BEFORE THE ARBITRATOR

In the Matter of the Arbitration of Two Disputes Between	Case 99 No. 49104 MA-7820
CITY OF MANITOWOC EMPLOYEES, LOCAL 731, AFSCME, AFL-CIO	
and	Case 102 No. 49107 MA-7823
CITY OF MANITOWOC	

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL- CIO, P.O. Box 370, Manitowoc, WI 54221-0370, appearing on behalf of City of Manitowoc Employees, Local 731, AFSCME, AFL-CIO.

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

ARBITRATION AWARD

City of Manitowoc Employees, Local 731, AFSCME, AFL-CIO, (hereinafter Union) and City of Manitowoc (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission from its staff. On April 16, 1993, the Union filed a request to initiate grievance arbitration of these two matters with the Commission. The Employer disputed the right of the Union to use the grievance procedure to obtain permanent reclassification of the employes involved in these two matters; nonetheless, the Employer concurred in the Union's request to initiate grievance arbitration, stating that it would submit to the arbitrator the question of whether the grievance procedure is the appropriate forum for the relief being sought in these grievances. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in these matters.

Prior to hearing, the parties agreed to bifurcate the hearing process so that the arbitrator could first determine whether the collective bargaining agreement permits the Union to seek the permanent reclassification of a bargaining unit member through the grievance procedure. A hearing was held on June 22, 1993, in Manitowoc, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed. The parties stipulated to framing the issue as follows: Does the Labor Agreement permit a party to seek the permanent reclassification of a bargaining unit member through the grievance process? The parties filed briefs which were received on July 6, 1993. No reply briefs were received as of July 12, 1993, the date this arbitrator began to write this Award.

On July 15, 1994, the Arbitrator issued the following Award: That the Labor Agreement does permit a party to seek the permanent reclassification of a bargaining unit member through the grievance procedure.

Hearing on the merits was conducted on July 27 and November 18, 1993, in Manitowoc, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearings were transcribed, the last copy of which was received on December 2, 1993. The parties filed briefs, the last of which was received on March 10, 1994, and they waived the filing of reply briefs on August 5, 1994. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

The pertinent facts are not in dispute. Since at least 1977, permanent job reclassification requests initiated by the Union have been handled through contract negotiations. The parties have also negotiated reclassifications mid-term, generally when initiated by the City. The Union requested the permanent reclassifications of Frances Miller and Rose Mary Lambert from Clerk-Typist II to Clerk-Typist III in its bargaining proposals for the current 1992-94 collective bargaining agreement. In the course of collective bargaining, the Union dropped the reclassification requests. After signing that agreement, these grievances were filed. These grievances proceeded through the parties' grievance procedure without resolution. They are properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

AGREEMENT

> Whereas, in order to maintain general efficiency, to maintain existing harmonious relationship between the Employer and its employees, to promote the morale, well-being and security of said employees, to maintain a uniform minimum scale of wages, hours and working conditions among the employees and to facilitate a peaceful adjustment of all grievances and disputes which may arise:
>
> Now, therefore, the parties hereto each in consideration of the Agreements herein contained hereby agree as follows:
>
> . . .

ARTICLE II MANAGEMENT RIGHTS

> Except as otherwise provided in this agreement management of the various City departments listed above shall be as follows:
>
> . . .
>
> (c) To hire, promote, transfer, assign and retain employees consistent with this agreement.
>
> . . .
>
> Any dispute with respect to the reasonableness of the

application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein.

ARTICLE III GRIEVANCE PROCEDURE

Section 1. Definition.

A grievance shall be defined as any dispute or misunderstanding which may arise between the Employer and employee(s) or between the Employer and the Union.

. . .

Section 3. Arbitration.

(b) Arbitration Examiner. The Wisconsin Employment Relations Commission (WERC) shall appoint an arbitrator from its staff and the decision of said arbitrator shall be final and binding on the parties.

. . .

ARTICLE VIII PAY POLICY

Section 1. Rates.

Employees shall be compensated at the rates specified in Addendum A & B of this Agreement.

. . .

Section 10. Work at Higher Classification.

When employees perform work at a higher classification, the employee shall be compensated at the higher rate for all time worked in said classification.

. . .

ARTICLE IX SENIORITY AND JOB POSTING

. . .

Section 2. Job Openings.

. . .

(j) New Situations. In the event a new situation arises (such as the creation of a new job classification) the parties hereby agree to immediately commence conditions applicable to meet the situation.

. . .

ADDENDUM B CITY HALL CLASSIFICATION AND WAGES

CLASSIFICATION	1992
. . .	
Clerk Typist II	($)8.41
Clerk Typist III.	9.48
. . .	
Secretary to Director of Public Works	10.61
Secretary to Police Chief	10.61

. . .

