BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LaCROSSE CITY EMPLOYEES' UNION,
LOCAL 180, SEIU

and

CITY OF LaCROSSE

Case 204
No. 46032
MA-6853

Appearances:

Mr. James Birnbaum, Attorney at Law, appearing on behalf of the Union.
Mr. Thomas Jones, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City or Employer, respectively, were 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 undersigned conducted grievance mediation on September 25, 1991 and March 3, 1992, but the dispute was not resolved. A hearing, which was not transcribed, was held on April 1, 1992, in LaCrosse, Wisconsin. The City's brief in the matter was received June 12, 1992, and the Union's brief was received December 14, 1992. Afterwards, the parties filed reply briefs which were received by January 6, 1993, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUES

At the commencement of the hearing each side gave its version of the issue(s) involved here. The Union stated the issue as:

> Did the City violate the collective bargaining agreement by failing to compensate the grievant as a full-time permanent employe after the first 120 days of her employment? If so, what is the appropriate remedy?

The City would not stipulate to the Union's proposed issue and stated the issues as:

1. Was the grievance timely filed?

2. If the grievance was not timely filed, could the allegations of the grievant constitute a "continuing violation" of the collective bargaining agreement?
3. If so, did the City violate the collective bargaining agreement?

Since there was no stipulation on the issue(s) to be decided, the parties asked that the undersigned frame them in the Award. From a review of the record, the opening statements at hearings and the briefs, the undersigned has framed the issues as follows:

1. Is the grievance procedurally arbitrable?

2. If so, did the Employer violate the collective bargaining agreement in the manner in which it compensated the grievant? If so, what is the appropriate remedy?

3. Did the Employer violate the collective bargaining agreement when it laid off/discharged the grievant on May 31, 1991? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1991 collective bargaining agreement contained the following pertinent provisions:

RECOGNITION

. . .

WHEREAS, the City recognizes Local 180 as the exclusive bargaining agent for all employees of the City of La Crosse exclusive of all department heads, supervisors, craft and confidential employees, members of the La Crosse Professional Police Association, non-supervisory bargaining unit; La Crosse Professional Policeman's supervisory bargaining unit; Local 127 International Association of Fire Fighters; Amalgamated Transit Union Local 519, Airport Crash, Fire, Rescue and Security employees; all crossing guards, and all temporary, seasonal employees who are employed less than 120 calendar days in a calendar year.

. . .

ARTICLE 2

GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

1. Discuss the grievance with his immediate supervisor within thirty (30) working days, excluding Saturdays, Sundays, and holidays of the date the employee should have known of the grievable matter. If no solution is reached he may,

2. Reduce the grievance in detail to writing, using an 'Initiation of Grievance Form' and submit it to his supervisor who will note his comments and forward it to the Director of Personnel, who, with the Department Head, will within five (5) days (Saturdays, Sundays and holidays excluded) attempt to solve the grievance.

3. If a satisfactory solution cannot be reached, the grievant may, within seven (7) days appeal to the Wisconsin Employment Relations Commission who will within ten (10) days appoint a neutral arbitrator; the findings of the arbitrator to be final and binding on the parties hereto.

. . .

ARTICLE 19

RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right . . . to lay off for lack of work or funds . . . are vested exclusively in Management.

. . .

ARTICLE 20

LIMITATIONS ON DISCIPLINARY ACTIONS

. . .

D. The City shall not . . . discharge any employee except for just cause. . . .

FACTS

The Union represents a residual bargaining unit with employes in all City departments, including the Parks Department and Recreation Department. The Parks Department maintains the City's parks, playgrounds and pools, and the Recreation Department provides a variety of recreational activities and programs for the City's residents. The two departments share a common director and the same office space. In the early 1980s, the City had two full-time clerical employes working in the Parks/Recreation Department office located in City Hall. In 1984, it officially eliminated one of those full-time clerical positions. Afterwards, though, the number of clericals working in the office did not decrease. Instead, the City continued to employ two clericals in that office; one in a permanent full-time position and the other in a non-permanent position. Several temporary employes filled the latter, non-permanent clerical position on a successive basis. One of those persons was Lurene Larson, the subject of the instant grievance.

Lurene Larson started working for the City on June 10, 1987. She was hired as a temporary employe. She never received a formal job description, but she was told her title was Temporary Office Assistant. She was also told when hired that her working hours were to be the same as the other clericals in City Hall (who work 37.5 hours a week or 75 hours biweekly). Her starting wage rate was $3.50 an hour with no fringe benefits.

Larson worked in the Parks/Recreation Department office in City Hall where she performed a variety of clerical job tasks. Specifically, she did typing, word processing, record keeping, filing, billing, scheduling, answering phone inquiries, collecting fees for Park programs, registering individuals for various programs, and making the Department's brochures, flyers, posters, etc. In doing this work, she worked side by side with Rita Gartner, the only other clerical employe who worked in the office. Gartner is classified as a Parks and Recreation Secretary and fills a permanent full-time position. Larson testified that she did the same work as Gartner except for the following: Gartner took care of the Parks Board minutes and Larson did not, Larson did the word processing work in the office and Gartner did not, Larson did the graphic arts work in the office and Gartner did not, and Gartner took shorthand and Larson did not.

In addition to her clerical duties in the Parks/Recreation Department, Larson also performed the following other duties for the Department: art instructor, volleyball site supervisor, and scorekeeper for youth basketball. Larson estimated that over a four year period from 1987 through 1991, she worked a total of about 245 hours in those three capacities. When she worked in those capacities, she was paid the wage rate then in effect for those duties.

