

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LACROSSE

and

LACROSSE CITY EMPLOYEES UNION LOCAL 180, SEIU

Case 327
No. 62097
MA-12156

Appearances:

Peter B. Kiskan, Deputy City Attorney, City of LaCrosse, City Hall, 400 LaCrosse Street, LaCrosse, Wisconsin 54601, appearing on behalf of the City.

Davis, Birnbaum, Marcou, Seymour and Colgan, LLP, 300 Second Street North, Suite 300, P.O. Box 1297, LaCrosse, Wisconsin 54602-1297, by **James G. Birnbaum**, appearing on behalf of the Union.

ARBITRATION AWARD

City of LaCrosse (hereafter City or Employer) and LaCrosse City Employees Union Local 180, SEIU (hereafter Union) are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so appointed on March 12, 2003. A hearing was held August 14, 2003 in LaCrosse, Wisconsin. The hearing was not transcribed. The record was closed on October 16, 2003, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issue. The Union frames the issue as follows:

Did the City violate Article 17 and/or past practice when it failed to bid the vacancy in the Chemist/Pretreatment Coordinator position?

If so, what is the appropriate remedy?

The Employer frames the issue as follows:

Whether the City of LaCrosse violated the collective bargaining agreement by redistributing and reallocating duties of the position, which became open through retirement, where the duties of this position no longer warranted a full-time vacancy?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE 2
GRIEVANCE PROCEDURE**

...

The arbitrator shall not add to, or subtract from the terms of this agreement.

...

**ARTICLE 17
TRANSFER**

- A. Department seniority is recognized and shall be considered in filling vacancies and making promotions in the department, providing the applicant is qualified in accordance with the job description as posted by the City. The best qualified candidate of those bidding on the job within the department shall be awarded the position. The City carries the burden to show that the person selected is the best qualified.

Employees who bid on higher classifications may successfully bid only three times in a calendar year. Successfully bidding shall be defined as completing the thirty-day trial period.

...

ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of LaCrosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively with Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

ARTICLE 25
AMENDMENT PROVISION

This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union wherein mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

ARTICLE 28
ENTIRE AGREEMENT

The foregoing constitutes an Entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

RELEVANT BACKGROUND

Prior to January 2000, the following individuals held the following positions in the City's Waste Water Treatment Plant: Cliff Hendricks-Chemist/Pretreatment Coordinator; Tom Genz-Chemist; Dave Goyette-Chemist and Rich Smith-Lab Tech/Pretreatment Aide. In January of 2002, Hendricks retired and, in March of 2002, Genz retired. The City did not post a vacancy in the position of Chemist/Pretreatment Coordinator.

On or about November 11, 2002, a Union grievance was filed, alleging that the City had violated Article 17, Transfers. More specifically, the grievance states:

On March 31, 2002, the position of Chemist/Pretreatment Coordinator at the Wastewater Utility became vacant when the employee holding the position, (Cliff Hendrick), retired. The position has remained unfilled and as of today's date, 10/31/02, has never been posted for bidding. On October 14, 2002, Jeff DeJarlais, the Special Projects Coordinator at the Wastewater Utility was informed by supervisor Greg Paul, that Jeff would be performing the duties of the Pretreatment Coordinator on a permanent basis. Greg has had Jeff work on a regular basis in the lab doing testing like Cliff used to do, and in September of 2002, Jeff's Monday to Friday schedule was changed. His new schedule is like Cliff's former schedule and Jeff now works one weekend per month in the lab doing testing just like Cliff used to do. In light of the current situation, it is the Union's contention that the City has filled a vacant full-time position without posting the job for bidding. This violates Article #17 of the current bargaining agreement.

The grievance was denied at all steps of the grievance procedure and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

This grievance challenges the City's attempt to avoid the job bidding requirements for filling the vacant position of Chemist/Pretreatment Coordinator. Although the City maintains that the position no longer exists, the persons who actually observed the work being done and the City's own official records confirm that this position is alive and well.

