BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC EMPLOYEES,
LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 161
No. 58578
MA-11000

(Jennifer Barrett Grievance)

Appearances:

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

Mr. William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, S.C., appearing on behalf of the City.

ARBITRATION AWARD

City of Fond du Lac Employees, Local 1366, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Fond du Lac, 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 collective bargaining agreement. The undersigned was so designated. Hearing was held in Fond du Lac, Wisconsin on April 13, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on May 31, 2000.

BACKGROUND

Brian Thompson has been employed by the City as a Stockroom Attendant in the Construction and Maintenance Division, formerly known as the City Garage, for 16 years. In the negotiations for the 1995-1997 collective bargaining agreement, the Union and the City agreed to reclassify the Stockroom Attendant and increase his classification by $.27 an hour. In and prior to 1997, the position of Account Clerk III in the City Garage was filled by Wayne Krohn who was nearing retirement. The City introduced computers and because Wayne was retiring, he could not or would not learn how to use the computer. Thompson was assigned to convert the manual systems to computer and he asked to be paid at the Account Clerk III rate because he was performing Wayne's job. The Employer began to pay out-of-classification pay to Thompson, eight hours a day. Wayne retired and Mary Pinnow filled the Account Clerk III position. Thompson continued to receive out-of-classification pay until October 25, 1999, when Joe Longo, Superintendent of Construction and Maintenance, became aware that Thompson was still getting the out-of-class pay for eight hours a day. Longo met with Thompson and his supervisor, Ken Kluza, and reduced Thompson's out-of-class pay to four hours a day which was determined to be the amount of time Thompson performed Account Clerk III duties. Longo admitted that he had made a mistake and let Thompson get out-of-class pay for too long but the City did not seek to recoup any overpayments. Jennifer Barrett, the grievant in this matter, has been employed in the Parks Department for 21 years and is classified as a Clerk Stenographer II. In September, 1999, Barrett learned that Thompson was getting out-of-classification pay for eight hours each day. On October 10, 1999, Barrett requested out-of-class pay claiming she too did certain of the Account Clerk III duties which were not in her job description. Her request was denied and a grievance was filed which was processed to the instant arbitration.

ISSUE

The parties were unable to agreement on a statement of the issue. The Union stated the issue as follows:

> Did the City of Fond du Lac violate the Labor Agreement, specifically Article IX Differential Pay and Article XXVIII Nondiscrimination, when it denied Jennifer Barrett out of class pay since October of 1999?
>
> If yes, what is the remedy?

The City stated the issue as follows:

Did the City violate Article IX Differential Pay, Section 2 Work Out of Class, when it denied the grievant, Jennifer Barrett, out of class pay when she performed her regular job duties as a Clerk/Stenographer II? If so, what is the remedy?

The undersigned adopts the issue as stated by the Union.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IX

DIFFERENTIAL PAY

. . .

Section 2 – Work Out of Class – Whenever an employee works at a higher rated job for three (3) consecutive hours or more, he shall receive the higher rate of pay for those hours worked in the higher rated job. Such higher base rate will be the wage step in the wage scale for the higher rated job which is commensurate with his years of service with the City. (i.e., if the employee is at the eighteen (18) month wage rate in his regular position, he would receive the eighteen (18) month rate for work performed in the higher classification.)

. . .

ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

ARTICLE XXVIII

NONDISCRIMINATION

Section 1 – Both parties hereto agree that there shall be no discrimination with respect to any employee because of race, creed, color, national origin, age or sex.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the instant dispute revolves around how the City is paying out of class pay in an inconsistent manner. It claims that some employes are held to a higher standard than others. It alleges that the City treats female employes disparately by deducting what it calls an overpayment, yet when a male employe receives an overpayment, no deduction is made. It asserts that a review of the background of the case is important in that of the twenty-eight (28) clerical classifications, all are presently held by female employes and the one job previously held by a male was the Account Clerk III which is paid considerably higher than other clerical jobs. The Union submits that it has attempted to get these jobs upgraded, but the City has not agreed.

It observes that the City has stated that Thompson is receiving out of class pay because he is assuming the duties of the Account Clerk III, whereas the grievant is only doing her job. The Union maintains that a review of the job descriptions establishes that Thompson is doing more than his job description calls for and if that warrants out of class pay, then the grievant who does work covered by the Account Clerk III is also entitled to out of class pay. It points out the various Account Clerk III duties performed by Thompson but notes that the grievant performs more Account Clerk III functions, and therefore, she should get the same out of class pay as Thompson. It insists that the same standard should apply. It argues that it is not a new concept that management rights must be exercised in good faith and cites the case of Barb Preissner, a Utility Clerk III, who was paid out of class pay for Account Clerk III and when the City reviewed this, it decided she was not entitled to out of class pay and the money was deducted from future paychecks, yet Thompson was admittedly paid in error for months, and he was not required to pay back the money. It observes that the City gives no explanation why they are not treated the same.

The Union argues that the standard used by Arbitrator McLaughlin in a case between the parties, CITY OF FOND DU LAC, Case 158, No. 58218, MA-10886 (McLaughlin, 4/00), was applied to deny the grievant out of class pay but not applied to Thompson. It states that

the

record failed to show that Thompson worked out of class for three consecutive hours and so a different standard has been applied and this standard should be applied to the grievant. It submits that this standard is: when someone does work, not specifically spelled out in the employe's job description, an additional payment will be determined to fairly compensate the employe for the additional work and responsibility. It states that the standard should be applied in a non-discriminatory fashion. It insists that the City cannot arbitrarily and in a discriminatory manner pick and choose how it is going to pay employes. It argues that to continue the unfair treatment of employes doing essentially equal work but receiving different pay would be to perpetuate an injustice and undermine the efforts of both parties to promote harmony and efficiency.

As for a remedy, the Union seeks out of class pay and a make whole order. It concludes that the grievance should be sustained and the grievant made whole.

City's Position

The City contends that the recent arbitration award between the parties from Arbitrator McLaughlin concerned the same contractual provision and is controlling in the instant case. The City notes that there are key differences between the Clerk/Stenographer II – Parks Division position filled by the grievant and the Account Clerk III position held by Mary Pinnow. It claims that the Union did not present any evidence that the grievant is performing all the duties in the Account Clerk III's job description and, in fact, the grievant does not perform many of the examples of the Account Clerk III. It insists that there are significant duties of the Account Clerk III which explains the wage difference between the Account Clerk III and the Clerk/Stenographer II. The City argues that the Union's own witness proves that the grievant is not entitled to out of class pay. It points out that the degree to which the grievant performs the examples of work of the Account Clerk III's position is unknown. It refers to the City's Human Resources Director's testimony that the grievant is performing the same duties as she has for the past ten years and though technology has changed, the grievant is still performing the same basic job function. It points out that the grievant admitted she was performing the same duties and has never received out of class pay. It observes that there is overlap between the Account Clerk III position and the grievant's but that has existed previously.

The City argues that the only reason the grievant filed the instant grievance is because Thompson is getting out of class pay. It contends that Thompson is getting out of class pay because he is performing as an Account Clerk III. It notes he assumed the duties and as time went on, these duties lessened and in October, 1999 his pay was split between Stockroom Attendant and Account Clerk III. It points out that the parties have agreed to an extensive

classification or grouping of classifications and if a job is worthy of additional compensation, the appropriate forum for additional compensation is at the bargaining table. The City maintains there are significant differences between the Clerk/Stenographer II and the Account Clerk III and the evidence failed to prove that the grievant performed actual work that "invaded" the Account Clerk III's position to any significant degree, thus failing to meet the standard set by Arbitrator McLaughlin.

The City maintains that in order to receive out of class pay under Article IX, Section 2, the grievant had to assume the duties of the Account Clerk III and as the grievant performed her regular duties, she is not entitled to out of class pay. The City states that while there may be overlap between the two positions, the grievant works her own job and there was no evidence that she performed all or a significant part of the duties of the Account Clerk III. It insists that the grievant was not working at a "higher rated job" because she is performing her regular job and therefore is not entitled to out of class pay. It contends that if the Union believed the grievant was performing the same duties as an Account Clerk III, it was incumbent upon the Union to propose a job reclassification.

The City claims that it properly granted out of class pay to Thompson. It labels the Union's analysis, that because Thompson received out of class pay so should the grievant, faulty. It observes that Thompson assumed the Account Clerk III's duties because the former Clerk III could not or would not handle the new computer technology and Thompson received additional training to work on computers. It alleges that as Thompson was performing the duties of the Account Clerk III, he was entitled to out of class pay. Thompson, according to the City, was assigned to bring the Department's inventory and other records onto the new computer system and he was paid out of class pay for 8 hours a day. In October, 1999, the City admits that it realized that Thompson was doing 50% Stockroom Attendant duties and 50% Account Clerk duties and his out of class pay was reduced accordingly. It notes that the Union never grieved the compensation Thompson received, so it must have agreed with it. It concludes that as Thompson assumed the duties of Account Clerk III, he met the requirements of Article IX, Section 2 and as the grievant never assumed these duties, the grievant's claim is distinguished from Thompson's entitlement to out of class pay.

The City accuses the Union of using the grievance arbitration process to achieve something that should be bargained. It observes that the grievant testified that in negotiations the Union proposed to reclassify her position to equal the Account Clerk III and to reduce the 21 job titles to three or four. It also points out that the Union's proposal was dropped, so it is now seeking to secure in the arbitration forum what it was unsuccessful in securing at the bargaining table. The City contends that out of class pay is a premium earned by employes when they are performing in a higher-rated job. It claims the Union is stretching the concept

of out of class pay beyond all bounds of reasonableness by claiming out of class pay without

assuming the duties of the higher-rated job. It insists that the issue here more properly belongs at the bargaining table and there was no evidence presented that the parties ever negotiated "out of class pay" to cover the instant case. It maintains that there is a long standing practice that out of class pay is paid only when the employe assumes the position of the higher-rated job classification.

The City asserts that the Union has failed to meet its burden of proof regarding its charge that the City has discriminated against female employes by denying them out of class pay. It states that Thompson was entitled to out of class pay because of his duties and not because of his sex. It argues that the grievant never assumed the duties of the higher-rated position and is not entitled to out of class pay. It takes the position that the Union is simply inventing arguments that have no substance and it failed to produce any evidence or facts that support its claims of discrimination. It concludes that for these reasons, the grievance should be dismissed in its entirety.

DISCUSSION

Article IX, Section 2 provides that whenever an employe works at a higher-rated job for three consecutive hours or more, he shall receive the higher rate of pay for those hours worked in the higher rated job. In order to qualify for the higher pay, the employe must meet certain requirements. The first requirement is that the employe must be assigned the duties of the higher-rated job and the second requirement is that the employe must perform certain duties of the higher classification. CITY OF GREEN BAY, Case 88, No. 27141, MA-1909 (Houlihan, 1981); CITY OF FOND DU LAC, Case 158, No. 58218, MA-10886 (McLaughlin, 4/00). The employe is not required to perform all of the duties of the higher-rated position but the mere performance of isolated or relatively insignificant duties does not entitle the employe to out of class pay. The employe is required to perform the key or core elements of the job. WILSON JONES CO., 51 LA 35 (Daugherty, 1968). The standard proffered by the Union would grant additional pay for employes performing work outside their job descriptions to fairly compensate them for their work. There is no arbitral support for this standard and the standard has no guidelines or limits to apply and does not draw its essence from the contract. The carefully negotiated classifications and wage rates would essentially be ignored or become blurred.

Application of the two criteria set out above is necessary to determine whether or not the grievant is entitled to out of class pay in the instant case. Many of the arguments involved Thompson, the Stockroom Attendant, who was receiving Account Clerk III out of class pay. Thompson does perform Account Clerk III duties but the amount of time he was paid in the past was not accurate and he is now paid for four hours per day. Thompson was assigned by the City to perform the Account Clerk III's duties. The grievant maintains that she also performs Account Clerk III duties but the record fails to prove that the City ever assigned the grievant to perform the Account Clerk III, Mary Pinnow's duties. Additionally, the job

descriptions in evidence are outdated and are not accurate. The last Account Clerk III job

description is dated February, 1991 and is not accurate or up to date. (Ex. 4). Many functions have now been computerized and others are no longer performed. The issue in this case is whether the grievant performs the core or key duties performed by Mary Pinnow. Without up-to-date job descriptions, it is mere speculation to conclude that the grievant performs the core or key duties. The Union infers that Thompson isn't really performing Pinnow's key duties, so the grievant should be treated the same as Thompson and be paid out of class pay. If Thompson is not performing the key or core duties, he should not get out of class pay. The Union is almost saying that two wrongs make a right, but if the grievant is not performing Pinnow's key or core duties, she too is not entitled to out of class pay.

The evidence presented failed to establish that the grievant was ever assigned to perform Mary Pinnow's duties, and the record further fails to prove that she performed the key or core duties of Pinnow's job. Thus, the evidence fails to establish that she is entitled to out of class pay.

The grievant may very well be performing more than the mere overlap of duties between her position and the Account Clerk III position; however, the appropriate method for dealing with this is at the bargaining table. Nothing in the Agreement authorizes the arbitrator to determine the proper classification or to grant a reclassification. It would appear that seeking eight hours of out of class pay indefinitely because of a comparison of one's duties with the Account Clerk III's is simply a ploy to get paid the same as if the position was reclassed. The parties must do this at the bargaining table, and not in arbitration.

The grievant also alleged a violation of Article XXVIII claiming discrimination on the basis of sex. As noted above, the issue is whether or not the grievant is performing Mary Pinnow's job. Any reference to Thompson's job is irrelevant. Inasmuch as the grievant and Mary Pinnow are both female, the charge of discrimination on the basis of sex is unfounded. The fact that Thompson is paid out of class pay while the grievant is not has been dealt with above and fails to prove any discrimination on the basis of sex. The Union made general arguments asserting that all the clerical positions were occupied by females, and the highest paid had been occupied by a male. It must be noted that the rates were negotiated between the Union and the City. The Union has the right to proceed to interest arbitration if it feels the City's position is not comparable to other cities and many of its arguments are more appropriately made to an interest-arbitrator. As the undersigned is a rights arbitrator and bound by the contract terms, a decision on the appropriate pay is not within the scope of these proceedings. In this case, the evidence failed to prove any discrimination. Although the Union referenced Barb Priesner, the record showed she never filed a grievance and the Union's statement of the issue does not reference her or her case, so her situation is not relevant to these proceedings and she has not been included in the consideration or disposition of the case.

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

AWARD

The City of Fond du Lac did not violate the agreement, specifically Article IX, Differential Pay and Article XXVIII, Non-Discrimination, when it denied Jennifer Barrett out of class pay since October, 1999, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 20th day of June, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

LLC/gjc
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