisfactorily perform the new position or if the employee decides, he or she may return to his or her former position and selection shall be made among the remaining employees who signed the posting according to the criteria set forth above. Any question involving the qualifications and relevant experience of an employee may be submitted to the Grievance Procedure.

In the Event an employee chooses to return to his or her former position as provided for above, the Employer may choose to retain the employee in the latter position until the Employer refills the position, or for thirty (30) days, whichever is less.

. . .

Article 26 - Part-Time Benefits

26.01 Unless otherwise stated in this Agreement, part-time employees working more than 600 hours per year will receive all fringe benefits set forth in the labor agreement. Part-time benefits will be computed based upon the proration of the part-time employees hours of work as compared to a full-time employee. Seasonal employees will receive no fringe benefits.

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Article 29 - Non-Discrimination

29.01 The parties hereto agree that there shall be no discrimination with respect to any employee or the hiring of new employees because of age, sex, race, creed, color, religion, national origin, handicap, sexual preference, or Union or non-Union affiliation.

. . .

LETTER OF AGREEMENT

BETWEEN

TOWNSHIP OF VERNON MUNICIPAL EMPLOYEES UNION
LOCAL 97, DISTRICT COUNCIL #40,
AFSCME, AFL-CIO

AND

TOWNSHIP OF VERNON

The parties agree that with respect to the implementation of the first collective bargaining agreement, only wages shall be retroactive. This Agreement shall not constitute a precedent for any future negotiations between the parties.

Executed at the Township of Vernon, Wisconsin, this 11 day of Dec., 1990.

BACKGROUND

Annette Gerick, hereafter the Grievant, was employed by the Town of Vernon as a seasonal employe in the calendar years 1990 and 1991. On or about June 12, 1991, the Town of Vernon posted the following:

POSTING FOR AVAILABLE POSITION

DATE: June 12, 1991

POSITION: Recycler

WORK LOCATION: Town of Vernon

RATE OF PAY: Flexible, depending on need, work likely to be performed between the hours of 7:00 a.m. and 3:30 p.m., Monday through Friday.

JOB REQUIREMENTS
AND QUALIFICATIONS: Recycler shall perform full range of duties relating to recycling and such other Town work as the director of pubic works shall deem necessary.

Applicant must be 18 years of age or older and present evidence that he or she holds a valid commercial driver's license within 90 days of beginning his or her employment with the Town.

On or about September 27, 1991, the Union filed a grievance with the Employer which indicated that the Employer had violated " Article 10 Section 10.01 & 10.03 & 10.04 Article 11 Section 11.01 & 11.02 Layoffs & Recall & also 11.03 also Article 9 Section 9.01 & any other Section of Contract that may apply. The most qualified person was not hired". The grievance requested the following adjustment:

Annette Gerick to be hired to fill the Recycler position. As of Aug 30, 1991 all monies & benefits to

> make her whole, to be paid back to above date of Aug 30, 1991

The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

As set forth in the Recognition Clause, seasonal employes are included in the bargaining unit. Union membership, or lack thereof, does not alter seasonals bargaining unit status and entitlement to contract coverage.

The Employer's reliance on Section 6.01 is misplaced. The clear and unambiguous meaning is that a probationary employe is barred from challenging his/her probationary dismissal. All other contract rights are subject to the grievance procedure.

The clear purpose of the posting provision is to give bargaining unit employes preference over non-employe applicants. The fact that the Agreement addresses seniority in terms of regular full-time and regular part-time status does not obviate the right of the Grievant to be awarded the Recycler position over a non-employe outside applicant.

Section 10.03 states that any employe shall be eligible to apply for a vacancy. Indeed, the Town accepted her signature on the posting as evidence of her proper application. This acceptance is tacit acknowledgement that the Grievant has preferential hiring rights based on her status as a seasonal worker.

Section 10.04 refers to selection criteria between internal employe applicants. It specifically provides that the employe with the greatest seniority shall be given the position. Had the parties wished to exclude seasonal employes from access to the posting provision, a specific exclusion would be stated in the contract as in the case regarding fringe benefits.

