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

Case 166
No. 56522
MA-10312

Appearances:

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

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, appearing on behalf of the City.

ARBITRATION AWARD

Superior City Employees' Union Local #235, AFSCME, AFL-CIO, hereinafter referred to as the Union, and City of Superior, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Superior, Wisconsin, on August 27, 1998. The hearing was not transcribed and the parties submitted post-hearing briefs which were exchanged on October 22, 1998. The parties reserved the right to file reply briefs and notified the undersigned on November 2, 1998, that neither would file a reply brief and the record was closed.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant, Connie Billings, was hired as a part-time employe in the City's Police Department on August 12, 1991. On June 25, 1993, the grievant was promoted to a full-time position. In January,

1998, the grievant found out that her vacation accrual was two weeks per year based on her June 25, 1993 start of full-time status. The grievant believed she was entitled to accrue three (3) weeks of vacation based on her August 12, 1991 hiring date. The grievant filed a grievance claiming she was entitled to an additional week of vacation. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue.

The Union states the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement when the City denied the grievant one additional week of vacation?

And if so, the appropriate remedy is for the Employer to award the grievant one additional week of vacation as per the terms of the collective bargaining agreement.

The City states the issue as follows:

Did the City violate Article 7.03 B) 3) when it denied Connie Billings an additional week of vacation?

The undersigned frames the issue as follows:

Did the City violate the parties' collective bargaining agreement, specifically Section 7.03 B) 3), when it denied the grievant an additional week of vacation in 1998?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 7
SENIORITY

. . .

7.03 Effect of Employee Status Upon Seniority:

B) Part-time Employee:

. . .

3) A part time employee promoted to a full-time position will maintain his\her part-time hire date for the purposes of vacation and longevity calculation only. Seniority for bumping or promotion rights will be determined from the date of full-time employment.

. . .

UNION'S POSITION

The Union contends that the language of the contract is clear and unambiguous and specifies the accrual of vacation for employes. It argues that had the parties intended to leave any employe under the old accrual schedule, they would have said so, but there is no such "grandfathering" language in the current contract. It points out that Section 7.01 provides different seniority accrual for employes hired before and after January 1, 1986. It submits that there is no reference in Section 7.03 B) 3) for treating employes differently as is found in Section 7.01. Citing Elkouri & Elkouri, How Arbitration Works (5th Ed.), the Union asserts that where language is clear and unambiguous, it will not be given a meaning other than that expressed.

The Union claims that the clear language of the contract reflects the intent of the parties. It observes that there was no discussion in negotiations as to a two-tier method of handling part-time employes promoted to full time before January 1, 1997, as to vacation accrual. It notes that the parties eliminated old language which the City relies on but no longer has any relevancy. It disputes the City's contention that removal of the language was merely "housekeeping." It insists that the intent was the fair and equal treatment of part-time employes and securing their original seniority date for vacation accrual was an important aspect of the Union's objective. The result, according to the Union, is the language which

guarantees part-timers' rights. It states that the City seeks to reinsert language deleted from the prior contract but the contract prohibits the arbitrator from adding or deleting from the existing provisions of the agreement.

The Union concludes that current language of the contract controls and the grievant is entitled to three weeks of vacation accrual, not two. It requests that the grievance be sustained and the grievant made whole with three weeks of accrued vacation.

CITY'S POSITION

The City contends that the parties negotiated a provision in the 1994-1996 agreement which changes the vacation accrual for individuals who were promoted from part-time to full-time after ratification of the agreement. The City took the position in negotiations that it would not apply the provision retroactively and recalculate vacation accruals for employes in full-time positions at the time of ratification. It notes that the grievant was in a full-time position when the contract was ratified and there was no recalculation for her or any other full-time employe.

The City observes that the contract was modified in the 1997-1998 contract by dropping the reference to "after ratification" because the provision would apply to promotions from part-time to full-time after January 1, 1997, or during the term of the contract. It argues that there was no intent to restrict the provision from January 1, 1997, until ratification and so the reference to ratification was removed, so any promotion after January 1, 1997, would change the vacation accrual date. It takes the position that because the grievant was promoted prior to the ratification of the prior agreement and not during the term of the current agreement, she was not eligible to use her part-time date of hire for vacation accrual. It observes that another employe requested the same consideration for the prior agreement and was denied the request. The City acknowledges that a part-time employe could be at a higher accrual rate than the grievant as a full-time employe and although the Union has argued that this is not fair, that is what the parties negotiated.

The City argues that arbitration is not designed to supplant negotiations but is designed to consider if there has been a contract violation or misapplication and not to provide a benefit when the intent of the negotiations had a clear and different meaning. The City maintains that its evidence of negotiating history supports its position and whether someone is or is not impacted or there is some unfairness is not within the scope of arbitration. In conclusion, the City states that it acted properly in denying the grievant a change in date for vacation accrual and granting the Union's claim will deny the City the ability and right to negotiate the terms and conditions of employment of which vacation accrual is a part.

DISCUSSION

It is axiomatic in labor arbitration that where the language of an agreement is clear and unequivocal it must be given effect. As Arbitrator Jules Justin stated in PHELPS DODGE COPPER PRODUCTS CORP., 16 LA 229 (1951), "Plain and unambiguous words are undisputed facts . . . The intent of the parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used."

Section 7.03 B) 3) of the parties' agreement is clear and unambiguous and defines seniority for purposes of vacation and longevity calculation without reference to any time frame. This language is unambiguous and therefore reference to negotiating history is inappropriate to vary its plain meaning. The parties could have put in a limitation as they did in Section 7.01 of this same article. They could have said employes promoted from part-time to full-time during the term of this agreement or after January 1, 1995, will maintain their part-time hiring date for purposes of vacation and longevity calculation. They did not do so. They could have and did in other sections including Section 7.01 noted above and Section 7.05.

The undersigned is prohibited from adding to the provisions of the contract. Where the language is clear, it would be outside the arbitrator's authority to add a date or restriction which the parties could have done in negotiations but did not.

Section 7.03 B) 3) provides that a part-time employe promoted to a full-time position will maintain their part-time hire date for vacation calculation purposes. The grievant was a part-time employe who was promoted to a full-time position and thus she will maintain her part-time seniority date for vacation accrual purposes. The refusal of the City to allow the proper accrual violated Section 7.03 B) 3) of the contract.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The City violated the terms of the parties' collective bargaining agreement when it denied the grievant an additional week of vacation in 1998, and the City is directed to make the grievant whole by granting her an additional week of vacation as provided in Section 7.03 B) 3) of the parties' agreement.

Dated at Madison, Wisconsin, this 30th day of November, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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