During her employment with the City, Larson also attended college on a full-time basis. As a student, she took numerous evening classes. When she had day classes, the Parks and Recreation Director arranged her work schedule around her classes. As a result, Larson sometimes worked hours that differed from those of the other clericals in City Hall. Also, on several occasions, she took unpaid leaves of absence from work. One such leave was for one week after her father died.

Larson's employment status was apparently discussed by representatives of the City and the Union in May, 1988, because the record contains the following letter:

> June 2, 1988
>
> Mr. Fred D. Ray, Recording Secretary
> La Crosse City Employees' Union
> Local 180, SCIU (sic)
> La Crosse, WI 54601
>
> Dear Mr. Ray:
>
> Effective with the present pay period ending on May 26, 1988, Lurene Larson, who has been employed by the Park department, will have passed the 120-day contract restriction for part-time employees. She will be paid 10 cents less an hour than the beginning rate of the Clerk-Typist I for Local 180 agreement. I am relaying this information to you because of your request in our last meeting on May 25, 1988. Ms. Larson will probably be laid off this fall.
>
> Sincerely,
>
> J. H. Rusch /s/
>
> Mr. Jerry Rusch
> Director of Personnel

Although this letter stated that Larson would "probably be laid off" in the fall of 1988, that did not happen, and she continued to work for the City.

In June, 1990, Larson discussed her pay status with the City's then Personnel Director, Ralph Nuzzo. Larson testified that Nuzzo told her to request a reclassification to Clerk Typist I, which she did. Insofar as the record shows, no action was ever taken by the City on Larson's reclass request. Insofar as the record shows, the Union was not aware of Larson's reclass request.

Larson's paycheck stubs reveal the following salary history during her employment in the Parks/Recreation Department. From June 10, 1987 to May, 1988, she was paid $3.50 an hour. She was paid $4.65 an hour for one paycheck on June 2, 1988. From June 18, 1988 to December 29, 1988, she was paid $6.47 an hour. From January 12, 1989 to July 27, 1989, she was paid between $4.88 and $5.00 an hour, with the amounts varying from paycheck to paycheck. The specific amounts were either $4.88, $4.90, $4.92, $4.93, $4.95 or $5.00 an hour. From August 10, 1989 to May 30, 1991, she was paid $6.47 per hour except for one paycheck on September 21, 1989, when she was paid $6.28 an hour. In June, 1991, she was paid $7.55 an hour. During this four-year period Larson did not receive any fringe benefits except for WRS pension benefits which commenced in 1990 after she had worked 600 hours.

Larson's paycheck stubs indicate that during the same four-year period (i.e. 1987-1991), she worked a total of 7,265 hours for the Parks/Recreation Department. This figure includes the approximately 245 hours Larson worked as an art instructor, volleyball site supervisor and scorekeeper for youth basketball. In 1991, Larson worked the following hours in the Parks/Recreation Department:

Biweekly Period Ending	Hours Worked
1-03-91	69.5
1-17-91	93
1-31-91	61
2-14-91	67
2-28-91	77
3-14-91	94
3-28-91	85
4-11-91	74.75
4-25-91	73
5-16-91	90.75

5-23-91	84.5
6-06-91	51
6-20-91	3

In March and May, 1991, Larson questioned City and Union officials regarding her pay status. As a result of her inquiries, a meeting was held on May 31, 1991, to address that topic. Representatives of the City and the Union attended this meeting. During the course of this meeting, City Personnel Director Jim Geissner acknowledged that the City had violated the 120 day rule for temporary employes with regards to Larson. The Union proposed that Larson's situation be remedied by her receiving a permanent full-time bargaining unit position with benefits. Geissner responded that he was not empowered to make Larson's current position in the Parks/Recreation Department permanent. When the parties could not agree on a resolution to the matter, Geissner laid off/discharged Larson effective as of the end of the meeting.

On June 14, 1991, Larson filed the instant grievance seeking "reinstate-ment, back pay and benefits retroactive from 121st day of my employment to the time I was discharged." The grievance was denied and was ultimately appealed to arbitration.

After Larson was laid off/discharged, she collected unemployment compensation at the rate of $140 per week for 17 weeks.

In September, 1991, a partial settlement was reached concerning Larson's grievance. Under the settlement terms, Larson returned to work for the City on September 30, 1991, as a full-time meter reader in the Water Department. She was paid $10.90 an hour in this position and received full fringe benefits, including health insurance. She worked in that capacity for three months until January 3, 1992, at which time she voluntarily resigned from that position and employment with the City. Larson has not worked for the City since that date, having assumed employment elsewhere. She no longer seeks reinstatement with the City.

Additional facts are contained in the "Discussion" section.

POSITIONS OF THE PARTIES

Union

The Union initially contends that the grievance was timely filed. It acknowledges in this regard that the instant grievance deals with a situation that arose in 1987. Be that as it may, the Union argues it did not sit on its contractual rights or

ignore the matter. In support of this premise, it notes that in 1988 it raised Larson's situation with the City. According to the Union, Personnel Director Rusch's letter led the Union to believe that Larson would be properly paid and that she would be laid off at the end of the summer. The Union submits that while that did not happen, it had no notice or knowledge of same until it was brought to the Union's attention in May, 1991. The Union contends that as soon as it became aware of Larson's individual circumstances, and as soon as Larson became aware that she was covered by the labor contract, the matter was brought to the attention of the City seeking remedial adjustment. The Union therefore contends that the grievance which was ultimately filed was timely. In the alternative, the Union argues that the Employer should be estopped from asserting timeliness as an issue in this case or raising the equitable doctrine of latches since, according to the Union, it has engaged in a pattern of intentional deception and deceit since 1987 concerning Larson's position and her pay.

With regard to the merits, the Union argues that the City breached the contract, specifically the so-called 120 day rule, by failing to properly compensate Larson. In its view, there is no question that a contract violation occurred since Personnel Director Geissner admitted this point at the meeting where Larson was laid off. According to the Union, the City's violation of the 120 day rule was not just a slight oversight where Larson fell through the cracks, so to speak. Instead, the Union believes that for years the City intentionally concealed its action relative to Larson and deceived the Union. It therefore characterizes what happened here as a conspiracy between the Director of Parks and the City Personnel Director to employ a full-time clerical person in the Parks Department without paying that person (i.e. Larson) the contractual rates and benefits.

The Union also argues that in addition to trying to duck their contractual obligations towards Larson, the City is trying to get various contractual modifications from the Arbitrator. Specifically, it cites the following: (1) the City's argument that it is entitled to a "new clock" each calendar year for the 120 day rule; (2) the City's argument that there should be a limitation on damages to just the contractual year of the violation; and (3) the City's argument that there should be a limitation on benefits for employes who work past 120 days. The Union asks the Arbitrator to reject outright all of the Employer's foregoing contractual arguments.

In order to remedy the City's alleged breach of the labor contract, the Union requests a make whole remedy for Larson. In the Union's opinion, this make whole remedy should include lost wages, overtime and all other benefits such as health insurance, sick leave, vacations and holidays. According to the Union, this make whole remedy should run from June 10, 1987 to the present. Thus, the Union seeks to have the remedy be retroactive to 1987. In the Union's view, that's what this case is really all about. It requests that the Arbitrator find that regardless of how long the Employer

concealed its contractual violation, it will be required to comply with the contract. It argues that unless that happens, "catastrophe will ensue." In support of its premise that the remedy should be retroactive to 1987, the Union relies on a 1984 arbitration award involving the instant parties. In that case Arbitrator Duane McCrary awarded a remedy which went back five years. The Union argues that "it would be a grave injustice for this arbitrator to reverse, or in any way restrict, retroactivity . . .", especially when there is no language in the contract limiting same. Next, the Union seeks to have the back pay award cover the period of time Larson was laid off in the summer of 1991, specifically from May 31, 1991 until she returned to work for the City in September, 1991, as a meter reader. Finally, as part of this remedy, the Union requests that Larson be paid at the Clerk Steno II rate rather than the Clerk Typist I rate proposed by the Employer. In the Union's view, that is the only appropriate rate. It asserts that Larson performed the duties of a Clerk Steno II, so it is only fair that she should be paid at that rate.

Employer

The Employer initially contends that the grievance was not timely filed. It notes in this regard that the collective bargaining agreement provides that the grievance procedure is to be commenced within thirty working days of the date the employe should have known of the grievable matter. It submits that did not happen here. According to the Employer, both the Union and the grievant knew, or should have known, the nature of the grievant's employment years prior to filing the grievance. It therefore argues that both the Union and the grievant sat on the matter for years. In the Employer's view, the grievance that was ultimately filed was untimely and should be denied on that basis.

With regard to the merits, the Employer argues that its actions herein did not violate the collective bargaining agreement. In its view, there was neither a management conspiracy (as alleged by the Union) to subvert the contract, nor was there a contract violation which requires a remedy. The Employer's position is based on the premise that the grievant was compensated at the proper rate in 1991 for all the work she performed after the 120th day of calendar year 1991. According to the Employer, the grievant's employment was properly terminated on May 31, 1991, after the Union objected to the manner in which the grievant was being compensated. The Employer believes it terminated the grievant's employment for the calendar year (1991) in accordance with the parties' practice as set forth in the Shaw arbitration award. While the Union takes particular umbrage at the Employer's actions and statements that were made at the May 31, 1991 meeting, the Employer submits that all those actions and statements were proper under the circumstances.

As to any remedy that should be awarded, the Employer makes the following arguments. First, it is the Employer's position that reinstatement of the grievant is neither required nor appropriate under the circumstances. Second, it argues that the appropriate remedy in this case is "no remedy." Third, it contends that if any remedy is awarded, it should not be retroactive to 1987. In its view, such a retroactive remedy would run contrary to the great weight of arbitral authority. In its view, if any remedy at all is awarded, it should be of limited retroactive effect. Specifically, it believes the remedy should be limited to take effect on the date the grievance was filed (i.e. June 14, 1991) or, at the most, be given effect from the date of the grievance back to the date at which a grievance would have been untimely under the contract (i.e. thirty days prior to the June 14 filing date, which would be May 2, 1991). The Employer therefore argues that under no circumstances should the remedy awarded be retroactive prior to that date. Fourth, if any economic remedy is awarded, the Employer argues it should be at the Clerk Typist I rate, not the Clerk Steno II rate proposed by the Union. In the Employer's view, a Steno classification is not appropriate because the grievant testified she did not have that skill. The Employer submits that in the period between May 2, 1991 and Larson's last day of work, she was paid at a Clerk Typist I rate. Finally, the Employer asserts that any remedy granted should not include fringe benefits as proposed by the Union. It asserts there is no precedent for the Union's demand that the grievant receive fringe benefits because she was a part-time employe and Geissner testified without contradiction that part-time employes in the City do not receive such benefits. The City therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the City contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The parties' contractual grievance procedure (Article II) contains time lines for filing grievances. Specifically, it provides that grievances are to be discussed with the (employe's) "immediate supervisor within thirty working days . . . of the date the employe should have known of the grievable matter." It goes on to provide that if no solution is reached, the employe may reduce the grievance to writing, whereupon it is processed and forwarded to the Director of Personnel. The Employer argues that the Union and the grievant failed to comply with the aforementioned time limits.