The Employer's supervisor, Titze, testified that the Grievant had performed all of the duties of the Recycler, except those involving a CDL. As Supervisor Michaels acknowledged, he had not tried to determine what, if any, relevant experience the Grievant had as a seasonal employe for the Town. Ignoring relevant experience was inherently unfair and capricious.

Supervisor Michaels weeded out the Grievant because she had no high school diploma, even though it was not a requirement of the job. The only relevant requirement was the acquisition of a CDL. No evidence was adduced that, despite her lack of a diploma, she was unable to pass a CDL test.

The Town arbitrarily excluded internal applicants for reasons not related to the job. The successful outside applicant was the Town Board Chairman's son-in-law. Given the nepotism issue in this matter, the failure to test and/or interview, underscores the Union's contention that the selection process was biased.

DPW Secretary, Carol Beres, gave unrebutted testimony that DPW Supervisor, Lee Titze, responded to her question of why the Grievant didn't get the job by

stating that she was pregnant. Supervisor Michaels' reference to Andrea Holtz, a married female, as a "girl" reinforces the Union's claim of gender discrimination.

The selection process used by the Town was fundamentally flawed in that it failed to elicit the relevant and appropriate information necessary for a reasonable and unbiased decision maker to make a fair and objective determination. Failure to elicit this key information means that any decision of the Town Board was necessarily arbitrary and capricious. The grievance must be sustained and the Grievant made whole in all respects.

Employer

Section 6.01 defines an employe's "probationary" period as the "first six (6) months" of employment. Ms. Gerick had not completed the six months of employment at the time her grievance was filed. Therefore, under the provisions of Section 6.01, she does not have recourse to the grievance procedure.

Any argument that the Grievant had passed her probationary period is not only contrary to the evidence, but directly rebutted by the Union's own conduct. Article 4, Section 4.01.03 requires deduction of dues to commence on the month following completion of the six month probationary period. The Union never certified that dues be deducted from the paycheck of the Grievant or other seasonals hired in May of 1991.

In July, 1991, the Union wrote a letter to the Town requesting dues deductions for seasonal employes, including the Grievant. The Town took the position that there would be no deductions for the Grievant or any other seasonal employe since they had not passed their probationary period. The Union did not challenge this procedure and never filed a timely grievance. Apparently noting the fatal inconsistency in its position, a full month after the Grievant was terminated, the Union filed a grievance concerning the dues deduction for the Grievant. The Town Director of Public Works, Lee Titze, issued a timely denial of the grievance and the Union never filed a timely appeal under the contract. Nor did it request grievance arbitration in a timely manner.

The plain language of the contract provides that a probationary employe who is terminated during his or her probationary period is not entitled to recourse to the grievance procedure. The grievance is not arbitrable and, therefore, must be denied.

The Director of Public Works submitted five candidates to the Town Board, one of which was the Grievant. The Director of Public Works had no additional input into the decision making process. The Town Board independently made the ultimate decision as to who would be hired. Chairman Macur did not participate in the decision as his brother-in-law, Terry Pisarek, was one of the applicants. The evidence does not support the Union's assertion that nepotism played a role in the decision to hire Pisarek.

The remaining two Board members, Floyd Michaels and Jerry Crawley, considered the applicants separately and, with minimal consultation, reached their conclusions regarding who would be excluded from consideration. It is undisputed that the Town Board relied fully on the information contained in the employes' applications.

Supervisor Crawley eliminated the Grievant's application from consideration when, upon reviewing the document, he observed that she was

applying for "part-time" work. Crawley also rejected Lang's application because it did not indicate whether Lang wanted full or part-time work. Crawley considered this designation to be important because the Town Board was looking for a full-time employe. Crawley also excluded the application of Greg Gauger, another seasonal employe, on the basis that he did not have a high school diploma.

Supervisor Floyd Michaels testified that, in considering applications, he initially focused on the information concerning education and work experience. Michaels, like Crawley, compared the education of the various applicants and removed the Grievant's application from consideration because the Grievant did not have a high school degree. Michaels also compared the applicants' work history, noting that the Grievant "didn't have much of a work history" in that she had held three jobs in a two-year period and had not been employed for eleven years after she had quit high school. According to Michaels, the Grievant's indication that she was seeking "part-time" work on her application indicated to Michaels that she "didn't want the job." Michaels, like Crawley, excluded the application of Gauger on the basis that Gauger had not obtained a high school education.

