

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 579**

and

**CITY OF SHULLSBURG**

Case 13  
No. 55526  
MA-10040

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Appearances

**Ms. Andrea F. Hoeschen**, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of the Union.

**Mr. William McDaniel**, Attorney at Law, Johnson, Kranz & McDaniel, 434 Main Street, P.O. Box 209, Darlington, WI 53530, appearing on behalf of the City.

**ARBITRATION AWARD**

The Union and the City named above are parties to a 1996-1998 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve the grievance of Matthew Woodward. The undersigned was appointed and held a hearing on November 12, 1997 in Shullsburg, Wisconsin, at which time the parties presented their evidence and arguments. At the conclusion of the hearing, the parties made oral arguments in lieu of filing briefs, and the record was closed on November 12, 1997.

**ISSUE**

The parties ask:

Did the City violate the collective bargaining agreement when it failed to hire Matthew Woodward for the water operator position? If so, what is the appropriate remedy?

## CONTRACT LANGUAGE

### ARTICLE 1 - RECOGNITION

The Employer recognizes the Union as the exclusive bargaining representative of all employees of the City of Shullsburg, employed at 202 West Water Street, and 112 South Gratiot Street, Shullsburg, Wisconsin, including office, clerical employees, but excluding city clerk-assessor-treasurer and supervisors as defined in the Act, part-time librarian and all other employees, for the purposes of conferences and negotiations with the Employer or its lawfully authorized representatives, on questions of wages, hours and conditions of employment.

### ARTICLE 7 - SENIORITY

1. Seniority shall be defined as an employee's length of continuous service.

. . .

### ARTICLE 8 - JOB POSTING AND TRAINING

The Employer agrees to take into consideration the present employees when job vacancies shall become available. In making its decision to fill the vacancy, the Employer shall take into consideration the applicant's seniority and qualifications to perform the work.

### ARTICLE 29 - STUDENTS, PART-TIME EMPLOYEES AND SPECIAL EMPLOYEES

All seasonal employees, probationary employees, and part-time employees are not eligible for the following benefits:

1. Health and welfare
2. Pension
3. Holiday pay
4. Sick leave
5. Funeral leave
6. Jury duty pay
7. Vacation pay

Only part-time employees shall have the benefit of wage negotiations and shall be subject to the fair share dues requirement. Part-time employees shall receive 85% of the wage rate in their classifications until said part-time

employee works more than 1040 hours in the above mentioned

classifications and subsequent to that time the employee shall receive the full rate for their classification. Part-time employees are those employees who work less than 1040 hours per anniversary year (date of hire to one year later). The part-time Sewer/Water employees must work in excess of four hundred (400) hours per calendar year to be classified as a part-time employee under this contract. Seasonal employees are those employees who work from May 1<sup>st</sup> through September 10<sup>th</sup>, or a lesser period and are engaged in some or all of the following work: park and or recreation work, grounds keeping, lawn upkeep, and miscellaneous minor painting. The City shall employ no seasonal employees or part-time employees, at any time unless all full-time employees of the City are working a full 40-hour week, unless said City employees' absence is because of disability, vacation or leave of absence.

### **BACKGROUND**

The Grievant is Matt Woodward, who has been working for the City since February 25, 1997 on weekends in the Water and Sewer Department. Woodward serves as a relief operator, running chlorine and fluoride and pH tests, checking equipment, making sure there are no leaks. He works approximately six hours a week, three weekends a month. His hours for the year of 1995 – from the end of February to the end of the year – were 198 hours. He worked 212 hours in the calendar year of 1996. And he had worked 164.5 hours in 1997 up to November 7<sup>th</sup>. Woodward started at \$7.00 an hour and his current rate is \$7.35 an hour. The rate was established by the City and not negotiated with the Union. The City makes deductions from his paycheck for social security and Medicare, but makes no deductions for state or federal taxes or fair share dues. The City gives Woodward a W-2 form for tax purposes.

Woodward heard about the opening for a full-time water operator position from another employee. The job was also advertised in the newspaper. He applied at the City's offices and noted that his experience included doing water and sewer work for the City's Water and Sewer Department. He was not interviewed for the job and was not called by anyone from the City about it. He heard that he did not get the job from his wife and was notified by letter from the City two or three weeks after the City filled the position.

Union Steward Verne Jackson has worked for the City for 18 years, as a water operator and a sewer operator. He is familiar with Woodward's duties, since many of the same duties are performed during the week, such as the chlorine and fluoride and pH tests. Certain tasks, such as maintenance and meter reading, are not done on the weekend but during the week days. Jackson found that Woodward's work was done correctly and he wrote the City a letter stating that Woodward has been very reliable and his work over the last two and a half years was satisfactory. Jackson stated in the letter that Woodward had a good attendance record with his other employer in Darlington, and that Woodward could work with the other employees.

Water operators need to go to school to get certified and go yearly to get credits to keep their certification. George Morrissey was awarded the position of water operator by the City. Jackson believed that Morrissey had no prior experience. Either Morrissey or Woodward would have to get certified.

The City Clerk-Treasurer, Mary Lawrence, maintains records and takes minutes at City Council meetings. The minutes of the meeting of the Council held on August 5, 1997, were prepared by her. The minutes reflect that the Council went into a closed session to review the applications recommended by the Utility committee for the job of water operator. Lawrence recalled that there were 11 applicants, and there were three finalists from that group. Woodward was one of those finalists. None of the other applicants was a current employee of the City. In the closed session, a motion was made and seconded to hire Woodward for the water operator position, but the roll call vote did not carry. A motion was then made and seconded to hire George Morrissey, and the motion carried.

Lawrence also recalled that there was no discussion regarding Woodward's seniority with the City or his qualifications or his skills. One of the aldermen stated that employees had given Woodward a good recommendation and she had a call putting in a good word for Morrissey.

The language of Article 29 pertaining to the part-time sewer/water employees was added to the contract when the regular full-time employees did not want to work every weekend, and the Union made a proposal so that a relief worker could work weekends and the City could unilaterally establish the rate. The language regarding a part-time sewer and water employee was negotiated before Woodward was hired for the position.

The Mayor, Charles Ubersox, testified that the relief position was not intended to be a Union position. The wage for the job was not put in the contract and the position was treated differently from part-time employees. Part-timers make 85 percent of the wages for full-timers in their classification until they work over 1040 hours. Woodward's wage rate is not up to the 85 percent level. Ubersox did not recall whether the parties discussed if the relief person would have any seniority rights.

The President and Business Agent of Local 579, Darrell Shelby, stated that the arrangement with the City is an open shop, that employees do not have to belong to the Union to be covered by the contract. Shelby was not involved in the negotiations that led to the modification of Article 29, but his understanding was that someone working less than 400 hours would still get Union representation but that the Union could not collect fair share dues and the City could establish the wage rate. Under Article 1, all employees are eligible for Union representation and someone under 400 hours is not excluded from representation. Shelby did not know what was contemplated by the parties when they negotiated the language in question.

## **The Union**

The Union states that there are two crucial issues – one, whether the Grievant gets the protection of the collective bargaining agreement, and two, whether he got consideration for the job under the contract. The Union asserts that the plain language of the contract shows that he is covered by the contract. Woodward was a statutory employee, not an independent contractor. He had social security deducted and received a W-2 form from the Employer.

The Union submits that there are three levels of employees under the contract. Full-time employees have all the benefits, the Cadillac plan. The second level is part-time employees between 400 and 1040 hours, who do not have the benefits listed in Article 29 but have negotiated wage rates and pay fair share dues and get other benefits not specifically taken away by Article 29. The third level, falling below 400 hours, receive even fewer benefits. They have no benefit of negotiated wage rates and they do not pay fair share dues, and Article 29 is specific in that regard. However, the contract does not take away Woodward's right to Union representation because he falls below 400 hours.

The Union argues that if the parties intended Woodward to fall outside of the contract, it could have easily done that by changing the recognition clause to state that the Union represents all regular full-time and part-time employees. Or the parties could have modified Article 7 regarding seniority, stating that it meant continuous service in part-time or full-time employment. Or the parties could have modified Article 8, and stated that the Employer agrees to take into consideration present part-time and full-time employees when job vacancies become available. The contract language was not modified in a manner specific enough to make the ultimate forfeiture of losing the right to Union representation.

The Union further submits that there is no evidence that Woodward got consideration under Article 8. In his current position, he does many of the jobs that a full-time water operator would do. He has performed his job successfully and satisfied the requirements of a part-time operator. He would need to be certified, just as Morrissey. There was no reason that Woodward would not qualify for the job. The City has no evidence that the City considered his seniority or his qualifications. The City did not interview him or inquire about his qualifications from his co-workers or anyone else. The Union states that there is no evidence of why Morrissey was hired, and it would be pure speculation to find why he was hired. The fact that Woodward's name came up for a vote does not show that his seniority or qualifications were considered.

The Union requests that Woodward be given the position of full-time water operator, and be given back pay from September 2, 1997 to the date he receives the position.

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## **The City**

The City states that the recognition clause in Article 1 is modified by the changes negotiated in Article 29. The modifications for a relief operator were made specifically to exclude the relief operator from coverage of the collective bargaining agreement.

Woodward worked less than 400 hours per year, did not pay fair share dues, and had no wages negotiated for him. The position was not intended to be covered by the contract.

The City notes that the language of Article 8 is clear, and that the Employer is to consider present employees when job vacancies shall become available. Because Woodward was a relief operator under Article 29, he was not a covered employee and does not have the benefit of being considered under Article 8. Therefore, the City did not violate the bargaining agreement.

The City submits that if it is determined that Woodward is covered by the collective bargaining agreement, the City did not violate Article 8 because it did consider him to fill the vacancy. The testimony shows that there were 11 applicants for the position, and the field was narrowed to three finalists. Woodward was one of those three finalists. There is evidence that the Council considered Jackson's recommendation and another alderman's recommendation.

The City asserts that under Article 8, it is not required to hire the Grievant. It is only required to consider the applicant's seniority and qualifications to perform the work, but it is not required to hire Woodward. The City believes that the City was not required to consider Woodward under the contract as an employee, that he was not a covered employee, and he was not entitled to the benefits of the contract. Nonetheless, he did receive consideration in the hiring process. His name was placed before the Council. A motion was made to hire him, but the motion did not carry. That implies that Woodward's qualifications, his work experience, had been given consideration, even though Article 8 would not require the City to do so.

Thus, the City requests that the Arbitrator find that the City did not violate the contract and that the Grievant is not entitled to the protection of the contract.

### **DISCUSSION**

On the first issue of whether or not the Grievant is entitled to the protection and benefits of the collective bargaining agreement, the Arbitrator finds that the Union's position on this issue is preferred. While the City may have thought it meant to exclude the relief operator falling under 400 hours from the collective bargaining agreement entirely, it needed to add something to the recognition language to do so. The recognition clause states: "The Employer recognizes the Union as the exclusive bargaining representative of all employees . . ." (emphasis added). Woodward is an employee of the City, and there is nothing in the recognition clause or Article 29 that excludes his position from representation.

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Article 29 does not modify the contract to provide that special employees falling under 400 hours per year are exempt from the contract completely. While it seemed to be the City's intention to do so, pursuant to Ubersox's testimony, the Union's intention was to give the City flexibility in a wage rate in order to allow the full-time employees to have weekends off, according to Jackson's testimony. There was likely no true meeting of the minds on this particular part of the contract, so the parties need to live with the language they

negotiated until they negotiate something else.

The relevant language in Article 29 states: “The part-time Sewer/Water employees must work in excess of four hundred (400) hours per calendar year to be classified as a part-time employee under this contract.” Then one has to analyze the top of that paragraph, which states:

Only part-time employees shall have the benefit of wage negotiations and shall be subject to the fair share dues requirement. Part-time employees shall receive 85% of the wage rate in their classifications until said part-time employee works more than 1040 hours in the above mentioned classifications and subsequent to that time the employee shall receive the full rate for their classification. Part-time employees are those employees who work less than 1040 hours per anniversary year (date of hire to one year later).

The sentence referring to the part-time Sewer/Water employee means that the position is not entitled to what the part-time employees get – the benefit of wage negotiations, fair share dues, and 85% of the wage rate in their classification until they go over 1040 hours. None of those three things apply to the relief operator in the contract. If the relief operator worked over 400 hours a year, according to Article 29, he would get the same status that part-time employees have, which is basically 85 percent of the full-time wage, more than Woodward currently receives.

The heading of Article 29 is “STUDENTS, PART-TIME EMPLOYEES AND SPECIAL EMPLOYEES.” The first sentence and other language in the Article refers to seasonal employees. Obviously, the parties intended to exclude seasonal employees (or students) from the benefit of wage negotiations and from having to pay fair share dues. However, the contract language does not exclude seasonal employees or special employees from coverage under the contract.

Accordingly, Woodward is entitled to be considered as a “present employee” under Article 8 for any vacancies. The Union correctly points out that the parties could have excluded him from coverage under either Article 7 or 8, if it wanted to exclude employees working less than 400 hours for consideration in job postings.

Since the parties did not exclude anyone from consideration under Article 8, the next question is whether Woodward got the consideration due him under Article 8. The

City is correct in that Woodward received some consideration, in that he was one of the final three applicants out of 11 applicants, and that he was recommended for the position in a closed Council session but that vote did not carry. The Water Committee reviewed all 11 applicants and narrowed the field down to three, of which Woodward was one. None of the other applicants was an employee with the City at that time.

Article 8 further requires that the Employer take into consideration the applicant's seniority and qualifications to perform the work. This is where things get a little muddy. The City believes that the fact that Woodward was a finalist, was recommended for hire, and a vote was taken implies that his seniority and qualifications were considered. However, Lawrence recalled no such discussion over Woodward's seniority or qualifications or skills from working in the Water Department. But Lawrence recalled that someone noted that Jackson had recommended Woodward, and an alderman put in a good word for him.

Jackson put his letter recommending Woodward on the Utility chairman's desk before the Council was to take up the issue of filling the position, and a copy of it was found with the minutes of the Council meeting held on August 5, 1997, during which the aldermen went into a closed session and took a vote on Woodward. During the closed session, the aldermen took note of Jackson's recommendation.

Lawrence's notes show that Jackson's recommendation was considered. Jackson's letter states that Woodward has been working for the City for the past two and a half years and has been doing a good job, and that he was very reliable and willing to learn. Jackson stated that he was very satisfied with Woodward's work performance pertaining to sewer duties and understood that Woodward had a good attendance record with another employer in Darlington.

This consideration – albeit minimal – is sufficient to find that the City did take Woodward's seniority and qualifications into consideration. The City did not arbitrarily or capriciously discount Woodward and give him no consideration. This may not be much in the way of consideration, where the applicants were not interviewed and the discussion of qualifications and seniority seems minimal. It is noted that the City was acting under the mistaken belief that Woodward would not qualify as a "present employee" under Article 8, and had it given Article 8 its due, it may have well put more on the record. However, it is sufficient, given the language of Article 8 that demands consideration but does not give any weight to the factors of seniority or qualifications.

Accordingly, the grievance will be denied. However, it should be noted that the City's request that a finding be made that the Grievant is not entitled to the protection of the collective bargaining agreement is also denied.

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### **AWARD**

The grievance is denied and dismissed. While the Grievant was an employee covered by the collective bargaining agreement, the City did not violate that bargaining agreement where it considered his seniority and qualifications in filling a vacancy for a water operator.

Dated at Elkhorn, Wisconsin this 21st day of November, 1997.



Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator

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