

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration      :
of a Dispute Between                  :
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INTERNATIONAL ASSOCIATION OF          : Case 123
FIREFIGHTERS, LOCAL UNION NO. 583,   : No. 50840
AFL-CIO                               : MA-8398
                                       :
                                and     :
CITY OF БЕЛОIT                        :
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Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow,
 appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on
 behalf of the City.

ARBITRATION AWARD

International Association of Firefighters, Local Union No. 583, AFL-CIO, hereinafter referred to as the Union, and the City of Beloit, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a promotion. The undersigned was so designated. Hearing was held in Beloit, Wisconsin, on August 24, 1994. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on October 18, 1994.

BACKGROUND

The facts underlying the grievance are not in dispute. On or about December 28, 1993, Shift Commander John Foster retired. Acting Lieutenant Ted Peck was promoted effective April 4, 1994. The City deferred or delayed Peck's promotion because Foster was entitled to two weeks' severance pay and pay for unused vacation and Peck was not promoted sooner because of the Department's decision to remain within its budget. The Union filed the instant grievance asserting that Peck should have been promoted when the vacancy occurred on December 28, 1993.

ISSUE

The parties stipulated to the following:

When the City deferred the promotion of the grievant, were Articles XX and/or XV (J) of the collective bargaining agreement violated?

If so, what should the remedy be?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VIII

RETIREMENT

. . .

Section 3 All employees will receive two (2) work weeks (sic) pay as gratuity pay. Employees shall have the option to receive any and all unused vacation earned in a lump sum payment of money or time off as provided for in Article X of this Agreement at the time of his/her retirement unless the Wisconsin Statutes provided otherwise.

. . .

ARTICLE XV

PROMOTIONS PROCEDURE

. . .

Section 3. The promotional testing procedure will include:

. . .

VII. Requirements to be fulfilled:

. . .

J. Those persons selected to a Relief Driver position or as an Acting Lieutenant will not have to retake those examinations as they will move up as a vacancy occurs.

. . .

ARTICLE XX

MANAGEMENT RIGHTS

The Union recognizes and agrees that, except as expressly limited by the provisions of this Agreement, business and operations are exclusively the functions of the City. The powers, rights, and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent or purpose of this Agreement.

The City and Union shall immediately enter into negotiations to replace any section of this Agreement if found to be in violation of the Wisconsin Statutes.

UNION'S POSITION

The Union contends that pursuant to Article XV, Section J of the parties' collective bargaining agreement, a promotion shall occur when the "vacancy occurs." It submits that the parties could have used any number of qualifiers and/or conditions precedent to determine when a promotion occurs, such as the January of the year succeeding the vacancy or when funding is available. It argues the parties did not do this but used the phrase, ". . . as the vacancy occurs." The Union claims this means exactly what it says, and the City violated the agreement by delaying Lieutenant Peck's promotion by some ninety-eight days. Using the dictionary definition of the verb "occurs," the Union submits it means ". . . to come to pass, take place or happen." The Union states that the question is when did the event causing the "vacancy" occur and that event was Shift Commander Foster's retirement on December 28, 1993, and Peck should have been promoted this same date, i.e. December 28, 1993.

The Union asserts that the City's promotional practices, especially those involving Lieutenants, have been the subject of arbitration in the past and, in each case, the arbitrator has ruled that the City violated the collective bargaining provision. It cites City of Beloit (Fire Dept.), MA-4421 (Crowley, June 30, 1987) and City of Beloit (Fire Dept.), MA-4100 (Houlihan, August 21, 1987). It maintains that the City has not understood and/or not correctly applied Articles XV and XX from 1987 to the present, and in the instant case, the City has, once again, not understood and/or erroneously applied Articles XV and XX. It insists that appropriate relief must be ordered.

CITY'S POSITION

The City contends that there is no dispute that the grievant was promoted to the rank of Lieutenant from Acting Lieutenant and that occurred on April 4, 1994. The City submits that it has a long-standing practice of conforming to budgetary restrictions when effecting the promotion of an employe and the timelines for effective dates of promotions have varied. The City explains that the reason for this is set forth in Article VIII (3), which provides for gratuity pay and, at the option of the employe, for payment of unused vacation. The City submits its budgeting process relates to full-time positions and does not allow for, in effect, doubling up staffing by paying two employes in the same position at the same time.

The City relies on its Management Rights, Article XX which contains no limitations or mandation relative to the immediacy of a promotion or any

requirement to exceed the budgetary authorization of the City Council. The City claims there is no timeline requiring any filling of positions within the collective bargaining agreement and this authority is reserved to the City under Article XX and is supported by a long-standing practice related to implementing promotions within its budget. It insists that the City has reserved the right to conduct its business in a fiscally responsible manner and the contract contains no language relative to staffing numbers, crew size, number of employes in ranks and it therefore acted appropriately in the method it implemented the promotion of the grievant. The City maintains that the grievance is without merit as the supervision, management and control of the City's business and operations are exclusive functions of the City. It asks that the grievance be dismissed.

DISCUSSION

The sole issue presented in this case is whether Lieutenant Ted Peck should have been promoted the same day as Shift Commander Foster's retirement. It is generally recognized that in the absence of a specific contractual provision, it is management's right to determine whether a vacancy exists and when it should be filled. 1/ In some contracts, the parties have agreed to fill vacant positions within a certain time. 2/ Even where a contract is silent, the employer must permanently fill a position that continues to exist within a reasonable period of time. 3/

There is nothing in Article XV which requires that a position be filled within a certain period of time. The Union's reliance on subsection VII, J is misplaced because it is part of the promotional testing procedure which provides that Acting Lieutenant will not have to retake an examination and the language "as they will move up as a vacancy occurs" does not restrict the City's discretion to determine when to fill a vacancy. The Union's reliance on City of Beloit (Fire Dept.), MA-4421 (Crowley, June 30, 1987) is not on point with the instant dispute. In that case, the grievant was Acting Captain for a year. It is noted that while the agreement did not specify a time period for posting a promotional vacancy, 4/ the arbitrator held it had to be posted in a

- 1/ Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at pp. 517-518.
- 2/ City of Pontiac, 91 LA 830 (Kalin, 1988) where the agreement provided ". . . shall be filled within thirty (30) days after vacancy occurs if an eligibility list is available."
- 3/ City of Derby, 98 LA 457 (Freedman, 1991). "A three-year appointment stretches 'reasonableness' beyond appropriate limits."
- 4/ Ex. 3. The list of promotions show a delay of from one day to over four months.

reasonable time period and a failure to do so for over six months was unreasonable and the Captain was ordered promoted effective July 31, 1986, where the vacancy occurred in January, 1986. The Union's reliance on City of Beloit (Fire Dept.), MA-4100 (Houlihan, August 21, 1987) is also misplaced as the issue in that case involved the creating of three additional acting lieutenant positions referred to as Reserve Acting Lieutenants who were granted a pay increase upon promotion, which increase was later rescinded by the new Fire Chief. There the issue was not when a vacancy was to be filled and the case is not applicable to the instant dispute.

The City has asserted that it has a long-standing practice of not filling a position on the same date a retirement occurs. The basis for the delay depends on the payment of unused vacation and gratuity pay which essentially are budgetary considerations. 5/ The evidence failed to establish that the City's delay in promoting Lieutenant Peck for budgetary reasons and for the amount of time, ninety eight days, was unreasonable, and therefore, the undersigned finds no violation of the contract.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

Article XX and/or XV (J) of the parties' collective bargaining agreement were not violated when the City deferred the promotion of the grievant, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 17th day of November, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

5/ Id.