The Grievant's application contains absolutely no information indicating that she had performed recycling duties for the Town. In fact, her application indicates that the only position she held was as a "Park Worker" and her duties were "mow parks." Like the Grievant, Gauger was not chosen and his duties as a seasonal were not considered by the Town Board in deciding whether he should be hired. There is no requirement that the Town hire an individual into a full-time position merely because the individual had previously been employed on a short term seasonal basis.

The application which Gerick submitted to the Town Board was the same application she had completed for the seasonal position. Any argument that this resulted in unfair or arbitrary treatment of the Grievant is absolutely without merit. The Grievant was fully aware that the Town would confine its consideration to the information she provided in her written application.

The Union stipulated that it would limit the issue of Gerick's pregnancy to the narrow question of "whether or not it was a factor that caused arbitrary and capricious decision making" by the Town and not whether there was pregnancy discrimination. The utter failure of the Grievant or the Union to even raise the issue of pregnancy in its grievance or in any communications relating to the grievance exposes the claim for what it is, an after the fact attempt to attribute arbitrary and capricious characteristics to a Town Board process that was, in fact, fair and even-handed.

Far from relying on the Grievant's pregnancy to exclude her application, Titze actually favored her application. Supervisors Michaels and Crawley indicated that the Town Board had absolutely no knowledge of the Grievant's pregnancy at the time it made its decision. The record does not demonstrate otherwise.

Article 26.01 of the Agreement clearly states that seasonal employes will receive no fringe benefits. The Town reasonably interprets this language to mean that the Grievant, a seasonal employe, was not entitled to contractual benefits including the alleged preferential hiring advantage. The Town's interpretation is consistent with the long line of arbitration decisions which have held that "fringe benefits" constitute any nonwage benefit received by a worker. Moreover, the language describing seasonal employes clearly contemplates the hiring of employes on a temporary basis, serving only during the particular season required and having no contractual rights other than those expressly stated in the contract.

Section 10.04 only applies to employes who are eligible or otherwise entitled to accumulate seniority. Article 9 provides seniority from the date an employe is employed or re-employed in a "regular full-time or part-time position." Omission of seasonal employes from the definition is clear and unambiguous. Moreover, Section 6.03 recognizes that probationary employes, such as the Grievant, cannot accrue seniority until the employe has completed his or her probationary period. The Grievant, by definition, cannot accumulate seniority.

Neither the language contained in Article 10, nor the parties' job posting practices, confine the contractual hiring procedure solely to bargaining unit employes. Nor does the language of the contract grant seasonal, probationary employes preferential hiring rights.

Consistent with past practice, the only right the Grievant received as a seasonal employe was the right to a contractual wage rate. To require the Town to create a benefit for seasonal, probationary employes which currently does not exist, is contrary to the arbitral authority provided in Section 8.05 of the contract.

Assuming arguendo that Article 10 provided a preferential hiring right to the Grievant, the evidence presented at hearing clearly establishes that the Grievant did not meet the fundamental qualifications for the position in question. The Grievant was deemed ineligible for the available full-time recycler's position because her application indicated that she was applying for part-time work. Moreover, the Town reasonably determined that a high school diploma was a qualifying condition for employment. The even-handed application of the high school diploma requirement removed both Gauger and Gerick from consideration. The Town exercised its legitimate managerial authority in choosing the most qualified individual of the remaining applicants.

Evidence reveals that the Grievant made no attempt to mitigate damages. The Grievant's failure to make any effort to obtain gainful employment defeats any contention on the part of the Union that she is entitled to backpay.

It is undisputed that the Grievant was terminated by the Town in August of 1991, shortly before the Town hired Mr. Pisarek. Since the Grievant had not passed her probationary period on the date she was terminated, she could not pursue a grievance concerning her dismissal. As she could not grieve her dismissal, she is not entitled to reinstatement or any backpay remedy subsequent to the date she was dismissed. A finding to the contrary would render meaningless the language of Section 6.01. The grievance must be denied with appropriate costs assessed against the Union.

DISCUSSION

Arbitrability

The Employer, contrary to the Union, argues that the Grievant is a probationary employe and, as such, does not have standing to file a grievance. Section 6.01, relied upon by the Employer, states that "Probationary employees shall not have recourse to the grievance procedure if dismissed during the probationary period." The most reasonable construction of this sentence is that a probationary employe cannot grieve a dismissal which occurs during the probationary period. Assuming arguendo, that the Grievant had been a

probationary employe at the time that the grievance was filed, she is not grieving a dismissal. 1/ Rather, the Grievant is grieving the failure of the Employer to award her the Recycler position. Thus, even if the Grievant had been a probationary employe, the provisions of Section 6.01 would not preclude the Grievant from filing the instant grievance.

The decision to award the Recycler position to Terry Pisarek was announced on August 19, 1991. At that time, and at the time that the Grievant signed the Recycler posting, the Grievant was a seasonal employe of the Employer. As the Union argues, Article 1, Recognition, expressly recognizes that the seasonal employes are members of the collective bargaining unit represented by the Union. The classification of seasonal employe is also recognized in Section 5.03 of the collective bargaining agreement. Since seasonal employes are covered by the collective bargaining agreement, it is reasonable to conclude that seasonal employes are entitled to receive all of the benefits of the agreement, unless the agreement provides otherwise.

Article 26, Part-Time Benefits, recognizes, inter alia, that "Seasonal employees will receive no fringe benefits." Since Article 26 does not define the term fringe benefits, it is reasonable to conclude that the parties intended the term to be given the definition which is commonly and ordinarily accepted in the field of labor relations. Robert' Dictionary of Industrial Relations, which is recognized and accepted in the field of labor relations, defines the term "fringe benefits" as follows " Nonwage benefits or payments received by workers. They include such items as vacation pay, paid sick leave, paid holidays, pensions and insurance benefits." 2/ Applying this definition to the present case, it is reasonable to conclude that access to the contractual grievance procedure is not a fringe benefit.

Section 7.01, Definition of Grievance, states that "A grievance shall mean a dispute concerning the interpretation or application of this contract." The grievance, as filed, alleges that the Employer violated various sections of the collective bargaining agreement when the Employer did not hire the Grievant for the Recycling position.

The undersigned is satisfied that the Grievant has standing to file the instant grievance and that the Grievant's claim involves a grievance within the meaning of Article 7, Grievance Procedure. Despite the Employer's argument to the contrary, the grievance is arbitrable.

Merits

At hearing, the Union, over the objection of the Employer, sought to litigate the claim that the Employer discriminated against the Grievant on the basis of the Grievant's pregnancy. During the hearing, the parties entered into a stipulation by which it was agreed that the undersigned would not make any decision as to whether the Employer discriminated against the Grievant in violation of any law external to the contract. The parties further agreed that the undersigned could consider the issue of pregnancy for the purpose of determining whether the Grievant's pregnancy was a factor in the Employer's hiring decision.

1/ Since the undersigned need not determine whether or not the Grievant was a probationary employe, the undersigned has not addressed the Employer's arguments regarding deductions made under Article 4.

2/ Third Edition (BNA, 1986) p. 233.

The Recycler position was posted on or about June 12, 1991. Following a Town Board directive to provide the Town Board with candidates for the position, the Employer's Director of Public Works, LeRoy Titze, sorted through the Employer's applications for employment and provided the Town Board with five applications, i.e., the Grievant, Dennis Smith, Greg Gauger, Daniel Lang, and Terrance Pisarek. At that time, the Grievant and Gauger were seasonal employes of the Town and Pisarek was the Town's Weed Commissioner. The other two applicants were not employes of the Town.

The Grievant recalls that Titze told her that he had recommended her to the Town Board. Titze, however, denies that he told the Grievant that he had recommended her. According to Titze, he told the Grievant that he had given her application to the Town Board. Titze maintains that his only participation in the hiring process was to submit applications to the Town Board. Titze's testimony on this point was corroborated by the testimony of Town Board members Floyd Michaels and Gerald Crawley.

Upon review of the record evidence, the undersigned credits Titze's testimony that his only participation in the hiring process was to submit the applications to the Town Board. However, it is evident that Michaels and

Crawley construed the act of submitting the applications to the Town Board to be an endorsement from Titze that the applicants were qualified for the position.

The Grievant learned of her pregnancy at the end of July, 1991 and, thereafter, told Tom Cappel, a fellow employe, that she was pregnant. The Grievant believes that Cappel told Titze of the Grievant's pregnancy sometime in early August. On August 12, 1991, Titze asked the Grievant to have her doctor certify that she could perform the following:

DUTIES - SEASONAL EMPLOYES

1. Park Maintenance
2. Recycling
3. Upkeep of Building and Grounds
4. Sign Maintenance
5. Crackfilling
6. Patching
7. Brush work
8. Other Town work as the Director of Public Works deems necessary.

On August 26, 1991, the Grievant' doctor certified that the Grievant could continue the duties contained on the Employer's list. The doctor's certification was given to Titze on August 27, 199.

At hearing, Union witness Carol A. Beres, an employe of the Employer's Department of Public Works, stated that, approximately one week before Pisarek started employment as a Recycler, she learned that the Grievant did not get the Recycling position. 3/ At that time, she asked Titze why the Grievant had not received the position. According to Beres, Titze replied "She is pregnant". Titze, who also testified at hearing, neither admitted nor denied the conversation related by Beres. Inasmuch as Beres' testimony concerning this conversation is uncontradicted, it is entitled to be credited herein.

According to Michaels and Crawley, Robert Macur, the third member of the Town Board and the Chairman of the Town Board, did not participate in the hiring decision because one of the applicants for the Recycler position, Pisarek, was Macur's brother-in-law. The record does not demonstrate otherwise.

The decision to hire Pisarek was announced at the Town Board meeting of August 19, 1991. 4/ Both Michaels and Crawley deny having any knowledge of the Grievant's pregnancy at the time that they made the decision to hire Pisarek and not to hire the Grievant.

Neither Titze, nor any other witness, stated that, prior to August 19, 1991, he/she had advised any member of the Town Board that the Grievant was pregnant. Nor did any witness claim that, prior to August 19, 1991, any member of the Town Board had made any statement acknowledging that the Grievant was pregnant.

3/ Pisarek started his Recycler duties on or about August 30, 1991.

4/ Michaels and Crawley had reviewed the five applications prior to August 19, 1991 and, some time prior to August 19, 1991, had independently concluded that Pisarek was the most qualified applicant .

The record supports the conclusion that the decision to hire Pisarek and to not hire the Grievant was made by Michaels and Crawley, and not by Titze. It is not evident that Titze was privy to the discussions that lead to the Town Board's decision to hire Pisarek and to not hire the Grievant. Nor is it evident, between the time that Titze learned of the Grievant's pregnancy and the time that Beres had her conversation with Titze, that any member of the Town Board had any discussions with Titze regarding the reasons for not hiring the Grievant.

Titze was not asked to explain why he made the statement "She is pregnant" and he did not offer any explanation for the statement. The record fails to demonstrate that Titze's remarks to Beres reflect the Town Board's position, rather than Titze's own viewpoint of the matter. Neither Titze's remarks to Beres, nor any other record evidence, provides a reasonable basis to conclude that the Grievant's pregnancy was a factor in the Town Board's decision to not hire the Grievant for the Recycler position. The undersigned turns to the issue of whether or not the Grievant has any contractual rights under Article 10, Promotion and Transfer.

Section 10.03 provides that "Any employee interested in such vacancy may sign the job posting. Any employee shall be eligible to apply for a vacancy." The undersigned does not consider access to the Article 10 posting procedure to be a "fringe benefit" as defined above. Neither the language of Article 26, nor any other contract language relied upon by the Employer, states that seasonal and/or probationary employes do not have access to the posting procedure set forth in Article 10. Absent such limiting language, the most reasonable construction of Article 10.03 is that the term any employe includes both probationary and seasonal employes. Thus, assuming arguendo, that the Grievant had been a probationary employe at the time that she signed the posting, such a fact would not deprive the Grievant of the rights provided in Article 10. Nor would the Grievant's status as a seasonal employe deprive her of a right to post for vacancies in accordance with the provisions of Article 10.

