

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 LOCAL 71 AFSCME, AFL-CIO : Case 176
 : No. 49368
 : MA-7919
 and :
 THE CITY OF KENOSHA :
 :
 :

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME,
Mr. Roger Walsh, Attorney at Law, Davis & Kuelthau, S.C., 111 East
 Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613,
 appeared on behalf of the City.

AFL-CIO

ARBITRATION AWARD

On June 11, 1993, the Wisconsin Employment Relations Commission received a request from AFSCME Local 71 to appoint an arbitrator to hear and decide a grievance pending between the Union and the City of Kenosha. Following jurisdictional concurrence from the Employer, the Commission, on July 16, 1993, appointed the undersigned to hear and decide the matter. Following several postponements, and continuances, the matter was ultimately heard on April 21, 1994, in Kenosha, Wisconsin. At the conclusion of the evidentiary hearing, the parties made closing oral argument.

This arbitration concerns the circumstances of a leave of absence granted to employe Kelly Andreoli.

BACKGROUND AND FACTS

Kelly M. Andreoli, a Clerk Typist II, has been employed by the City of Kenosha since approximately June of 1985. On January 11, 1993, Andreoli, who is employed in the Police Department, initiated a conversation with Chief of Police Gerald Schuetz. Andreoli advised Schuetz that she intended to quit. This was the first indication Schuetz had of Andreoli's intent to leave her position. Andreoli and Schuetz talked at length, discussing various options available to Ms. Andreoli. Chief Schuetz regards Andreoli as a valuable, capable employe. Among the options discussed was a leave of absence. Chief Schuetz advised Andreoli that he was considering reducing Andreoli's position to part-time. In connection with that remark, he asked her, "If it was possible, would you consider part-time?" Andreoli responded that she would discuss that with her husband.

The next day, January 12, 1993, Andreoli returned to advise the Chief that she had discussed the matter with her husband, believed that a leave of absence would be in her interest, and would be willing to take a part-time position. That same day, Ms. Andreoli filled out a request for a leave of absence. Chief Schuetz approved that leave request that same day.

Personnel Director Chuck Grapentine approved Ms. Andreoli's request for a leave of absence the next day. That same day, January 13, Chief Schuetz initiated a personnel transaction, which he memorialized as follows:

January 13, 1993

Comments regarding personnel requisition

Part time employee to temporarily replace full time Clerk Typist II position during evaluation period.

Our department has made a number of operational changes in our record keeping and other clerical functions within our Investigations Division. We are planning to computerize additional record keeping functions that we believe will further reduce the amount of work required for this position.

It is our opinion that as a result of all of our changes a full time clerk typist II may not be needed in this position.

I propose an evaluation study be done for the remainder of the year 1993 to determine if a full time person is required in this position.

The current employee has applied for, and at my step I have approved, a leave of absence for personal reasons for one year from February 1, 1993 to February 1, 1994.

I propose filling this temporary vacancy in this classification with a part time employee working 20 hours per week to start. If necessary we would consider increasing this to 25 to 30 hours per week.

I have discussed this plan with Mrs. Andreoli and she is interested in this part time position during her leave of absence. I would consider it essential to our reduction study to have Mrs. Andreoli work part time in this position. It would be because of her that a fair evaluation could be made on the need for a full time person in this position. There would not be a need to train a new employee in the functions of this position.

The confidentiality of our juvenile records would be maintained, and Mrs. Andreoli has consistently maintained a high productivity level and interest in this job.

I respectfully request that Mrs. Andreoli's leave of absence be approved and that she be retained in this part time position during our evaluation period. I further recommend that Mrs. Andreoli's hourly rate of pay be calculated as follows. Her current salary is \$2,277.00 per month. I believe we use the figure of 173 work hours per month for 5 day a week personnel. 173 hours divided into \$2,277.00 equals \$13.16 per hour, this is the hourly rate of pay I would approve for Mrs. Andreoli.