Effective January 1, 1993 and January 1, 1994 the hourly wage rates shown on Addendum A and Addendum B will be adjusted to reflect increases in the Consumer Price Index. . . .

ISSUE

The parties stipulated to framing the issue as follows:

Is the City of Manitowoc in violation of the 1992-94 Labor Agreement by not permanently reclassifying the Grievants from Clerk Typist II to Clerk Typist III?

If so, what is the remedy?

POSITION OF THE PARTIES

Union

The Union argues that long serving, dedicated, competent employees who willingly assume additional duties should be recognized for their exceptional effort; that this argument sounds like an employer rebuttal to a standard union wage scale; that in this case the Employer is opposing rewarding the superlative service of these two fine employes; that the Employer prefers to make these employes the pawns of a bargaining struggle with reduction of benefits for all employes as the basis for agreement on reclassification; that the Employer holds to the arbitrary notion that there can be no more than one secretary or Clerk Typist III in any department; that this position disregards the size of the department or the sophistication or quantity of work performed by the individual employe; that the Employer has job description drawn; that the Employer says that these do not represent the work of the position; that the Employer posts the job descriptions and then denies that they are used; that the Employer illustrates that the secretary performed many of the same duties as the Grievants when the secretary was a Clerk Typist III and then denies that the Grievants are worthy of the classification; and that to the Employer service, quality of work, sophistication of work and dedication does not matter.

Specifically, the Union argues that Grievant Fran Miller has responsibility which is well beyond the level of a Clerk Typist III; that this is thoroughly illustrated in the record; and that several of her job duties are the basis for reclassification, starting with the responsibility of managing the Worthless Check Program, which was handled by the Captain of Detectives previously, payment and adjustments for citations, which was previously done by a Shift Commander, and classification and general identification of fingerprints which had been done by a detective.

In regard to Grievant Rose Mary Lambert, the Union argues that she has responsibility beyond her present classification; that this is abundantly clear; that the Police Department, the City Council, the state, the press and the public depend on the information she provides; that her tasks require sophisticated computer skills, great accuracy, thorough technical knowledge, and dependability; that Grievant Lambert supplies all amply; and that she should be elevated to the classification which best corresponds with the level of her work.

Finally, the Union argues that both Grievants have received support of their department head for their reclassification; that both have responsibilities which exceed even the Police Department Clerk Typist III job description; and that, therefore, both are entitled to be paid the negotiated rate for their work.

The Union holds that the Arbitrator has no choice but to award in favor of the Grievants, to sustain the grievance; and to order that the Grievants be reclassified effective with the date of filing of the underlying grievance and that they be made whole for the wage differential from their previous classification, with all wage related benefits also granted.

Employer

The Employer argues that the grievance must be denied for two reasons; that, first, the Union cannot ask the arbitrator to find that the City violated the 1992-1994 collective bargaining agreement by failing to pay these employees at the classification specifically agreed to by the Union in the bargaining process; that the agreement to pay these employes at the Clerk Typist II rate

was made a specific part of bargaining in negotiations which led to the current labor agreement; that the Union cannot be allowed to renege on its agreement after it induced the Employer to give up other requests; and that, secondly, even if the Union was permitted to renege on its agreement, the Union has not met its heavy burden of showing that the duties performed by the Employees fall into a clear and distinct Clerk Typist III category to the exclusion of historical Clerk Typist II duties.

More specifically, the Employer argues that by negotiating the continuance of the Grievants in the Clerk Typist II pay category, the Union has waived its right to challenge their classification absent a subsequent change in duties; that while the Employer understands the Arbitrator's July 15, 1993 decision that these grievances are arbitrable, it still asserts that it is paying the Grievants the pay rate required by the collective bargaining agreement; that the only way the Union can obtain the relief it seeks is by asking the Arbitrator to change the terms of the contract to which the parties agreed; that both Grievants testified that there has been no change in their job duties since the collective bargaining agreement was negotiated; that this is a case where the Union is simply trying to back out of its bargain through the grievance procedure; that the Union asked to have the Grievants reclassified to the Clerk Typist III position during negotiations; that the Union withdrawal of their reclassification request induced the Employer to withdraw health insurance concessions which had been accepted by other non-AFSCME bargaining units; that the parties were aware that as part of the final collective bargaining agreement, the Grievants would continue to be paid at the Clerk Typist II rate; that the Employer is not in violation of the contract; and that, on the contrary, the Employer is specifically paying the two Grievants at the rates which were negotiated for them in the collective bargaining agreement.

In addition, the Employer argues that the Union has not met its burden of clearly showing that the Grievants are improperly classified; that the evidence presented at hearing does not meet the heavy burden imposed on the Union to force the involuntary reclassification of the two Grievants; that the evidence is insufficient to show that the Grievants are improperly classified; that in fact, the evidence demonstrates that virtually all of the duties being performed by the Grievants are Clerk Typist II duties which fit into their current classification; that there is no doubt that the Grievants are dedicated, hard-working employes who perform their duties in a competent manner; that the issue here, however, is whether the Employer has violated the contract by fundamentally altering their duties; and that the Employer has not done this.

The Employer requests that the grievances be denied.

DISCUSSION

The Union argues the violation of two contractual clauses.

First, the Union notes that Article II - Management Rights specifies that the Employer's right to promote employes is subject to a reasonable standard. The Union argues that the Employer's failure to promote or permanently reclassify the Grievants from Clerk Typist II to Clerk Typist III is a violation of Article II because it is unreasonable.

Second, the Union argues that, since the Grievants are doing Clerk Typist III work, the Employer is violating Addendum B - City Hall Classification and Wages by not permanently reclassifying the Grievants.

In many ways, these arguments are intertwined. The answer to both arguments is the same and for the same reason.

The agreement between the parties gives the Employer the right "To hire, promote, transfer, assign and retain employees consistent with this agreement." Article II (c). In the same article, the agreement also states, "Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein."

The agreement also specifies in Addendum B - City Hall Classification and Wages an hourly pay rate for Clerk Typist II and a higher pay rate for Clerk Typist III.

Much of the Union's case consisted of submitting evidence to show that the Grievants were performing Clerk Typist III work. The Employer presented contrary evidence. I do not need to make a determination on the issue of whether these employes are doing Clerk Typist III work in order to decide this case.

Therefore, I do not take a position on that issue. One or both parties may want an answer to that question but it will have to come from another arbitrator in another case. For the sake of this Discussion, I will act as if the Union has proven that the Grievants are working at the Clerk Typist III level.

The first question before this arbitrator is whether the Employer's refusal to promote the Grievants from Clerk Typist II to Clerk Typist III is unreasonable. I find that it is not. The second question before me there is whether the remedy for a Clerk Typist II doing Clerk Typist III work is permanent reclassification. Again, I find that it is not.

While the Employer has retained the right to promote under Article II, it has also retained the right not to promote, as long as said right is exercised in a reasonable manner consistent with the Agreement.

Here, the main argument of the Union is that the two Grievants are doing work out-of-class. One remedy for employes working out-of-class is for the Union to seek the reclassification of these employes. Indeed, this is something that the parties have agreed to do in the past and something that the Union appropriately tried to do in this situation.

However, the Union was unsuccessful in reaching an agreement with the Employer on this issue. The Union had the reclassifications on the bargaining table, but removed them prior to securing an overall agreement with the Employer for 1992-94.

Now the Union seeks to have the reclassifications implemented through the grievance procedure. As I noted in my previous Award in theses cases, this is something that the Union is not precluded from attempting to do. Indeed, this Arbitrator would entertain such a remedy if the Employer was in violation of the agreement and if the parties had not already anticipated this circumstance and made accommodations for it.

In this situation, however, the Employer is not violating the agreement by refusing to promote or permanently reclassify these employes whom the Union asserts are working out-of-class since the parties have already agreed to a remedy in such a situation. In Article VIII - Pay Policy, Section 10 - Work at Higher Classification, the parties have agreed that "When employees perform work at a higher classification, the employee shall be compensated at the higher rate for all time worked in said classification."

Therefore, by the parties own agreement, a remedy is available for the Union when an employe is working out-of-class. The remedy is not permanent reclassification but payment to the employe at the higher rate during that time the employe is working out-of-class.

The parties are free to reclassify these employes; indeed, this would make sense if these employes are doing a lot of out of class work since, among other benefits, it simplifies the bookkeeping. But in this situation, the Employer is not required to do so.

It is not unreasonable for the Employer to refuse to promote or permanently reclassify these employes, even if they are doing Clerk Typist III work since the parties have agreed to a remedy in such a situation: to pay said employes at the Clerk Typist III rate for all time worked in that classification. Nor is a permanent reclassification the remedy for an employe who is working in a higher class; again, it is payment of the higher rate for all time worked in the higher classification.

The question before me is whether the Employer is in violation of the 1992-94 Labor Agreement by not permanently reclassifying the Grievants from Clerk Typist II to Clerk Typist III. Since the Grievants have the remedy of seeking out-of-class pay for all time worked as a Clerk Typist III, I do not find it a violation of the agreement for the Employer to refuse to permanently reclassify the Grievants. The remedy for the Grievants when they work out-of-

class is to submit all such time to the Employer for compensation at the higher rate; if the Employer refuses to pay said rate, the grievance procedure is available to resolve the dispute.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. That the City of Manitowoc is not in violation of the 1992-94 Labor Agreement by declining to permanently reclassifying the Grievants from Clerk Typist II to Clerk Typist III?

2. That the grievances are denied and dismissed.

Dated at Madison, Wisconsin, this 23rd day of November, 1994.

By James W. Engmann /s/
James W. Engmann, Arbitrator