Section 10.4, Selection, provides, inter alia, that "Selection shall be based on qualifications, relevant experience and seniority. When the qualifications and relevant experience of two or more applicants are relatively equal, the employee with the greatest seniority shall be given the position...." By using the word applicant, rather than employe, in the second sentence of Section 10.04, the parties have recognized the right of the Employer to consider individuals other than employes when selecting an individual to fill a vacancy which is posted pursuant to Section 10.02. The preferential hiring right afforded to bargaining unit employes by Section 10.04 is the right to have seniority determine the selection when qualifications and relevant experience are relatively equal.

Article 9 is entitled "Seniority". Section 9.01, Definition, states that "The date an employee is employed or re-employed in a regular full-time or part-time position shall become his seniority date. The seniority date shall be used in all computations that involve length of service in other articles of this Agreement."

As discussed above, Article 5, Definitions of Employees, recognizes three classifications of bargaining unit employes, i.e., Full-Time, Part-Time and Seasonal. Inasmuch as Section 9.01 provides seniority rights to regular full-time and regular part-time employes, but does not reference seasonal employes, it is reasonable to conclude that the seasonal employes do not have seniority for the purpose of determining contractual benefits. Since Gauger and the Grievant were seasonal employes at the time that the Town Board selected Pisarek for the Recycler position, neither Gauger, nor the Grievant, had any Section 10.04 seniority at that time.

The collective bargaining agreement between the Employer and the Union sets forth the terms and conditions of employment of employes represented by the Union. It follows, therefore, that the seniority rights recognized in Section 9.01 accrue to regular full-time and part-time employes who are members of the Union's bargaining unit employes, but not to other regular full-time and part-time employes of the Town.

The record does not demonstrate that the position of Town Weed Commissioner, which was occupied by Pisarek at the time that he was selected for the Recycler position, was a bargaining unit position. Nor is it evident that Smith and Lang had any employment relationship with the Town at that time. Construing 10.04 in a manner which is consistent with Section 9.01, the undersigned is satisfied that neither the Grievant, nor any of the other four applicants considered by the Town Board, had any seniority for the purposes of Section 10.04.

Where, as here, bargaining unit employes sign for a posting pursuant to Section 10.03, Section 10.04 requires the Employer to award the position on the basis of qualifications, relevant experience, and seniority. The fact that the Grievant does not have any seniority for the purposes of Section 10.04 does not relieve the Employer of the contractual obligation to consider qualifications and relevant experience. 5/ Nor do the management rights relied upon by the Employer relieve the Employer of the contractual obligation to consider qualifications and relevant experience.

Gauger's application was dated 5/6/91 and the Grievant's application was dated 5/22/91. Following the receipt of these applications, the Grievant and Gauger were hired as seasonal employes for the Town. The testimony of Michaels and Crawley demonstrates that one of the reasons for eliminating the Grievant

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5/ The Employer's reliance on past practice to determine the contractual rights of seasonal employes is misplaced. As the grievance occurred during the term of the parties' initial collective bargaining agreement there is no relevant past practice.

from consideration for the Recycler position was that the Grievant's application for employment indicated that she was seeking part-time employment.

The posting for the position of Recycler states that "work likely to be performed between the hours of 7:00 a.m. and 3:30 p.m., Monday through Friday." By signing the posting, the Grievant clearly gave notice that she was available to work the hours in the posting. Given the fact that the application of the Grievant submitted to the Town Board by Titze pre-dated the June 12, 1991 posting of the Recycler position, the Town Board knew, or should have known, that the application was not made in response to the posting. In relying upon an application which pre-dated the job posting to conclude that the Grievant only wanted part-time employment, the Employer acted unreasonably.

There is no contractual requirement that bargaining unit employes provide an updated application at the time that they post for a position. While the Employer could have asked the bargaining unit employes who signed the Recycler posting to update any applications on file, it did not.

Although the Grievant acknowledged that she knew that the Town Board would consider her May 22, 1991 application, neither the Grievant's testimony, nor any other record evidence, supports the Employer's argument that the Grievant was aware that the Town would confine its hiring considerations to the information contained in her written application of May 22, 1991. Contrary to the argument of the Employer, under the circumstances presented herein, it was not reasonable for the Employer to disqualify the Grievant because her May 22, 1991 application indicated that she was seeking part-time, rather than full-time employment.

Section 10.02 requires, inter alia, that the posting shall set forth "necessary qualifications". As the Union argues, the posting for the Recycler position did not indicate that a high school diploma was a necessary qualification of the position.

Michaels testimony demonstrates that his primary reason for rejecting the Grievant's application was that she did not have a high school diploma. 6/ Michaels acknowledged, however, that the lack of a high school diploma did not disqualify the Grievant from the position of Recycler, but rather, provided a basis for determining that the Grievant was less qualified than other applicants, including Pisarek.

Michaels and Crawley both acknowledge that they did not give any consideration to the Grievant's, or Gauger's, work experience as seasonal employes of the Town when selecting Pisarek for the Recycler position. Given the fact that the Grievant's duties as a seasonal employe included recycling duties, the Grievant's work for the Town was "relevant experience". By failing to consider the Grievant's work experience as a seasonal employe of the Town, the Employer did not consider all of the Grievant's "relevant experience" and, thus, violated Section 10.04 of the collective bargaining agreement.

6/ Michaels rejected Gaugers' application for the same reason.

The appropriate remedy for the Employer's contract violation is to nullify the prior decision to hire Pisarek into the Recycler position and to order the Employer to select the individual to fill the Recycler vacancy in accordance with Section 10.04 of the collective bargaining agreement. In making this selection, the Employer is required to select among the five applicants who had their applications forwarded to the Employer by Titze, i.e., the Grievant, Gauger, Smith, Lang and Pisarek. The Employer, however, need not consider any applicant who notifies the Employer that he/she is no longer interested in the position of Recycler.

For the reasons discussed above, the undersigned is satisfied that none of the five applicants had any seniority at the time that they applied for the position of Recycler. Thus, in reconsidering the applicants, the Employer is required to base its decision on "qualifications" and "relevant experience".

As the Union argues, it is not uncommon for an employer to test or interview job candidates. In the instant case, however, the Employer chose not to do so. As the Employer argues, there is no contractual requirement that it do so. Having decided to rely upon applications, the Employer must judge the qualifications and relevant experience of Smith and Lang on the basis of the applications which were before the Employer at the time that the Employer made the decision to hire Pisarek.

For the reasons discussed above, in judging the Grievant's qualifications and relevant experience, the Employer must consider the Grievant's work experience as a seasonal employe of the Town, as of August 19, 1991, the date on which the Employer announced its decision to hire Pisarek. The Employer may also give consideration to Gauger's work experience as a seasonal employe of the Town and Pisarek's work experience with the Town, as of August 19, 1991. Given the fact that the Employer violated the collective bargaining agreement when it selected Pisarek for the Recycler position, the Employer may not give consideration to work performed by Pisarek in the position of Town Recycler.

Given Michaels' testimony, as well as the fact that the posting for the Recycler position did not state that a high school diploma was a "necessary qualification", the Employer may not use the lack of a high school diploma to conclude that the Grievant is not qualified for the Recycler position. Nor may the Grievant be disqualified on the basis that her application of May 22, 1991 indicated that she wanted "Parttime (Summer)" employment.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is arbitrable.

2. The Employer did not comply with the requirements of Section 10.04 of the collective bargaining agreement when the Employer selected Terrance Pisarek for the position of Recycler and, therefore, the Employer has violated the collective bargaining agreement.

3. To remedy the contract violation, the Employer is to immediately reconsider the decision to hire a Recycler in accordance with this Arbitration Award and the requirements of the parties' collective bargaining agreement.

4. If the reconsideration of the decision to hire a Recycler results in the Grievant's selection as Recycler, the Grievant is to be awarded the thirty day trial period set forth in Section 10.04 of the collective bargaining agreement.

5. If the Grievant successfully completes the trial period, the Grievant is to be made whole for all wages and benefits lost as a result of the Employer's failure to award the Recycler position to the Grievant on August 19, 1991.

6. The undersigned will retain jurisdiction for at least sixty days to resolve any claim that the Employer's reconsideration of the decision to hire a Recycler is inconsistent with this Arbitration Award and/or the requirements of the parties' collective bargaining agreement and for the purpose of resolving any other dispute as to the remedy awarded herein, including the issue of mitigation of damages.

Dated at Madison, Wisconsin this 12th day of August, 1992.

By _____
Coleen A. Burns, Arbitrator

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