Gerald A. Schuetz /s/
Gerald A. Schuetz, Chief of Police

That day, Chief Schuetz invited Kay Seidel, the Union's Treasurer, to meet with him at the end of her shift. Seidel and Schuetz met at the end of her shift on January 13, and Schuetz provided Seidel with a copy of the Memorandum set forth above. Schuetz advised Seidel of his intentions including his intent to grant Andreoli a leave of absence and to have her work part-time in the vacated position. The Chief advised Ms. Seidel that he wanted to evaluate whether or not the position ought to be full or part-time and that

Andreoli was interested in a part-time position. The parties did not discuss the rate of pay to be paid Ms. Andreoli. Seidel asked Schuetz whether or not the position would be posted full-time if Andreoli did not take the job being offered. The Chief responded that it would not. Seidel asked Schuetz if Andreoli didn't take the part-time position, would it be given to someone else as a part-time position. Schuetz responded that it would. Seidel advised Schuetz that she was unable to tell the Chief what position the Union would take on the transaction. She committed to take the matter back to the Union's Board of Directors, of which she was a member.

Ms. Seidel took the matter back to the Union's Executive Board. It was that body's determination to consult with Mr. Maglio, the Union representative. A member of the Board subsequently consulted with Mr. Maglio, and reported back that it was the view of the Union that an individual could not be on leave of absence without pay and simultaneously work part-time for the City. In late January, Ms. Seidel contacted Chief Schuetz and advised the Chief of the Union's position.

Ms. Andreoli was granted her leave of absence and did fill the vacated position on a part-time basis. On February 10, 1993, the Union, citing various provisions of the collective bargaining agreement, grieved. On February 16, Chief Schuetz met with Ms. Seidel and with Mr. Jerry Pace, President of the Local. The parties exchanged their respective viewpoints and by memorandum of February 26, Chief Schuetz rejected the grievance. The matter was appealed, and rejected by the Mayor by memo of March 23, 1993.

The Employer did not fill the full-time slot vacated by Ms. Andreoli during 1993. Ms. Andreoli worked part-time throughout 1993. The Employer never went to the City's Civil Service Commission in order to pursue an extension of "temporary" status. Rather, it regarded Ms. Andreoli as a part-time employe. It was Mr. Grapentine's testimony that the City does not provide notice to the Union when it hires/fires part-time employes. Mr. Grapentine further testified that at times the Employer does not fill vacated positions. It was the testimony of Mr. Pace that the Union has always been contacted by written notice where the Employer makes permanent changes.

On January 14, 1994, Chief Schuetz provided Mr. Pace and Ms. Seidel with the following memo:

M E M O R A N D U M

DATE: January 14, 1994
TO: Jerry Pace, President
Kay Seidel, Treasurer
Local # 71, AFSCME
FROM: GERALD A. SCHUETZ, CHIEF OF POLICE
SUBJECT: Notice of Change in Operation

You are aware that our department has been conducting an evaluation of a Clerk Typist II position within the Investigation Division of our department.

You will recall that we undertook this evaluation because of a number of significant changes in job requirements and manual tasks that we were planning to make, along with the changes we had already made.

We have completed our evaluation and have determined that there is no longer a need for a full time person in this position.

Per Article XXIII of our labor agreement I here-by notify you that effective January 31, 1994 a current full time Clerk Typist II position within our department will be eliminated.

Chief G. Schuetz /s/
CHIEF GERALD A. SCHUETZ

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

. . .

1.02 The Employer recognizes and acknowledges that the American Federation of State, County, and Municipal Employees, AFL-CIO, Local #71, is the authorized representative for the express purpose of having conferences and negotiations with the Employer on behalf of the employees of the city of Kenosha employed in the . . . Police Department. . .

. . .

4.07 Loss of Seniority. An employee shall lose seniority rights for the following reasons only:

. . .

E. If he/she accepts gainful employment when on a leave of absence, unless such leave was granted to allow gainful employment.

. . .

ARTICLE VIII - LEAVES OF ABSENCE

. . .

8.02 Leave of Absence Without Pay. Written leaves of absence without pay may be granted by a Department Head with the approval of the Director of Personnel for a period not to exceed one (1) year. Upon expiration of the leave, the employee will be reinstated to the position he/she held before the leave was granted if it still exists. If no such position exists, the employee shall be given a similar position in the same or lower pay classification for which the employee is qualified and the provisions for making layoffs shall apply. Failure of the employee to report promptly at the expiration of the leave will be cause for dismissal. Such leave will be granted only when it will not result in undue prejudice to the City as an employer.

. . .

ARTICLE XXIII - CHANGES IN OPERATION

23.01 The City agrees to notify the Union in writing of any proposed changes in the methods of operation which may affect employees covered by this Agreement. All proposed changes will be discussed between the Employer and the Union prior to effectuating any change where the proposed change would introduce new job classifications, or affect the wages of employees.

THE ISSUE

The parties were unable to stipulate the issue. I believe the issue to be:

Did the City violate the collective bargaining agreement by either (1) granting a leave of absence to Ms. Andreoli, and/or (2) - simultaneously re-employing/continuing Ms. Andreoli in a part-time capacity? If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

The Union believes the Employer's actions violate a number of provisions of the collective bargaining agreement. The Union cites Section 1.02 as conferring exclusive status upon it to negotiate wages, hours, terms and conditions of employment of bargaining unit employes. At the time of their discussion, Andreoli was a member of the bargaining unit and it was not within the province of the Employer to negotiate an alternative work schedule which impacted upon the position she occupied, with Ms. Andreoli. The Union notes that Ms. Andreoli's leave of absence was for personal reasons. The Union then turns to Section 8.02, and contends that her leave of absence was one "without pay pursuant to the terms of 8.02". The Union contends that there is a clear inference that an employe on a leave of absence without pay does not receive wages and other city benefits while on that leave. This provision ties into the contractual provision dealing with leaves for gainful employment, and the Union contends that any such employment must be with an employer other than the City of Kenosha. The Union points to Article XXIII and contends that the Employer breached its notice obligation in that Article. The Union contends that the City eliminated Andreoli's full-time position. Thus, notice is due. The first meeting the Employer conducted with the Union occurred on February 16, 16 days after the change had been accomplished. Section 23.01 requires a notice and discussion "prior to effectuating any change". The notice that was given, was given orally, and not in writing, an independent violation of the mandates of Section 23.01. To the extent the Employer argues there has been no change in operation, the Union believes a full-time job exists.

The Union believes that the position continued to exist throughout 1993; that it was filled by a part-time/temporary employe. To extend a temporary appointment beyond 90 days the Employer is obligated to seek and secure civil service approval, creating a forum for the Union to have input and object. As a remedy, the Union believes that Andreoli should be treated as a full-time employe and be made whole for lost wages, benefits, seniority and any and all other losses she has suffered.

The Employer denies violation of any provision of the contract. The Employer points to Section 4.07 and subparagraph E, which raises the possibility of a leave of absence with gainful employment. The Employer contends there is no question in this dispute that the leave was approved to

permit Andreoli to go from full-time to part-time status. This provision of the contract, it is argued, runs to the favor of the Employer and permits the Employer to grant leave for gainful employment. There is no definition of who the subsequent employer can be; i.e., the City of Kenosha or some other employer. Section 8.02 restricts leaves of absence to a period not to exceed one year. The Employer contends that this leave does not exceed one year.

With respect to Article XXIII the Employer contends that the change in the method of operation was the elimination of Andreoli's full-time position. That was done in 1994 and notice was then provided. The Employer notes that the Chief immediately called Kay Seidel into his office, informed her of what was going on, related all relevant facts to her, and indicated and described to her what he intended to do. Seidel took the matter back to the Executive Board. Ms. Seidel, argues the Employer, never alleged individual bargaining. The grievance does not refer to Section 1.02.

The Employer contends that Andreoli cannot be a temporary employe within the meaning of the contract since the collective bargaining agreement only covers full-time employes and Andreoli was a part-time employe. The Chief's January 13 letter makes reference to a temporary employe, but ought properly to refer to Andreoli as a part-time employe. What occurred here is that a vacancy was soon to occur upon the resignation of Andreoli. The Employer made a determination to hold that vacancy open and explore an alternative to a full-time position. Following the period of evaluation, a decision was made and notice was given. The Employer argues that the Chief met the spirit of Section 23.01, even though that Section did not apply to this proceeding. He supplied Seidel with a document and allowed her to read it. She could have asked for it and it would have been provided to her. The purpose of the provision is to give notice, and that purpose was accomplished. The Union was on actual notice of what was going on.

If the Employer is found to have breached the agreement, then the Employer regards any breach as moot. Andreoli has no right to any of the damages sought; the sole penalty that could be applied would be for Andreoli to lose her seniority under Section 4.07.

DISCUSSION

At the outset of the hearing, the parties stipulated that the Union does not represent part-time employes. The parties further stipulated that the City does employ part-time employes in clerical positions. I do not believe the Employer violated any provision of the contract. Article 1.02 confirms the Union's exclusive bargaining status. To the extent the Employer is under an obligation to bargain over some condition of employment it is with the Union, and no one else, that that duty must be satisfied. I do not believe bargaining occurred here. My conclusion in this regard is essentially drawn from Chief Schuetz's testimony, which I have credited. The Chief's January 13 memo indicates that he questions the need for a full-time Clerk Typist II position. The Chief advised Ms. Seidel that he would not fill the full-time position. He further advised Seidel that if Ms. Andreoli declined the part-time position, that part-time position would be offered to someone else. I credit that testimony.

Ms. Andreoli's imminent resignation posed both a problem and an opportunity for Chief Schuetz. Schuetz testified that he regarded Andreoli as a valuable, capable and productive employe. He clearly did not want her to leave. However, her departure opened the Clerk Typist II position up to be replaced by a part-time person/position. To the extent Andreoli was willing to take the position on a part-time basis it fulfilled the Chief's needs completely. I believe that as of January, 1993, there had been no determination as to the permanent status of the Clerk Typist II position.

Article 4.07 discusses the circumstances under which a bargaining unit employe loses seniority. Among the events that can lead to the loss of seniority includes Paragraph E's circumstance; "if he/she accepts gainful employment when on a leave of absence, unless such leave was granted to allow gainful employment." Here, the Employer was not only aware, but encouraged Andreoli to engage in gainful employment coincidentally with her application for a leave of absence. The Union contends that the seeking of gainful employment implies employment by an entity other than the City. While that would certainly be the norm, nothing in Section 4.07(E) so limits the provision. If anything, this Section demonstrates that the parties anticipated the possibility that a leave of absence could be granted for the purpose of allowing gainful employment. That is precisely what occurred here.

The Union contends that Article 8.02 addresses leaves of absence without pay. The Article, argues the Union, creates a leave which is to be taken without compensation from the City. By employing Ms. Andreoli, the Employer is alleged to have offended the provisions of 8.02. On its face, 8.02 addresses leave without pay. However, if 8.02 is read in conjunction with 4.07(E), it appears to me that these parties contemplated and consciously created the possibility of a leave of absence being granted for the purpose of an employe seeking gainful employment. While I certainly agree that the norm would be that the gainful employment be employment outside the City, as already noted I do not read 4.07 to restrict employment to entities other than the City of Kenosha.

Assuming the transition from full to part-time employment constitutes a change in method of operation, I believe the Employer satisfied the provisions of Section 23.01 sufficiently so as not to warrant reversing its actions. The requirements of Section 23.01 are procedural; i.e., "written notice" and an opportunity to "discuss" prior to "effectuating any change". While there is a disagreement as to what, if anything, constituted a change in operation, a number of things are clear. First, the Chief told Ms. Seidel exactly what he planned to do. He did so promptly. Second, the Union, as an institution had knowledge of all that was transpiring. The Union response was delivered prior to February 1. Finally, by February 16 a meeting did occur involving Pace, Seidel, and the Chief. The meeting addressed the previously filed grievance. To the extent the City sinned, its sin was to fail to furnish notice in writing, and to bring about Andreoli's change in status prior to discussion with the Union. However, the Chief was open about what he was doing. The Union took its position prior to the implementation date. Discussion was had.

There is no remedy arising out of this dispute that would not elevate form over substance. There is nothing in the contract that permits the Union to force the City to maintain a full-time position when workload does not so warrant. Here, the employe was about to leave. The employer wanted to see if he needed a full-time employe. It appears that the needs of both employer and employe coincided. There is no hint that the employer has manipulated this scenario to dissipate the unit. The employe has no complaint. The Union has intervened to protect the integrity of its contract and of the unit.

I find no contractual basis for overturning the employer's actions. It appears that the employer has part-time clerical positions and it further appears that the employer has, from time to time, left positions vacant. There is no provision of the contract vesting me with the discretion to order the employer to maintain a position as full-time. The only meaningful remedy in this dispute would be to order the employer to return to the status quo ante; i.e., a return to full-time employment. No contract provision supports that. Delaying the implementation of the change in Andreoli's status is not possible due to the passage of time. An order directing payments of monies and/or other contractual benefits to Andreoli is not warranted. She was going to quit and was not available to work full-time. There is no evidence here that the City

is undermining the integrity of the unit. There is no apparent effort to dissipate the unit or to systematically reduce employes below fringe benefit thresholds.

In light of the foregoing, I do not believe there was a remediable breach of the labor agreement.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 18th day of October, 1994.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator