

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 883, AFSCME, AFL-CIO

and

CITY of SOUTH MILWAUKEE

Case 81
No. 50079
MA-8141

Appearances:

Ms. Monica M. Murphy, Podell, Ugent & Cross, S.C., Attorneys at Law, appearing on behalf of the Union.

Joseph G. Murphy, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear the grievance of Janet Talaska regarding posting for a full-time Clerk I position in the Police Department. A hearing was held on February 9, 1994, in South Milwaukee, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs after the hearing by March 17, 1994.

ISSUE:

The parties agreed that the issue is:

Did the City violate the collective bargaining agreement, specifically Article VI, Section 10(a), when the Grievant, who had passed her probationary period as Police Clerk I part-time, was denied the opportunity to be considered for a full-time Police Clerk I position and instead someone was hired from outside the bargaining unit? If so, what is the appropriate remedy.

CONTRACT LANGUAGE:

ARTICLE VI
Seniority

. . .

SECTION 10 - Vacancies

(a) Seniority shall be the determining factor in filling vacancies after qualifications have been established for the job classification. At the request of the appointing authority, Civil Service Commission testing procedures may be required to establish qualifications for the following job classifications:

(classifications omitted)

If the appointing authority or the Union disagree on minimum qualifications, an affected employee who claims to meet the minimum qualifications shall be given an appropriate qualifying examination and/or appropriate physical examination and shall be assigned to the position if the employee achieves a passing grade.

If an employee has successfully completed a probationary period in a job classification he/she shall not be requested to re-establish qualifications at any future date for that job classification.

(b) (1) When a vacancy occurs in any of the departments listed in Article I, Section 4, Paragraph (c) the job shall be posted simultaneously for two (2) full working days within all departments.

(2) If the job is not filled by a full-time employee within the department where the vacancy has occurred, the job shall be offered to the most senior full-time employee in one of the other departments within the bargaining unit who has signed the job posting.

(3) If the job is not filled by a full-time employee from one of the other departments, then, the job shall be offered to the most senior part-time employee working within the department where the vacancy occurred. If no part-time employee within the department posts for the job, then the job shall be offered to the most senior part-time Public Safety officer or Building Service Helper provided that the part-time employee is qualified for the position.

(4) Part-time employees hired after October 1, 1987 or

signing of the Agreement shall not be covered by the above paragraph (3). All part-time employees hired after the effective date shall be required to apply for a vacant position as everyone from the outside is required to apply for.

. . .

BACKGROUND:

The Grievant, Janet Talaska, started working for the City on April 5, 1990, as a part-time Clerk I in the Police Department. She first applied to work for the City in 1989 when two full-time jobs for Clerk III became open. Clerk III is a higher classification than Clerk I. Talaska took a Civil Service examination, placed in the top ten on that list of those eligible established by the exam, and stayed on the eligibility list for a future position. She was not hired for the full-time Clerk III positions, but was called later when a part-time Clerk I job in the Police Department opened.

Talaska was interviewed by Police Chief Erick Slamka for the position, and she told him that she wanted full-time work in a couple of years when her children would be in school.

Talaska had passed her probationary period and remained a part-time employee, never obtaining a full-time job with the City, when a full-time Clerk I was posted on January 6, 1993. Talaska expressed interest in the position and Chief Slamka replied on January 11, 1993, as follows:

Having received your request to be considered for the full-time Clerk I position which was posted on January 6, 1993, I regrettably must inform you that I am unable to considered your request.

Article VI, Section 10(b)(4) exempts part-time employees hired after October 1, 1987 from the posting provisions for full time positions.

The Chief gave the identical response to a part-time dispatcher who also applied for the full-time Clerk I position. Talaska filed a grievance on February 4, 1994, and Chief Slamka responded on February 8, 1993, as follows:

Please consider this response to your grievance (not numbered) dated 2-4-93 relative to the posting for the full time Clerk I position in the Police Department.

I would draw your attention to Article VII, Section 2, which requires a grievant to discuss the complaint with the appropriate supervisor/manager within twenty calendar days after the event

giving rise to the complaint occurred. You were notified in writing on January 11, 1993 that you would not be considered for the position. You did not discuss the grievance with me until February 3, 1993, which was twenty three days later.

In any event, my response remains the same. Article VI, Section 10(b)(4) exempts part-time employees hired after October 1, 1987 from the posting provisions for full time positions.

Talaska appealed to Step 3 on February 12, 1993, and eventually to arbitration. When Talaska discussed the grievance with the wages and negotiations committee of the City, the aldermen sitting on that committee told her that they would waive the technicality of timeliness. It is also unclear as to the date that Talaska became aware of Slamka's January 11th memo.

