

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF SOUTH MILWAUKEE (CITY HALL)

and

SOUTH MILWAUKEE CITY EMPLOYEES, LOCAL
NO. 883, MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO

Case 92
No. 54088
MA-9546

Appearances:

Murphy & Leonard, Attorneys at Law, by Mr. Joseph G. Murphy, 2013 Fourteenth Street, P.O. Box 308, South Milwaukee, Wisconsin 53172-0308, appearing on behalf of the City.

Podell, Ugent, Haney & Delery, S.C., by Ms. Carolyn H. Delery, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202, appearing on behalf of the Union.

ARBITRATION AWARD

The City of South Milwaukee (City Hall), hereinafter referred to as the City, and South Milwaukee City Employees, Local No. 883, Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the filling of a posted position. Hearing in the matter was held on July 23, 1996 in South Milwaukee, Wisconsin. Post-hearing arguments were received by the undersigned by October 8th, 1996. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the City violate the collective bargaining agreement when it failed to award the grievant the newly created P.S.O. position?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VI

SENIORITY

SECTION 10 - VACANCIES

- A. Seniority shall be the determining factor in filling vacancies after qualifications have been established for the job classification. At the request of the appointing authority, Civil Service Commission testing procedures may be required to establish qualifications for the following job classifications:

Wastewater Treatment Facility

Chief Operator
Laboratory Technician
Stores Equipment

Senior Equipment Mechanic
Automotive Mechanic

City Hall

Engineering Aide III
Clerk III
Clerk IV

Water Utility

Chief Operator and Lead Man
Laboratory Technician
Public Library

Reference Librarian
Children's Librarian

If the appointing authority or the Union disagree on minimum qualifications, an affected employee who claims to meet the minimum qualifications shall be given an appropriate qualifying examination and/or appropriate physical examination and shall be assigned to the position if the employee achieves a passing grade.

If an employee has successfully completed a probationary period in a job classification, he/she shall not be required to re-establish qualifications at any future date for that job classification.

- B. When a vacancy occurs in any of the departments listed in Article I, Section 4, Paragraph C, the job shall be posted simultaneously for two (2) full working days within all departments.
1. If the job is not filled by a full-time employee within the department where the vacancy has occurred, the job shall be offered to the most senior full-time employee in one of the other departments within the bargaining unit who has signed the job posting.
 2. If the job is not filled by a full-time employee from one of the other departments, the job shall be offered to the most senior part-time employee working within the department where the vacancy occurred. If no part-time employee within the department posts for the job, the job shall be offered to the most senior part-time Public Safety Officer or Building Service Helper, provided the part-time employee is qualified for the position.
 3. Part-time employees hired after October 1, 1987 or signing of the Agreement shall not be covered by Paragraph 2 (above). All part-time employees hired after the effective date shall be required to apply for a vacant position as everyone from the outside is required to apply.
- C. Employees desiring to be considered for this vacancy shall make a written request for the job to their foremen within such period. The Union will be given the results of such bidding upon request. The request shall be made in quadruplicate on a form provided by the Municipality. One copy will be retained by the employee, one by the supervisor, one given to the Union Steward and one given to the appropriate Board, Commission or governing body. The form provided will be the only one used.
- D. An employee going on vacation, sick leave or excused absence who wishes to be considered for a particular job which may be posted during his/her absence, may apply in writing to his/her foremen before leaving on such absence.

- E. Employees covered under this Agreement who accept a different position under this Article shall have a twenty (20) working day probationary period. However, when an employee accepts said position, the employee shall have the right to return to his/her previously held position within the first twenty (20) working days of the probationary period.
- F. Employees accepting either temporary or permanent promotion to a supervisory position may, within six (6) months of the date of their promotion, elect to return or to be transferred back by the Municipality as though he/she had been on a leave of absence for the period of his/her promotion. After six (6) months in supervision, such employee shall not accrue additional bargaining unit seniority.

. . .

ARTICLE XXXII

AMENDMENTS

SECTION 1 - WRITTEN AMENDMENTS

This Agreement may be amended by mutual consent of the parties. Such amendments shall be in writing.

