

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
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CITY OF MANITOWOC, PUBLIC WORKS	:	
EMPLOYEES, TEAMSTERS LOCAL NO. 75	:	Case 93
	:	No. 48638
and	:	MA-7665
	:	
CITY OF MANITOWOC	:	
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, WI 53212, by Mr. John J. Brennan, appearing on behalf of the Union.

Mr. Patrick L. Willis, City Attorney, City of Manitowoc, 817 Franklin Street, P.O. Box 1597, Manitowoc, WI 54221-1597, appearing on behalf of the Employer.

ARBITRATION AWARD

City of Manitowoc, Public Works Employees, Teamsters Local No. 75, hereafter the Union, and City of Manitowoc, hereafter the Employer or City, 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 to appoint a staff member as a single, impartial arbitrator, to resolve the instant grievance. On February 12, 1993, the Commission appointed Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on April 21, 1993 in Manitowoc, Wisconsin. The hearing was not transcribed and the record was closed on May 14, 1993, upon receipt of written argument.

ISSUE:

The parties stipulated to the following statement of the issue:

Did the City violate the parties' agreement by failing to promote Manny Cantu to the vacant, full-time driver position?

If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS:

ARTICLE IV

PROBATIONARY AND EMPLOYMENT STATUS

Section 1. Probationary Period. All newly hired employees shall be considered probationary for the first six (6) months of their employment with the Employer and such probationary employees may be disciplined or discharged without recourse to the grievance procedure contained in this agreement. The seniority of an employee who has satisfactorily completed probation shall date from his original date of employment and he shall then be entitled to all benefits accruing to regular employees. The City reserves the right to shorten the probationary period for any employee.

Section 2. Definitions.

(a) A regular full-time employee is hereby defined as an employee who has completed his designated probationary period and who occupies a regular full-time position.

(b) A regular full-time position is defined as a group of duties and responsibilities requiring the full-time employment of one (1) person for forty (40) or more hours per week on a regular schedule throughout the year.

(c) A regular part-time employee is an employee who is assigned regular duties throughout the year and works more than twenty (20) hours per week.

(d) A temporary or seasonal employee is an employee who occupies a temporary or seasonal position.

(e) A temporary or seasonal position is defined as a group of duties and responsibilities requiring the temporary or seasonal employment of one (1) person on either a full-time or part-time basis. Temporary or seasonal employees are not covered by this agreement. A temporary or seasonal position is one in which the continuous length of time from its creation to its expiration is one (1) year or less.

Section 3. Reclassification. Should a part-time or seasonal employee be reclassified as a regular employee

and should he be maintained in the same or kindred occupation under the same division supervisor, the first ninety (90) days of continuous employment (including all time worked) shall be considered his probationary period.

Section 4. Opportunity. Qualified part-time, temporary and seasonal employees shall be given an opportunity for full-time jobs when such openings occur. The term "opportunity" shall mean that part-time employees will be considered for full-time positions, but will not automatically be entitled to a trial period for the position.

ARTICLE VII

SENIORITY

Section 1. Seniority to Prevail. Unless otherwise modified elsewhere in this Agreement, seniority shall prevail. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

Section 2. Definitions.

(a) City-wide Seniority shall be defined as the length of service with the City of Manitowoc from the employee's last date of hire to a position with the City plus such additional time as is required or granted for vacations, leaves of absence, illness or injury.

(b) Department Seniority shall be defined as the length of service with a department within the bargaining unit from the employee's last date of hire to a position within such department, including such additional time as is required or has been granted for vacations, leaves of absence, illness or injury. The bargaining unit shall be deemed to consist of three (3) departments, namely: (1) Bus Drivers, (2) Mechanics, and (3) Other Department of Public Works employees. Employees of each department shall be carried on a separate seniority list for all purposes including Article IX, Job Posting, or any other article. Employees in any department shall not be credited with seniority when bidding for any position in another department, but once hired to a position in such other department, they shall be credited with previously earned seniority for other respects in accordance with

the terms of this agreement. Such employees shall not be required to fill out a new city job application when bidding on a job in another department in the bargaining unit, but they will be allowed to submit supporting information if they desire.

Section 3. Relation with Other City Departments. If an employee moves from another City department to the Department of Public Works, city-wide seniority shall prevail for the computation of fringe benefits, but department seniority shall prevail for vacation bidding and job bidding purposes. When being considered for a position in another department of the City, the employee seeking the position in the other department shall not be credited with any seniority when being considered.

ARTICLE IX

JOB POSTING

Section 1. Job Posting Procedure. A new job or vacancy shall be filled as follows:

(a) Posted on the bulletin board five (5) working days before the job operation begins. Copies of all job posting will be forwarded to the Union.

(b) Employees desiring posted job shall sign notice.

(c) In filling new or vacant positions, the full-time applicant with the most seniority in the department, if qualified to learn the new position, shall be given an opportunity to be awarded the new or vacant job position.

(d) Employees shall be allowed to sign for posted jobs within their same bracket but shall only be allowed one (1) such move per year.

(e) When seniority is not recognized in job preference the case shall be subject to the grievance procedure.

(f) Vacancies may be temporarily filled for a maximum of fifteen (15) working days without posting or without regard to seniority.

(g) Employees covered by this Agreement and under the procedures of the above paragraphs shall be given

consideration for new positions or vacancies.

Section 2. Return to Former Position. The employee shall have 30 days in which to familiarize himself with his new position at his old rate of pay. Should the employee fail to qualify for the posted position within 30 days, or if he desires within 30 days, he shall be returned to his former position.

Section 3. New Positions. In the event a new situation arises during the life time of this Agreement (such as the creation of a new job classification) the parties hereby agree to immediately commence negotiations to arrive at the conditions applicable to meet the situation.

Section 4. Temporary Vacancies. Temporary vacancies in higher classifications due to vacations and/or illness shall be filled by regular employees in the next lower bracket and they shall be compensated accordingly.

BACKGROUND:

Manny Cantu, hereafter the Grievant, is a regular, part-time Bus Driver for the City of Manitowoc. As a part-time driver, he normally works 70 hours every two weeks or 35 hours per week. In addition, Cantu works an occasional Saturday. Cantu has held this position since March 13, 1984 and is at the top of the seniority list for regular part-time drivers.

On October 7, 1992, the City posted a notice of job opening for a full-time Bus Driver position. Several employees posted for this position, including part-time Bus Drivers Ron Kaminski and the Grievant. The City awarded the position to Kaminski, who had less seniority than the Grievant.

On November 4, 1992, the Grievant grieved the denial of the full-time position on the basis that the position was filled by a less senior employe. On December 9, 1992, Director of Public Works Michael E. Hawley denied the grievance and stated, inter alia, the following:

In conclusion, all contract requirements clearly were followed when Ron Kaminski was selected to fill the full-time Bus Driver vacant position. The City was obligated to consider all three part time Bus Driver

applicants for the position, but was not required to award the position to any of them.

As we explained at our meeting, it was our determination that Ron Kaminski was the most qualified of the three to fill the vacancy and he was in fact selected for the position.

On December 16, 1992, in a letter to Teamsters Representative Michael Williquette, City Attorney Patrick Willis confirmed that Kaminski was selected for the full-time Bus Driver position because he was the most qualified of the three part-time employees who had applied for the position. Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

Article IV, Section 4 of the Labor Agreement specifies that "qualified, part-time, temporary and seasonable employees shall be given an opportunity for full-time jobs when such openings occur.

The term 'opportunity' shall mean that part-time employees will be considered for full-time positions, but will not automatically be entitled to a trial period for the position." This language does not require the City to fill full-time positions with its part-timers and allows the City to hire from outside of the bargaining unit. However, when the City chooses to fill the full-time position with a part-time employe, then the provisions of Article VII are controlling.

Article VII, Section 1, states, "unless otherwise modified elsewhere in this Agreement, seniority shall prevail." Seniority is accrued in three (3) separate departments, i.e., Bus Drivers, mechanics and other DPW employees. Article VII, Section 2, provides that "employees of each department shall be carried on a separate seniority list for all purposes including Article IX, Job Posting, or any other article (emphasis added)." Seniority is not distinguished on the basis of part-time or full-time status within the department.

At the very least, the language of Article VII directly contradicts Article IV, Section 4 and requires a finding of ambiguity in the Labor Agreement. Union Steward Judith Novak has had fifteen (15) years of service as a full-time Bus Driver. Novak's testimony demonstrates that, during her tenure as a full-time Bus Driver, vacant full-time Bus Driver positions have always been filled by the most senior part-time Bus Driver, without regard to any other factor. Indeed, as Novak stated at hearing, in the past, the full-time driving positions were not even posted, but rather, the City offered the position to the most senior part-

time driver without objection. Novak's testimony both supports and is supported by the language of Article VII. When a new supervisor arrived in the Transit Department, the City unilaterally changed the past practice.

The City's rationale for denying the Grievant the full-time position has varied from time-to-time. The Union witnesses who attended the post-grievance meeting stated there was absolutely no mention of work performance problems, but rather, the only reason given for the failure to promote the Grievant was that his language skills were inadequate. Apparently, the Grievant's English is completely adequate for 35 hours a week, but is a complete bar to employment at a 40-hour per week position. Such an argument is astounding.

The forms completed by the Grievant indicate that the Grievant is a below average speller and that the Grievant confuses closely related (in terms of spelling) words. The City witnesses acknowledged that they were able to understand the written statements of the Grievant and, given the mechanics notations, apparently the mechanics were also able to understand the Grievant's statements.

At hearing, the City's position changed slightly when the City witnesses claimed that, while the language/communication problem was a factor, it was also determined that the Grievant's performance was not up to the standards of a full-time driver. The documentary evidence does not substantiate the sub-standard performance claim of the City.

The record reflects that the Grievant received only one written warning, *i.e.*, a 1988 reprimand for failing to show up at work or call. The City introduced passenger complaint forms which were dated from May, 1991 to April, 1992 and asserted that they represented verbal warnings. Of the five (5) complaint forms, four were written for failing to stop at railroad tracks and one referred to an allegation that the Grievant had arrived early at a pick-up point and did not stop. With the exception of one complaint form, no complainants were identified.

The complaint forms are hearsay, have no foundation for reliability, and should be given no weight. Assuming arguendo, that the City exhibits are entitled to be given any weight, the exhibits do not provide a basis to ignore the clear language of Article VII of the Labor Agreement and the past practice which has arisen thereunder.

The language of the contract, as well as the evidence of the parties' past practice, establishes that, should the City choose to hire from the ranks of the part-time Bus Drivers, then the most senior part-time Bus Drivers must be selected to fill vacant,

full-time positions. The grievance should be sustained.

Employer

Essentially, the Union is arguing that the Grievant's seniority as a part-time Bus Driver entitles the Grievant to a trial period, regardless of whether or not he is the most qualified applicant for the position. Article IV, Section 4 of the contract clearly, specifically and unequivocally provides otherwise.

The clear and unambiguous language of Article IV, Section 4, is supported by the job posting language itself which provides that only the "full-time applicant with the most seniority in the Department" will be given a trial period to fill a new or vacant position. Despite the Union's arguments to the contrary, the definition of "Department Seniority" , Article VII, Section 2(b) does not create ambiguity in the otherwise clear and unequivocal language of Article IV, Section 4. Certainly, the Grievant retains his seniority within the Bus Driver department, whether or not he is promoted.

The City does not allege that Grievant is not qualified to be a Bus Driver, but does argue that the Grievant's performance suffers in some important areas, i.e., in the last two years, there have been at least four complaints that the Grievant has not made proper stops at railroad crossings; there has been another complaint that the Grievant did not stop at a bus stop when he was five minutes early; and the Grievant has difficulty speaking and understanding the English language.

As Transit Manager Tony Scherer testified at hearing, on one occasion the Grievant reported an accident to the Transit System Office while he was driving a bus and, because of the Grievant's inability to speak comprehensible English, the Office could not determine the location of the accident and, thus, could not assist in summoning help to the scene. The Grievant's conduct at hearing demonstrated that the Grievant has difficulty understanding questions and difficulty responding to questions in a comprehensible manner.

Contrary to the Union's argument, the fact that the City, in the past, selected the most senior part-time driver for vacant, full-time openings does not require the City to continue to select the most senior applicant. The City has authority to select the most senior applicant, but is not contractually required to do so. Moreover, giving the clear and unambiguous of the Labor Agreement, past practice is not controlling.

Kaminski, unlike the Grievant, has never received any

warnings about his driving and, in fact, has received a number of compliments from the public for his help and service as a Bus Driver. Consistent with the requirements of the labor contract, the City evaluated the qualifications of the part-time Bus Drivers who applied for the vacant, full-time position and then selected the applicant the City believed to be most qualified. The grievance is without merit and should be denied.

DISCUSSION:

Article IV, Section 2, recognizes the following classifications of employees: regular full-time, regular part-time, temporary or seasonal. Article IX, Section 1, (c), addresses the right of full-time employees to fill new or vacant positions and Article IV, Section 4, addresses the right of part-time, temporary and seasonal employees to fill full-time jobs.

Article IV, Section 4, provides that qualified part-time employees are to be given an "opportunity" for full-time jobs when such openings occur, with "opportunity" defined to be "that part-time employees will be considered for full-time positions, but will not automatically be entitled to a trial period for the position". Article IX, Section 1, (c), states that "the full-time applicant with the most seniority in the department, if qualified to learn the new position, shall be given the opportunity to be awarded the new or vacant position".

Article IX, Section 1, (c), unlike Article IV, Section 4, references the seniority status of applicants. Given this reference, it is reasonable to conclude that, had the parties intended a regular part-time employe to have a seniority right to full-time positions, then they would have expressed such a right in the language of Article IV, Section 4.

The language of Article IV, Section 4, neither expresses, nor implies, that the most senior qualified part-time employe is entitled to be awarded a full-time job. As the City argues, the language of Article IV, Section 4, clearly and unambiguously provides the City with the right to select the most qualified part-time applicant, regardless of seniority.

The language of Article VII, Seniority, relied upon by the Union, contains the following:

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Construing the language of this provision in a manner which is consistent with the language of Article IV, Section 4, the undersigned is persuaded that, if there is no reasonable basis to distinguish between the qualifications of two or more qualified part-time applicants, then seniority "prevails". 1/ However, to interpret this language as providing the Grievant with an absolute seniority right to the disputed full-time position would be a nullification of the language of Article IV, Section 4, rather than, as the Union argues, a clarification of this language.

1/ Apparently, only part-time and full-time employees are on the seniority list. A part-time employe may have more seniority than a full-time employe.

Union Steward Novak is a full-time Bus Driver and has been employed by the City since January of 1978. During Novak's tenure with the City, the City has had five or six vacancies in full-time Bus Driver positions. Prior to the instant grievance, all of these vacancies were filled by the most senior part-time Bus Driver. In each of these cases, the vacant full-time position was not posted and the position was offered only to the most senior part-time Bus Driver.

Apparently, the disputed position is the first full-time vacancy to be filled during Anthony Scherer's tenure as Transit Supervisor. 2/ Scherer's predecessor did not testify at hearing and, thus, the undersigned does not know the rationale underlying his decision to offer vacant full-time Bus Driver positions to the most senior part-time Bus Driver. 3/ It may be that the predecessor thought the senior Bus Driver was the most qualified or, perhaps, he thought that all of the part-time Bus Drivers were equally qualified and, thus, seniority prevailed.

Assuming arguendo, that all of the relevant contract language is the same as the language administered by Scherer's predecessor, it is not evident that Scherer's predecessor understood or agreed that the language of Article IV, Section 4, or any other contract language, required the City to offer full-time vacancies to the senior part-time Bus Driver, regardless of qualifications. Absence such evidence, there is no reasonable basis to conclude that the decision to offer the full-time vacancies to the most senior part-time Bus Driver was other than an exercise of the City's discretion under Article IV, Section 4. Neither the evidence of past practice, nor any other evidence, persuades the undersigned that the parties mutually understood and agreed that the City has a contractual obligation to offer vacant full-time Bus Driver positions to the most senior part-time Bus Driver.

The undersigned is persuaded that the City's decision that Kaminski was more qualified than the Grievant was primarily based upon the City's determination that the Grievant, unlike Kaminski,

2/ There was an agreement between the parties that the disputed position should be posted.

3/ Union Steward Novak did not indicate that she had had any discussions with the previous Transit Supervisor regarding his reasons for awarding vacant full-time Bus Driver positions to the most senior part-time Bus Driver. Nor did Novak state that the parties had any other discussions in which the City indicated that it understood that it had a contractual duty to fill vacant full-time Bus Driver positions on the basis of seniority.

had difficulty speaking, writing, and understanding English. This determination of the City was supported by the testimony of Scherer and the examples of the forms completed by the Grievant in which he reported repair problems to the Bus Mechanics. 4/ The City's

4/ Employer Exhibit #2.

determination was further supported by the Grievant's conduct at hearing. It was evident that the Grievant had difficulty understanding the questions which were asked by counsel. Additionally, the undersigned had difficulty understanding the Grievant's responses to these questions.

Oral and written communication skills are legitimate criteria for determining the relative qualifications of a full-time Bus Driver. The record presented herein supports the City's determination that the Grievant has difficulty speaking, writing and understanding the English language and, thus, is less qualified for the full-time Bus Driver position than Kaminski.

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

AWARD

1. The City did not violate the parties' agreement by failing to promote Manny Cantu to the vacant, full-time driver position.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 11th day of August, 1993.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator