BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF MANITOWOC

and

CITY OF MANITOWOC EMPLOYEES,
LOCAL 731, AFSCME, AFL-CIO

Case 113
No. 52623
MA-9046

Appearances:
Mr. Patrick Willis, City Attorney, appearing on behalf of the City of Manitowoc.
Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the grievant and Local Union 731.

ARBITRATION AWARD

The City of Manitowoc (hereinafter referred to as the City or the Employer) and Local 731, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the City's refusal to allow Kay Kautzer to post into two open positions in the bargaining unit. A hearing was held on August 9, 1995 in Manitowoc, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on closing arguments and requested an expedited decision. The record was closed on August 24, 1995 after the submission of additional exhibits by the Union and the City.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the arbitrator makes the following Award.

I. Issue

The parties were not able to reach a stipulation on the wording of the issue and agreed that the arbitrator should frame the issue in his award. They did agree, however, that the case turns on the existence or non-existence of a side agreement in negotiations in 1992. The alleged side agreement exempts the grievant's position from the posting provisions of the contract. If the side agreement does not exist, it is conceded that the City has violated the contract by refusing to allow the grievant to post from her temporary job into another bargaining unit position. If the side agreement does exist, it is conceded that the grievance must be denied.

The issue may be fairly stated as follows:

> Did the City and the Union enter into a binding side agreement in 1992 exempting the Clerk-Typist I in the Assessor's office from the posting provisions of the collective bargaining agreement?
>
> If not, what is the appropriate remedy?

II. Background

In early 1992, the City advertised a job for a Clerk-Typist I in the Assessor's office. The advertisement indicated that the job was temporary, and would last for the duration of the city-wide reassessment, a maximum of three and one-half years. The grievant, Kay Kautzer, applied for the job and was hired in February.

The collective bargaining agreement had expired on December 31, 1991, and negotiations over a successor commenced in the Fall of 1991. After the initial exchange of proposals, several other issues came up and were placed on the table for negotiation. Among these was the City's January 1992 proposal to treat the Clerk-Typist I in the Assessor's office as ineligible for posting rights. The City's reasoning was that it was a job with a defined term, and the City was reluctant to have constant turnover as the incumbents posted out into permanent jobs. The City also raised an issue concerning a variance in the contractual work schedule for clericals and aides in the Parks and Recreation Department.

Negotiations continued into the summer without agreement. The parties met for bi-lateral talks on August 4th. During that session, several package proposals were exchanged. In these packages, the parties reached agreement to exempt the Clerk-Typist position and on the schedule variance for the Recreation Department employees. The parties did not, however, reach overall agreement on the packages.

On September 9th, the parties engaged in a mediation session and reached agreement on a contract. The Clerk-Typist's posting rights and the schedule for the Recreation Department were not discussed at the mediation session, and were not referenced in the tentative agreement written out and signed at the end of the mediation.

The City Attorney sent a letter to the Union's Staff Representative on September 18th:

> Enclosed please find two original copies of the 1992-1994 City Hall contract ready for execution, along with a copy showing the added language shaded and the deleted language lined out from the agreement. Please contact me after you have a chance to review the shaded-lined out copy in order to determine if we are in agreement on all portions of the form of the contract.

> In reviewing my notes, I wanted to clear up one item regarding the temporary Clerk-Typist I position in the Assessor's Office. At our last bargaining session before mediation you had indicated in a package proposal that the Union would agree this position would be treated as a limited term position provided that the Clerk-Typist I salary rate and all other benefits under the contract were provided. We agreed to this proposal. Since this is a new position, there really is no status quo to be maintained under our agreement to extend the existing bargaining agreement by three years. Am I safe in assuming that our agreement on the temporary Clerk-Typist I in the Assessor's Office stands? If I am not, please let me know.

The Union did not respond to the letter, and the contract was signed by representatives of both parties on October 5th.

In the summer of 1994, Kautzer signed a posting for an open job, and lost out to a more senior applicant. At that time, the City Attorney informed her that she did not have the right to sign job postings. She did not approach the Union to pursue the matter.

In the winter of 1994-95, the grievant signed two postings, one for a Parking Attendant's job, and one for a Clerk-Typist opening in the City Clerk's office. The City refused to consider her bids for these jobs, although she was allowed to compete as an outside applicant for the Parking Attendant job. Another outside applicant was selected for the Parking Attendant's job, and the Clerk-Typist job in the Clerk's office remained vacant after the posting process. Kautzer approached the Union after her experiences with the postings and the instant grievance was filed.

Additional facts, as necessary, will be set forth below.

III. Discussion

The central question here is whether the parties did or did not make a side agreement in the late summer of 1992 to exempt the Clerk-Typist in the Assessor's office from the posting provisions of the contract. Without such an agreement, the grievant clearly has the contractual right to post for other jobs, and the City has no right to prevent her from transferring to a permanent position. There is no dispute about the general sequence of events. The City sought the exemption in bargaining to prevent turnover in the job. No specific contract language was contemplated, simply an understanding between the parties. The Union agreed to the City's proposal at one point, but this agreement was part of an overall package, and the package was not agreed to. After the exchange in which agreement was expressed on this and the schedule for the recreation department personnel, those issues were never raised again by the City and were not referenced in the written list of tentative agreements.

Had the negotiating history on this dispute ended with the signing of the tentative agreements, the City would be hard pressed to claim a binding agreement on the exemption, even though I have no doubt its representatives subjectively believed an agreement had been reached. The negotiating history to that point was highly ambiguous, and while there are a wide variety of approaches to bargaining, it is commonly understood in the industry that package proposals are made on an all or nothing basis. There are three subsequent developments, however, that favor the City's claim that an agreement was reached.

Prior to the signing of the collective bargaining agreement, the City presented the draft contract for review and simultaneously stated its belief that the agreement to exempt the Assessor's Clerk-Typist from posting rights had been reached as part of the negotiations but that specific new contract language was not required to put that agreement into effect. This was communicated directly to the Union's chief spokesperson in the negotiations. The Union took no exception to this representation, and proceeded to sign the contract three weeks later.

The second development that lends credence to the City's position is that the schedule for the parks and recreation employees, which was discussed and putatively agreed at the same time as the exemption for the Clerk-Typist, and which was likewise not raised in the mediation or listed in the tentative agreements, was put in place after the contract was signed. Unlike the Clerk-Typist issue, which was dormant until the third year of the contract, the work schedule is an on-going indication that at least one of the issues agreed as part of the exchange of packages on August 4, 1992 has been treated as a binding agreement, notwithstanding the fact that the packages themselves were rejected.

The third development that bears on this question is the refusal of the City in the summer of 1994 to allow a bid by the grievant on the grounds that she did not have the right to use the posting procedure. She did not inform the Union of this, and I do not mean to suggest that this somehow gave notice of the City's interpretation to the Union. It does, however, show a consistent belief on the City's part that the exemption had been successfully bargained.

The Union argues that the agreement should have been reduced to writing if it existed, and that a unilateral letter cannot substitute for a clear written agreement. The first of these arguments overlooks the principle that conduct alone, much less an exchange of assurances, can create binding agreements. It is also completely inconsistent with the treatment of the scheduling issue, where the parties have honored the unwritten agreement. The parties have a legal obligation to reduce their agreements to writing if requested, but the lack of a document does not negate a bargain. In any event, the agreement here was not, strictly speaking, unwritten. It was reduced to writing by the City Attorney and presented to the Union before the contract was signed, with the clear expectation that the Union would make an objection if it disagreed. In that sense, the

agreement was not unwritten and the letter was not unilateral. The Union had the option to object and return to bargaining, and the obligation to notify the City of its disagreement before the contract was signed. By instead allowing the City to sign the contract,

thus terminating the employer's right to demand further bargaining or interest arbitration on the topic, the Union effectively acquiesced in the position set forth by the City Attorney. 1/

Expressing this in terms of basic contract theory, the City made an offer in the form of the City Attorney's letter, the Union stood silent in circumstances where it knew that silence would be construed as acceptance, and the City's change in its legal position by signing the contract became consideration for the contract as described in the City Attorney's letter. Another way of conceptualizing the case is as an estoppel of the Union's right to insist on the language of the posting clause, based upon its conduct in not responding to the letter. Whichever way the case is analyzed, the result is the same.

Although I do not question the sincerity of either side in pressing forward with this case, the preponderance of the evidence demonstrates that the parties did in fact make a side agreement during contract negotiations to prevent the grievant from using the posting provisions of the contract. This conclusion necessarily leads me to deny the grievance.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The City and the Union entered into a binding side agreement in 1992 exempting the Clerk-Typist I in the Assessor's office from the posting provisions of the collective bargaining agreement. The grievance is denied.

Dated at Racine, Wisconsin this 12th day of September, 1995.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

1/ This conclusion is premised upon the particular facts of the case, including the exchange of proposals on this topic, the apparent but ambiguous agreement, and the City's good faith in clarifying the issue before the contract-making process was completed. As noted, there are many different methods and practices in bargaining. I find it particularly significant in this case that the parties have used a type of "negative check-off" in the past, with interpretations being stated in letter form and the onus being placed on the party receiving the letter to say whether they disagree.