In analyzing whether the time limits were met here, it is noted at the outset that the instant grievance deals with a situation that first arose in 1987. The Employer

contends that since Larson is complaining, in part, about the pay she received in 1987, that is when the instant grievance arose and when the grievance time lines started to run. Relying on this premise, the Employer reasons that a grievance filed in June, 1991, challenging an act which first occurred in 1987 is untimely. If the instant grievance involved a single transaction that occurred in 1987, certainly the Employer would have cause to complain about the timeliness of a grievance filed four years later. However, while many grievances involve a single isolated and completed transaction, that is not the case with all grievances. In some situations, the act complained of may be said to be recurring or repeated from day to day. In such circumstances, arbitrators have often times applied what has become known as the continuing violation theory. Under this concept grievances can be filed at any time during the continuing violation, even outside or after the time limits stated in the agreement. Said another way, the continuing violation theory construes time limits so as to permit the filing of what would otherwise be an untimely grievance. The continuing violation theory has been applied by arbitrators in cases involving improper wage rates, 1/ change in commission structure, 2/ failure to pay the proper job rate 3/ and salary increase denial. 4/ In the opinion of the undersigned, Larson's grievance is very similar in nature to the cases just cited. As a result, the undersigned finds that the continuing violation theory is applicable to Larson's grievance. Application of that theory here means that Larson's grievance is considered timely and procedurally arbitrable even though it deals with a situation that first arose four years before the grievance was filed.

In so finding, the undersigned is not ignoring the parties' arguments concerning who bears responsibility for the fact that the instant grievance addresses a situation that first arose in 1987. Instead, these arguments (specifically the Employer's contention that the Union and the grievant should have known of the grievable matter years prior to the time it actually filed the grievance and the Union's contention that it had no knowledge of the facts concerning Larson's employment status because of the City's intentional deception) will be addressed if a contractual violation is found and a remedy

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1/ Bethlehem Steel Company, 34 LA 896 (Seward, 1960).

2/ Sears, Roebuck and Company, 39 LA 567 (Gillingham, 1962).

3/ Steel Warehouse Company, 45 LA 357 (Delnick, 1965).

4/ San Francisco United School District, 68 LA 767 (Oestreich, 1977).

awarded retroactive to 1987.

Merits

Attention is now turned to the substantive merits of the grievance. As previously noted, the Union contends that the grievant was improperly paid for most of the time she worked for the City. The City disputes this contention.

Larson was originally hired as a temporary employe. There is nothing in the contract that precludes the Employer from hiring temporary employes. That being the case, the Employer was certainly within its contractual rights when it hired her as a temporary employe in June, 1987. Temporary employes are specifically excluded from the parties' contractual recognition clause. This means that temporary employes hired by the City are not in the Local 180 bargaining unit. Since temporary employes are not covered by the Local 180 labor contract, the Employer does not have to compensate them pursuant to the terms contained therein. The Employer is therefore free to compensate them however it wants. In Larson's case, it was $3.50 an hour with no fringe benefits.

Having said that, the contractual recognition clause goes into further detail regarding casual employes than that just noted above. Specifically, it provides that the temporary employes who are excluded from the bargaining unit are those "who are employed less than 120 calendar days in a calendar year." It is implicit from this language that employes who are employed less than 120 calendar days in a calendar year are not included in the bargaining unit. Conversely, it is just as implicit from this language that employes who work more than 120 days in a calendar year are included in the bargaining unit. The parties call this the 120 day rule. If a temporary employe is employed past that cutoff point (i.e. 120 calendar days in a calendar year) they cross a critical threshold. By crossing that threshold they become a member of the Local 180 bargaining unit and are covered by that labor contract. This means that when the Employer hires a temporary employe, it has to decide by the 120th day of that person's employment what it is going to do with that person. Specifically, it can either discharge/lay them off or it can continue to employ them. The Employer can choose either course of action. If it chooses the latter course of action over the former, though, the temporary employe becomes a member of the Local 180 bargaining unit effective as of their 121st day of employment.

The Union implies that if the Employer continues to employ a temporary employe past the 120 day cut off point, they (i.e. the former temporary employe) automatically assumes a full-time permanent position with the City. That is not the case. While the former (temporary) employe would automatically become a member of

the Local 180 bargaining unit as of their 121st day of employment, becoming a member of the bargaining unit is not synonymous with assuming full-time employment. For example, if a temporary employe who worked half-time crossed the 120 day threshold, the City is not obligated under the recognition clause to increase their hours from half-time to full-time on the 121st day of employment. Instead, the City can keep them at half-time. Thus, the employe's working hours do not necessarily change after they cross the 120 day threshold. As previously noted, what does change after a temporary employe crosses the 120 day threshold is that the (former) temporary employe is now included in the bargaining unit.

The foregoing principles will now be applied to the instant facts. What happened here is that Larson crossed the 120 day threshold and continued to be employed by the City. Specifically, she continued to be employed by the City for almost four years past her original date of hire. During that four year period she worked continuously in the Parks/Recreation Department except for several short leaves and was never laid off. While she did not work the same hours or schedule as the other clericals in City Hall, she worked a total of 7,265 hours for the City during that period. Given the long term duration of her employment, the number of hours worked during that time frame and the fact that she was never laid off, the undersigned sees nothing "temporary" about her employment status with the City. In fact, the undersigned surmises that the City would have allowed her to continue to work in the same capacity as she had been doing for almost four years had she not brought the matter to a head.

Once Larson worked past the 120 day cutoff point, her employment status changed from that of a temporary employe to a bargaining unit employe covered by the Local 180 contract. Given her changed status, she should have been treated as a bargaining unit employe from her 121st day of employment forward. However, that did not happen. Specifically, the Employer failed to treat Larson as a bargaining unit employe covered by the Local 180 contract from her 121st day of employment in the Parks/Recreation Department until her employment in that Department ceased. Since it failed to do so, it follows that the City violated the contract, specifically the 120 day rule. City Personnel Director Geissner acknowledged this point when the parties met on May 31, 1991, to address Larson's employment status. At that meeting, Geissner admitted to Union representatives that the City had, in fact, violated the 120 day rule with regards to Larson.

Notwithstanding Geissner's admission of a 120 day rule violation at the May 31, 1991 meeting, the City makes several arguments concerning the rule and its application. Each is addressed below.

First, the City argues that it could reset the clock on Larson for 120 days each

year of her employment. As the Employer sees it, there is a new or reset clock for temporary employes every calendar year. In their view, temporary employes who work from one calendar year into the next revert back to being a temporary employe all over again, even if they worked more than 120 calendar days in the previous year. Applying this premise to Larson's employment, the Employer contends that on January 1, 1988, 1989, 1990 and 1991 (the four years in which Larson worked for the City in the Parks/Recreation Department), Larson was, or reverted back to, a temporary employe. The practical implication of the Employer's interpretation is that Larson could be paid at the temporary employe rate (i.e. non-bargaining unit rates) for 120 days each year, namely, until April 30.

The undersigned finds the Employer's argument that it could reset the clock on Larson for 120 days each year to be untenable. The counting process for figuring when temporary employes have worked 120 calendar days begins anew each year if the Employer avails itself of its inherent right to lay off/discharge the temporary employe. For example, if the Employer lays off/discharges a temporary employe on their 119th day, the counting process would start all over again if the Employer were to rehire that same person in the next calendar year. Here, though, that never happened. Specifically, the Employer never availed itself of its right to lay off/discharge Larson before her 120th day of employment in 1987. Instead, it continued to employ her for four years without any break in service. Once Larson crossed the 120 day threshold and became a bargaining unit employe in 1987, the Employer could not change her status back to what it had originally been (i.e. a temporary employe). That being so, the Employer is not entitled to reset the clock, so to speak, on Larson and revert her status back to that of a temporary employe. Consequently, the Employer's contention that there was a new clock on Larson for 120 days in 1988, 1989, 1990 and 1991 whereby she essentially reverted back to temporary employe status is expressly rejected.

In so finding, the undersigned is well aware that Larson's pay was cut at one point during her employment. The record indicates in this regard that in January, 1989, Larson's pay was reduced from $6.47 an hour to about $5.00 an hour. Larson worked at this lower rate until August 10, 1989 when she returned to $6.47 per hour. Insofar as the record shows, she never protested this pay cut. The Employer argues that this pay cut shows that Larson must have considered herself to be a temporary employe, as opposed to a bargaining unit employe, since she did not protest this $1.50 an hour pay cut. However, in my view, it is irrelevant what she thought her status was or why she failed to protest her pay cut because those matters (i.e. bargaining unit status and pay) are governed by the contract's terms -- not the individual's choice or intent.

Next, the Employer contends that in applying the 120 day rule to the instant facts, the Arbitrator should consider an alleged past practice. Past practice is often

times used by labor arbitrators to interpret ambiguous or silent contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is ambiguous or silent on a specific topic. Here, though, the language in the recognition clause dealing with temporary employes is neither ambiguous nor silent. In my view, it is clear and unambiguous concerning what happens to temporary employes after a specified time frame, namely, 120 days in a calendar year. Given this finding, there is no need for the undersigned to resort to evidence external to the agreement, specifically an alleged past practice.

Be that as it may, the undersigned has nevertheless decided to review the alleged practice since the Employer places great reliance on it and contends its lay off/discharge of Larson was consistent with it. According to the Employer, the practice is that the Union notifies the Employer when a temporary employe has reached the 120th day of employment and then the Employer terminates the temporary employe. For purposes of discussion here, this alleged practice is divided into two components: (1) who notifies whom regarding the temporary employe, and (2) what the Employer does to the temporary employe. The Union does not dispute the second component of the alleged practice, namely, that the Employer can discharge temporary employes at or before their 120th day of employment. That being so, there is no dispute concerning the Employer's ability to do so. What is disputed, though, is the other part of the alleged "practice", namely, the question of who notifies whom regarding the temporary employes. The Employer contends that historically the Union has notified the Employer concerning temporary employes. It cites a previous arbitration award between the parties to support this premise. In that case, which also dealt with the 120 day rule, Arbitrator David Shaw stated the following in the "Background" section of his award:

> Since the recognition clause was amended in the 1978-1979 agreement, it has been the practice in the Parks and Highway Departments for the Union to notify the City when it thought a temporary or seasonal employe was at or near the 120 day limit.

The Employer contends that the foregoing statement accurately identified the state of the practice when the award was issued (1980) and that it continues to be the practice up to the present time. The Union disagrees. At the hearing Union President Steve Reget disputed the accuracy of the afore-mentioned statement in the Shaw arbitration award concerning the existence of such a practice. In his view, there was no such practice then or now. While the parties obviously dispute whether there was, or was not, such a practice in 1980, the undersigned need not revisit that matter. This is because the question here is not what the practice was in 1980, but rather what it (the practice) was

in 1991 when the instant grievance was filed. Attention is now turned to that point. Obviously, given the Union's disavowal of the existence of such a practice, it was incumbent upon the Employer to prove the existence of same. The Employer's proof of such a practice consisted of one instance where the Union wrote the Employer and inquired about an employe named Sprain. In that instance, the Union's Recording Secretary wrote the following letter to the City's Personnel Director on November 2, 1987:

> Mr. Jerome Rusch
> Director of Personnel
> City of La Crosse City Hall
> 400 La Crosse Street
> La Crosse, Wisconsin 54601
>
> SUBJECT: Temporary Help over 120 days.
>
> Dear Jerry:
>
> The Executive Board at their last regular meeting brought up the fact that Mr. Sprain was over his 120 days and was wondering if he was getting Local 180 wages. Please check and let me know what the disposition of his wages are.
>
> Sincerely,
>
> LA CROSSE CITY EMPLOYEES UNION LOCAL 180
>
> Fred D. Ray /s/
>
> MR. FRED D. RAY - RECORDING & CORRESPONDING SECRETARY

While this letter shows that on one occasion the Union wrote the Employer and inquired about a temporary employe, that is all it shows. On its own, this single instance is insufficient to create a practice that it was, and is, the Union's responsibility to notify the Employer when temporary employes approach their 120th day of employment with the City. Since there is no practice on the subject matter to the contrary, the responsibility to keep track of the temporary employes falls on the Employer, and not the Union. Practically speaking, the Employer is better suited than the Union to keep track of such information because the Employer keeps those records. Application of this rationale here means that the Union was not obligated to inform the Employer in

1987 when Larson reached her 120th day of employment.

The focus now turns to the other component of the alleged practice. As previously noted, that component is that regardless of who notifies whom regarding the temporary employes, the Employer can discharge temporary employes at or before their 120th day of employment. The Employer contends that when it laid off/discharged Larson on May 31, 1991, it was simply acting in conformance with this practice. In other words, the Employer uses the practice to justify Larson's lay off/discharge. The problem with applying this practice to Larson though is that she was not a temporary employe on May 31, 1991. This of course means that the aforementioned practice has no application whatsoever to Larson. Had Larson been a temporary employe who was at or near her 120th day of employment with the City on May 31, 1991, certainly the City would have been within its rights to lay off/discharge her. However, the simple fact of the matter is that Larson was not a temporary employe on May 31, 1991. As previously noted, her employment status changed from that of a temporary employe to a bargaining unit employe back in 1987. Given her status as a bargaining unit member, she should have been treated as one on May 31, 1991. What happened though is that the Employer treated Larson as a temporary employe when it laid off/discharged her on that date. It erred in doing so.

Having so found, the question remains whether Larson's layoff/discharge violated the contract. I find that it did based on the following rationale. As noted above, Larson was a bargaining unit employe covered by the Local 180 contract at the time of her lay off/discharge. As a bargaining unit employe she was entitled to receive whatever rights the contract gives employes in the aforementioned areas. With regard to discharges, Article 20 D provides that "the City shall not . . . discharge any employe except for just cause." There are two basic questions in any just cause case. The first is whether the employe is guilty of misconduct and the second, assuming this showing is made, is whether the punishment fits the crime. Here, the Employer did not offer any evidence whatsoever that Larson's discharge was due to job related misconduct. In point of fact, it was not. That being so, the Employer simply did not meet its burden of proof that it had just cause to discharge Larson. Next, with regard to layoffs, Article 19 gives the Employer the right "to lay off for lack of work or funds." 5/ Insofar as the

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5/ There are two contractual provisions which deal with layoff: Article 19 (the management rights clause) and Article 18 (the layoff clause). Article 18 explicitly refers to just full-time employes. The reason Article 18 was not used here will become apparent later in the discussion when the undersigned resolves the question of whether Larson worked full-time or part-time.

record shows, Larson's layoff was not necessitated because of any lack of clerical work in the Department or funds to pay her. Instead, her layoff resulted from the fact that she brought the matter of her pay to a head. Given the foregoing, it is held that Larson's layoff/discharge on May 31, 1991 violated the contract.

Remedy

Having found a contractual violation, the focus now turns to the remedy. Inasmuch as there are several components to this matter, the discussion concerning same has been divided into the following areas: reinstatement, back pay retroactivity, benefits and applicable wage rate. Each is addressed below.

Reinstatement

Attention is focused first on the matter of reinstatement because there appears to be a question concerning same. It is noted at the outset that the grievance filed June 14, 1991, specifically sought, among other things, "reinstatement" for the grievant. At the hearing, though, the Union specifically indicated in their opening statement that they were not seeking reinstatement for the grievant since she had assumed employment elsewhere. Given the latter pronouncement, Larson's reinstatement to a job with the City will not be part of the remedy awarded here. As a practical matter then, this finding means that the focus of the remedy herein will be retroactive, rather than prospective, in nature.

Back Pay Retroactivity

As noted in the procedural arbitrability section, this grievance concerns the continuing matter of the Employer's failure to pay Larson the proper contractual rate. Normally the remedy in continuing violation cases is prospective only. Specifically, the remedy is usually limited to the date of the grievance filing forward and does not date back to the time of the initial contract violation. 6/ In other words, there is generally no retroactivity to the remedy. The Employer's brief cited numerous arbitration awards that have so held.

The undersigned concludes that the normal remedy noted above for a continuing contract violation will not suffice here. In so finding, it is noted that if the remedy was limited to just the filing date of the grievance forward, it (i.e. the remedy) would not

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6/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed., p. 153.

even date back to the time of the wrongful layoff/discharge because the instant grievance was filed two weeks after that occurred. In my view, such a remedy would not be sufficient to remedy the Employer's contractual breach. The undersigned therefore believes it is necessary for the remedy to go back beyond the filing of the grievance.

The big question here is how far back to go. The Union proposes that the remedy go back to 1987, specifically the date Larson started her employment with the City -- June 10, 1987. Thus, the Union is seeking over four years' back pay. In support of its premise that the remedy should be retroactive to 1987, the Union relies on a 1984 arbitration award involving the instant parties. In that case Arbitrator Duane McCrary awarded a remedy which went back five years. According to the Union, this award created a "clear and uncontroverted precedent . . . that when contractual violations occur, the remedy goes back to the date of the violation." I do not find the McCrary Award as conclusive on retroactivity as the Union does. Although it, like any former award, is instructive, it has limited precedential value. Additionally, as noted above, McCrary's Award of five years' back pay for a continuing grievance is certainly contrary to the great weight of arbitral thinking on the matter. That being so, the undersigned believes he is not obligated or constrained by the McCrary Award to give full retroactivity here.

After considering the above, the undersigned concludes that the appropriate remedy under the facts of this case is for the remedy to go back to the effective date of the agreement under which the instant grievance was filed. The contractual basis for this finding is found in Article 2 (the grievance procedure) wherein it provides that "matters involving the interpretation of this contract shall constitute a grievance." (emphasis added) I read the language just cited as prohibiting me from imposing a remedy that exceeds "this contract." Said another way, I interpret the clause just cited to not allow for liability preceding the effective day of "this contract." Here, the grievance was filed under the 1991 contract so the Employer's retroactive liability cannot precede the effective date of that contract. Were I to find otherwise and go back to the point of the original contract violation for a remedy (i.e. to 1987) as the Union proposes, I would not be interpreting the 1991 contract but rather the 1987-88 contract. Simply put, I'm not authorized to do so. It is therefore held that the Employer's back pay liability for its contractual violation here begins January 1, 1991 and runs until September 30, 1991 (the day Larson began employment as a meter reader with the Water Department). 7/

7/ In light of the decision to not award a remedy retroactive to 1987, the undersigned need not comment further on the parties' various arguments concerning who bears responsibility for the fact that the instant grievance addresses a situation that first arose in 1987.

Benefits

Next, the focus turns to the question of whether the remedy awarded here will include fringe benefits. The Union argues that the remedy should include fringe benefits, specifically health insurance, sick leave, vacations, holidays and overtime. The Employer disputes this assertion. According to the Employer, there is no precedent for Larson to receive fringe benefits because she was a part-time employe, and part-time employes have historically not received such benefits.

Before looking at what the contract says about fringe benefit eligibility, it is first necessary to decide whether Larson worked full time or part time because this call has a bearing on the question of benefit eligibility. The Union argues she was full time while the Employer disputes this and asserts she worked part time. The contract defines full-time status for City Hall clerical employes as being 37.5 hours per week or 75 hours biweekly. If this same figure were expressed in a yearly figure, it would be 1950 hours per year (i.e. 37.5 hours per week times 52 weeks equals 1950 hours). By inference then, an employe must work 1950 hours per year to qualify for full-time status. Union Exhibit 15 lists all the hours Larson worked in the Parks/Recreation Department, including the approximate 245 hours she worked as an art instructor, volleyball site supervisor and scorekeeper for youth basketball. That chart shows that her hours varied from one pay period to the next. In some biweekly periods she worked more than 75 hours, while in others she worked less than 75 hours. Since her hours varied from week to week, I have decided to use the yearly figures. The yearly figures contained in Union Exhibit 15 show that Larson worked 1001 hours in 1987, 1706 hours in 1988, 1775.25 hours in 1989, 1859.75 hours in 1990 and 923.5 hours in 1991. This breakdown by year shows that Larson never met the threshold in any year to qualify for full-time status since she never worked more than 1950 hours. The same conclusion is reached if instead of using a yearly breakdown, Larson's entire employment period is used. Union Exhibit 15 shows that Larson worked 7265.5 hours during her four years in the Parks/Recreation Department. Had Larson worked full time during the period between June 10, 1987 and May 31, 1991, specifically 204 weeks, she would have worked 7650 hours. This analysis shows that even looking at Larson's four year employment as a whole, she did not qualify for full-time status since she failed to average 1950 hours per year. As a practical matter, this finding that Larson did not qualify for full-time status means that she automatically falls into the only remaining category -- part-time.

Having so found, attention is now turned to what the contract says about fringe benefit eligibility. The contract does not indicate whether there are any eligibility requirements to receive fringe benefits. Specifically it does not say whether part-time

employes get such benefits. That being so, it is apparent that the parties did not include language in the 1991 contract covering that matter. Given this contractual silence on the topic, it follows that the contract language is ambiguous on whether part-time employes get fringe benefits. This contractual silence has apparently existed for over a decade because Arbitrator Shaw noted in his 1980 award that "the parties collective bargaining agreement does not appear to contemplate or provide that employes who work less than full-time are entitled to fringe benefits and other conditions of employment . . ."

Since the agreement is ambiguous on this point, attention is turned to an alleged past practice. As previously noted, evidence of the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is silent on a topic.

The record indicates in this regard that for at least a decade, the Employer's practice has been that part-time employes do not receive fringe benefits. Personnel Director Geissner testified without contradiction to this affect. Given his uncontradicted testimony on this point, no dispute exists over the existence of the practice.

Unwritten practices, such as this one, become an implicit part of the contract. Application of that principle here means that the Employer is not obligated to provide fringe benefits to employes who work less than full time. It has already been concluded that Larson worked less than full time. It follows from that decision that the remedy awarded here will not include fringe benefits because Larson, as a part-time employe, was not eligible to receive such benefits.

Applicable Wage Rate

Finally, the focus turns to what wage rate Larson should be paid. The Union alleges Larson should be paid at the Clerk Steno II rate, while the City disputes this assertion and contends the applicable rate is the Clerk Typist I rate. The undersigned finds that neither rate is appropriate for the following reasons. The Clerk Steno II job description, 8/ which the Union relies on, provides on its face that the incumbent works in the City Clerk's Office. Larson never worked in the City Clerk's Office so the job description is inapplicable to her on that basis alone. Also, that job description provides that performing "stenographic work" was the nature of the job, and Larson acknowledged she did not do steno work. That being the case, I find that the Steno II

8/ Union Exhibit 4.

rate is not appropriate for Larson. Next, the Clerk Typist I job description, 9/ which the Employer relies on, provides on its face that the incumbent works in the "Police/Finance Office; sharing time between offices." Once again, Larson did not do that; she never worked in the Police/Finance Office. As a result, that job description is inapplicable to her on that basis alone. Additionally, there are other job duties listed on that job description that Larson did not do, such as: "perform work for court officer -- enter data into CRT unit -- receive and count transit money." That being so, I find that the Clerk Typist I rate is not appropriate either. Given the foregoing, it is held that Larson should not be paid at the Clerk Steno II rate as proposed by the Union, or the Clerk Typist I rate as proposed by the Employer.

Having so found, the question remains as to what rate Larson should be paid. Insofar as the record shows, Larson performed most of the same duties as Rita Gartner, the other clerical in the Department, except that Gartner did the Park Board minutes and the steno work, while Larson did the word processing work and graphic art work. Except for those differences then, they did essentially the same clerical work. Although some confusion exists on the point, Gartner was classified at the time of the hearing as a Park and Recreation Secretary. 10/ The job description for the Park and Recreation Secretary position 11/ indicates that the nature of the job is to perform "typing, filing and recordkeeping." That job description goes on to list examples of job duties that someone in that classification performs. The undersigned has compared the job duties listed on that job description with the listing Larson made of the duties she performed in the Department. 12/ After making a comparison between the two documents, I am persuaded that Larson performed almost all of the duties listed on the Park and Recreation Secretary job description with the exception of dictation work. In my view, the critical question here is whether Larson is precluded from receiving the pay of a Park and Recreation Secretary because she did not do dictation work. I conclude she is not. In my view, the overall job duties that Larson and Gartner performed are close enough that they should be paid the same, especially since the alternative pay

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9/ Employer Exhibit 3.

10/ The Union mistakenly indicated Gartner was classified as a Clerk Steno II.

11/ Employer Exhibit 4.

12/ Union Exhibit 20.

classifications proposed by the parties for Larson (i.e. Clerk Steno II by the Union and Clerk Typist I by the Employer) have been rejected. It is therefore held that Larson is to be paid at the rate of a Park and Recreation Secretary. The 1991 contract provides that a "Park/Recreation Secretary" is to be paid at the rate of $10.41 per hour effective January 1, 1991.

The findings made above are incorporated into the following remedy. Attention is focused first on the back pay owed for the period of January 1 to May 31, 1991. Larson worked 923.5 hours in the Parks/Recreation Department in 1991 between January 1 and May 31, 1991. As noted above, she should have been paid at the rate of $10.41 an hour for those hours. However, she was paid at $6.47 for all but the last two pay checks, where she was paid $7.55 an hour for 54 hours. Thus, she was paid for 869.5 hours at $6.47 an hour and for 54 hours at $7.55 an hour. The difference between $10.41 and $6.47 is $3.94. $3.94 an hour times 869.5 hours is $3,425.83. The difference between $10.41 and $7.55 is $2.86. $2.86 an hour times 54 hours is $154.44. Adding $3,425.83 and $154.44 totals $3,580.27. Larson is owed this amount for the period between January 1 and May 31, 1991. Attention is now turned to the back pay owed for the period of May 31, 1991 to September 30, 1991 (i.e. from the date of her layoff/discharge to the date she returned to work for the City as a meter reader in the Water Department). In determining how much back pay is owed for this four month period, it is obviously necessary to determine how many hours are involved. Had Larson worked a set number of hours each week, that same number of hours would have been applied to this four month period. However, this call has been complicated by the fact that Larson did not work a set number of hours each week. Thus, it is unknown exactly how many hours Larson would have worked in that four month period had she not been laid off/discharged. It has therefore been necessary for the undersigned to use an alternative method for determining the number of hours that Larson is to be paid for that period that has some basis in the record. The undersigned has decided to use the hours Larson worked in the four month period between January and April, 1991. Union Exhibit 15 indicates Larson worked the following hours in that four month period:

Biweekly Period Ending	Hours Worked
1-03-91	69.5
1-17-91	93
1-31-91	61
2-14-91	67
2-28-91	77
3-14-91	94

3-28-91		85
4-11-91		74.75
4-25-91		73
	Total	694.25

Since Larson worked 694.25 hours in the four month period of January through April, 1991, it is assumed, for purposes of determining a remedy here, that she would have worked the same number of hours in the four month period of June through September, 1991, but for her layoff/discharge. $10.41 an hour (the applicable rate) times 694.25 hours is $7,227.14. This amount is offset by the $2,380.00 in unemployment compensation that Larson received for that period. Subtracting $2,380 from $7,227.14 yields $4,847.14. Larson is owed this amount for the period between May 31 and September 30, 1991. Adding the two subtotals of $3,580.27 for the period between January 1 and May 31, 1991 and $4,847.14 for the period between May 31 and September 30, 1991 yields a total figure of $8,427.41. Larson is to be paid this amount (i.e. $8,427.41).

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

AWARD

1. That the grievance is procedurally arbitrable;

2. That the Employer violated the collective bargaining agreement in the manner in which it compensated the grievant;

3. That the Employer violated the collective bargaining agreement when it laid off/discharged the grievant on May 31, 1991.

4. That in order to remedy these contractual violations, the Employer is to pay the grievant at the rate of the Park and Recreation Secretary ($10.41 per hour) from January 1, 1991 (the effective date of the applicable labor contract) to September 30, 1991 (when she returned to work for the City as a meter reader in the Water Department). The amount to be paid the grievant is $8,427.41. Reinstatement of the grievant is not required. Additionally, the Employer is not required as part of this Award to pay Larson any fringe benefits.

Dated at Madison, Wisconsin this 6th day of April, 1993.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator