

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER CITY EMPLOYEES LOCAL 1226, AFSCME, AFL-CIO

and

CITY OF RHINELANDER

Case 102
No. 60259
MA-11565

(Walker Overtime Grievance)

Appearances:

Mr. Michael Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Rhinelander City Employees, Local 1226, AFSCME, AFL-CIO.

Mr. Philip Parkinson, City Attorney, City of Rhinelander, 135 South Stevens Street, Rhinelander, Wisconsin, appearing on behalf of the City of Rhinelander.

ARBITRATION AWARD

Rhinelanders City Employees, Local 1226, AFSCME, AFL-CIO, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Rhinelander, hereinafter "City," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on December 14, 2001, in Rhinelander, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on February 21, 2002. Based upon the evidence and the arguments of the parties, the undersigned makes and 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.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute and stipulated that the issue to be determined was:

Whether the provisions of Articles 2, 3, 4, 5, 6 and 7 or any other article of the collective bargaining agreement apply to this employee (i.e. the Grievant, Jeremy Walker)?

The parties further stipulated that the appropriate remedy if the Arbitrator finds that the collective bargaining agreement applies to the employee is time and one-half pay for the weeks of May 7-11, 2001 and May 21-25, 2001.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - RECOGNITION

- A. The Employer recognizes the Union as the exclusive collective bargaining agent in matters of pay, hours of work and conditions of employment for regular, part-time and seasonal Employees, who are Union Members and who are employed in the following Departments of the City: Public Works, Sewer and Water Construction, Water and Waste Treatment Plant Operators, Cemetery and Parks, Golf Course, excluding Department Heads, supervisory and confidential clerical personnel.

ARTICLE 3 - DEFINITION OF EMPLOYEES

- A. A Regular Employee is one who has successfully completed his/her probationary period in a permanent position with full annual employment.
- B. A Part-Time Employee is one who works throughout all or most of the year in a position which does not normally furnish full-time employment.
- C. A Seasonal Employee is one who has successfully completed his/her probationary period in a position which is seasonal in nature and in which employment is available for a period of three to six months annually.
- D. A Temporary Employee is one who works in a position created by the pressure of extra work. Temporary appointments shall not exceed three months in duration, except for Golf Course and Parks & Recreation

Employees, in which case employment is available for a period of up to nine months. For any individual, a subsequent temporary appointment shall not be made before three months has lapsed since the termination of the previous temporary appointment.

...

ARTICLE 5 – UNION MEMBERSHIP

A. Both the Employer and the Union recognize the rights of each Employee under Section 111.70 of the Wisconsin Statutes in regard to Union Membership. In the interest of labor harmony, the Employer recommends that eligible Employees become members of Local 1226, AFSCME, AFL-CIO, upon completion of 30 days of employment.

...

C. FAIR SHARE AGREEMENT.

...

As to new Employees, such deduction shall be made on the last pay period of the month following the first six (6) months of employment.

...

ARTICLE 6 – PERSONNEL PROCEDURES

...

B. PROBATION. New Employees, hired after January 1, 1984, without prior regular or part-time service to the City, shall serve a six-month probationary period. Time spent as a temporary Employee shall not be counted. During this period they may be discharged for cause without recourse. Upon satisfactory completion of the probationary period, an Employee shall have all rights and privileges granted under this Agreement, computed from the date of employment.

...

C. SENIORITY. The seniority of each regular, part-time, and seasonal Employee hired after January 1, 1984, shall begin with the Employee's starting date of regular, part-time, and seasonal employment, provided, however, that no time prior to a discharge or quit shall be included. The

Employee's earned seniority shall not be diminished by temporary layoff or authorized leaves of absence or any other contingency beyond the control of either party to this Agreement.

...

ARTICLE 7 – PAY PROCEDURES

A. PAY PERIOD. The pay period shall be two weeks, and paychecks shall be issued every other Friday, a week following the end of the pay period.

B. WORK DAY AND WORK WEEK.

1. The work day shall consist of 8 hours from 7:00 a.m. to 3:00 p.m. with a 15 minute lunch break commencing at noon to be taken on the job site.
2. The normal work week shall consist of 5 consecutive, 8-hour days, Monday through Friday, making a total of 40 hours.
3. The Waste Treatment operators shall alternate shifts and receive a pay differential of seventeen (17) cents per hour on the second shift and twenty-one (21) cents per hour on the third shift. The work schedule shall be attached hereto and titled Addendum II.

...

C. OVERTIME. All work performed outside the normal schedule, as specified in Article 7, Section B,1; B, 2; B, 3; B, 5; shall be paid for at the rate of one and one half times the regular rate, except for Employees specifically otherwise provided for.

...

ARTICLE 8 – GRIEVANCE PROCEDURE

...

Section 3.

...

The Employer and the Union may agree upon an arbitrator. If the Employer and the Union cannot agree upon an arbitrator, the Union shall request one be

selected by the Wisconsin Employment Relations Commission (WERC). The arbitrator's decision shall be final and binding upon both parties, and that arbitrator shall have no authority to alter in any way or add to the provisions of this agreement.

. . .

ARTICLE 9 – EMPLOYEE BENEFITS

A. SICK LEAVE

1. Sick Leave credit shall be accumulated as follows:

- a. Employees shall accumulate sick leave credit at the rate of one day for each month of employment.

. . .

C. HOLIDAYS. After thirty (30) days of employment, regular Employees shall be allowed the following holidays with pay at their regular rate: New Years Day, Memorial Day, Independence Day, Labor Day, the Monday of the week in which Armistice Day occurs, Thanksgiving Day, Christmas Eve from noon on, Christmas Day, Good Friday and one floating holiday to be granted between the dates of May 1 and November 1.

. . .

E. INSURANCE. The Employer agrees to provide the following benefits to the Employees. All Employee contributions shall be withheld from wages.

. . .

3. Hospital and Surgical Insurance. After thirty (30) days employment, all regular Employees may participate in the hospital and surgical insurance program, . . .

. . .

ARTICLE 11 – MISCELLANEOUS PROVISIONS

E. SPECIAL CLOTHING. The Employer shall furnish the following special clothing: Rain suits for Employees when needed, aprons for Employees of the garbage department and those operating the compressor, and coveralls for lift pump men. The Employer shall provide leather gloves for

REMARKS: DO = DAY OFF
1 = 1ST Shift
2 = 2nd Shift
1s = 1st Shift – Standby

BACKGROUND AND FACTS

The City of Rhinelander provides municipal services to its citizens including the operation of a Waste Treatment Water Plant. The Grievant, Jeremy Walker, was hired to the permanent position of Waste Treatment Plant Operator I and started working for the City on May 7, 2001. Walker had no prior employment experience with the City. Walker replaced an employee named Marv, who retired.

There are seven employees, six (6) operators and one (1) lab technician, who work in the Waste Water Treatment Plant. The primary responsibilities of Waste Treatment Plant Operators are to monitor the wells and the water supply for city residents. The City assigns four (4) operators to the first shift which begins at 7 a.m. and ends at 3 p.m. and two (2) operators to the second shift which begins at 3 p.m. and ends at 7 p.m. The lab technician works the first shift. The City and Union have bargained and agreed upon a six week shift rotation schedule that incorporates operator assignment to first shift, second shift, first shift plus standby and days off.

The master schedules for April 28-May 11, 2001, and May 12-May 25, 2001, were prepared during December, 2000. Each work week on the schedule begins on Saturday and ends on Friday. Marv was off for all weekends included in the above identified schedules. The master schedule showed that Marv was scheduled to work the first shift April 30-May 4, second shift May 7-11, first shift May 14-18 and second shift May 21-25, 2001.

Although Walker was hired to replace Marv, he did not work the same schedule as Marv had been projected to work. While Marv had been scheduled for the second shift the weeks of May 7th and May 21st, Walker worked the first shift, 7 a.m. to 3 p.m., for all Monday through Friday work weeks from May 7, 2001, through May 25, 2001. Walker received straight time for all hours worked during this time period. Walker did not work any weekend shifts. Walker was put into the Waste Water Operator shift rotation on May 28, 2001, when he worked the first shift plus standby assignment.

The pending grievance was filed by Union representative Dennis O'Brien on June 5, 2001. It challenged the assignment of Walker to a schedule different than that of Marv, stating "Jeremy was required to work out of his regularly scheduled shift. He was not paid the proper overtime rate of pay on two one week periods." The grievance was denied by Zapota on June 6, 2001, "on the grounds that Jeremy Walker is not covered by the contract." Any new employee is on probation for the first six months of employment and is not considered a "regular employee who would be covered by the contract."

Zapota testified that Walker was assigned to work with Ed Underwood, Waste Treatment Plant Operator to “learn what to do” and to learn what “level of performance” was expected. Zapota testified that Walker worked with Underwood his “entire first week of employment, some of the second week and a portion of the third week.” Underwood was assigned first shift May 7-11, 2001, first shift plus standby for May 12-18, 2001, and second shift May 21-25, 2001. Walker also worked with other operators during these three weeks.

Deborah Breivogel, City Clerk/Treasurer since 1971, is responsible for payroll and benefit calculations for the City. Breivogel testified that “newly hired employees, permanent employees” earn sick leave “immediately upon employment.” 1/ She further testified that this is the same for non-represented employees.

1/ Article 9, Section A, SICK LEAVE provides the benefit to “all regular and part-time employees.” “Permanent position” is the title used in the labor agreement when defining a regular employee. Thus, it is reasonable to conclude that the Clerk was describing a regular employee when using the term “permanent.”

Walker did not appear or testify at hearing. Evidence was not offered at hearing as to whether Walker is currently employed by the City nor whether he satisfactorily completed the probationary period.

POSITIONS OF THE PARTIES

The Union

The Union asserts that regular employees on probation are entitled to coverage under the collective bargaining agreement and therefore the Grievant is entitled to receive time and one-half pay for the weeks of May 7-11, 2001, and May 21-25, 2001. The Union argues that the language of the labor agreement and the City’s provision of other benefits of the agreement to probationary employees support the Union’s position that regular employees on probation are covered by the contract. The Union first notes that the contract clauses that address holidays and health insurance grant these benefits to new hires after 30 days of employment. The Union further argues that since the City provides new employees with the bargained for benefits of overtime, call time, holiday double time, stand-by pay, funeral leave, Section 125 Plan participation, jury duty, clothing allowance and sick leave, then the City has recognized that the contract applies to newly hired employees that have not completed probation.

The Union next points out that if the City’s definition of “regular employees” is accepted by the Arbitrator, then part-time regular employees on probation enjoy greater rights

and benefits under the contract than full-time regular employees because part-time employees pursuant to Article 3 are not obligated to fulfill a probationary period and they thus would receive all rights and benefits of the labor agreement from their date of hire.

The Union advocates application of the principle of avoidance of forfeiture in this situation. The Union argues that the City's interpretation would result in a probationary employee's benefits being reduced and thus Walker's benefits would be reduced should the Arbitrator find in the City's favor.

Finally, the Union asserts in response to the City's management rights argument that the parties have adopted a normal schedule for Waste Treatment Operators (see Addendum II of the labor agreement) and as a result, the City was obligated to follow the repeating schedule and further, that Walker was entitled to time and one-half for the work he performed outside of his normal schedule.

For all of the above reasons, the Union argues that Walker is entitled to all rights and benefits of the labor agreement and compensation as stated in the stipulated remedy.

The City

The City asserts that the Grievant is a probationary employee and as such, is not entitled to any rights or benefits of the collective bargaining agreement. The City first looks to the definition of "regular" employee and notes that a regular employee is one who has completed probation. The City next notes that the probationary period is six (6) months at which time the employee is entitled to "all rights and privileges granted under this Agreement, computed from the date of employment." The City concludes that since the Grievant was a probationary employee and therefore not a regular employee, he was not entitled to the rights afforded under the contract. The City cites KIEL POLICE DEPT. EMPLOYEES, CASE 43, NO. 48539, MA-7648 (NIELSEN, 11/29/93) in support of this conclusion.

The City next argues that the Management Rights clause of the contract provides it the right to direct its workforce and that it exercised this right and chose to not assign Walker to a shift. The City argues that the time and one-half benefit is for employees whose shift has been changed and since Walker was not assigned a shift, it is not possible for him to be entitled to monies for a change in shift.

Finally, the City argues that Walker did not have the grievance procedure available to him as a recourse. The City cites the Recognition clause and notes that the probationary employees are not referred to as entities represented by the Union. The City argues that the case should be dismissed because Walker was a probationary employee who did not have the benefit of the grievance procedure available to him.

For all of the above reasons, the City asserts that the grievance be denied.

DISCUSSION

This grievance arises from the City's assertion that Jeremy Walker was not covered by the collective bargaining agreement until he attained "regular" employee status rather than "probationary" employee status and hence was not afforded the rights and benefits of the agreement including time and one-half for hours worked as a result of a change in schedule. In contrast, the Union asserts that Walker was a regular employee, though on probation, represented by the Union, and entitled to the benefits of the labor agreement.

The parties have stipulated that the issue in this case is not whether the City had the right to assign Walker to first shift rather than second shift during his orientation period. Rather, the parties have framed the issue in terms of whether the collective bargaining agreement, as a whole, applies to a probationary employee, and specifically, whether such an employee is, therefore, entitled to the time and one-half pay provided in Article 7 for working outside the normal schedule.

Article 5

As a threshold matter, the City argues that, irrespective of probationary status, Walker is not entitled to coverage afforded by the labor agreement because he was not a member of Union in May, 2001. Article 2 extends recognition to the Union as the exclusive bargaining representative for employees in various departments "who are Union members." While this provision is inartfully worded, it is clear from other portions of the agreement, and from the statute, that the parties could not have intended that representation in the bargaining unit be literally construed thereby restricted to only those employees who become Union members. Section A includes an express affirmation by the City and the Union of employee rights under Section 111, 70, Wis. Stats. Among those rights is the right to refrain from joining a labor organization. The City's argument would require violation of both this provision and the underlying statute. Further, Section C of this Article expressly provides for Fair Share payments by non-member employees. Neither section of Article 5 can be made consistent with a reading of Article 2 that limits its provisions to employees who exercise their right to join the Union.

It is axiomatic that an interpretation that renders the contract legal and enforceable must be favored over one that renders it illegal. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 485 (1997). In the same vein, an interpretation that makes all provisions effective is favored over one that gives meaning to one at the cost of rendering other provisions ineffective or meaningless. *Id.* at 493. For these reasons, I find that Walker's membership in the Union, or lack thereof, is a non-issue. 2/

2/ The City asserts that CITY OF KIEL (POLICE DEPT), CASE 43, No. 48539, MA-7648 (NIELSEN, 11/29/93) in support of its position that employees who have not completed their probationary period are not entitled to the rights of the labor agreement. This Award is inapposite. Arbitrator Nielsen did not conclude in CITY OF KIEL that probationary employees are not entitled to the contractual rights of a labor agreement. Rather, Arbitrator Nielsen determined that the discharged police officer grievant was a probationary employee and was therefore not entitled to grieve his termination because the City had the express contractual right to terminate a probationary employee without any arbitral review of the decision.

Articles 2, 3, 6 and 9

The parties' dispute arises out of the meaning of their labor agreement as it relates to regular employees on probation. Contract interpretation is only appropriate when the clear meaning of the contract cannot be ascertained. Elkouri at 470. Language is clear when it is susceptible to one convincing interpretation. *Id.* Language may be deemed ambiguous when plausible arguments can be made for differing interpretations. *Id.* The City concludes that Article 2, read in conjunction with Articles 3 and 6, is unambiguous; Walker has not completed probation and is therefore not a regular employee. The Union interprets Article 2 in the content of the entire collective bargaining agreement finding it to be "ambiguous, incomplete" and "subject to several different interpretations at [sic] definitions of employees."

Article 2 recognizes the Union as the exclusive bargaining representative of "regular, part-time and seasonal" employees. The provision excludes "Department Heads, supervisory and confidential clerical personnel" from inclusion in the unit. "Probationary employee" is neither specifically included nor excluded from the recognition clause itself. However, Article 3, Section A, defines a "regular" employee as "one who has successfully completed his or her probationary period in a permanent position with full annual employment." On its face, this would suggest that employees on probation are not "regular" employees, and are not included in the bargaining unit. A closer look at other provisions of the labor agreement negate this seemingly clear conclusion since the parties have obviously bargained over the rights and benefits of employees during their first six months of employment and have, in several instances, used the term "regular" employee to describe such employees.

Article 9, Section C, provides "regular" employees with paid holidays after 30 days of employment. Section E grants regular employees insurance benefits after 30 days of employment. These sections provide a regular employee on his 31st day of employment with the contractual benefits of holiday pay and insurance which is inconsistent with Article 2 which denies all rights and benefits to new employees until after they have completed the probationary period. Thus, the true intent of the parties was not to tie rights and benefits to the attainment of "regular" status as defined by Article 3 but rather is manifested in the language the parties drafted as it relates to probationary period.

As is widely cited, “the primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned work, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. RILEY STOKER CORP., 7 LA 764, 767 (PLATT, 1947). The question then is whether other portions of the labor agreement provide sufficient guidance in determining whether regular employees on probation are covered by the terms of the agreement.

Article 6, Section B, PROBATION, states that “[n]ew employees, . . . without prior . . . service to the City, shall serve a six-month probationary period” and further, probationary employees “upon satisfactory completion of the probationary period, . . . shall have all rights and privileges granted under this Agreement, computed from the date of employment.” This language appears to be clear; a full-time permanent probationary employee does not receive the rights and benefits of the labor agreement until he/she has completed the six-month probationary period. Yet again, a closer look at other provisions of the labor agreement indicate that the parties have bargained over rights and benefits of probationary employees in full-time permanent positions.

As previously discussed in this Award, full-time permanent regular employees on probation receive paid holidays and health insurance on their 31st day of employment.

Article 6, Section B, sentence three, states that a probationary employee “may be discharged for cause without recourse.” Recourse in this context includes the ability of the probationary employee to utilize the grievance procedure of Article 8. Sentence three is followed by the sentence cited above that denies probationary employees all rights and privileges until the completion of probation. It is a well-accepted interpretative canon that the expression of one thing is to the exclusion of another. Theodore St. Antoine, The Common Law of the Workplace, p. 70 (1999). If the parties did not intend for probationary employees to be covered by the labor agreement, they did not have a reason to articulate that a probationary employee does not have the benefit of “recourse” during probation.

Article 11, Section E, states that the City will pay the Meter Reader a one hundred dollar clothing allowance annually. In addressing this obligation, the contract states “the Meter Reader must have completed his probationary period to be eligible for the payment.” If the parties had not included this exclusion, then the Meter Reader would have been entitled to the annual clothing allowance while on probation. By including the exclusion language, it supports the outcome that the parties intended for new hires on probation to receive coverage and the privileges under the terms of the labor agreement.

This Arbitrator does not have the authority to “alter in any way or add to the provisions” of the parties’ agreement, but rather must attempt to harmonize the contradictory sections of the parties labor agreement. It is within this context that I conclude that the parties intended to afford regular employees on probation with the rights and benefits of the labor

agreement. I reach this conclusion by applying a “broadly observed principle of contract interpretation, acknowledged in both courts of law and arbitration, [which] holds that specific language prevails over general language [sic].” AIRCO CARBON, 86 LA 6, 9 (DWORKIN, 1986). The Recognition Clause, Definition of Employees clause and Probationary clause of the labor agreement are general clauses, contained in virtually all labor agreements whereas the Special Clothing, Holiday Leave, Personnel Procedures and Health Insurance clauses are specific clauses which afford specific benefits to regular employees of Local 1226. If I were to find that the City’s interpretation is correct, in addition to nullifying the specific provisions of the labor agreement, it would allow the City to arbitrarily determine, irrespective of those contained in the labor agreement, the wages, hours or conditions of employment for a probationary employee up until the employee has completed the probationary period and this I am unwilling to do. I therefore conclude that the parties intended to provide regular employees on probation with the rights and benefits of the labor agreement.

The Union finds strength in its argument that the City’s actions in granting Walker some benefits of the labor agreement support the conclusion that probationary employees are entitled to all rights and benefits of the agreement. The testimony of the Department Head at hearing indicates that Walker worked consistent with Article 7, Section B; received pay differential as provided in Article 7, Section C; would have received call-in pay per Article 7, Section D; received double time on July 4 pursuant to Article 7, Section E; would have had Article 9, Section B funeral time available to him; earned sick leave consistent with Article 9; special clothing per Article 11, Section E, had been ordered for him; and he was paid the same rate of pay as other Waste Treatment Plant Operators as shown on Addendum I which is the JOB CLASSIFICATION AND SALARY SCHEDULE of the labor agreement. I do not find the City’s provision of these benefits to Walker is evidence that the parties in drafting the labor agreement intended to recognize “probationary employees” nor do I find that the provision of benefits to Walker constitutes a practice of providing probationary employees with benefits. Rather, I find that the evidence indicates that the City’s position at hearing is inconsistent with its actions.

Article 12

The City asserted in its brief that the Management Rights – Subcontracting clause of the labor agreement granted the City the right to direct its workforce, that Walker was not assigned a shift as evidenced by Joint Exhibit 3, the Wastewater Treatment Plant Work Schedule which did not have a shift assigned to Walker’s name and as a result, he was not working outside of his normal shift and therefore entitled to time-and-one-half pay. Regardless of the merits of this argument, this Arbitrator is not at liberty to address this issue because it is not the issue the parties stipulated to at hearing.

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

AWARD

1. Yes, Articles 2, 3, 5, 6 and 7 and the labor agreement as a whole, except for Article 9, Sections C and E, as it relates to the 30-day eligibility periods, and Article 11, Section E, as it relates to the Meter Reader clothing allowance, apply to full-time regular employee Jeremy Walker while on probation.

2. As the parties stipulated, the remedy shall be payment by the City of time and one half (1 ½) pay for the weeks of May 7-11, 2001 and May 21-25, 2001, to Jeremy Walker, less any monies he already received for these time periods.

Dated at Wausau, Wisconsin, this 22nd day of May, 2002.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator