BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 569-A, AFSCME, AFL-CIO

and

CITY OF MAUSTON

Case 24
No. 46907
MA-7101

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Jon Anderson, Godfrey & Kahn, S.C., Attorneys at Law, appearing on behalf of the City.

SUPPLEMENTAL ARBITRATION AWARD -- REMEDY

On February 12, 1996, the undersigned arbitrator held that the grievances filed by Susan Bosgraaf in January and March of 1992 were arbitrable and were sustained. The parties were given an opportunity to reach a mutually satisfactory resolution and I retained jurisdiction. The parties notified me that they were unable to reach agreement on a remedy and submitted briefs by October 12, 1996, stating their positions on the remedy.

The City's Position:

The City notes that as a general rule, damage awards in arbitration cases should be designed to preserve the spirit and intent of the parties' collective bargaining agreement. While the Supreme Court in one of the Steelworkers' Trilogy cases gave rather broad remedial authority to arbitrators, it has been interpreted narrowly by the majority of arbitrators who routinely recognize that their remedial authority should be limited to measures necessary to make the injured party whole. There is no reason to depart from this general rule in this case, given the fact that the amount of damages are readily ascertainable.

The City believes that the proper remedy is that Ms. Bosgraaf be compensated as if she were allowed to work from the period of time that she was sent home by Ms. Boyer to the point in time that she was laid off from her position with the City following the reorganization. Any sums of money would be reduced by any earnings or other compensation, including Worker's Compensation, received by Ms. Bosgraaf during that period of time.

The City notes that this case was not a discharge case, but dealt solely with the issue of whether the City acted reasonably in not allowing Ms. Bosgraaf to return to work. The ruling in this case relates to the City's actions in January of 1992, and the remedy needs to relate directly to the issue in dispute.

It is undisputed that Ms. Bosgraaf was laid off from her position in August 1992. A separate grievance is pending on whether the City violated the collective bargaining agreement when it refused to allow Ms. Bosgraaf to bump following her layoff. The City does not believe that the circumstances underlying the grievance at issue requires the provision of a job to Ms. Bosgraaf beyond the date of her layoff, as that issue will be decided in a separate pending case.

The Union's Position:

The Union believes that the City's position that Ms. Bosgraaf be compensated only until she was laid off is an attempt to terminate her without having to submit to the just cause standard. It is the Union's position that Ms. Bosgraaf be reinstated to her position, which is the position now held by the Deputy Clerk.

The Union notes that the Arbitrator stated that the normal and usual remedy for a contract violation is to put a grievant in a position that he or she would have been in but for the contract violation. The Union argues that it is incumbent upon the party proposing a deviation from that normal and usual remedy to provide sufficient justification for the deviation, and there is no such justification here.

Ms. Bosgraaf testified that in January of 1991, there were three clerical employees in City Hall -- the Utility Clerk/Public Works Secretary, the Deputy Clerk-Treasurer, and the HUD-DOD part-time secretary. Ms. Boyer testified that she was concerned about a lack of checks and balances in the office and re-titled the positions as Deputy Treasurer, Deputy Clerk, and Confidential Secretary. Ms. Boyer also testified that with the reorganization, work loads shifted very much, but no specifics were offered. Ms. Bosgraaf testified that she has done almost all of the work done by the Deputy Clerk position. When the City reorganized the office staff, it declared all of the positions to be out of the bargaining unit. Since then, however, the Commission has determined in Dec. No. 21424-E that the Deputy Clerk position was indeed properly included in the bargaining unit.

The Union asserts that the Deputy Clerk position is the same position that had been held by Ms. Bosgraaf for years. A new title does not mean that the position is a different one. Even if there are some differences between the positions, the issue is whether the Deputy Clerk's position is a position that Ms. Bosgraaf would have been in but for the contract violation. Since she was

the only represented office worker in City Hall before the contract violation, and since the Deputy Clerk position is the only represented office worker in City Hall after the contract violation, where else would she have gone?

The Union contends that the City did not explain why Ms. Bosgraaf was laid off as a result of the reorganization. The work she traditionally performed was still being done, and the layoff was a sham, the Union states. The City is trying to eviscerate the fundamental protections of the labor agreement -- seniority and just cause. If the City is permitted to not return Ms. Bosgraaf to her job -- or what is clearly substantially her job -- under the pretense that her job no longer exists, what would stop an employer from trying this trick any time it wishes to get rid of an employee? Even if the employer loses the just cause claim or the seniority claim, it can trot out the job-no-longer-exists-claim and accomplish the same thing.

The Union submits that nothing short of reinstatement to the Deputy Clerk position is appropriate under the facts of this record.

The City, In Reply:

The City notes that Ms. Bosgraaf's grievances regarding her layoff and the City's refusal to allow her to bump into another position are not before this Arbitrator. Yet the Union asks that the Arbitrator reinstate Ms. Bosgraaf into the Deputy Clerk position as though the layoff never occurred, despite the fact that the layoff issue was not involved in this case. The sole issue before the Arbitrator here was whether the City violated the collective bargaining agreement by not allowing Ms. Bosgraaf to return to work in January of 1992. No evidence was presented regarding the propriety of the subsequent layoff in August of 1992 regarding the claim that Ms. Bosgraaf was denied the opportunity to bump. The Union's suggested remedy asks the Arbitrator to resolve all those issues in its favor, and is clearly inappropriate.

The bargaining agreement itself mandates that only one subject matter shall be covered in any one grievance, and it limits the arbitrator's authority to making decisions only with respect to each grievance submitted. See Article IV, Sections 3 and 8(f).

While the Union argued that anything short of complete reinstatement would "eviscerate" the spirit of the bargaining agreement, the guts of the agreement do not lie in its spirit but in its actual language that has been agreed to by the parties. The Union has agreed that only one subject matter shall be covered in any one grievance. The issues of Ms. Bosgraaf's layoff and bumping rights were not subjects of the grievance at hand. Therefore, it is the Union that is asking the Arbitrator to eviscerate the collective bargaining agreement.

The appropriate remedy is to award back pay from the time that Ms. Bosgraaf should have

been returned to work in January of 1992 through the time of her layoff in August of that year, less appropriate set offs and mitigation. Whether the layoff and denial of bumping rights also violated the labor contract are issues for another day and for another arbitrator.

The Union, In Reply:

The Union finds a flaw in the City's claim that the remedy would run afoul of the grievance procedure that requires only one subject matter be involved in one grievance. The Union took the view throughout the processing of this grievance that the City Administrator's act to send the Grievant home in January of 1992 and the later decision to eliminate her position and re-create it as a non-union position were part of the same act to conduct a "stealth discharge" of the Grievant and avoid those messy "just cause" considerations.

There is no evidence in the record to support the City's view that the Deputy Clerk position is a different position from the Utility Clerk position. The evidence is that the Deputy Clerk position is nothing more than a re-titled Utility Clerk position. If the City believed at the time of the hearing that a ruling in favor of the Grievant should not result in her being placed in the Deputy Clerk position, it should have put evidence in the record to that effect. The fact that the City did not do so means that the City knew that such a ruling would result in the Grievant assuming the Deputy Clerk position.

If the Arbitrator believes that the record is insufficient to support the Union's position on the remedy, the hearing could be re-convened to take evidence on the remedy question, since the lack of evidence in support for the City's view militates against a ruling in the City's favor.

REMEDY

The Grievant is entitled to be restored to her former position. The City is ordered to immediately pay her a sum of money, including all benefits but less any amount of money she has earned elsewhere and less money she received from Worker's Compensation, that she otherwise would have earned from January 3, 1992 to the time that she was laid off. The Grievant is entitled to retain her seniority without interruption and she is entitled, as part of being restored to her former position, any rights of a full-time employee in that position, including any rights to pursue any pending grievances with respect to her layoff, or any arguments she may have had at that time to pursue the right to bump other employees or attain other positions.

This remedy best achieves the goal of putting the Grievant in the position that she would have been in but for the contract violation. It is too speculative, based on this record, to determine whether or not the re-created position of Deputy Clerk is the same as the Grievant's position at the time she was wrongfully denied the right to return to work. That argument is still alive and well in another grievance.

Dated at Elkhorn, Wisconsin this 25th day of October, 1996.

By Karen J. Mawhinney /s/

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Karen J. Mawhinney, Arbitrator