BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF APPLETON

and

TEAMSTERS LOCAL 563

Case 437
No. 62338
MA-12246

(Part-Time Hire Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Timothy C. Hall**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

Ms. Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, WI 54911, on behalf of the City.

ARBITRATION AWARD

Pursuant to an agreement between the City of Appleton (City) and Teamsters Local 563 (Union), the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding the hire of three part-time Caretaker employees in the Parks Department. Hearing in the matter was held at Appleton, Wisconsin, on September 19, 2003. A stenographic transcript of the proceedings was made and received by the Arbitrator on October 24, 2003. The parties originally agreed to send two copies of their briefs to the Arbitrator, 30 days after their receipt of the transcript for the Arbitrator's exchange. Those briefs were received by the Arbitrator by November 28, 2003. The parties agreed to waive reply briefs. On February 5, 2004, the Arbitrator requested that the parties send her pages 24-28 of Joint Exhibit 3 (the 2000-02 labor agreement) which was missing from the Arbitrator's copy. On February 10 and 11, 2004, the Union and City respectively faxed the Arbitrator the requested pages.

ISSUES

The parties stipulated that the Arbitrator should resolve the following issues in this case:

Did the City violate the collective bargaining agreement by converting two year-round Caretaker positions to three eight-month Caretaker positions? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION

The Employer shall recognize Teamster Local Union #563 as the authorized representative and exclusive bargaining agent for the employees employed in the Park, Forestry, Mechanic, Weed Control and Golf Course Divisions, Recreation Maintenance Division, and Office and Clerical Personnel, exclusive of Supervisors, Professional and Managerial employees, seasonal student help.

. . .

ARTICLE 3 – TEMPORARY and PART-TIME EMPLOYEES

Part-time employees shall receive pro-rata benefits based on the approved budgeted position.

All temporary employees who are employed one thousand (1,000) or more hours in a twelve (12) month period shall be considered permanent employees after such time with no further probationary period required. This provision shall not be used to circumvent the hiring of new employees for permanent positions.

Temporary employees who are hired on a regular basis prior to working 1,000 hours in a twelve month period shall be required to serve the full probationary period provided for in Article 2, regardless of the number of hours they worked as a temporary employee.

ARTICLE 4 – HOURS OF WORK

The work week for employees covered by this Agreement, shall be as follows:

A. The normal work week shall be forty (40) hours, and shall consist of eight (8) hours per day, Monday through Friday.

B. The normal hours of work per day, Monday through Friday, except for office clerical employees shall be from 7:00 AM to 12:00 Noon and from 12:30 PM to 3:30 PM, unless by mutual agreement between the Employer and the Union.

C. The normal hours of work per day, Monday through Friday, for office clerical employees shall be from 8:00 AM to 4:30 PM with a one-half hour unpaid lunch break, unless by mutual agreement between the Employer and the Union. In order that the office may remain open during the lunch period, the employees shall take their lunch breaks at staggered times on an alternating basis.

D. There shall be no split shifts.

E. Employees will be subject to call at any time for special assignments and/or emergency work.

F. Extra (temporary) employees shall not be used unless all available permanent employees are working. Except that temporary employees may be used in lieu of using permanent employees on an overtime basis for the following:
   1. Game preparation work
   2. Situations involving an extension of the work day to complete a task at their job location.
   3. On weekends at the golf course and in Recreation.

G. The work week begins at 12:01 AM Sunday. The work day is defined as a 24-hour period beginning at 12:01 AM.

H. Changes to the schedule may be made by mutual agreement between the Department Head and a majority of the affected employees. The Union shall determine if a majority agrees to the change and will so notify the Employer.

BACKGROUND

It is significant that for many years, all employees in the Park and Recreation Department have been full-time, full-year employees except for two clerical employees who have worked less than 8 hours per day on a year-round basis (since 1999) because they wished to share a job. 1/ It is also undisputed that the City has never employed any temporary employees (for 999 hours or less per year) in the Park and Recreation Department, Operations Division.

1/ The part-time clerical employees have job-shared since approximately 1991; each is now an Administrative Clerk and each works .5 FTE. Both prior to and following 1991, only the two clerical employees have been employed as part-time, with the exception of one Pool Maintenance employee

employed by the Park and Recreation Department, Recreation Division in 1983 and 1984. Bridge Tenders, who were formerly employed part-time by the City in DPW, have never been employed by the Parks and Recreation, Operations Division.

The provisions of Article 4 have not changed in at least the past 7 years and the title of Article 3 has remained as quoted above for the past 30 years, including the reference to part-time employees. However, during negotiations for the contract prior to the effective one, the parties agreed to insert paragraph 1 of Article 3 as there were two part-time clericals in the Park and Recreation Department, sharing a job at their own request, whose benefits were not expressly covered by the agreement. Therefore, the parties agreed to make reference to these employees having prorated benefits based upon the position budgeted for in 2000-02 agreement.

The facts of this case also show that formerly, there were full-time (Greens Keepers) employees employed at the City Golf Course who performed the overtime there. However, the City and Union agreed (in approximately 2000) that employees there would be red circled and stay in their positions and be given the overtime work available at the Golf Course. Yet, two months later, the City notified the Union that it believed it could use seasonal employees at the Golf Course pursuant to Article 4, Section F, subsection 4. Based on the language of Article 4, Section F4, the Union reluctantly agreed that the City could utilize seasonal employees at the Golf Course and therefore, the mutual agreement of the parties regarding red circling of Golf Course full-time employees was never implemented or followed. 2/

2/ Although the language of Article 4, Section F, had read as it appears above for many years, the City had never previously used it to distribute overtime away from the Greens Keeper.

There are two Divisions in the Park and Recreation Department. One is the Operations Division, which covers the Parks, Forestry and Golf Course. The instant grievance covers only the Operations Division. The other division of the Park and Recreation Department is the Recreation Division. The Operations Division employs 25 to 35 seasonal employees while the Recreation Division employs up to 800 seasonal employees. The seasonal employees are most often students who work during the summer months.

Beginning in January, 2002, the City was very concerned about its financial health and the Council placed hiring restrictions so that vacancies could not be filled unless approved by the Mayor, the Personnel and Finance Committee and HR Director Neisen. 3/ Changes in the Table of Organization must be approved by both the Personnel and Finance Committee and the Appleton Common Council. Prior to January, 2003, there were two full-time (full year) Caretaker positions vacant in the City of Appleton, Park and Recreation Department,

Operations Division. At this time, the Common Council converted the two full-time Caretaker positions to three part-time eight-month positions and thereby changed the Table of Organization to reflect their action. At this time, the Common Council had funding for the three eight-month part-time Caretaker positions already in the budget, equal to the previously budgeted two full-time Caretaker positions.

3/ Prior to this time, HR Director Neisen could authorize the filling of vacancies on her own.

The City has a policy regarding employee status, which defines same for "non-represented employees." This is the only City document which defines regular part-time, part-time, temporary and seasonal employees. It reads in relevant part as follows:

. . .

II. POLICY

All City of Appleton non-represented employees must fall under one of the defined categories of employee status.

III. DISCUSSION

The City of Appleton may hire full-time, part-time, temporary, seasonal, grant funded, student intern, co-op, limited term or temporary employees pursuant to the budgetary approval by the City Council.

IV. DEFINITIONS

A. Regular Full-Time (exempt): Employee who works a minimum of 2080 hours per year or 80 hours bi-weekly and not eligible for overtime or compensatory time for any hours worked beyond 40 hours per week. A full-time exempt employee is expected to work beyond 40 hours per week. A full-time exempt employee is expected to work whatever hours necessary to complete the job they have been hired for. Employees whoa re classified as exempt must be paid on a "salaried basis" meaning that the person must be paid the same full salary for any week in which work is performed without regard to the number of hours worked.

Regular Full-Time (non-exempt): Employees who work 2080 hours per year and are eligible for overtime after working 40 hours per week.

. . .

B. Regular Part-Time: Employees who are normally scheduled to work more than 1040 hours per week but less than 2080 hours per year. Part-time employees shall be eligible to receive pro-rated City fringe benefits.

C. Part-time: Employees who normally work less than 1040 hours per year. Part-time employee are not eligible for benefits.

D. Temporary: Employees hired to fill in on a limited basis with no specific end date or specified time period. Temporary employees are eligible for benefits.

E. Seasonal: Employees hired to perform seasonal work. Seasonal employees are not eligible for benefits. Employment terminates at the end of the season.

. . .

The City admittedly tracks seasonal and temporary employee hours very carefully so that these employees do not exceed 1,000 hours worked for the City in order to become permanent employees. The Park and Recreation Department has a budget for seasonal work which is set by the Common Council.

FACTS

In September, 2002, a City contract proposal to the Union sought to "modify language to allow for flexible hours" and to "discuss less than full-time regular positions" in the Park and Recreation Department. Specifically, the City stated to the Union at negotiations in September, 2002, that the Park and Recreation Department was a 24/7 operation and that the City needed flexibility to assign employees, for example, on the weekends (from 8:00 a.m. to 12 Noon) in order to avoid overtime. The Union rejected this proposal. The City also stated that it wished to employ three to five part-time Caretakers which would work from April 1st through November 30th each year and then be laid off by the City from December through March of each year; the City suggested that these employees receive prorated benefits. The Union made a counter-proposal to the City's proposal wherein it suggested that no more than two part-time Caretakers could be utilized by the City, Monday through Friday, for the same hours as full-time Caretakers and receive Caretaker wages; that these part-time Caretakers could apply for full-time full year positions in the Department whenever a full-time employee retired or quit and the City could then replace a part-time worker with another part-time worker, up to a total of two. The Union noted that the City also had labor pool employees who are not represented by the Union who could assist in departmental work.

The City rejected the Union's counter-proposal stating they were not interested in it; that they did not feel they had to bargain with the Union regarding how to hire or what type of employees to hire and that the City would do whatever it chose with its Table of Organization. The parties ratified a labor agreement sometime after the end of May, 2003, which did not contain any changes in Articles 3, 4 or the side letter quoted herein.

Sometime in January, 2003, without prior notice to the Union, the City advertised for three part-time Caretakers and at approximately the same time it posted for these positions as openings under the contract. That posting read in relevant part as follows:

. . .

> There is a job vacancy for a Park Caretaker-Eight Month for the Parks and Recreation Department. This position is full-time for eight months out of the year — April through November. The starting rate for this position is $16.79/hour (2002 wage). For further information on the duties of this position, please see the attached job description and job analysis requirements.
>
> For employees with contractual posting rights to this position, please note the following: If this vacancy was created as a result of the incumbent signing for another position for which they had posting rights, that incumbent retains the right to return to this position during the approved trial period. If the incumbent exercises their right to return or is returned by the City, you may be displaced to your previous position. Testing may be required for this position.

. . .

The job description the City created for the Park Caretaker-eight-month position read as follows:

PARK CARETAKER – EIGHT MONTH

NATURE OF WORK

> This is a semi-skilled position responsible for the day-to-day maintenance and repairs to parks, City buildings and grounds such as litter removal, refuse pick-up, mowing grass, landscaping and snow removal and inspecting and maintaining City equipment. Work is performed from April to November under the general supervision of the Park Foreman and/or Golf Superintendent, and receives direction from Leadmen and Technicians.

JOB FUNCTIONS

ESSENTIAL JOB FUNCTIONS

- Cleans and maintains park and other City buildings, shelters and rest rooms.
- Oversees and provides direction to seasonal employees.
- Maintains parks and other City property, collects and disposes of litter and refuse, mows grass, rakes and removes leaves, applies chemicals and maintains turf.
- Operates and maintains related equipment such as mowers, plows, trucks, tractors, etc.
- Paints buildings, playground equipment, fencing, and other City facilities.
- Removes snow from park roads, sidewalks, other City properties, and maintains ice rinks.
- Performs routine maintenance and safety checks on facilities and equipment.
- Performs minor maintenance on park and other City buildings and facilities.
- Performs minor repairs/maintenance to recreation program equipment/apparatus such as bases, hockey nets, signs, tumbling mats, etc.
- Advises and supports supervisory staff.

OTHER JOB FUNCTIONS

- Assists forestry division with brushing, chipping, site clearance, etc.
- Trims hedges and bushes.
- Prepares buildings and parks for recreation programs.
- Distributes supplies to parks and recreation programs.
- Performs related work as assigned.

REQUIREMENTS OF WORK

Requires some experience and training beyond high school in building and grounds upkeep and general maintenance or any equivalent combination of experience and training which provides the following knowledge, abilities and skills.

- Knowledge of parks operation, facilities and procedures.
- Some knowledge of the tools, methods, and materials used in the building trades such as plumbing, welding, carpentry, masonry, painting, etc.
- Some knowledge of horticulture/landscaping and grounds maintenance and techniques.
- Some knowledge of the types and uses of common hand tools.
- Advises and supports the Park Operations Manager or designee.
- Ability to perform safety inspections and minor equipment repairs.

- Ability to operate truck, tractors and turf and equipment.
- Ability to understand and follow oral and written instructions.
- Ability to maintain effective relationships with other employees, volunteers and to deal effectively with the public in a courteous and tactful manner.
- Ability to perform tasks on a regular basis which require frequent standing, climbing, lifting, reaching, bending, squatting, and carrying.
- Ability to work in a variety of temperatures, weather and working conditions.
- Ability to lift and move heave [sic] picnic tables, large wall panels, hockey boards, etc.
- Ability to perform duties with varying heights.
- Possession of or ability to obtain certification as a pesticide applicator.
- Possession of (or ability to obtain) a valid Wisconsin Class A Commercial Driver's License (CDL) and possession of good driving record.

No bargaining unit employees were interested in these positions. The City filled them with applicants off the street. 4/

4/ Three part-time Caretakers, all paid at the same rate as full-time Caretakers, were hired by the City. All three employees are Union members and pay Union dues which are based upon their hourly rate, not upon their hours worked. After their hire, the Union and the City agreed upon various benefits for these eight-month Caretaker employees, including holidays, insurance, retirement, vacation, sick leave, funeral leave, life insurance, a Section 125 flexible spending account and deferred compensation.

On January 24, 2003, the Union filed the grievance herein, asserting

> Parks department came to the Bargaining table to take 2 Caretaker positions that are open and fill them with part-time. They have unilaterally plan [sic] on establishing this position. They have made this a mandatory [sic] subject of bargaining. Therefore this issue should be bargained.

On April 15, 2003, HR Director Neisen responded as follows to the grievance:

. . .

> This letter shall constitute the City's response to the above-mentioned grievance. The parties discussed this issue on March 28, 2003 as a final-step grievance meeting at which time it was decided to place the issue on hold pending further discussion at the mediation session on April 4, 2003. During the parties discussions on April 4, 2003 it was decided that this issue needed to move

forward pursuant to the grievance procedure and that a response from the City would be forthcoming.

The issue in this grievance is whether or not the City has the right to create part-time positions in lieu of full-time positions. The Union agrees that it is the Employers' right to create part-time positions but objects to the present situation of creating 3 part-time positions in lieu of 2 full-time positions arguing that this is a circumvention of Article 3 of the parties labor agreement. The Union seeks as remedy, to have some guarantee that future positions will be filled as full-time or that the Employer provide some sort of guarantee as to the number of full-time positions.

The City does not believe that the Collective Bargaining Agreement has been violated and therefore respectfully denies the grievance. If the Union wishes to move this grievance forward, it should do so within five (5) working days of receipt of this response or the City will consider this grievance dropped.

. . .

POSITIONS OF THE PARTIES

The City

The City argued that all positions were vacant when the City took action to change its Table of Organization to delete two full-time Caretakers and replace them with three eight-month Caretaker positions. The City noted that no Union employees were deprived of work by the City's actions. The City urged that unless it is restricted by statute or the collective bargaining agreement, it retains an unqualified right to hire or refuse to hire into positions maintained by the City's Common Council.

Here, the City chose not to hire two full-time Caretakers and this was its' management prerogative. In the absence of a contract provision limiting the City's rights, the City can determine whether a vacancy exists and whether and when it shall be filled. In addition, the City has the right to schedule work in order that it be most efficiently done within the parameters of the labor agreement. All three part-time Caretakers were paid the same rate of pay as the full-time Caretakers and they have paid Union dues as do other members of the unit.

Thus, the issue here is whether the three part-time Caretakers are "part-time" employees or are "temporary" employees. The City noted that these terms are not defined in the labor agreement with the exception that if temporary employees work more than 1,000 hours per year they become permanent employees. Thus, the City has looked to its policy, not the labor agreement, to define regular part-time employees and it has treated these three part-time Caretakers as such, working them more than 1,040 but less than 2,080 hours per year. In addition, the part-time Caretakers are eligible for prorata benefits.

The Union has argued that there are no temporary employees in the Park and Recreation Department and that seasonal employees are not temporary employees. However, the City argued that seasonal employees are those working less than 1,000 hours per year (in a 12 month period) and are hired only for the "season." As such, seasonal employees receive no benefits and have no guarantee of being rehired for the next season. This is not true of the three part-time Caretaker employees who have a guarantee of returning year after year.

The City urged that for approximately 30 years, the contract has contained language concerning "temporary employees" yet the City has not employed any temporary employees in the Park and Recreation Department. The language clearly has been kept in the labor agreement to prohibit the City from hiring a series of temporary employees, working them less than 1,000 hours per year, in order to avoid paying benefits and to avoid employing more permanent employees who are members of the Union and whose jobs are subject to job posting and other contract provisions. The City has carefully tracked hours worked by temporary and seasonal employees and has avoided this complication over many years. Where, as here, the City hired the three part-time Caretakers pursuant to the contract and has given them prorated benefits and applied Union membership provisions to them, these employees must be treated as regular part-time employees.

The City noted that Teamster employees have worked part-time for the City in its other bargaining units, Streets, Sanitation, CEA, Traffic, Water and Department of Public Works; and that in the early 1980s, City bridge tenders who were full-time in the summer, worked at the Municipal Building in part-time positions after the summer season was over. However, the City admitted that the Park and Recreation Department has never employed in part-year/part-time positions prior to this case. The City urged that the facts and evidence of this case simply do not support the Union's argument that if the City works employees less than 2,080 hours but more than 1,000 hours for a portion of the year, the employees are no longer temporary employees but become permanent employees in violation of Article 3. The City therefore argued that the grievance be denied and dismissed in its entirety.

The Union

The Union argued that Article 4, Section H, states that changes to the work schedule can only be made by mutual agreement between the City and the Union. Article 3 of the contract also prohibits the City from using temporary employees to avoid hiring permanent employees. Therefore, the City has violated Articles 3 and 4 by converting two permanent full-time Caretaker positions into three temporary eight-month positions. This conclusion is supported by the fact that the City has used these temporary employees to do more work than is listed in Article 4, Section F, and it has imposed schedule changes on the three part-time Caretakers in contradiction of Article 4, Section H of the contract.

Article 3 was intended to cover non-traditional employees, that is seasonal employees, who work only part of the year. These part-time Caretakers are certainly seasonal. There is no language in the agreement defining part-time employees and the Arbitrator should not allow the City to obscure this case and the language contained in Article 3 by engaging in such "casuistry." Thus, the Union urged that the City cannot honestly claim that the contract is ambiguous regarding the use of seasonals when there is a side letter restricting their use.

The manner in which the City has proceeded in this case makes clear that the City was aware that its acts would violate the contract. In this regard, the Union noted that the City floated its proposal for the eight-month Caretakers early in the 2000-02 negotiations; and that the City tried to get the Union to consent to its plan because of contract restrictions on the use of temporary and seasonal employees. The Union noted that HR Director Neisen admitted herein that the City had already decided to create three eight-month positions before the 2000-2002 contract negotiations began with the Union. However, the Union urged that the remainder of Neisen's testimony was not credible. In this regard, the City's actions of posting the three eight-month positions was merely an attempt to make the best of a bad situation from the City's point of view.

The City's attempts to justify its actions are insufficient to overcome the violation of Articles 3 and 4 in this case. The Union has refused to allow a violation of the agreement. If the Arbitrator allowed the City to take the actions it took in this case, this would undermine the contractual relationship between the parties, decrease the Union's legitimacy in the eyes of its members and lower morale among City employees. The Union noted that in the public sector, budgetary restraints, the Table of Organization, the change in employee status definitions and the need for staffing flexibility and to continue the level of services cannot be used as excuses to override the specific terms of a labor agreement. Based on the above, the Union urged the Arbitrator to sustain the grievance "and order City to limit such eight-month positions to no more than 2 in number and to offer the individuals currently filling the eight-month positions seniority in applying for full-time, year-round Caretaker positions."

DISCUSSION

Article 3, paragraph 2, defines "permanent employees" as those employees who "are employed one thousand (1,000) or more hours in a twelve (12) month period," and "no further probationary period [is] required" of them. Under this contract language, the City could conceivably employ "temporary employees" for up to 999 hours in a 12-month period and discharge them, without violating the labor agreement so long as the City does not use its powers under this provision "to circumvent the hiring of new employees for permanent provisions."

The Union has argued that the language of Article 3, paragraph 1, was placed in the agreement and was intended to apply only to the two clerical employees in the unit who have

job-shared since 1991. Article 3, paragraph 1 states that "part-time employees shall receive pro-rata benefits. . ." This provision does not limit the type of part-time employees who are to receive pro-rata benefits: specifically, this provision does not refer to part-time clericals. Therefore, the language of Article 3, paragraph 1, on its face, is extremely broad and it could reasonably be interpreted to apply to any employees who are part-time because they work only part of the year. The Arbitrator also notes that the title of Article 3 has read as it appears in the effective agreement for a long time — prior to the advent of the current Union Representatives.

The City's search of its records also showed that from 1979 through 1982, the Park and Recreation Department had no part-time employees; that in 1983 and 1984, the Department employed one " pool maintenance" employee with "exempt status" at .8 FTE; and that from 1985 to 1991, the Department had no part-time employees. From 1991 to date, the Department has employed two part-time clerical employees (at .5 FTE each) who chose to job-share at their request. These facts plus the fact that there is no contractual definition of part-time employees and no limitation on the applicability of Article 3, paragraph 1, tend to support a conclusion that this provision, on its face, could be used to apply to employees who are part-time because they work part of the year.

The City has treated the three part-time Caretakers as permanent employees who work the same hours as full-time employees (but for only eight months) and who have an expectation of continued employment year after year so long as they pass their initial probationary period. Thus, the City's hire and use of these part-time Caretakers has not technically violated Article 4, Sections A-D and H, contrary to the Union's assertions herein. 5/ It is also clear that the City has not treated these part-time Caretakers as seasonal employees, who are exempt from contractual coverage pursuant to Article 1. Rather, the City posted these positions; it has paid those hired into the positions the contractual rate of pay for full-time Caretakers; it has applied Union dues and check-off provisions to these employees and it has paid them pro-rated benefits. It is significant that no full-time employees were on lay off at the time these part-time Caretakers were hired, nor have full-time employees been laid off since the hire of these part-time Caretakers.

5/ Article 4, Section F, makes clear that all permanent (unit) employees must be fully employed before "extra (temporary) employees" may be used by the City. Article 4, Sections A through D, define the hours of work of unit employees and state that "the normal work week" is 40 hours per week and 8 hours per day "Monday through Friday" and these sections define the normal hours of work per day in this context and state that "there shall be no split shifts."

The fact that the parties never contemplated that the City would employ eight-month employees, that there was no testimonial evidence to indicate that the parties ever discussed less than year-round employment for unit employees prior to the 2002 negotiations and that

Saturday and Sunday generally off, is very troubling to this Arbitrator. In labor relations, the parties can never foresee every potential application of broad contractual language. But, the application of such broad language to unforeseen situations is permissible where, as here, Article 3, paragraph 1, is so broad on its face that it can reasonably be applied to the three part-time/part year Caretakers.

The City has argued that its policies should determine the definition of part-time employees in this case. I disagree. The labor agreement defines temporary employees , and by implication, permanent employees and it refers to part-time employees. The fact that the contract does not define part-time employees in so many words does not mean that the City can impose its policies upon the Union. Thus, the express terms of the labor agreement must control this case, not the City's policies. In addition, the fact that the City has employed part-time employees in other bargaining units represented by the Teamsters, can have no effect upon the dispute in this case, as those units are covered by separate labor agreements between the City and the Teamsters.

The Union has argued that the three part-time Caretakers are seasonal employees because they work only part of the year. The City's deliberate actions in posting, hiring, paying, retaining and giving pro-rata benefits to these part-time Caretakers has distinguished them in every material way from seasonal employees so that these part-time Caretakers must be considered permanent part-time employees rather than seasonal employees. Thus, the contractual side letter regarding seasonal overtime and Article 4, Section F, regarding the use of temporary employees do not apply to these three part-time Caretakers.

It is significant that there is no language in this agreement describing the required size or structure of the bargaining unit and that there is no language restricting the City's reserved management right to determine staffing levels. It is also significant that the City admitted that it was under hiring constraints and that it had grave budgetary concerns when it began and continued negotiations with the Teamsters in 2002 which caused it to seek ways in which it could do business in a more efficient (less expensive) manner.

In the specific circumstances of this case 6/ and in the absence of any evidence showing that the City's hire and retention of the three part-time Caretakers was intended to undermine and/or destroy the Union, I issue the following

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6/ The Union's requested remedy herein and the City's attempt to get the Union to agree to the employment of eight-month Caretakers during the 2002 negotiations, in my view, are merely understandable reflections of how uncertain both parties were how a grievance on the issue would be resolved.

AWARD

The City did not violate the collective bargaining agreement by converting two year-round Caretaker positions to three eight-month Caretaker positions. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 11th day of March, 2004.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/anl
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