BACKGROUND

Amongst its various governmental functions the City operates a dispatch center. The instant matter arose when the City determined to fill two (2) full time Public Safety Officer positions (P.S.O.) or dispatchers. At the onset of the hearing in the instant matter the parties stipulated to the following facts:

1. Two (2) full time positions were created.

There were eight (8) part-time positions which were filled on 1-18-96.

Process wasn't the usual process.

2. Part-time employes do not have any posting rights per Article 10, Section B,3.
3. The part-time employe who did have posting rights per Article 10, Section B, was awarded one of the vacant positions.
4. The other employe who had posting rights did not post for the position.
5. The City elected not to solicit applicants who were not current employes.
6. In the past the City has generally filled full time vacant positions, which weren't posted, of this type through the Civil Service process: open recruitment, testing, etc.. The Civil Service process was not used in this matter.
7. In January, 1996 the full time Insurance Clerk was filled by the part-time Insurance Clerk without going through the Civil Service Process.
8. The P.S.O.'s and the Insurance Clerk went through the Civil Service Process prior to being awarded their part-time positions.
9. The City had decided to fill the second full time position from among the part-time P.S.O.'s.

During the early part of 1996 the City met with the Union to discuss the creation of two (2) full time P.S.O. positions. There was agreement on the wage rate and the work schedules for the positions. The Union also took the position that the vacancies be filled by seniority. On February 13, 1996, the City Administrator, Tom Reber, sent the following memo to Mark Milinovich, the Chair of the City's Wages, Salaries and Welfare Committee:

DATE:February 13, 1996

TO: Mark Milinovich
Chair of Wages, Salaries and Welfare Committee

CC: Mayor Dave Kicek

Tom Zapecki, President of Common Council
Larry Plachinski
Jim Burnam
City Clerk Jacqueline Johnson
Chief Erick Slamka

FROM: Tom Reber
City Administrator

During the discussions on the 1996 budget the Common Council approved a move towards full-time dispatchers. Towards that end the Common Council approved two full time dispatchers in the 1996 budget. To implement this plan the following has occurred:

1. Chief Slamka and I discussed the conditions of employment with the union representatives.
2. There was an agreement with the Union on the following:
 - a. The wage for this position would be \$11.00 per hour plus benefits.
 - b. There would be flexibility in scheduling for the first year.
 - c. Placement within the full-time positions would be based on seniority within the department (as a dispatcher).
3. These positions are currently being posted. Our objective is to have two full-time dispatchers in place by March 1, 1996.

If there are any other requirements that need to be filled prior to implementation please make me aware of them. Also if you have any questions, give me a call.

On February 16, 1996, Reber sent the following memo to the Mayor and the Common Council.

DATE: February 16, 1996

TO: Mayor and Common Council

FROM: Tom Reber
City Administrator

RE: Friday Memo

Item #1 An alert reporter for the Journal/Sentinel spotted that offering Hepatitis B to sixth graders in a school clinic was to be discussed at our Board of Health meeting on 2/14/96. That same reporter attended our meeting. What resulted was a lot of press on South Milwaukee being the first city in the area to plan giving this immunization to sixth graders.

Unfortunately, some individuals interpreted this to mean that SM has a high incidence of Hepatitis B. This is not an accurate presumption. The Hepatitis B program is a pro active move toward disease prevention.

Item #2 On Monday I received a call from an Ameritech representative. She indicated that the newspaper article referring to Ameritech discontinuing operations in this area was not accurate. In fact, Ameritech is going to pursue franchises in this area. Their initial concentration will be in the communities of Wauwatosa, West Allis, West Milwaukee and Greendale. They continue to be interested in franchising in South Milwaukee, however, it would be at least two years before they will be providing service here.

Item #3 The full-time Dispatcher positions (2) are currently being posted. The AFSCME contract determines who will receive these jobs.

Item #4 Permit applications received from Friday, February 9, 1996 - Thursday, February 15, 1996 were:

1222 Forest Hill Avenue	Foundation & Move
1418 Marquette Avenue	Remodel 2nd Floor
1333 Monroe Avenue	Detached Garage
2406 Lake Shore Boulevard	Siding
1790 Spruce Court	Foundation Repair

Thereafter, the Union President, Larry Plachinski, verbally gave the City a seniority list which placed Daniel P. Margetta behind Yvonne Wozniak. Margetta and Wozniak have the following seniority dates:

Date of Hire

Date Entered

Date entered	Dept.	PSO Classification
Margetta	2/13/89	8/9/91
Wozniak	11/7/89	11/7/89

The two (2) P.S.O. positions were posted on February 13, 14, and 15, 1996. There is no dispute over the posting and filling of the first position. When Margetta became aware that the City was going to award the position on the basis of Classification seniority he raised the matter with the Union President. The Union President discussed the matter with the City and was informed the City would use the Classification date, that they were aware they were using the Classification date and that the hiring decision had already been made. The matter was then discussed at the Union's February 26, 1997 membership meeting and the Union took the position the vacancies should be filled by Departmental seniority. Thereafter, Union Staff Representative James Burnham sent the following letter to the City:

February 27, 1996

Mr. Thomas Reber
City Administrator
City of South Milwaukee
2424 15th Ave.
South Milwaukee, Wisconsin 53172

Re: Filling of the Full-Time Public Safety Officer Positions

Dear Tom:

This letter will confirm our telephone conversation of today regarding the above referenced issue.

AFSCME Local 883, at its regular membership meeting held February 26, 1996, discussed and came to a conclusion on the issue of filling the full-time PSO positions by seniority.

It is the Union's position that department seniority is the determining factor for filling these positions and not the City's contention of classification seniority.

The current Collective Bargaining Agreement, in Article VI, Seniority, defines this process of filling by department seniority.

It is further understood that Article VI, Section 1 - List of

Employees, defines City Hall as the department that the PSOs would be listed under.

If you have any questions, please give me a call.

Sincerely,

James E. Burnham /s/
James E. Burnham
Staff Representative

The City offered the second P.S.O. position to Wozniak, who accepted and commenced working full time on March 11, 1996.

Thereafter the instant grievance was filed and processed to arbitration in accordance with the parties grievance procedure.

Union's Position

The Union contends there was an agreement between the Union and the City that seniority would be the basis for filling the vacant P.S.O. positions. The Union acknowledges that typically the City uses the Civil Service Process for filling vacant positions. However, the City did not want to open the positions to the public and wanted to solicit applicants from current employees. The Union points out that if the Civil Service Process had been used the applicants would have been tested and graded, an eligibility list would of been created, and selection would of been based upon the highest score. The Union stresses the City desired to use an internal process. The Union contends it clearly informed the City that if an internal process was to be used it had to be in conformance with the collective bargaining agreement. The Union asserts it has never deviated from this position.

The Union also argues that the City agreed on January 31, 1996, that placement for the new position would be on seniority. The Union argues that it clearly informed the City it would not agree to a merit selection process. Further, the Union claims that there was not any ambiguity in the selection process. In support of this position the Union points to the February 13, 1996 Reber Memo, the February 16, 1996 Reber Memo, and a February 20, 1996, Slamka Memo. The Union argues that even after it made its complaint the City asserted it was using Classification seniority. The Union concludes that there was a clear understanding and agreement because the City wanted to select and fill the new full time P.S.O. positions from the part time P.S.O. employees the City would use seniority for the basis of the selections.

The Union also contends Departmental seniority date is to be used for filling Department vacancies. The Union argues that the Union President originally gave the City an incorrect seniority list. As soon as the Union became aware of the problem it informed the City. The Union stresses the City acted on the incorrect list but had the opportunity to change its actions but

had refused to do so. The Union points out the collective bargaining agreement does not contain a reference to classification seniority. The Union also points out there has never been a past practice where classification seniority was used.

The Union also argues Article VI, Section 10 (B.), does not apply to the instant matter. The Union contends the instant matter is distinguishable from a previous arbitration wherein the Arbitrator held a grievant had no seniority rights to a position because he was a part time employe but had to be considered with other outside candidates. The Union points out that in the instant matter there was no outside competition. The Union also points out that in computing length of service as a dispatcher the grievant has worked more hours than Wozniak had.

The Union would have the undersigned sustain the grievance and direct the City to make the grievant whole.

Employer's Position

The City contends the determinative facts in the instant matter are not in dispute. These are: the grievant did not have posting rights to the position; the grievant and all other part time P.S.O. employes were considered for the vacant full time position; and, the discussions between the City and the Union did not result in an amendment to the collective bargaining agreement. The City points out the grievant had no contractual rights to the vacant P.S.O. position as Article VI, Section 10, (B) 3, expressly denies any posting rights to the grievant. The City acknowledges that by arbitral authority part time employes who have already completed the civil service process must be considered. The City asserts the grievant was considered and has no basis for his complaint that another employe was selected.

The City argues there is nothing in the provisions of the collective bargaining agreement which limit the City's right to select the P.S.O. candidate it deemed best for the position. The City also argues the discussions with the Union prior to the selection of Wozniak for the position demonstrate the City attempted to exercise its managerial rights in a cooperative fashion. The City asserts the instant matter demonstrates the futility of such efforts. The City points out the discussions did not result in an amendment to the collective bargaining agreement. The City concludes that absent such an amendment it was free to fill the position with any of the part-time P.S.O. employes provided it considered all of them. The City asserts there is no evidence to controvert the testimony of Chief of Police Slamka that he considered all employes. The City contends it therefore satisfied all obligations under the collective bargaining agreement and submits that the grievance should be denied.

DISCUSSION

As both the City and the Union have pointed out, the majority of the pertinent facts herein are not in dispute. The grievant is a part time employe who, as defined by the collective

bargaining agreement, does not have any posting rights to full time positions. The fundamental issue, as raised by the Union, is whether the City and the Union reached an agreement with the Union on how to fill the vacant P.S.O. position. However, as the City has pointed out, Article XXXII of the collective bargaining agreement requires any amendment to the collective bargaining agreement to be in written form. The burden is on the Union to demonstrate that an amendment to the collective bargaining agreement was reached by the parties. The record demonstrates the only written documentation of the parties efforts to resolve the matter was the February 13, 1996 Memo from Reber to the Chair of the City's Wages, Salaries and Welfare Committee. Therein it states... "Placement within the full-time positions would be based on seniority within the department (as a dispatcher)." The undersigned finds this statement to be clear and unambiguous. Not departmental seniority but rather seniority in the classification would be the determinant as to who received the position from among the part time P.S.O. employees. However, Reber is the author of this memo. The February 13, 1996 Memo is therefore the City's view of the agreement reached between the parties. Although the Union informed the City it did not concur with the filling of the vacancy by classification seniority after issuance of this memo, Reber's memo supports a conclusion that the City believed the agreement reached between the parties was that the position would be filled by seniority as a dispatcher.

The undersigned would note here that neither party cited any evidence or practice which mandated that the City was required to follow its Civil Service Process in filling the vacancy. The record demonstrates that this is not the first time the City did not seek non-city employees when it filled a vacant position. A careful review of the parties' collective bargaining agreement demonstrates that there is no requirement that the City must open recruitment to the public when it seeks to fill a position. Thus there is nothing in the contract which precludes the City from limiting its search for a candidate to only currently-employed personnel.

The City's actions of hiring the employe with the earlier seniority date as a P.S.O. is consistent with the City's understanding of the agreement reached with the Union. The Union's initial action of supplying the City with a seniority list by classification seniority is also consistent with the City's understanding of the agreement. Thus, while the Union did raise issue with the City's actions prior to the approval of filling the vacancy by the City's Common Council, the only conclusion the undersigned can reach is that either there was agreement that filling of the vacancy would be by classification seniority and the Union, after discussing the matter internally, changed its position, or, there was no meeting of the minds as to what filling the position by seniority meant. Regardless of either conclusion, because the agreement reached by the parties had not been reduced to written form the undersigned finds that whether the Union desired to change its position or whether there was no meeting of the minds as to what filling the position by seniority meant, Article XXXII requires a written agreement to amend the agreement. There is no evidence of a written amendment to the collective bargaining agreement except the February 13, 1996 Memo and this Memo supports the City's actions. There is also no evidence the City failed to consider the grievant for the position. Thus, there was no violation of arbitral authority that required the City to consider part time employees for full time positions because the City did

consider the grievant for the position. The undersigned therefore concludes the collective bargaining agreement clearly specifies the grievant has no contractual right to the position and the City's actions of awarding the position to another employe did not violate the collective bargaining agreement. The grievance is denied.

AWARD

The City did not violate the collective bargaining agreement when it failed to award the grievant the newly created P.S.O. position.

Dated at Madison, Wisconsin, this 13th day of February, 1997.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator