BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE VILLAGE OF WINNECONNE

and

VILLAGE OF WINNECONNE EMPLOYEES' UNION, LOCAL 1838, AFSCME, AFL-CIO

Case 7
No. 62690
MA-12401

(Marilyn West Additional Compensation)

Appearances:

Davis & Kuelthau, S.C., by **Attorney Tony Renning**, P.O. Box 1278, Oshkosh, WI 54903-1278, appearing on behalf of the Village.

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 807 Saunders Road, #1, Kaukauna, WI 54130, appearing on behalf of the Union.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Winneconne Village Employees' Union, Local 1838, AFSCME, AFL-CIO (hereinafter referred to as the Union) and the Village of Winneconne (hereinafter referred to as the Employer or the Village) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the payment of sums as a hiring bonus to Marilyn West. The undersigned was so designated. A hearing was held on December 8, 2003, in Winneconne, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on oral arguments at the close of the hearing, with the understanding that the Arbitrator would provide an expedited decision on the matter. The result was communicated to the parties through a draft copy of this Award on December 23, 2003.

ISSUES

The parties were not able to agree on a statement of the issues and agreed that the Arbitrator should frame the issues in his Award. The issues may be fairly stated as:

1. Does the Union have standing to bring the instant grievance?

2. If so, is the grievance moot as a result of the resignation of Marilyn West?

3. If not, did the Village violate the collective bargaining agreement when it negotiated and implemented an individual hiring bonus agreement with Marilyn West, providing West with pay in addition to that provided for her position in the collective bargaining agreement?

4. If so, what is the appropriate remedy?

OPINION

Facts

There is little dispute over the basic facts. Among its other municipal functions, the Village operates a water and wastewater utility. Carroll Vizecky, the Village's Director of Public Works, oversees the utility and is licensed as an operator. The utility's non-management operators, including the Chief Operator, are represented by the Union and their wages are set forth in the contract.

The position of Utility Operator became vacant late in 2002, and the Village posted the position. No incumbent employee had the certifications desired for the position and the Village advertised the position in various papers and journals in the upper Midwest. After two months of advertising, the Village got only a single application, from Marilyn West, an operator at the Neenah wastewater facility. In discussing the job, West told the Village's representatives that she would not take the job for what the Village was offering to pay. Vizecky approached Staff Representative Rick Badger and Local Union President Richard Sharratt to ask the Union's agreement to hire West at more than the entry level rate. Both refused unless the Village would consider an across the board increase for the bargaining unit. Vizecky then went back to West and negotiated an incentive agreement with her, whereby she would accept the job at the entry level rate from the contract, but the Village would also pay her a hiring bonus in four installments. By the terms of the agreement, which contemplated that she would begin work on May 21, 2003, West would be paid $2,500 on June 20, 2003; $1,500 on November 20; $2,500 on May 20, 2004; and $357 on June 20, 2005. If she left prior to any of those dates, she would not receive the remainder of the payments.

West signed the agreement on May 20th and began work the next day. The Village President signed the agreement on May 21st. One week later, Vizecky sent Rick Badger a letter, advising him that the vacancy had been filled, and that "Ms. Marilyn West was hired at the regular board meeting in May, started full-time Wednesday, May 21, 2003 salary per union contract."

In June, the Village paid West the first installment of her hiring bonus. Sharratt learned of the payment and the instant grievance was filed by the Local. The grievance demanded that the Village cease and desist its practice of paying extra money to West and that the money be repaid. The grievance also advised the Village that the grievance would be dropped if all Village employees were paid $2,500. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration on August 14th.

On July 31st, West resigned her employment with the Village. Since that time, her position has been filled by an Operator Trainee.

Arguments of the Parties

At the hearing, the Union argued that the collective bargaining agreement is the sole basis on which compensation to bargaining unit employees can be paid and that the agreement recognizes the Union as the sole bargaining agent for all persons and positions covered by the agreement. The individual compensation package negotiated with West violates the contract in that it provides for pay other than the contractual rate. Contrary to the Village's claims, the Union has standing as the bargaining agent to enforce its contract. Moreover, the resignation of West does not moot the grievance, since damage was done to the bargaining unit as a whole, and West's departure does nothing to remedy that damage. The Arbitrator must therefore grant the grievance and as equitable relief, should require the Village to recover the money from West and pay the same bonus amount to all other unit employees.

The Village argued that there was no violation and, even if there had been, the Union lacked standing to bring this complaint. Since West was not an employee at the time the hiring bonus was negotiated, she was not in the bargaining unit. The Union has no right to represent employees who are not part of the unit and any pre-hire negotiations between West and the Village are simply not any of the Union's concern. Moreover, the resignation of West moots this grievance. There is no important policy concern that needs to be addressed in this case, and thus, there is no reason to proceed to decision.

Even if the case was properly brought and still had some relevance, the Arbitrator should find that there had been no contract violation. West was not a member of the bargaining unit, and thus was not covered by the collective bargaining agreement when the hiring bonus was negotiated. After she joined the bargaining unit, her pay and benefits were

precisely as specified in the labor contract. Nothing in the contract specifically addresses hiring bonuses or incentives. Thus, the Union is unable to point to any specific contract provision that has been violated and cannot prevail.

The Arbitrator must bear in mind that the Village acted out of necessity. It could not hire at the rate specified in the contract, and it needed to fill the job. The Union refused to allow any flexibility in the hiring rates unless the Village acceded to an unreasonable and unnecessary across the board wage increase. The Village is obligated to provide utility services, and was entitled to act to meet its obligations.

Discussion – Standing and Mootness

The initial questions are whether the Union has standing to bring this grievance and, if so, whether the grievance is mooted by West's departure. I conclude that the Union does have standing and that West's departure does not moot the grievance. The reasons for each conclusion are largely the same. The Union did not represent West individually at the time the private negotiations with her commenced, but it did represent the position over which she was negotiating. The amount of compensation paid for the work performed in the bargaining unit is a critical concern to the Union, as is the integrity of the wage schedule it negotiates. This grievance does not concern some gray area of hiring incentives such as moving expenses. The hiring bonus was expressly intended as a supplement to the wages for the job. It was expressly intended to circumvent the wage schedule negotiated by the Union.

An effort to paper over deficiencies in the wage schedule is a matter of concern to the bargaining unit as a whole. If the wages rates are not sufficient to attract qualified candidates, there is obviously pressure on the Employer to negotiate an increase in those rates. That in turn provides the Union with leverage in negotiations on other wage rates and other issues. In that sense, the Union has as much interest in protecting below-market rates in some positions as it does in protecting above-market rates in other positions. 1/

1/ On the issue of legal standing to bring the grievance, I find that the Union has a free-standing interest in protecting the integrity of the contract. I also note however that the Village is wrong as a matter of fact when it argues that it made this agreement with West before she joined the bargaining unit. West started work on May 21st and the Village signed the agreement on May 21st. Thus, West was a member of the bargaining unit and fully subject to the collective bargaining agreement by the time the hiring bonus agreement was signed.

The Union's interest in bringing this grievance does not lie with Marilyn West. It lies with protecting its status as the sole bargaining authority for the positions in the bargaining unit, and with the remaining members of the bargaining unit who are damaged if Village may

individually bargain to evade those portions of the collective bargaining agreement it finds cumbersome, or even unworkable. Contrary to the Village's arguments, I find that this does present an important issue in the relationship between the parties and the potential for continuing damage, even though West has resigned. Thus, I conclude that the Union had standing to bring the grievance and that the grievance is not moot.

Discussion – Merits

The Village defends the agreement with West, asserting that it followed the collective bargaining agreement to the letter in its treatment of her and that the hiring bonus was a separate matter, not covered by the contract. As indicated above, that is simply not correct, either conceptually or as a matter of fact. Even assuming purely for the sake of argument that a true hiring bonus – money paid up front to an employee for agreeing to take a job – would be consistent with the contract and with the Union's role as exclusive bargaining representative, this agreement is not a hiring bonus. In order to receive the money, West had to work for the Village for specified periods of time. The first payment of $2,500 was made on June 20th. Had West left on June 19th, she would have received nothing. The agreement between the Village and West was a wage supplement and as such it is a clear violation of the collective bargaining agreement.

Discussion – Remedy

The Union requested as a remedy that the Village cease and desist entering into separate agreements on compensation, that it recover the money from West and that it pay each member of the bargaining unit the same $2,500 in additional compensation that West received. The order to cease and desist is an appropriate remedy. An order that the Village seek to recoup the monies paid to West would be appropriate if she was still employed by the Village, but it serves no practical remedial purpose to order the Village to pursue her now that she has left. It is the Village that violated the contract and the Village has already lost the benefit of its illegal bargain. The request for $2,500 to each member of the bargaining unit constitutes nothing more than a penalty, which is inconsistent with the general principle that an arbitrator should seek to place the parties in the position they would have occupied but for the contract violation.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The Union has standing to bring the instant grievance;

2. The instant grievance is not moot as a result of the resignation of Marilyn West;

3. The Village violated the collective bargaining agreement when it negotiated and implemented an individual hiring bonus agreement with Marilyn West, providing West with pay in addition to that provided for her position in the collective bargaining agreement.

4. The appropriate remedy is to void the separate agreement and to order the Village to cease and desist from entering into such agreements with any persons for work covered by the collective bargaining agreement

Dated at Racine, Wisconsin, this 29th day of December, 2003.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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