BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SUPERIOR CITY EMPLOYEES UNION, LOCAL 235, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Cases 127 - 139
No. 52001 - 52013
MA-8800 - MA-8212

Appearances:

Mr. James Mattson, Staff Representative, 1701 East 7th Street, Superior, Wisconsin, 54880, appearing on behalf of Superior City Employee's Union, Local 235, AFSCME, AFL-CIO

Ms. Mary Lou Andresen, Human Resources Director and Mr. Thomas Hayden, City Attorney, 1407 Hammond Avenue, Superior, Wisconsin, 54880, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. Pursuant to a request by Superior City Employees Union, herein the Union, to the Wisconsin Employment Relations Commission to appoint an arbitrator, the Commission appointed Stuart D. Levitan, a member of its staff. Hearing was scheduled for May 18, 1995, but on that date the parties entered into a stipulation to adjourn the case on certain terms. Subsequently, the Union communicated to the Commission that the matter had not been resolved, and the Commission appointed James R. Meier as arbitrator. Hearing was held on March 11, 1997, in Superior, Wisconsin. The hearing was not transcribed and the parties filed briefs by May 27, 1997.

PORTION OF MASTER AGREEMENT:

ARTICLE 5 - CLASSIFICATION

5.01 The Union may at any time request in writing to the Mayor for a revision of the allocation of any position. An investigation

shall be made of the position and the Mayor may affirm or alter the allocation with the approval of the Labor, Wage and Classification Committee and City Council.

SIDE LETTER AGREEMENT

The parties agree that the twelve reclassification grievances filed October 19, 1994, shall remain open upon the following terms:

1) The Director of Human Resources, to be hired shortly, shall make proper investigation of the twelve reclassification requests a high priority in his/her long term work plan.

2) The Director of Human Resources shall report his/her findings and/or recommendations to the Union, Labor Relations Committee and Mayor by December 1, 1995.

3) In the event any of the positions are reclassified, that reclassification would be effective October 19, 1994. Resulting back pay would be from that day forward.

4) Nothing in this agreement shall affect the rights of either party under Section 8.01 or Section 1.02 of the working agreement.

5) The Wisconsin Employment Relations Commission shall retain jurisdiction in these matters pending settlement or a final decision.

Dated May 18, 1995.

STATEMENT OF ISSUE:

The Union submitted the issue as follows:

Did the Employer violate the specific terms of the Agreement between AFSCME Local 235 and the City of Superior (Item #3) when it refused to provide back pay to Grievants who have been reclassified?

And if so; the appropriate remedy is to direct the Employer to make the affected Grievants whole for any and all lost wages and benefits

from October 19, 1994 to present due to their being reclassified.

The Employer submitted the issue as follows:

> Did management violate a side letter agreement by denying a claim of back pay to 12 individuals filing grievances for reallocation of their positions?
>
> If management is obligated to pay back pay, what is the method and period of the back pay?

The parties did not stipulate the issue for decision. I find the Employer's formulation of the issue to be satisfactory.

The parties agreed that in the event a back pay remedy is ordered the following would apply:

> Formula for Back Pay:
>
> 1. Once the wage rates and placement of individuals on the salary range for the positions in question are agreed upon between the parties effective January 1, 1997, subtract by 3% from these wages to determine the correct wage rates from January 1, 1996 through December 31, 1996.
>
> 2. Subtract another 3% to determine the correct wage rates for these positions from January 1, 1995 through December 31, 1995.
>
> 3. Finally, subtract another 3% to determine the correct wage rates from October 19, 1994 through December 31, 1994 for these positions.

BACKGROUND:

This dispute has a long history. As early as 1991, the Union raised concerns with management about the compensation of employes at the low end of the pay scale relative to other employes. In response, the Employer agreed with the Union that a comparable worth compensation study would be conducted by staff of the University of Wisconsin School for Workers at a cost of six thousand dollars ($6,000) to be paid by the Employer.

From 1991 to August 1994 the parties waited for completion of the study by the Wisconsin

School for Workers. On August 10, 1994, Margaret Ciccone, City Clerk, and Tim Nelson, Finance Director, reported to the City's Labor Relations Committee that the Comparable Worth Study was being submitted to the Labor Relations Committee with no recommendation from the Comparable Worth Study Committee. No action on the study was taken by the City. On August 24, 1994, the leadership of Local 235 also voted to receive and file the study.

Both the Employer and the Union found that the resultant study did not provide the expected answers. On August 29, 1994, the Labor Relations Committee was reminded by the Mayor that four reclassification requests had been pending since 1991 waiting on the results of the study. In spite of the fact that the Comparable Worth Study did not support the four reclassifications, on September 26, 1994, the Labor Relations Committee, at the urging of the Mayor, reclassified four Local 235 employes retroactive to the date of their requests in 1991. The relevant minutes of the meeting are set out below. (See items 5, 6 and 7 of Management Exhibit #4.)

> 5/6) Bergson explained that these employees have waited a long time due to the completion of the Comparable Worth Study, but now that the study has been received and filed, he felt that it was the Labor Relations Committee's obligation to deal with the reclassification.
>
> Kotter stated that the Labor Relations Committee recognized this and recommended that the Grievants bring this back to the Labor Relations Committee.
>
> Thoreson said that what the Labor Relations Committee expected from the comparable worth study was a category to be able to fit these employees in. He expressed that he felt these employees were treated unfairly and that the Labor Relations Committee's compromise to these people would be that the reclassification would be retroactive to the date they were filed. Motion by Thoreson, seconded by Kotter to approve the reclassification, items 5 and 6 on the agenda, that they be retroactive to the date the requests were filed and to refer them to the Finance Committee.
>
> 7) Vito questioned the reasoning for a 3% pay increase in 1993 instead of a .5%. He added that the Labor Relations Committee just approved reclassification without reason and he felt that most of the #235 Union Employees would be approaching the Labor Relations Committee with a request for reclassification . . . .

As predicted by Vito, twelve more employes who thought they would have been reclassified as a result of the Comparable Worth Study, requested reclassification. These reclassification requests were denied and are the subject of the grievance before the Arbitrator.

On November 7, 1994, the Mayor denied these twelve grievances at the second level and the Labor Relations Committee heard them that night. The transcript of the meeting is informative. {See Union 2-J}.

> Lois: Our ultimate question is that we do not know why the LRC denied our request for reclassification.
>
> Sharon: Well, I think it was, in my mind anyway, it was clear enough to refer it to the new personnel director rather than to have you and each one of us and we looked over all of the requests and in my opinion there are some in there that definitely need to be looked at but I would not agree that all of them do. So we just felt that it would be better to have somebody that was trained in personnel and the comparable worth study didn't seem to go over like it should have, the matrix system is not going over, and hopefully a new personnel director, when they come in, would have that knowledge to know, you know, what is that job today and what is that job worth today.
>
> Ron: It is proper to deny the request too, Lois, based on the lack of expertise.
>
> Lois: What about the reclasses that were just recently approved?
>
> Ron: They were going on since 1991.

Lois: That doesn't answer the question from what she just said, the lack of expertise, what expertise approved those?

> Ron: I just explained that we can base the denial on, I can explain what we can base the denial on.
>
> Lois: You based the denial on the lack of expertise by this Committee.
>
> Ron: I can say that.
>
> Terri: Will you put that in writing?

Ron: Well, first off we are not making comparisons on other rulings of this committee and we are not going to compare apples to oranges.

Terry: I think the point is the inconsistency.

Ron: . . .

Terri: . . .

Ron: Why does the denial concern you?

Terri: I don't know, it just does. And you brought up the fact Ron that, um, retroactive pay back, yes that could. Maybe someday when there is a new personnel director . . . maybe we do have that right to retroactive pay, I don't know, we may be able to but by your denying it, you may put the kibosh on all of that. And it might affect our request in the future for another reason by the personnel director saying that well these people denied it there must be some reason for it to be denied. I think if were going to be denied, I would like it stated somewhere the reason it was denied was because you don't have that expertise.

Ron: . . .

Lois: . . .

Ron: . . .

Mike: Let's get somebody who is totally qualified and can review all this and do the fairest thing for the most employees.

Each Labor Relations Committee member in one fashion or another stated that they were going to deny the grievance because they did not have the expertise to consider the re-class requests and one member indicated that she thought some positions needed to be reviewed. The Committee then met in Executive Session and formally denied the requests and referred them for review to the, as yet, unhired personnel director.

In November 1994, the Union petitioned the Wisconsin Employment Relations Commission to appoint an arbitrator. Staff member, Stuart D. Levitan, scheduled a hearing for May 18, 1995, and on that date the parties, without the substantive involvement of Levitan, entered into the Side Letter Agreement set out above. It provides in pertinent part that the new director shall make proper investigation of the twelve reclassification requests, report findings and/or recommendations to the City and to the Union, that any resulting reclassification would be effective October 19, 1994, and that the Wisconsin Employment Relations Commission would retain jurisdiction.

The new Director of Human Resources was hired in September 1995, made a review of each of the twelve positions, and reported to the Labor Relations Committee that the requested job classes were not appropriate, but simultaneously recommended yet a new study of the positions in the entire unit. The Committee adopted the Director's report. The Director finished her work, and her study was approved effective December 16, 1996. As a result, the twelve Grievants as well as other employes were reclassified effective from December 16, 1996. The question before the Arbitrator is whether the Side Letter Agreement requiring retroactivity to October 19, 1994, applies to these reclassifications for the Grievants.

UNION'S POSITION:

The Union's position, as set out at hearing and in its briefs, is that the Employer retroactively reclassified four union employes in 1994; summarily denied the twelve reclassification requests here; deferred them to a soon to be hired Human Resources Director and that the Union agreed to this deferral on May 18, 1995, on the condition that any resulting reclassification would be retroactive to October 19, 1994, which is the date the Union conveyed its support for these reclassifications to the Labor Relations Committee. The Union further argues that it entered into the Side Letter Agreement of May 18, 1995, in good faith, and that it clearly and unambiguously requires retroactivity to October 19, 1994.

EMPLOYER'S POSITION:

The Employer's position at hearing and in its brief is that in 1994 the Grievants requested reclassification; that the request was reviewed at the HRC meeting through written and oral presentation and the HRC denied the request of the twelve individuals. In November 1994, twelve grievances were filed claiming that the reclasses were not investigated. The HRC denied the grievances. The side letter set a date for completion of the review and limited any resulting back pay. The back pay provision was specifically linked to the review of the requests and grievances before the HRC.

When the Human Resources Director was hired, she made a review of the twelve positions. She recommended to the Human Resources Committee that their previous denial of the reclass requests was correct because the requested classes were not appropriate for their positions, and she also recommended that she be authorized to conduct a "new" study of all positions in the unit to result in a comprehensive recommendation for classifications for the entire unit including these twelve Grievants. The HRC approved this recommendation and thereby the side letter requirements were satisfied. A year later the study was completed, the reclasses occurred, but as the side letter requirements were previously met, no retroactivity is necessary.

DISCUSSION:

Article 5.01 of the master agreement provides that the Union may request a review of the

allocation of a position to the Mayor. It further provides that an investigation shall be made of the position and that the Mayor may affirm the current allocation or alter the allocation with the approval of the Labor, Wage and Classification Committee and City Council.

The contract does not state who is to investigate, but is clear that it is the City's responsibility since there is no language indicating that the responsibility to investigate shifts back to the Union. That the City did not have a qualified person to investigate prior to September 25, 1995, is clear. In 1991, when four people requested reclasses and the Union sought a broader review, the City agreed to hire the School for Workers to perform a study. When that study was nondeterminative in 1994, the City reclassed the four with apparently no expert investigation. In 1994, when twelve more applied for reclassification, they were denied for lack of expertise and their requests referred to an as yet to be hired expert. Finally, when the grievance went to hearing in May 1995, for failure to investigate, the City stipulated to an adjournment so that a proper investigation could be done.

The May 1995 Side Letter Agreement is an elaboration of the parties' intention relative to the City's duty to investigate under 5.01, as well as an agreement regarding the Human Resource Director's responsibility in reporting the results of the investigation to the City and the Union, an effective date for any resulting decision, and continuing jurisdiction in the Wisconsin Employment Relations Commission.

The City asserts that a proper investigation was done, and the Side Letter Agreement was fulfilled, when the Human Resources Director investigated and concluded that none of the twelve employes belonged in the classifications they requested. The City submits the historical evidence shows that selecting the proper classification in the reclass application is a precondition to a successful reclass based on a Union request. The testimony of the Human Resources Director was that she looked at past reclassifications and found that of those reclassifications which were initiated by an employe, only those where the employe named the proper new classification were approved. She asserts that this is evidence of a past practice.

Past practice is defined as "'the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances . . . It must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented.'" Richard Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 Mich. L. Rev. 1017 (1961) {**11} (quoting Sylvester Garret, Chairman, Board of Arbitration, U.S. Steelworkers, Grievance No. NL-453, Docket No. N-146, Jan. 31, 1953 [reported in 2 Steelworkers Arbitration Bull. 1187)]. To sustain the burden of proof that a past practice becomes an enforceable right under a collective bargaining agreement, the movant must show by clear and convincing evidence that the practice is "(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.'" See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 439 (4th ed. 1985) [quoting Celanese Corp of Am., 24 LA {Labor Arbitration} 168, 172 (Justin, 1954)].

In addition to the City's observation that in the past only employes who correctly identified the new classification were reclassified, two other observations regarding the asserted practice can be made. The first observation is that on at least one occasion where the City expected expert opinion regarding classification of employes, it would have implemented recommended changes regardless of whether the employes named the correct new class. Specifically, from the minutes of the Labor Relations Committee of September 26, 1994: "Thoreson said that what the Labor Relations Committee expected from the Comparable Worth Study was a category to be able to fit these employees in." In other words, as to the four reclass applicants from 1991, Thoreson expected to put them in whatever classification the study recommended and not simply deny the request if the study recommended a class different than that requested. This indicates that the asserted past practice is not unequivocal.

The second observation that can be made is that where the City tried and failed to have a competent classification and compensation study done on which to base reclass decisions, it reclassed the employes to the requested reclassification, even in the absence of expert evidence. {See comments of Bergson, Lotter, Thoreson and Vito relative to reclassification of four employes in minutes of Labor Relations Committee of September 26, 1994, Management Exhibit #A.} And so, it might be said that in some cases if employes were reclassed to classifications they requested, it might have been only because the decision makers did not have a better idea of where they belonged. This could indicate that rather than being clearly enunciated and acted upon, the asserted practice is merely an artifact of the then lack of expertise.

There is no evidence in the record that the Union understood and accepted the asserted past practice. Since it offered into the record Thoreson's comment that the Labor Relations Committee expected the Comparable Worth Study to provide a category to be able to fit these employes in, it can be inferred that the Union had no reason to believe there was magic to correctly predicting the classification that might be approved. Further, if the Union steward was aware that such a past practice existed, it is not confirmed by the Grievance Fact Sheet (Union Exhibit #2 at H1-page 4) where it is stated:

> We are willing to consider lesser grades of reclassification if investigation should determine that these requests are out of line but does concur that some grade of reclassification is justified.

This would indicate that the asserted past practice was probably unknown by the Union such that it cannot be said to have been accepted by both parties.

Finally, it should be noted that the asserted practice would not make sense in the real world since, to be anything other than a gamble, it would require a level of expertise on the part of the employe that even the City did not have from 1991 to 1995.

I find that there is no past practice of limiting employes initiated reclassifications to those

where the employe requests a classification which is later found to be the appropriate classification. Therefore, these reclassification requests did not expire with the adoption by the Human Resources Committee of the report of the Human Resources Director that none of the reclass petitions named the correct new classification and that, therefore, the 1994 denial of the reclassification requests by the Human Resources Committee was appropriate.

Rather, I find that the "investigation" anticipated by the parties in the Side Letter Agreement included a determination of what classifications the employes should be in if they were not found to be currently in the proper classification. The fact that the Director failed to report to the Union that her investigation would result in no reclassifications when she reported to the Human Resources Committee and the fact that her report to the Human Resources Committee included a recommendation for a new class and comp study, persuades me that her report to the Human Resources Committee was in the nature of an interim report to her oversight committee and not a fulfillment of the promises made in the Side Letter Agreement. While the comprehensive new class and comp study she performed was more than the parties agreed to in the Side Letter Agreement, it was also in fulfillment of the promises made therein as it relates to the Grievants.

Therefore, I find that the investigation agreed to in the Side Letter Agreement includes the comprehensive class and comp study performed by the personnel director and that the Side Letter Agreement of May 18, 1995, applies to the resulting reclassifications.

Therefore, it is ordered:

ORDER

It is ordered that the City make the reclassifications effective October 19, 1994, consistent with the agreed upon back pay formula. Jurisdiction will be retained for the sole purpose of resolving disputes about the meaning and application of the remedy.

Dated at Madison, Wisconsin, this 28th day of August, 1997.

By James R. Meier /s/
James R. Meier, Arbitrator

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