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

On January 27, 2000, I issued a decision, captioned by the Commission as Dec. No. 6010, to address the following issues stipulated by the parties at a hearing conducted on October 11, 1999:

> 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?

The Award issued in Dec. No. 6010 reads thus:

> 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.

The Union and the City stipulated that I should retain jurisdiction over the matter until a posting procedure had run its course. After its completion, the parties met on several occasions to resolve a series of remedial issues, then requested further hearing. That hearing was conducted on December 5, 2001 in Racine, Wisconsin. Madonna L. Rank prepared a transcript of that proceeding and filed it with the Commission on December 26, 2001. The Union entered its argument at the close of the hearing, and the City filed a brief on April 2, 2002.

ISSUES

The parties stipulated the following issues remain concerning the appropriate remedy for Dec. No. 6010:

> Is James Kaplan, Edward Burgess, Greg Nelson, Gabriel Simpson or Mark Gronholm entitled to any back pay wages as a result of the Arbitrator's award rendered on Grievance No. 33-98?
>
> If so, what are the appropriate back wages due?

RELEVANT CONTRACT PROVISIONS

ARTICLE III
Grievance Procedure

> A. Definition of a Grievance. Should a difference arise between the City and Union or an employee concerning the interpretation, application or compliance with this Agreement . . . such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

B. Subject Matter. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date of the incident or violation took place and the specific section of the Agreement involved.

. . .

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 XI
Hours and Wages

E. Overtime.

. . .

6. Overtime shall be divided as equally as possible at least quarterly during the course of the calendar year, and overtime Lists shall be posted in each department, premised upon the above-noted allocation of overtime equalization.

. . .

BACKGROUND

After a series of discussions concerning remedy, the parties executed the following Memorandum of Agreement:

It is hereby agreed between the undersigned parties, the City of Racine (Employer), and AFSCME, AFL-CIO, Local 67, (Union), that the following terms and conditions shall resolve the posting procedure in implementing Arbitrator Richard B. McLaughlin's arbitration award rendered on Grievance No. 33-98:

1 . The following positions shall be reposted and in the following order starting with the Sign Mechanic position:

a. Sign Mechanic
b. Garage Worker
c. Street Sweeper
d. Building Maintenance Worker - Garage
e. Parking Meter Collector
f. Tire Repair/Mechanic
g. Parking system Utility Worker
h. Equipment Operator - Parks (posted November, 1999)

2. The following positions shall not be posted:

a. Park Maintenance Worker
b. Truck Mechanic
c. Tree Trimmer/Arborist
d. Building Complex Maintenance Worker
e. Park Equipment Worker
f. Truck Driver - DPW
g. Equipment Operator - Parks (posted June, 1999)
h. Truck Mechanic

3. The parties agree to discuss back wages, if any, at the time the successful candidate stays on the posted job for 30 days.
4. The parties agree that if the successful candidate for any position that is posted is the current holder, then no back wages shall be payable.
5. The back wages, if any, shall be calculated from the time any of the jobs listed in Paragraph 1. were first filled until the date a new employee is selected and assumes the position as a result of the new first posting.
6. The parties agree that Arbitrator Richard B. McLaughlin shall retain jurisdiction until the back wage issues, if any, are resolved.
7. The resolution of the implementation of this Arbitrator's Award shall not serve as a precedent for any other dispute which may arise between the parties.

The positions that the City posted under this agreement and on which they could not agree regarding make whole relief are addressed individually below.

Under a reorganization process, the City's Department of Public Works includes four divisions: Street; Solid Waste; Bridge; and Traffic. Prior to the reorganization, the Traffic Division was part of the Department of Transportation. Prior to the posting that prompted Grievance No. 33-98, the City granted a seniority preference to Traffic Division employees posting for Traffic Division vacancies. If no applicant with intra-departmental seniority took a position, the City then granted a preference to employees in other departments prior to consideration of seasonal or temporary employees. Grievance No. 33-98 questioned whether the contract permitted the elimination of the intra-departmental preference for Traffic Division vacancies. City practice, prior to and following Grievance No. 33-98, did not necessarily demand that vacancies be posted within the Traffic Division prior to a City-wide posting. The Personnel Department often posted vacancies City-wide as an efficiency measure. If no intra-departmental applicant received a position, the Personnel Department would then move to extra-departmental applicants, thus sparing the delay of further posting.

Joe Golden is the Street Superintendent. He testified that it was not unusual for the City to offer a posted position to four or more different applicants until a qualified and willing applicant filled the position. For that reason, Golden advises prospective applicants to sign for any position they have an interest in.

The Sign Mechanic Position

This Traffic Division vacancy led to the grievance that led to Dec. No. 6010. The City initially posted it in late July of 1998. Ricky Hoffman is the most senior City employee who signed the initial posting. He accepted the position, trained in it, and then decided to return to his former position of Truck Driver. The next five most senior applicants refused the position, and the City awarded the position to Santos Moreno. Under the stipulation, the City reposted it in late February of 2000. James Kaplan received the position as a result of that posting, based upon his seniority within the Traffic Division.

Kaplan testified that he did not sign the original posting because he knew his seniority with the Department of Public Works would not rank him near the top of the applicant list. Beyond this, Hoffman informed Kaplan that he intended to take the job, and Kaplan knew Hoffman had considerably more seniority with the Department of Public Works than he did. Hoffman even assumed some of the duties of the Sign Mechanic position to determine if he would accept the position. Signing the first posting, to Kaplan, was an exercise in futility.

At the time of the initial posting, Kaplan worked in the Traffic Division as a Meter Collector/Parking System. In July of 1999, Kaplan posted into a position of Building Maintenance Worker in the equipment maintenance garage at the Department of Public Works. He signed the second posting because he knew his Traffic Division seniority would rank him near the top of the applicant list, and he assumed that the reposting process triggered by the parties' stipulation would bump him from the Department of Public Works.

While Moreno served in the position of Sign Mechanic, he earned $6,572.86 in overtime. During that same period, Kaplan earned somewhere between $66.30 and $142.32 in overtime in the two positions he occupied.

The Tire Repair/Mechanic Position

For purposes of this proceeding, the City initially posted this position in September of 1999. Edwin Burgess was, at the time of the initial posting, working as the Maintenance Worker Lead Man in the Traffic Division. That position is within Pay Range HU-14, and Burgess received a forty cents per hour add-on for serving as Lead Man.

Burgess signed the initial posting. The City offered him the position and he accepted it. Under the stipulation, the position was posted again. Burgess signed this posting, but was not the successful applicant, because his seniority within the Department of Public Works was not sufficient to place him at the top of the applicant list. Burgess trained two applicants, who ultimately declined the position. He also trained the third applicant, Gabriel Simpson, who accepted the position sometime in December of 2000.

Burgess originally posted into the Tire Repair/Mechanic position because it produced a twelve cents per hour increase, and he hoped it would provide more overtime. Ray Chacon assumed Burgess' duties in the Traffic Division while Burgess worked in the Tire Repair/Mechanic position. The City reorganized the position after Burgess' left it, essentially moving the maintenance worker duties to a position rated at Pay Range HU-10. Burgess bumped back into the Traffic Division, paid at the HU-14 Pay Range. The City ultimately discharged Simpson, and Burgess successfully reposted into the Tire Repair/Mechanic position in September of 2001.

Between September of 1999 and December of 2000, Burgess received $251.24 in overtime compensation as a Tire Repair/Mechanic. During this period, Chacon earned $7,668.78 in overtime compensation in Burgess' former position. Simpson, at the time of the initial posting for Tire Repair/Mechanic, served in a position compensated at the HU-7 Pay Range. For the period of time Burgess served in the Tire Repair/Mechanic position under the initial posting, Simpson earned $2,728.36 less in the HU-7 Pay Range than he would have had he been offered the Tire Repair/Mechanic position instead of Burgess.

Simpson did not testify.

The Parking System Utility Worker Position

For purposes of this proceeding, the City initially posted this Traffic Division position, compensated at Pay Range HU-10, in late October of 1999. Mark Gronholm was the successful applicant. Prior to this posting, Gronholm worked in the Department of Public Works on a general construction crew in the Street Maintenance Division, compensated at Pay Range HU-19. Burgess bumped back into this position when Simpson assumed the Tire Repair/Mechanic position. The difference between the compensation Gronholm earned at Pay Range HU-10 while a Parking System Utility Worker, and the compensation he would have earned had he remained in the Department of Public Works is $5,155.15. Gronholm testified that he posted for the Traffic Division position because of its work hours, not for overtime or wage considerations.

The Garage Worker Position

The parties submitted documentation indicating that the City posted this position on a City-wide basis in January of 1999. Greg Nelson's seniority placed him seventh, in seniority, on the list of applicants. The documentation indicates none of the more senior applicants were qualified for the job or willing to accept it. The City reposted the position in April of 2000, and awarded it to Ed Dobbins.

Neither Nelson nor Dobbins testified.

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

THE PARTIES' POSITIONS

The Union's Closing Statement

The Union contends that the City caused the remedial dilemma by improperly posting a series of openings after the Union warned the City about what could happen. The issue is thus how to make each employee adversely affected by the City's actions whole for the damages flowing from the City's contract violation. The Sign Mechanic position was the subject of the original grievance. Moreno filled the position on September 14, 1998. Kaplan did not sign the first posting because he reasonably concluded it would serve no purpose. He signed the second posting, and received the position. While filling the position between the first and second posting, Moreno earned $6,572.86 in overtime compensation that Kaplan would have earned had he filled the position from September 14, 1998. The labor agreement equalizes overtime across the unit, and thus precludes any chance of Kaplan recouping this amount. It follows that the City should make Kaplan whole by paying him $6,572.86.

The second position is Garage Worker. The City awarded Nelson the position after the initial posting. Nelson left a higher rated position to fill the vacancy, thus giving up forty cents per hour. Under the parties' agreement, the City reposted the position and awarded it to Dobbins. As a result, each employee suffered damages. Nelson suffered the loss of forty cents per hour for all hours worked between the time he assumed the role of Garage Worker on April 14, 1999, and the time Dobbins took the position on July 10, 2000. Dobbins is entitled to the difference between the overtime he earned during that period and the amount he would have earned had he been placed in the position on April 14, 1999. This demands a City payment to Dobbins of $526.08.

The next disputed position is that of Tire Repair/Mechanic. The City initially awarded the position to Ed Burgess, then reposted the position and awarded it to Gabriel Simpson. While Burgess occupied the position, he left his former position, which was filled by Chacon. Chacon worked a substantial amount of overtime, earning $7,668.78 during this period while Burgess earned only $251.24. The City should make Burgess whole by compensating him for the difference of $7,417.54. Beyond this, the City needs to make Simpson whole for the wages he could have earned but for the City's wrongful award of the position to Burgess. The difference between the hourly rate Simpson earned at his former position and that of the Tire Repair/Mechanic position is ninety-eight cents per hour. The City thus needs to pay Simpson ninety-eight cents for each hour he worked between its initial award of the position to Burgess and its eventual award of the position to Simpson.

The next disputed position is that of Parking System Utility Worker. Gronholm left a higher rated position in response to the City's initial posting of this position. The difference in positions was sixty-two cents per hour in 1999 and sixty-five cents per hour in 2000. Due to the stipulated reposting procedure, Gronholm was displaced from the position of Parking System Utility Worker. As a result, the City should make him whole by paying him $5,155.15, which is the difference between the amount he earned as a Parking System Utility Worker and the amount he would have earned in his former position.

The Union concludes that the disputed positions reflect the final piece of the remedial puzzle left after the parties resolved all other issues. The dollar amounts requested, regardless of size, should be awarded to give effect to the Award in Dec. No. 6010 and the parties' subsequent memorandum of agreement.

The City's Brief

After a review of the evidence submitted at the remedial hearing, the City contends that "the Union's requested remedy is outside the scope of the arbitrator's award and Kaplan, Burgess, Nelson, Simpson and Gronholm are not entitled to back pay as a result of the Employer's action." That the City "made some pay adjustments to employees" affected by the

posting of the Sign Mechanic position "certainly did not give carte blanc to the wording of the arbitrator's award as the Union believes."

Among the claimants, Kaplan is "the only employee who could have posted for the Sign Mechanic position." He failed to do so, however, and his failure cannot be rewarded in this proceeding. His reliance on another employee's stated desire to take the posted opening was unreasonable, particularly since the evidence shows senior employees often decline postings.

Nor do the other claimants make a persuasive claim. To grant any of the claims would reward "anyone who is willing to say he was going to sign up for a position if it offers a possibility of back pay." Intra-departmental postings go City-wide if there are no departmental applicants who claim the position, and none of the claimants has a persuasive excuse for not signing the Sign Mechanic posting.

Beyond this, the Union's position draws the grievance "outside of the subject matter of the initial grievance." The violations the Union seeks to remedy "occurred before or long after the violation date of August 10, 1998, or (have) nothing to do with the Sign Mechanic position."

The City concludes that the remedy should be limited to the Sign Mechanic grievance, and that no remedy awarded beyond that already implemented by the parties.

DISCUSSION

The stipulated issue on remedy poses arguably more difficult problems than the merits of the grievance. On a general level, the Union asserts that employees should be in no worse position as a result of City actions than if the City had properly given an intradepartmental preference for Traffic Division employees. Viewed as a legal matter, the Union asserts a measure of damages straddling the law of tort and of contract. In BROCKMEYER V. DUN & BRADSTREET, 113 Wis.2D 561, 576 (1983), the Wisconsin Supreme Court drew the line between the measure of damages in these two areas of law thus:

> In tort actions, the only limitations are those of "proximate cause" or public policy considerations. Punitive damages are also allowed. In contract actions, damages are limited by the concepts of foreseeability and mitigation.

The Union asserts a tort-like measure of damages by contending that the City had a duty to abide by the contract. By ignoring Union warnings, the City willfully violated the duty. The proposed remedy is contract-like by asserting the bumping process the parties set in motion in response to Dec. No. 6010 was foreseeable. It is tort-like to the degree the Union asserts the City must be punished for its willful conduct.

Elements of the proposed remedy that can be characterized as punitive strain my contractual authority. Such a remedy has little support in arbitration authority, see generally, *Remedies in Arbitration*, Hill & Sinicropi (BNA, 1991) at Chapter 19. The Union does not assert the damages are punitive, but the City appropriately questions at what point events flowing from the original grievance pose separate disputes that exceed whatever make whole authority flows from the grievance questioning the Sign Mechanic posting.

Even if the Union's arguments fall within the scope of my jurisdiction over the Sign Mechanic grievance, they do not establish a need for relief beyond that already agreed to. Union arguments overstate the nature of the City's breach of the labor agreement as a general matter and as applied to the facts. On the general level, there is no evidence to establish how the Union warned the City of the risk of its position regarding the first Sign Mechanic posting. Even if the Union clearly warned the City, there is no evidence of City bad faith.

To the contrary, the evidence shows a long-simmering, good faith disagreement posing defensible views of the contractual impact of an administrative reorganization. The reorganization dates from 1995. The Sign Mechanic posting and grievance date from August of 1998. The contractual impact of the reorganization poses something other than a conflict of right and wrong. Whether DPW or Traffic Division employees get a preference for intradepartmental vacancies fails to pose clearly identified City interests against clearly defined Union interests. From the City's position, the vacancy is filled in either event. As the bumping process shows, the value of the preference varies from the perspective of DPW to Traffic Division employees.

The original grievance underscored the difficulty of the dispute by seeking impact bargaining. This complicated the grievance, as noted in Dec. No. 6010 at 10:

> 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.

Thus, the evidence establishes a good faith disagreement, not willful City action violating a clear contractual duty. This undercuts the Union's general contention that any adverse impact of the bumping process must be held against the City. It makes unpersuasive any claim to a strictly legal measure of damages. Much of tort and contract law regulates the conduct of parties related through a single transaction. This makes it imperative that damages fully compensate a wronged party who may have no further relationship with the adverse party.

This grievance, however, focuses on the closely bargained issue of seniority and involves parties with a longstanding and continuing relationship.

Analysis of the individual claims advanced by the Union does not overcome these general considerations. The Garage Worker controversy concerns Nelson and Dobbins. There is no dispute regarding Dobbins' claim (Transcript at 13 and 76). The Union claims that Nelson received the position improperly, leaving a job that paid more in base wages and overtime than the posted position. Nelson did not testify, and the record contains no persuasive evidence to support the Union's claim. However, the claim prefaces similar claims made regarding other positions and warrants some discussion.

Support for the Union's theory is not self-evident. The Union's contention that the contractual duty the City violated is so clear that it should be held responsible for any adverse impact on the employee undercuts the Union's remedial claim. If the contract is that clear, why did DPW employees bid for the Traffic Division openings? Can their claim for the positions be considered reasonable? Was the Union under no obligation to warn unit members of the clear violation involved? If Nelson wanted the position enough to post for it in spite of lower base wages or overtime, what benefit did he receive as a result of improperly receiving the position? How should any such benefit be weighed against the financial claim he asserts against the City? As noted above, the issues on the merits of the grievance are more complex than the Union's remedial claims imply. The questions posed need no answer on this record, for the original decision and the parties' remedial agreements put the intra-departmental preference for Traffic Division employees back into place. The post-hearing evidence poses no persuasive reason to go beyond that.

Kaplan's claim underscores these considerations, and adds others. Kaplan did not sign the first posting, in significant part because Hoffman advised Kaplan that he would take the position. Kaplan, knowing Hoffman had considerably more DPW seniority than he had, viewed signing the posting as an exercise in futility. Kaplan's testimony was honest and candid. This cannot, however, obscure that Kaplan failed to take any action to protect his interest in the position. The City will post openings City-wide to avoid multiple postings for the same position, and routinely sorts through several applicants to fill a position. Kaplan's failure to sign the first posting cannot reasonably be held against the City.

This conclusion should encourage interested applicants to sign postings. Doing so works no harm on the applicant. The alternative complicates posting disputes by demanding an after the fact inquiry regarding the basis for an individual's refusal to sign.

The Union's request for Kaplan highlights the impact of inconsistencies touched on above. If the contractual duty the Union seeks to enforce is sufficiently clear that the City is liable for any adverse impact from the original posting, does the City have a disciplinary

interest in Hoffman's conduct to discourage Kaplan from signing? Employee misconduct exposing an employer to liability can invoke an employer's disciplinary interest, see, for example, ERNST ENTERPRISES, 103 LA 783 (Doering, 1994). This is not to say this issue is posed here. However, it highlights that the logical appeal of the Union's attempt to trace all adverse consequences of the original breach to the City must be tempered by common sense constraints.

The Union's attempt to paint the City's action as a clear violation undermines the strength of its own position. If Kaplan was egregiously denied roughly $6,500, Soreno was egregiously enriched by the same amount. If the Union's portrayal of the duty is accurate, it is less than apparent why Soreno or other DPW employees who signed the posting bear no responsibility for participating in the wrongful act. The City derived no clear benefit from preferring a DPW over a Traffic Division employee. Dec. No. 6010 resolved the contractual impact of the City's actions. To adopt the Union's theory of damages risks turning a basic seniority dispute into complex civil litigation.

Simpson did not testify, and there is no persuasive evidence to support the Union's claim on his behalf.

The evidence and argument concerning the Tire Repair/Mechanic and Parking System Utility Worker positions do not pose issues beyond those addressed above. Burgess understandably feels that he bounced around quite a bit to end up in the same place. Gronholm spent time in a position that paid less than the one he left. In each case, the employees acted without any City coercion and for reasons of their own choosing. This does not mean neither suffered adverse consequences. However, the turmoil reflects a bumping process that is the result of a bargained seniority system, and the concern of an employee found less senior to another. That turmoil is inevitable if seniority is to prevail. The remedial issue is whether that turmoil is sufficiently remarkable that it warrants an extraordinary remedy above that already agreed upon by the parties. As noted above, nothing in the evidence affords a persuasive basis to do so. To stray beyond the parties' agreement stretches the limit of my authority as an arbitrator, and raises more troublesome issues than it solves.

The parties' stipulation notes that the resolution of this dispute "shall not serve as a precedent for any other dispute". I stress that the considerations stated above reflect my understanding of the unique facts posed by this grievance. The issue as I understand it and as I have addressed it does not question the generally appropriate rule for damages traceable to a single posting. Rather, it questions whether this grievance poses unique facts warranting relief beyond the make-whole relief already agreed to by the parties. The Union's concern that Article XI, Section E, 6 complicates the provision of make-whole relief and warrants special consideration for the overtime claims of the claimants has persuasive force, but presumes their entitlement to relief beyond that already agreed to.

AWARD

Neither James Kaplan, Edward Burgess, Greg Nelson, Gabriel Simpson nor Mark Gronholm is entitled to any back pay wages as a result of the Arbitrator's award rendered on Grievance No. 33-98.

With the issuance of this Award, I relinquish jurisdiction over the grievance.

Dated at Madison, Wisconsin, this 10th day of April, 2002.

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

RBM/gjc
6362.doc