The person hired for the full-time Clerk I position in the Police Department was not a prior employee of the City. The City had established an eligibility list for the position by running an examination about eight months before the position was posted. Talaska did not take that exam, as it never dawned on her to take a test for a Clerk I position. The duties of the full-time Clerk I in the Police Department are the same as the duties that Talaska performs. Talaska trained the new full-time Clerk I in the job.

Chief Slamka was part of the management negotiating team for the 1987-90 collective bargaining agreement when the language of Article VI, Section 10(b)(4) was first put into the parties' labor contract. The City proposed the language because of an accident that occurred in the Police Department, where a part-time public safety officer bid on a job posting in the street department and moved from part-time to full-time to another full-time job in the library. The City was concerned that it could not attract qualified candidates or that it would severely limit its pool of qualified applicants if the only way to obtain a full-time position with the City was to first get a part-time job with the City and wait to post into a full-time position. The City did not intend to foreclose the possibility of those holding part-time positions from getting into full-time positions, but wanted the part-timers to go through the same testing process as anyone from the outside would have to.

This particular contract language has been the center of dispute in other instances. Robert Gagnon and Mark Bundalo were building service helpers who wanted positions in the Water Department, and they grieved the denial of the opportunity to test for such positions. The City denied that grievance, and it was not appealed to arbitration.

Talaska had also applied for a full-time Library Assistant I position in 1992 and took a civil service exam for that position. Another person without bargaining unit seniority received the position. Talaska grieved the denial of being allowed to post through internal procedures for that position, and this grievance was appealed to arbitration. On July 8, 1993, Arbitrator Raleigh Jones denied the grievance.

THE PARTIES' POSITIONS:

The Union asserts that the contract states that part-time employees hired after October 1, 1987, are not covered by Article VI, Section 10(b)(3), but they are not excluded from other provisions of the contract. The City appears to exclude them from all the other provisions in Article VI, Section 10, and it is a well established principle that to express one thing is to exclude another. The Union further submits that the City's exclusion of part-time employees from all of Section 10(a) reads in the loss of accumulated seniority as well as having to serve a second probationary period in a classification in which they have already completed a probationary period. The Union believes that both the City's interpretation and the Jones Award render paragraph 10(a) meaningless for part-timers hired after October 1, 1987, where seniority and proven experience in a classification do not count.

The Union states that the Police Chief interpreted the contract as forbidding him from considering Talaska for a full-time position, and he hired someone off the street with no experience who was trained by Talaska. The Union asks whether it was really the City's intent to prohibit experienced employees from getting full-time jobs and being stuck in part-time jobs. The Union points out that it made no sense for Talaska to take the Clerk I test in April 1992 when she was already working in that position and where she passed the exam for Clerk III. Having already proven her qualifications, Talaska should have been given the position over the person hired because of her seniority. If there is any ambiguity in the contract, it should be construed against the City, the party that wanted Section (b)(4) added to the contract.

The City argues that reading Article VI, Section 10 as a whole, paragraph (a) could be in conflict with (b)(4). However, the rules of contract construction, the drafting history and the past practice show that paragraph (b)(4) is meant to restrict part-timers hired after October 1, 1987 to the same chance as outsiders, and it overrides provisions which would have given part-timers bid/posting rights based on their seniority. Paragraph (b)(4) was added to the 1987-90 contract at the insistence of the City because of the perception that qualified people could not get jobs with the City unless they took part-time jobs first.

The City asserts that the contractual questions before Arbitrator Jones are dispositive of this grievance. Jones found that Section 10 (b)(4) overrides the general provision in Section 10(a) and found that the Grievant was required to apply for the Library opening as any one else would by taking the Civil Service test which established eligibility for the opening. The Grievant's current part-time status does not give her any special eligibility status for any full-time opening.

The City further maintains that the contract as applied by the parties shows that the Grievant has no bid/posting rights. In this respect, the City cites the examples of Gagnon and Bundalo, as well as the Talaska grievance which was dropped and the Talaska grievance which ended with the Jones Award. In conclusion, the City notes that Talaska is "required to apply for a vacant position as everyone from the outside is required to apply for." She failed to take the Civil Service exam and therefore was not eligible for the full-time Clerk I opening.

DISCUSSION:

The City appears to read the contract as barring part-time City employees from competing for full-time jobs. Nothing in the contract prohibits part-time employees for applying for full-time positions -- the only bar is that part-time employees hired after October 1, 1987, do not automatically get full-time vacant slots and they have to compete on an equal footing with applicants who do not work for the City (called outsiders in this award).

Clearly, Article VI, Section 10(b)(4) states that part-timers hired after October 1, 1987 are not covered by Article VI, Section 10(b)(3), the section which would give part-timers automatic progression to full-time jobs. This is what the City bargained for and got in the 1987-1990 contract. This group of part-timers -- including the Grievant -- no longer enjoy a preference to getting full-time jobs by virtue of their seniority and having worked for the City. They now have to go head to head for those jobs with outsiders.

However, Article VI, Section 10(b)(4) does not take anything away from the last paragraph in Article VI, Section 10(a). The fact that a part-timer hired after 1987 would have to apply for the position just as someone from the outside is required to apply does not mean that the part-timer would have to re-establish qualifications, where the contract clearly states that once an employee successfully completes a probationary period in a job classification, he/she shall not be required to re-establish qualifications at any future date for that job classification.

The Grievant established qualifications for the job classification of Clerk I in the Police Department. She took and passed a Civil Service exam for Clerk III, a higher classification than Clerk I. She did not have to take a Civil Service examination for a Clerk I position to establish her eligibility for a Clerk I position, where in fact she had been performing the Clerk I position and passed probation in that position, and the contract in Article VI, Section 10(a), states that:

If an employee has successfully completed a probationary period in a job classification he/she shall not be required to re-establish qualifications at any future day for that job classification.

Talaska did, however, have to compete on an equal footing with anyone applying outside the bargaining unit, or others from the unit. The City believes that the second sentence in Article VI, Section 10(b)(4) -- "All part-time employees hired after the effective date shall be required to apply for a vacant position as everyone from the outside is required to apply for" -- means that part-timers have to take the same tests. This is a ludicrous result, given the fact that the Civil

Service exams are often given several months in advance of an actual job opening. Such an interpretation would mean that any part-time employee who was interested in full-time work would constantly have to take any or all exams offered, whenever they were offered, despite the lack of an open position, and despite the fact that they already hold those positions and passed exams in the past to obtain them. This result would also wipe out the final paragraph of Section 10(a), and the contract should not be read to reach such a result.

The better reading of the contract as a whole is that under Section 10(a), once you're qualified in a job classification, you never had to establish qualifications for that job classification. However, if you are a part-timer hired after October 1, 1987, you may not obtain a full-time position by seniority and you have to compete for it with outsiders. In such a head to head competition, the City must consider the part-timer's qualifications to be established by the successful completion of a probationary period.

When the City did not consider Talaska for the full-time Clerk I position at issue because she was not on the eligibility list from the Civil Service exam, the City violated the contract. Specifically, the City violated Article VI, Section 10(a) by demanding that she re-establish qualifications before being considered for the position of Clerk I where the contract stated that she did not have to do so for the classification where she had already passed her probationary period successfully.

The Jones Award is not in conflict with this Award, due to the difference in facts in the Jones Award. In that case, Talaska sought a full-time position as a Library Assistant I and took the corresponding Civil Service exam. She had never established her qualifications as a Library Assistant, 1/ and therefore, would not fall within the language of Article VI, Section 10(a), and she would have to establish qualifications through the Civil Service exam. She was denied the job when an outsider scored higher on that exam. The other cases cited by the City -- the Gagnon and Bundalo cases and the Talaska grievance that was dropped - have no facts on the record and cannot be considered dispositive. Furthermore, the language of Article VI, Section 10(a) is clear and needs no interpretation through past practice.

Talaska's seniority was irrelevant in the Jones Award, and it continues to be irrelevant in this case due to the language of Article VI, Section 10(b)(4). However, the language of Article VI, Section 10(a) demands that she not have to re-establish qualifications for the Clerk I position, as noted earlier.

1/ Even though the City considers the Library Assistant I position to be equal to the Clerk I position, the difference is that Talaska never established qualifications in that particular classification. Under the contract, the term "job classification" is used in Article VI, Section 10(a).

If Talaska had been considered for the Clerk I full-time position with others including outsiders, it is speculative to determine at this time whether or not she would have been given the position. At a minimum, the record shows she was well qualified for the position. She took and passed the Clerk III exam and was in the top ten on that list, she passed the probationary period for Clerk I, and she trained the outsider hired as full-time Clerk I. The City acknowledges that the full-time position had the same duties as Talaska's part-time job. The City does not claim that Talaska would not have been hired for that job if she had been allowed to compete for it.

Therefore, the only way to make the Grievant whole for the City's violation of the labor contract is to put Talaska in a full-time Clerk I position immediately with back pay to be awarded from the time the City awarded the full-time job to an outsider, minus any pay she received from her part-time position.

AWARD

The grievance is sustained.

The City violated Article VI, Section 10(a), when it denied the Grievant Janet Talaska the opportunity to be considered for a full-time Police Clerk I position.

As a remedy, the City is ordered to immediately offer to Janet Talaska the full-time Police Clerk I position and to pay her the difference in wages between her part-time position and the full-time position from the date that the City filled the full-time position with another person.

The Arbitrator will retain jurisdiction over this matter until July 15, 1994, solely for the purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 25th day of May, 1994.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator