BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO LOCAL UNION NO. 67

and

CITY OF RACINE, WISCONSIN

Case 565
No. 57526
MA-10665

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of American Federation of State, County and Municipal Employees, AFL-CIO Local Union No. 67, referred to below as the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City Hall, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appearing on behalf of the City of Racine, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the County 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. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of "Sign Mech. HU-10." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 11, 1999, in Racine, Wisconsin. A transcript of that hearing was filed with the Commission on October 21, 1999. The parties filed briefs by December 14, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the Collective Bargaining Agreement when it filled the position of Sign Mechanic (HU-10) on August 10, 1998?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II
Management and Union Recognition

A. Recognition. The Employer does hereby recognize the Union . . . as the sole collective bargaining agency for all City employees of the Public Works System in the job classifications listed on Exhibit "A" . . . of the following related departments: Department of Public Works and its related divisions thereof, namely: DPW Streets (and Alleys) Maintenance Division, DPW Equipment Maintenance Division, DPW Solid Waste Division, DPW Bridges Division and DPW Building Complex Division; Parks and Recreation Department and its related divisions thereof, namely: the Cemeteries, Wustum Museum, Community Centers, Memorial Hall, the Zoo, and the Forestry Division; and the Traffic and Parking Sytems (sic) Division of the Department of Transportation . . .

ARTICLE III
Grievance Procedure

. . .

J. Decision of the Arbitrator. The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE XII
Job Postings

A. Posting Procedure. Any job vacancy which occurs due to retirement, quit, death, new position or for whatever reason in the bargaining unit shall be posted.

. . .

B. Posting Departments. For the purpose of defining departments as divisions for job postings, the following will be classed as departments or divisions:

Traffic
DPW – Street Maintenance
DPW – Solid Waste Division
DPW – Bridge Division
DPW – Equipment Maintenance Division
DPW – Building Complex Division
Parks – Zoo – Recreation – Community Services
Forestry Division
Cemetery
Memorial Hall
Wustum Museum
Police Department Garage – Animal Control

C. Preference. Preference will be given first to the employees in the department and second to regular bargaining unit employees in other departments for posted jobs before a seasonal or temporary employee is considered. Screening of a man on the basis of seniority and ability to perform the duties of the job still applies.

. . .

SCHEDULE "A"
Hours of Work

. . .

Department of Transportation

Traffic and Parking System Division

Sign Mechanics	7:00 a.m. to 3:00 p.m. *
Parking System Utility Worker	5:00 a.m. to 1:00 p.m. *
Parking Meter Maint. Worker	7:00 a.m. to 3:00 p.m. *
Parking Meter Collector	7:00 a.m. to 3:00 p.m. *
Parking System Maint. Worker	5:00 a.m. to 1:00 p.m. *

. . .

BACKGROUND

The grievance form states the "applicable violation" thus:

> On 10 Aug 98 the City of Racine filled the position of Sign Mech HU-10. The City of Racine failed to bargain the impact of the merger of Traffic into D.P.W. We feel this is a violation of ART. 12 sec. a, b, c, ART. 2 sec e and any other articles that may apply.

The grievance form states the "Adjustment required" thus: "Follow the language set forth in the contract and meet with Local 67 to bargain said impact as it has been done in the past." The City response notes: "This grievance is grossly untimely in accordance with Article III, Grievance Procedure, insofar as the mergers of D.O.T. and Public Works took place in 1994 through action by the Common Council."

The City posted the Sign Mechanic Position on July 23, 1998. The posting notes the position as a day shift position placed in the HU-10 wage scale. The parties do not dispute that the position was properly posted. Rather, the grievance questions the departmental preference afforded in filling it. The City posted the vacancy city-wide, but granted first preference in filling the position to employes within the Department of Public Works (DPW). Prior to the 1994 City Council action referred to in the City's response, the preference would have been afforded to employes within the Traffic Division of the Department of Transportation (DOT).

Through Ordinance No. 29-94, adopted in February of 1995, the City created Section 2-531 of its Municipal Code. That section states:

> (a) There is hereby created and established the office of commissioner of public works, and the duties of the board of public works, as defined in the state statutes, shall be performed by the commissioner of public works. The commissioner of public works shall perform such other and further duties as may be imposed by law or designated by the common council.
>
> (b) The commissioner of public works is hereby given and shall have general control, supervision and direction of the following offices and departments: Building inspection department, electrical inspection department, plumbing inspection department, engineering department, transportation department, equipment maintenance division, street maintenance division, solid waste collection and disposal division, bridges, public buildings, specifically city hall, city hall annex, safety building, the central heating plant, and library and memorial hall.

The ordinance is a public record. It is undisputed that the City did not give formal notice to the Union of the changes effected by Sec. 2-531. It is also undisputed that the creation of Sec. 2-531 has not been submitted to the collective bargaining process.

Prior to the enactment of Sec. 2-531, the City operated the Traffic Division as one of two divisions within the stand-alone DOT. The City supervised unit employes within the Traffic division through a traffic engineer from DOT. Day to day supervision of unit employes changed on the retirement of this working supervisor. From his retirement, in 1998, day to day supervision of unit employes within the Traffic Division fell to a general foreman from the DPW. Other administrative changes accompanied the reorganization started by Sec. 2-531. For example, DOT gave up responsibility for vehicle maintenance to the DPW.

Changes to DOT occurred over a period of years. An internal memo from the Commissioner of Public Works to the Mayor, dated March 15, 1996, reflects that changes within the table of organization for the "Transportation Department" were being considered as "the second phase of potential changes which began . . . when the decision was made to place the Transportation Department under the jurisdiction of the Commissioner of Public Works." Some of the changes implemented by the City, such as the movement of vehicle maintenance from DOT to DPW, did not prompt any Union challenge. Other changes did. For example, the Union unsuccessfully grieved the impact of the City's refusal to replace the working supervisor from DOT. The Union's grievance asserted that the City spread the duties of the retiring supervisor among a number of unit employes, and that these employes should receive a reclassification, see CITY OF RACINE, MA-10362 (MAWHINNEY, 6/99).

The provisions of Article XII, Sections A, B and C, which are set forth above, have not been changed since at least the 1990-91 labor agreement. In the bargaining that produced the 1992-94 labor agreement, the City made the following proposal to the Union to amend Articles II and XII:

Article II: Delete references to Cemeteries, Wustum Museum, Zoo, and the Animal Control Officer in the Recognition Clause. (page 2)

Article XII: B. Change from "Traffic" to "Transportation-Traffic" and "Transportation-Parking", delete Zoo, Cemetery, Wustum Museum and Animal Control References. (page 33)
C. Delete zookeeper references. (page 36)

The Union did not agree to this proposal.

In the bargaining that produced their 1995-97 labor agreement, the City made the following proposal to the Union to amend Articles II and XII:

Article II, Management and Union Recognition

A. Recognition: Eliminate all references to Cemeteries, Wustum Museum, Zoo, and Animal Control Officer here and wherever else referenced in the contract.

Article XII, Job Postings

B. Posting Departments: Eliminate references to Zoo, Cemetery, Wustum Museum and Animal Control.

G. Forestry and Zoo Divisions: Eliminate all references to the Zoo in this Section . . .

J. Police Garage Employees: Eliminate all language and references to Animal Control Officer.

The Union did not agree to this proposal.

The City viewed the proposals to amend the agreement regarding classifications outside of Traffic to be matters of house-keeping since the City no longer used municipal employes at the locations or in the classifications covered by the proposals. The Union would not agree to the changes, because it opposed the loss of positions in the listed classifications and locations, and wished to retain the contractual references in the event the City determined to return to the use of municipal employes.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that Article XII, Section C, governs the grievance. The City's action undercuts that provision by "effectively reducing the chance of more senior employees not in the DPW" to fill the posting. This action is based on a change in the Municipal Code. That change was not, however, bargained with the Union, either at the time the Code was changed or in any collective bargaining following the change.

Even if the change in the Code is considered relevant to the labor agreement, the change "does not identify traffic as a division of the DPW." Internal memos demonstrate that the City itself does not uniformly identify traffic as a division of the DPW.

Nor will the labor agreement support the City's position. Article II, Section A identifies the bargaining unit and lists Traffic as part of the Transportation Department. Article XII, Section B, lists Traffic as a separate department or division for purposes of posting. Beyond this, Schedule A lists Traffic as a part of the Transportation Department.

The Union then asserts that bargaining history fails to support the City's position. The Union has uniformly opposed City proposals to delete job titles with no incumbents from the labor agreement. Even if the Union had not done so, the City's attempt to eliminate unfilled positions from the agreement cannot obscure that it has never proposed to eliminate contract references granting departmental status to the Traffic Division. The Union concludes that accepting the City's position would permit it to eviscerate the labor agreement through unbargained City Council action.

It follows, according to the Union, that the "only logical conclusion that can be reached is that the City . . . did violate the express provisions of the Collective Bargaining Agreement when it filled the sign mechanic position on August 10, 1988." As the appropriate remedy, the Union requests "an award that orders the City to re-post the job first within traffic and then . . . to all employees of the City." The Union further requests "that the Arbitrator maintain jurisdiction over this matter since rectifying the situation could affect returning the individual awarded the job to his former position and potential residual postings occurring after that date."

The City's Brief

After a review of the evidence, the City argues that it "correctly posted and offered the Sign Mechanic position to the most senior employee within the Department of Public works." In 1994, the City "legislatively" moved the Traffic Division into the DPW. This change cannot be considered new by, or news to, the Union. Employes in the Traffic Division "are supervised by a general foreman from the Department of Public Works." Beyond this, the Traffic Division's "total responsibility for vehicle maintenance was transferred to other Department of Public Works divisions." The Union did not file any grievance "from either the employees who assumed the duties or those who relinquished the responsibility." That the Union filed a reclassification grievance protesting the changes establishes that the Union was well aware of the 1994 reorganization.

Nor can internal City documents be used to establish that Traffic remained a Division within the Transportation Department. The memo does not address the employes affected by the grievance, and does no more than discuss a transitional phase of the reorganization. That the Transportation Department "continues to call itself a department" has no significance here. The City notes that the "Engineering Department, Electrical Inspection Department, Plumbing Inspection Department are all called departments" but "they do not stand alone as departments." The movement of the Traffic Division into DPW does no more than was done with "the Maintenance Division, Solid Waste Division, Bridge Division and Equipment Maintenance Division."

The evidence establishes that the Traffic Division has been a part of the DPW since the enactment of Ordinance Sec. 2-531." The Union "knew or should have known the Traffic Division was part of the DPW by the ordinance's public notice and hearings." Unit members experienced the reorganization as part of their daily duties. This and past grievances show no more than the Union's attempt to "pick certain aspects of the change it does not like." The City concludes that the "Union must be held to the fact that it acquiesced to the departmental reorganization mandated by the new ordinance adopted in 1995."

The City concludes that there has been no contract violation, and that the grievance should be denied.

DISCUSSION

Although the issue is stipulated, it poses a threshold ambiguity when viewed in light of the grievance form. The stipulated issue questions whether the City violated the labor agreement when it filled the Sign Mechanic position. The grievance form cites Article XII as the governing provision, but also questions the City's obligation to bargain the merger of DOT and DPW. If viewed as a bargaining issue, the grievance challenges the posting of the Sign Mechanic position as a means to restore the pre-merger "status quo". If viewed as a contract interpretation issue, the grievance challenges the posting because the City violated Article XII by granting the Section C preference to DPW employes rather than to Traffic Division employes.

The City persuasively argues that the grievance does not pose any issue regarding the propriety of the merger. The administrative changes following the merger, including those addressed in the Mawhinney award, preclude reading the grievance as a challenge to the merger. The reclassification requests placed before Mawhinney were meaningless unless the merger is taken as an accomplished fact. This confirms the City's assertion that the merger of DOT and DPW does not, standing alone, pose an issue relevant to this grievance.

This does not, however, address the assertion that the City inappropriately applied Article XII when filling the Sign Mechanic position. Under this view of the grievance, the issue is whether the City's merger of DOT and DPW renders meaningless the statement, in Section B, that Traffic constitutes a separate division "(f)or the purpose of defining departments as divisions for job postings."

Section C of Article XII grants a preference to intra-departmental applicants regarding positions posted under Section A of Article XII. Section C mandates the priority thus: "(p)reference will be given first to the employees in the department and second to regular bargaining unit employees in other departments." The interpretive issue posed by the grievance focuses not on this priority, but on Section B, which defines "department".

The Union's position that the Traffic Division constitutes a "department" for posting purposes is persuasive. At a minimum, the language of Article XII, Section B, strongly supports the Union's position. Section B separately lists "Traffic" after stating "(f)or the purpose of defining departments as divisions for job postings, the following will be classed as departments". It may be that Traffic no longer constitutes a stand-alone administrative division, but it is undisputed that there are still employes within the Traffic Division. They may now be supervised from DPW, but both parties' arguments acknowledge that they are still identifiable as Traffic Division employes.

If it is presumed that the language of Article XII, Section B is ambiguous, the Union's interpretation still must be preferred. The language of Section B has been constant since at least 1990. Whatever the administrative implications of the merger, Section B has continued to identify "Traffic" as a "department . . . for job postings." The parties have not amended this language at the bargaining table. To sustain the City's interpretation would bring about a change in contract language never agreed to at the bargaining table.

In sum, under Article XII, Section B, Traffic remains a department for job postings. The Article XII, Section C, preference thus should have been afforded to Traffic Division applicants prior to applicants from other departments. The City's filling of the Sign Mechanic position thus violated this preference.

Before addressing the issue of remedy, it is appropriate to tie this conclusion more closely to the parties' arguments. The City asserts that the Union knew of the merger even though the City never expressly notified it. This point can be granted regarding the issue of bargaining the merger's impact. As applied to the interpretation of Article XII, Section B, however, the City's position demands concluding the merger automatically affected Section B by eliminating Traffic as a department. This conclusion cannot be accepted without modifying the labor agreement. Section B states "Traffic . . . will be classed" as a department "for job postings." There is no language in Section B to indicate it is subject to unilateral City action.

This leaves the reference to "will" unmodified. That reference allows no room for arbitral inference. To eliminate Traffic as a division or department for job posting alters the language of Section B. This would violate the admonition of Article III, Section J that an "Arbitrator shall not modify . . . or delete from the express terms of the Agreement."

It may be that the original basis for separately stating Traffic as a division for job postings has been diminished by administrative changes. This affords no persuasive guidance to interpret Article XII, since the determination of the significance of departmental status is the parties' to make. The parties must agree to minimize or to eliminate the departmental status of the Traffic Division before an arbitrator can enforce that agreement.

Nor can the merger be analogized, as a matter of contract interpretation, to the elimination of unit positions. That Article XII, Section B lists unfilled classifications cannot obscure that the City continues to employ unit members identifiable as Traffic Division employes. Section 2-531 itself refers to DOT as a department, as does the March, 1996 memo. These references, standing alone, have no contractual significance. They do not, however, stand alone. Article XII, Section B, defines Traffic as a department for posting purposes. References to Traffic as a department in Sec. 2-531 and in the internal memo underscore that the contractual reference to "Traffic" as a department cannot persuasively be dismissed as superfluous.

This makes it impossible to characterize the elimination of "Traffic" from Section B as a self-executing matter of contractual housekeeping. The ultimate authority of an arbitrator is contract language. Reading "Traffic" out of Section B rests on an arbitral inference that it should no longer constitute a separate division for posting purposes. This improperly places arbitral inference over express contract language.

The issue of remedy is more difficult than is immediately apparent. At hearing, the parties stipulated that the grievance demanded contract interpretation only, and posed no issue regarding remedy. The parties' post-hearing stipulation includes a remedial issue, but only the Union has addressed it. Because I am uncertain if the parties share a common view of the issue of remedy, I have decided to note the remedial issue in the Award below, and retain jurisdiction over the grievance. This leaves resolution of the remedial issue unclear, and thus places it back in the parties' hands to determine if a stipulation is possible. If no mutual agreement is possible, the retention of jurisdiction permits further proceedings to address the dispute. This conclusion postpones bringing finality to the dispute, but assures that the issue of remedy will be fully argued by the parties.

AWARD

The Employer did violate the Collective Bargaining Agreement when it filled the position of Sign Mechanic (HU-10) on August 10, 1998.

For the purpose of determining the appropriate remedy, I will maintain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this Award. This will permit the parties to determine whether a mutually agreeable remedy can be bargained. If no stipulation on the issue is possible, then evidence or argument restricted to the issue of remedy will be taken.

Dated at Madison, Wisconsin, this 27th day of January, 2000.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
6010