In the last several years, four people have worked in the lab at the Wastewater Treatment Plant. Cliff Hendricks worked as a Chemist/Pretreatment Coordinator; Tom Genz worked as a Chemist; Dave Goyette worked in the lab as a Chemist; and Rich Smith worked in the lab as a Lab/Pretreatment Aide. In January of 2000, Tom Genz retired. Genz' position was never filled.

In May of 2000, management decided to assign Jeff DeJarlais some duties in the lab, so he could gain background information for his position, i.e., Special Projects Coordinator. At that time, DeJarlais did not spend a majority of his time in the lab. Cliff Hendricks retired in March of 2002 and, thereafter, management assigned DeJarlais almost all of Hendricks' duties.

Prior to assigning DeJarlais lab duties, management approached the Union via Rich Smith and asked if the Union had any objection to such assignment. After conferring with co-workers, Smith advised management that there was no objection to DeJarlais working in the lab, so long as he did not prevent Union members from obtaining overtime hours.

Prior to Hendricks' retirement, DeJarlais performed two of the duties that are included in the Chemist/Pretreatment Coordinator position. With the exception of a few duties that are no longer performed (edits operator's log sheets, performs microscopic examination of activated sludge, makes operational decisions in regard to biological and chemical treatment processes in the absence of the superintendent, and administer underground storage tanks) DeJarlais now performs all of the duties in the Chemist/Pretreatment Coordinator job description and his work schedule has been changed such that he is now working the hours and weekend shifts that Hendricks worked while employed for the City.

As DeJarlais testified, on October 14, 2002, management told him that he would be the Pretreatment Coordinator. DeJarlais expressed his objection to management.

Under Article 17, Section E, the City is required, if there is a vacancy in a non-professional full-time position, to bid it. The City failed to bid the Chemist/Pretreatment Coordinator position and gave this position to Jeff DeJarlais.

The City has not reallocated just a few of the position's duties; rather, it reallocated 27 of the 31 duties. Although management may require employees to perform duties outside of their classification for temporary periods, it may not require the performance of such duties on a regular and continuing basis. The City's argument that Hendricks spent 40% of his time performing a duty called "Self-Directed Study and Research" is rebutted by the testimony of the Union's witnesses and the fact that such a duty is not listed on the position description. Notwithstanding the City's argument to the contrary, the Chemist/Pretreatment Coordinator position was not eliminated.

All this occurred shortly after the City tried to institute a reorganization of the Wastewater Treatment Plant. In negotiations to the successor of the 2000-2001 agreement, the City proposed the reorganization of the Wastewater Treatment Plant and subsequently withdrew its proposal for reorganization during contract negotiations. Another grievance is pending related to the City's decision to alter the practice of the assignment of laboratory hours at the Wastewater Treatment Plant. In addition, the City has announced the creation of a new job in the Wastewater Treatment Plant and has demanded to negotiate how it would impact that decision.

If the City is able to place one employee in another employee's job, drastically altering and adding to the job content as they choose, it has the power to reorganize its entire work force without bothering to bargain. To read the Management Rights clause in such an expansive manner, particularly with this residual bargaining unit, may drive the Wastewater Treatment Plant and every other Department of the City into labor chaos.

It is clear to the Union that the City is trying to achieve through arbitration that which it could not achieve through contract negotiations. The appropriate remedy for the City's contract violation is to direct the City to bid the position of Chemist/Treatment Coordinator.

City

The Union is asking the arbitrator to order the City to create a full-time vacancy that does not exist; to fund this vacancy; and to post it for bidding. By this request, the Union seeks to have the arbitrator rewrite the collective bargaining agreement, adding terms favorable to the Union, and at the same time, completely deleting the "Reservation of Rights" provision. Under Article 2 of the grievance procedure, the arbitrator shall not add to, or subtract from, the terms of the agreement.

Article 19 vests exclusively in management the right to direct the work force, including, but not limited to, the right to hire, to discipline or discharge for proper cause; to decide initial job qualifications; to lay off for lack of work or funds, or for reduction in the level of services; to abolish positions; to make reasonable rules and regulations governing conduct and safety; to determine the schedule of work and to subcontract work, together with the right to determine the methods, processes and manner of performing work. This broad management rights provision allows the Employer exclusive authority to determine whether a vacancy exists. In view of this unambiguous and clear language, the Union's past practice argument must fail.

In the absence of a contract provision limiting management's rights to fill vacancies, arbitrators recognize that it is management's prerogative to determine if a vacancy exists and if it shall be filled. Arbitrators have also recognized that, absent specific limiting language, management has the right to combine jobs and classifications where there is insufficient work in one (or in each) position for a normal day's work and where excessive workloads do not result from the combination. (Cites omitted). Not one Union witness testified in this case that the reallocation of duties resulted in an excessive workload.

The Union gives much emphasis to the City's reorganization proposal. It is important to note that the position of Special Projects Coordinator was not part of that reorganization proposal.

The Union's witness testimony is highly contradictory, and, as such, should be given little weight. The credible testimony of City witness Superintendent of Wastewater Greg Paul establishes that, upon the retirement of lab employees, Paul performed a careful and thoughtful evaluation of existing positions and that this evaluation lead Paul to conclude that certain work previously performed was no longer being performed; that certain work being performed was no longer necessary; and that the remaining work could be distributed among existing employees.

The evidence demonstrates that insufficient duties existed to justify a full-time Chemist/Pretreatment Coordinator position. In the past, the duties of other wastewater treatment utility full-time positions were reallocated to other positions.

Generally speaking, arbitrators have recognized that management has broad authority to implement the most efficient methods of operation and that, in the absence of specific contractual limitations or a showing of employer bad faith, management has the right to determine whether or not a vacancy exists. The Union has offered no credible evidence that suggests that the City has avoided contractually required procedures for filling positions.

Paul's conclusion that there was not a full-time vacancy with respect to the position of Chemist/Pretreatment Coordinator was made in good faith and for the legitimate purpose of allocating resources in the most efficient and cost-effective manner. The grievance should be denied.

DISCUSSION

ISSUE

The parties were unable to stipulate to a statement of the issue. Given the statements contained in the written grievance, the undersigned is persuaded that the issue is appropriately stated as follows:

Did the City violate Article 17 of the parties' collective bargaining agreement when it failed to post a vacancy in the Chemist/Pretreatment Coordinator position?

If so, what is the appropriate remedy?

Merits

In Article 19, Reservation of Rights, the parties have enumerated certain management rights and agreed that these management rights vest exclusively within management, "except as otherwise specifically provided herein." The enumerated rights include the general rights to manage the City and to direct the work force, as well as the more specific rights "to abolish positions" and "to determine the methods, processes and manner of performing work."

These general and specific Article 19 rights provide the City with the contractual authority to determine whether or not there exists a vacancy in the position of Chemist/Pretreatment Coordinator. The issue then becomes, are there other contractual provisions that may specify "otherwise?"

The Union relies upon Article 17, Transfer. This Article does not “specify” a limitation upon the City’s contractual authority to determine if a vacancy exists. Rather, it is a provision that, by its terms, establishes a process for filling vacancies and making promotions. The City, however, cannot contravene Article 17 seniority rights by placing an employee in a position that is a de facto vacancy or a promotion. Inasmuch as the Union does not argue that there has been a promotion, the undersigned turns to the issue of whether or not there is a de facto vacancy.

It is undisputed that, upon the retirement of Cliff Hendricks, duties he previously performed in the Chemist/Pretreatment Coordinator position were reassigned to other employees. The Union claims that the amount and kind of duties assigned to Special Projects Coordinator DeJarlais are sufficient to warrant the conclusion that there is a vacancy in the Chemist/Pretreatment Coordinator. The City denies that there is sufficient work to justify a full-time Chemist/Pretreatment Coordinator; asserts that existing lab employees are able to absorb the remaining work of the Chemist/Pretreatment Coordinator; and that the decision to reallocate the remaining Chemist/Pretreatment Coordinator duties among existing employees, including DeJarlais, is a reasonable exercise of management’s right to operate its business in an efficient and cost-effective manner.

Upon a review of the record, the undersigned is satisfied that there have been significant changes that have affected the workloads of Wastewater lab employees, including Hendricks and DeJarlais. Among the significant changes affecting the workloads of Hendricks and DeJarlais are the following: Paul’s decision that self-directed research previously performed by Hendricks would no longer be performed (Although Paul’s claim that this constituted 40% of Hendricks’ workload is rebutted by the testimony of the other witnesses, it is evident that Hendricks devoted a portion of his time to such work); Paul’s decision that the City would no longer allow DeJarlais to participate in WWOA on City time; the hiring of a full-time Safety Director, which reduced DeJarlais’ work duties; the establishment of a City Information Systems Department, which reduced DeJarlais work duties; the City’s decision to join a statewide lobby group, which reduced DeJarlais’ duties; Paul’s decision to significantly limit the occasions on which two employees would sample, which freed up the Lab Tech to perform lab related work that had been performed by Hendricks; and that, over time, technological advances, including automatic processes, reduced the amount of required lab testing, which freed up the Chemist to perform additional lab related work.

DeJarlais’ testimony establishes that he continues to perform a substantial number of the job duties that were historically performed by the Special Projects Coordinator, as well as a substantial number of duties that were historically performed by the Chemist/Pretreatment Coordinator. Thus, one may reasonably conclude that DeJarlais does not occupy the Chemist/Pretreatment Coordinator position that was occupied by Hendricks. Such a conclusion is also supported by Paul’s unrebutted testimony that workers other than DeJarlais

are now performing lab work historically performed by Hendricks, as well as Union Exhibits 6 and 12, which indicate that DeJarlais is in the lab for significantly fewer days than Hendricks. For example, in 2001, Hendricks was in the lab for 155 days, or 52% of the time. In 2002, DeJarlais was in the lab for 73 days.

The evidence that DeJarlais was able to absorb a substantial number of Hendricks' duties supports the City's claim that there is insufficient work to justify a full-time Chemist/Pretreatment Coordinator. The fact that DeJarlais was told by management that he would be the Pretreatment Coordinator does not require a contrary conclusion, but rather, merely confirms that DeJarlais has been assigned a substantial number of Hendricks' duties.

In summary, the record warrants the conclusion that, upon the retirement of Hendricks, there was insufficient work to justify a full-time position of Chemist/Pretreatment Coordinator and that, although DeJarlais performs a substantial number of duties previously performed by Hendricks, DeJarlais does not occupy the position that was held by Hendricks. Under the facts of this case, there is no de facto vacancy in the position of Chemist/Pretreatment Coordinator.

It is not evident that Supervisor Paul's reevaluation of the needs of the Wastewater lab was prompted by any factors other than the retirement of long-term employee Hendricks and a desire to make Wastewater operations more efficient. Notwithstanding the Union's argument to the contrary, it is not evident that the City has tried to circumvent job bidding requirements. Rather, under the circumstances of this case, the City's decision to not post a vacancy in the position of Chemist/Pretreatment Coordinator is a reasonable exercise of the City's contractual management rights and does not violate Article 17.

The Union apparently is of the opinion that there is a past practice that would require the City to post a vacancy in the position of Chemist/Pretreatment Coordinator. The record, however, does not provide any reasonable basis to conclude that, in the past, the decision to post, or to not post a vacancy, was based upon any factor other than the City's exercise of the management discretion reserved to the City under Article 19.

The City has exercised rights provided to the City under the existing collective bargaining agreement. Accordingly, the evidence that the City proposed and then withdrew a comprehensive plan regarding the reorganization of the Wastewater plant during the negotiations of the successor contract does not warrant the conclusion that the City has acted in bad faith, or is attempting to gain in arbitration that which it did not gain in negotiation.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The City did not violate Article 17 of the parties' collective bargaining agreement when it failed to post a vacancy in the Chemist/Pretreatment Coordinator position.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of April, 2004.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

