BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FRANKLIN EMPLOYEES, LOCAL NO. 2,
AFSCME, AFL-CIO, affiliated with
MILWAUKEE DISTRICT COUNCIL 48

and

CITY OF FRANKLIN

Case 52
No. 58792
MA-11061

(Robert Allmon Grievance)

Appearances:

Podell, Ugent & Haney, by **Attorney Robert E. Haney**, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202, appearing on behalf of the Union.

Adelman & Hynes, S.C., by **Attorney Jeffrey S. Hynes**, 308 East Juneau Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, were parties to a collective bargaining agreement that provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear and decide a grievance. A hearing, which was transcribed, was held on April 17, 2001, in Franklin, Wisconsin. At the hearing, the parties stipulated to certain facts and exhibits and made oral argument concerning the same. No witnesses testified at the hearing. The parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

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ISSUE

While the parties did not stipulate to the exact wording of the issue to be decided herein, they essentially agreed on the issue. The undersigned believes that the following wording, which is taken from page 13 of the transcript, accurately reflects the agreed-upon issue:

> Whether the Grievant filled the Truck Driver position in question for more than 60 working days under Article VI, Sec. 4, of the collective bargaining agreement?

PERTINENT CONTRACT PROVISIONS

The parties' 1997-1999 collective bargaining agreement contained the following pertinent provisions:

ARTICLE VI – SENIORITY

. . .

> Section 4. Vacancies. It shall be the policy of the City to fill all job vacancies, which resulted from an employee quitting, termination or retirement or the creation of a new position by posting at all locations, on the Union bulletin boards, where bargaining unit employees are working, for a period of five (5) working days. All presently employed staff, within this bargaining unit shall be given the first opportunity to apply for any posted position by giving written notice to the department head. All other factors being equal, full-time employees with the greatest department seniority shall be awarded the vacant or new position provided he/she is qualified to perform the work. The employee selected to fill the vacancy shall be given a sixty (60) working day trial period. If the employee is found not to be qualified within the sixty (60) working day trial period, the City shall return the employee to his/her former position.
>
> In the event the City is unable to find qualified individuals from within this bargaining unit with the necessary skill and ability to fill the vacancies in classifications, the City shall take whatever steps are necessary to fill the vacancy from outside the bargaining unit.

. . .

Section 7. Probationary Period. New employees shall be in a probationary status for a period of one hundred eighty (180) calendar days from the date of hire. Such period may be extended by mutual agreement between the City and the Union. (District Council 48).

. . .

ARTICLE VIII – RATES OF PAY

. . .

Section 2. Pay Increases.

. . .

(D) Custodians required to drive trucks for the Highway Department, when driving a truck, shall receive the starting rate of a truck driver. Highway Department shall keep a record of all hours driven by a Custodian and when the hours for driving equal 1040 hours, the Custodian shall receive certification as a truck driver and shall receive the full truck drivers rate of pay for times when driving a truck. Should a custodian take a full-time position as a truck driver, the hours previously driven shall apply toward his/her probationary period.

. . .

ARTICLE XIX – HOURS OF WORK

Section 1. The normal workday is eight (8) hours and the normal workweek shall be Monday through Friday.

Section 2. Normal working hours of Department of Public Works are 7:00 a.m. to 3:30 p.m. with one-half (1/2) hour lunch break.

RELEVANT BACKGROUND

In 1999, the Grievant drove a City truck on three separate occasions. The first time was Saturday, January 2, 1999, when he did so for 14.5 hours. The second time was Wednesday, January 13, 1999, when he did so for 5.2 hours. The third time was Saturday, March 6, 1999, when he did so for 3.8 hours. When these three figures are tabulated, they total 23.5 hours.

On April 20, 1999, the City posted a job opening in the position of Truck Driver in the Department of Public Works. Robert Allmon, an Assistant Custodian/Truck Driver, bid on and received this position.

Allmon, hereafter the Grievant, started in the Truck Driver position on October 11, 1999. The Grievant earned $12.79 as an Assistant Custodian/Truck Driver and $13.91 as a Truck Driver.

On January 13, 2000, management informed the Grievant that he had not passed his trial period in the Truck Driver position and, as a result, he would be returned to his former position of Assistant Custodian/Truck Driver. The Grievant returned to his former position on January 14, 2000.

The Union grieved the Grievant's return to his former position, contending that the Grievant's trial period had ended several days prior to January 13, 2000. The grievance was processed through the contractual grievance procedure and appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends that the Grievant had filled the Truck Driver position for more than 60 days by January 13, 2000. Building on that premise, the Union maintains that the time had elapsed for management to return the Grievant to his former position.

The Union further maintains that, in order to resolve this contractual dispute, the Arbitrator must harmonize several different sections of the collective bargaining agreement. According to the Union, these sections are Article VI, Secs. 4 and 7; Article VIII, Sec. 2(D) and Article XIX, Secs. 1 and 2.

First, the Union asserts that the contract language that caused the Grievant to be returned to his former position is contained in Article VI, Sec. 4. According to the Union, this section provides that the employee who fills a vacancy gets a 60-day trial period and, if the employee is found to be not qualified in that trial period, then the employee shall be returned to his/her old position.

Next, the Union focuses attention on the language contained in Article VIII, Sec. 2(D), particularly the last sentence that specifies that "Should a custodian take a full-time position as a truck driver, the hours previously driven shall apply to his/her probationary period." The Union maintains that the Grievant had previously driven a truck, so this section required the City to apply "the hours previously driven" by the Grievant "toward his probationary period."

The Union elaborates on this contention with the following analysis of Article VIII, Sec. 2(D). It notes at the outset that the phrase "probationary period" is not defined in that section. That being so, the Union looks elsewhere in the contract to determine its meaning.

The Union first addresses Article VI, Sec. 7, Probationary Period. The Union argues that the 180-day probationary period referenced therein is inapplicable because that section, on its face, applies only to "new employees" and the Grievant is not a "new employee", but rather, is an employee of the City who was simply promoted. The Union concludes, therefore, that, the "probationary period" referenced in Article VIII, Sec. 2(D), is not the 180 days that is referenced in Article VI, Sec. 7.

Having reached this conclusion, the Union turns its attention to the contract provision which it believes is applicable to determining the meaning of "probationary period", as that term is used in Article VIII, Sec. 2(D). According to the Union, the most "common sense way" of interpreting "probationary period" in Art. VIII, Sec. 2(D), is to refer back to the 60-day training period referenced in Art. VI, Sec. 4.

The Union contends that, not only is the Union's interpretation of Article VI, Sec. 4, and Article VIII, Sec. 2(D), consistent with the language of the agreement, construed as a whole, but also, such an interpretation avoids an unreasonable result. The Union notes that the penalty for failing a probationary period may be the loss of employment, while the penalty for failing the 60-day trial period is a return to a former position. The Union argues that it is not logical to conclude that the parties intended to strip an employee, who successfully demonstrated his/her ability to perform in the new position, of all rights and protections that the employee had previously enjoyed. Thus, the Union argues, logic dictates that the "probationary period" referenced in Article VIII, Sec. 2(D), cannot be the 180 day period referenced in Article VI, Sec. 7, but rather, must be the 60 working day trial period set forth in Article VI, Sec. 4.

The Union contends that a contrary conclusion would also present many unanswered questions. Are the 60-day trial period and the 180-day probationary period served concurrently? What happens to the employee between day 61 and day 180 and what contractual rights does the employee have, or not have, during this time period?

The Union asserts that, when determining the hours that should be credited to the Grievant under Art. VIII, Sec. 2(D), it is appropriate to count all truck driving hours, including those that occurred prior to the time at which the position was posted or filled. The Union submits, therefore, that the 23.5 hours in which the Grievant drove Truck in 1999 should be counted toward his 60-day trial period.

Building on that premise, the Union relies on Article XIX for the proposition that the normal workday consists of eight (8) hours. The Union then divides 23.5 hours by eight hours to obtain nearly three full eight-hour days. The Union reasons that if, these days are subtracted from the 60-day trial period, then the Grievant completed his trial period two or three days prior to January 13, 2000.

The Union asserts that, if the Arbitrator finds that the 23.5 hours are not applicable to the 60-day trial period, then the City's decision to move the Grievant back to his former position on January 13, 2000 was timely made; the grievance is without merit and should be dismissed.

City

The City contends that the Grievant was not in the Truck Driver position for more than 60 working days because January 13, 2000, was the 60th working day that the Grievant filled that position. Building on that premise, the City avers that on January 13, 2000, the time had not yet elapsed for management to return the Grievant to his former position. Thus, the City concludes that it had the contractual right to do so.

The City disputes the Union's assertion that it is necessary to harmonize several different sections of the collective bargaining agreement. In the City's view, this case is controlled by only one contract provision, i.e., Art. VI, Sec. 4. The City suggests that the Union seeks complexity where there is none in order to confuse the Arbitrator.

According to the City, the meaning of Article VI, Sec. 4, is plain and unambiguous – employees who are promoted have to serve a 60-day trial period. According to the City, it is implicit from this language that the trial period starts to run on the date the employee assumes the new position and runs forward 60 days from there. Thus, the trial period runs prospectively – not retroactively.

The City notes that the 23.5 hours which the Union wants credited to the Grievant's trial period occurred in 1999 before the Truck Driver job was posted, before the Grievant bid on it, and before the City awarded him the job. The City submits that acceptance of the Union's argument would illogically allow custodians who are promoted to truck drivers to reach back years in time and to count each occasion on which they "hopped onto a truck."

The City maintains that, notwithstanding the Union's contention to the contrary, the Arbitrator need not link the probationary period referenced in Art. VIII, 2(D), with the trial period referenced in Art. VI, Sec. 4. According to the City, a trial period is completely separate from a probationary period and the two do not overlap.

The City argues that the parties used the phrase "probationary period" in Art. VIII, Sec. 2(D), for a reason, and asks that the Arbitrator not read it out of existence. The City contends that this case should only involve the matter of the contractual trial period. According to the City, the matter of the contractual probationary period should not be addressed here, but rather, should be left for another day.

In the alternative, the City contends that, if the Arbitrator does accept the Union's argument that the time worked as a truck driver in 1999 should be counted toward the Grievant's trial period, then two of the three days should not be counted toward the trial period. This contention is based upon the premise that Saturdays and Sundays are not part of the normal workweek under Art. XIX, Sec. 1.

The City asserts that the record evidence does not support a finding that the City has acted in bad faith with respect to the Grievant's 60-day trial period. The City asks that the grievance be denied.

DISCUSSION

The question to be decided is: Did the Grievant fill the Truck Driver position in question for more than the 60 working day trial period provided in Article VI, Sec. 4, of the collective bargaining agreement? If this question is decided in the negative, then parties have agreed that this case should be dismissed.

The Union, contrary to the City, argues that the Grievant did fill the Truck Driver position in question for more than the 60 working day trial period provided in Article VI, Sec. 4. More specifically, the Union argues that the trial period provided in Article VI, Sec. 4, is the probationary period referenced in Article VIII, Sec. 2(D), and, thus, the 23.5 hours that the Grievant drove truck in 1999 must be applied toward this trial period.

Both parties agree that, if these 23.5 hours are not required to be applied toward the 60 working day trial period provided for in Article VI, Sec. 4, then the Grievant did not fill the Truck Driver position in question for more than 60 working days. Thus, the issue to be decided is whether or not the 23.5 hours are required to be applied toward the 60 working day trial period set forth in Article VI, Sec. 4.

The parties approach this dispute from different analytical perspectives. According to the City, there is only one applicable contract provision, i.e., Article VI, Sec. 4. While acknowledging that this provision is applicable, the Union maintains that Article VI, Sec. 7; Article VIII, Sec. 2(D) and Article XIX, Secs. 1 and 2, must be harmonized with Article VI, Sec. 4, to resolve the instant matter.

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It is undisputed that the Grievant was awarded his Truck Driver position pursuant to Article VI, Sec. 4. Article VI, Sec. 4, states, in pertinent part, as follows:

> The employee selected to fill the vacancy shall be given a sixty (60) working day trial period. If the employee is found not to be qualified within the sixty (60) working day trial period, the City shall return the employee to his/her former position.

Given the use of the term "shall be given," the most reasonable construction of the plain language of this provision is that the "sixty (60) working day trial period" is prospective. In other words, the "sixty (60) day working day trial period" does not commence until after the employee has been selected to fill the vacancy. Thus, the language of Article VI, Sec. 4, on its face, neither expresses, nor implies, that the 23.5 hours driven in 1999 is required to be applied towards the "sixty (60) working day trial period."

The Union argues, however, that Article VI, Sec. 4, does not stand alone, but rather, must be read in conjunction with Article VI, Sec. 7; Article VIII, Sec. 2(D) and Article XIX, Secs. 1 and 2. Article VI, Sec. 7, states as follows:

> Section 7. Probationary Period. New employees shall be in a probationary status for a period of one hundred eighty (180) calendar days from the date of hire. Such period may be extended by mutual agreement between the City and the Union. (District Council 48).

Article VIII, Sec. 2(D), states as follows:

> (D) Custodians required to drive trucks for the Highway Department, when driving a truck, shall receive the starting rate of a truck driver. Highway Department shall keep a record of all hours driven by a Custodian and when the hours for driving equal 1040 hours, the Custodian shall receive certification as a truck driver and shall receive the full truck drivers rate of pay for times when driving a truck. Should a custodian take a full-time position as a truck driver, the hours previously driven shall apply toward his/her probationary period.

Article XIX, Secs. 1 and 2, state as follows:

> Section 1. The normal workday is eight (8) hours and the normal workweek shall be Monday through Friday.
>
> Section 2. Normal working hours of Department of Public Works are 7:00 a.m. to 3:30 p.m. with one-half (1/2) hour lunch break.

The Union asserts that the "probationary period" defined in Article VI, Sec. 7, is only applicable to "new employees;" the Grievant is not a "new employee;" and, thus, on the plain language of the contract, the "probationary period" referenced in Article VIII, Sec. 2(D), cannot be the 180 day "probationary period" referenced in Article VI, Sec. 7. 1/ Thus, the Union argues, common sense requires the conclusion that the "probationary period" referenced in Article VIII, Sec. 2(D), is the "sixty (60) working day trial period" referenced in Article VI, Sec. 4. The undersigned disagrees.

1/ On March 31, 1998, during the term of the 1997-99 collective bargaining agreement, the City drafted a memo indicating that Joseph Chitko, an employee of the City, would be promoted to the position of Truck Driver on April 20, 1998 with a starting rate of $15.54/hour and that, after a six month probationary period, Chitko would receive a rate of $16.23/hour. It is not evident that Chitko, or the Union, received a copy of this memo prior to hearing in this matter.

On November 4, 1998, the City Engineer drafted a memo indicating that Chitko had completed his probationary period. Chitko was cc'd on this memo, but it is not evident that the Union received a copy of this memo prior to hearing in this matter.

It is evident that, on one occasion prior to this grievance, City managers took the position that an employee promoted into a Truck Driver position was subject to a six-month probationary period. It is not evident, however, that the Union was aware of this City position prior to hearing in this matter. Thus, the evidence concerning the City's treatment of Chitko does not demonstrate any mutual understanding with respect to the interpretation or application of Article VIII, Sec. 2(D), or any other provision of the parties' collective bargaining agreement.

The phrase "new employees" is not defined in Article VI, Sec. 7. On its face, "new employees" is susceptible to more than one plausible interpretation. For example, "new employees" could be individuals that have not previously worked for the City, or they could be

employees of the City that have received a new position with the City. It follows, therefore, that "date of hire" could mean the date hired into City employment, or the date hired into a new position. Thus, notwithstanding the Union's assertions to the contrary, the plain language of Article VI, Sec. 7, does not demonstrate that the "probationary period" referenced therein cannot be the "probationary period" referenced in Article VIII, Sec. 2(D).

It may be, as the Union argues, that the most reasonable construction of Article VI, Sec. 7, is that it applies to individuals that are newly employed by the City, rather than to existing employees that have received a new position with the City. Such a construction, however, would not demand the conclusion that the "probationary period" referenced in Article VIII, Sec. 2(D), is the "sixty (60) working day trial period" referenced in Article VI, Sec. 4. It would only require the conclusion that the "probationary period" referenced in Article VIII, Sec. 2(D), is not the "probationary period" referenced in Article VI, Sec. 4.

By application of the common and ordinary definitions, the term "probationary period" and the term "trial period" are not synonymous. Thus, the plain language of Article VIII, Sec. 2(D), and Article VI, Sec. 4, warrants the conclusion that the "sixty (60) working day trial period" referenced Article VI, Sec. 4, is not the "probationary period" referenced in Article VIII, Sec. 2(D).

In summary, the plain language of the collective bargaining agreement does not support the conclusion that the parties mutually intended the term "trial period" in Article VI, Sec. 4, to be synonymous with the "probationary period" in Article VIII, Sec. 2(D). The parties have not offered any extrinsic evidence, such as bargaining history or past practice, that demonstrates that the parties mutually intended any meaning other than that reflected in the plain language of the collective bargaining agreement. Thus, contrary to the argument of the Union, the City does not have a contractual obligation to apply hours driven by the Grievant in 1999 to the "sixty (60) day working day trial period" set forth in Article VI, Sec. 4.

The Union relies upon Article XIX, Secs. 1 and 2, to convert the hours driven by the Grievant in 1999 to days that must be deducted from the "sixty (60) day working day trial period." Given my conclusion that the City does not have a contractual obligation to apply these 1999 hours to the "sixty (60) day working day trial period," the Arbitrator need not, and does not address, the Union's arguments regarding Article XIX, Sec. 1 and 2.

Conclusion

Under the plain language of Article VI, Sec. 4, the Grievant's "sixty (60) day working day trial period" starts to run on the first working day that the Grievant filled the Truck Driver position awarded pursuant to Article VI, Sec. 4. This first working day was October 11, 1999. Given the stipulations of the parties, it must be concluded that the City returned the Grievant to his former position on the 60th working day of the Grievant's trial period.

The Grievant did not fill the Truck Driver position in question for more than 60 working days under Article VI, Sec. 4, of the collective bargaining agreement. Under the stipulations and concessions of the parties, the appropriate remedy is the dismissal of grievance.

AWARD

1. The Grievant did not fill the Truck Driver position in question for more than 60 working days under Article VI, Sec. 4, of the collective bargaining agreement.

2. The grievance is dismissed.

Dated at Madison, Wisconsin this 27th day of September, 2001.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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