BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2239, WISCONSIN COUNCIL 40

and

THE CITY OF RACINE

Case 683
No. 62858
MA-12440

Appearances:

John P. Maglio, Staff Representative, P. O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, City Hall, 730 Washington Avenue, Racine, Wisconsin 53403, appeared on behalf of the City.

ARBITRATION AWARD

On October 15, 2003, AFSCME Local 2239 and the City of Racine filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint a member of its staff to hear and decide a grievance that was pending between the parties. The Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on April 13, 2004 in Racine, Wisconsin. At the conclusion of the evidentiary hearing, the Union made a closing oral argument, and rested. The City submitted a written brief, received on June 7, 2004. This Award addresses what, if any obligation the City has to consider seniority in assigning bargaining unit employees to temporary, non-bargaining unit, vacancies.

BACKGROUND AND FACTS

In June of 2003, the Confidential Secretary to the City's Finance Director was placed on medical leave. The Employer determined to fill that position on a temporary basis, selected

bargaining unit employee Holly Mauer, and assigned her to the position effective June 3, 2003. The basis of the employer's decision was that the confidential work was not full-time. Mauer averaged a little over 10 hours per week doing work from the vacated position, ranging from .3 hours per week to 30 hours per week. It was the view of the City that Mauer could do the essence of the confidential work and continue to perform the core responsibilities of her regular position. Mauer was paid at a higher rate of pay.

The decision to so employ Mauer was announced to the staff of the Finance Department. Kathleen Banker, the Grievant, requested the assignment, and when she was denied, filed the grievance that led to this proceeding. Banker is senior to Mauer, though there are other bargaining unit employees senior to Banker. The employer chose not to assign Banker because her job is that of a payroll clerk. The work of Payroll Clerk is ongoing, and Banker would have had to be replaced. There is one other employee who has a job similar to Banker, but most other City employees cannot substitute for Banker. The parties stipulated that Banker has the skill and ability to do the work.

No other employees grieved Mauer's temporary assignment. The vacated work was not posted. There was no formal mechanism created to apply.

A grievance was filed on June 11, 2003, contending that the employer selected a least senior employee to fill a temporary vacancy. The grievance was denied on July 31, 2003.

In the negotiations for a successor agreement, the employer submitted the following among its proposed modifications:

. . .

E. ARTICLE XV, TEMPORARY ASSIGNMENTS

1. Change Section D from 30 to 90 days

2. Change Section C by adding a sentence providing for a 5% increase to the employee's current rate or the rate of the job, whichever is less.

3. Add the following clause to Section E, last sentence:

. . . "Accept seniority." . . .

The initial employer proposals were dated November 6, 2003. None found their way into the collective bargaining agreement. Each of these temporary assignments proposals was dropped.

It was the uncontradicted testimony of management witnesses that seniority was never a consideration in the filling of temporarily-vacated confidential positions. Employer witnesses testified that such temporary openings have historically been filled by non-City employees, and/or by City employees selected without regard to seniority or the provisions of the collective bargaining agreement by the Employer. This included a temporary confidential vacancy in the Police Department recently filled without regard to seniority. However, on cross-examination, employer witness James Kozina, former Human Resource Director, acknowledged that Article XV, Section E's last sentence was first negotiated into the parties' collective bargaining agreement sometime between 1998 and 2002.

ISSUE

The parties could not agree to an issue. It is the Union's view that the issue is:

Did the City violate the collective bargaining agreement when it failed to award the grievant a temporary assignment to a non-represented position? If so, what is the appropriate remedy?

In the view of the City, the issues consist of the following:

Is this grievance involving a non-bargaining unit position (Confidential Secretary) arbitrable?

Is voluntary and temporary placement in a non-bargaining position subject to the posting and seniority requirements of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE XV

TEMPORARY ASSIGNMENTS

A. An Administrative Manager or his designee shall have the right to make temporary changes on a day-to-day basis in the assignment of personnel within and between all departments or divisions under the jurisdiction of the Administrative Manager. Employees, upon proper notification when possible (at least thirty (30) minutes before the close of the shift), shall immediately report to the reassigned temporary position and thereafter perform the work shift of that division for the duration of the

reassignment. If a temporary reassignment will last more than five (5) workdays, the assignment will be based upon seniority, subject to ability to perform the assigned task.

B. In the event an employee is temporarily assigned to a lower pay rated job, he/she shall continue to receive the pay rate of his/her regular job.

C. In the event an employee is temporarily assigned to a higher pay rate job for eight (8) continuous work hours, he/she shall receive that higher rate of pay while on such temporary assignment, except where the employee is being trained. When the employee is trained, determined to be qualified by the Administrative Manager (or his designee) and working on the job alone with the complete responsibility, he/she shall receive the higher rate. However, the City shall not utilize two (2) or more employees in an assignment to abridge this article.

D. Temporary assignments shall not exceed thirty (30) days.

E. Whenever an employee is assigned to a position not covered by this agreement, said employee shall receive the rate of pay of the position so assigned or ten percent (10%) more than their current rate of pay, whichever is less. Only one employee shall be assigned the duties of the position not covered by this agreement. All other provisions of this Article XV shall apply to this Section.

POSITIONS OF THE PARTIES

It is the position of the Union that the contract is clear. Article XV, paragraphs A through D have existed for 23 years. Somewhere in the 1998-2002 time frame, paragraph E was added. That paragraph determines how represented employees are compensated when filling in for a non-represented employee, it regulates the number of employees filling that job, and invokes all other provisions of Article XV; notably, subparagraph A, which awards the assignment by seniority. There is no dispute the grievant has the skills for the position.

The Union contends that the Employer made an assignment of convenience, not in accordance with the collective bargaining agreement. The Union points to the City's rejected proposal which would have repealed the provision that is currently in dispute. The Union contends that the Police Department incident is irrelevant. In the Union's view, whatever practice previously existed was repealed by the change in contract language.

It is the position of the Employer that the position involved is not covered by the collective bargaining agreement. The Employer contends that historically it has selected temporary replacements regardless of the seniority provisions or other collective bargaining agreement provisions. The Employer points to testimony that the intent of paragraph E was to modify the rate of pay, not the selection practices.

It is the Employer's contention that should the Union prevail, it would require the Employer to post non-bargaining unit vacancies. The Employer notes that there is no such collective bargaining agreement provision which requires that.

DISCUSSION

The Employer, at least in its phrasing of the issue, contends the grievance is not arbitrable. Article X, paragraph A, defines a grievance as "a difference arising between the City and Union or an employee concerning the interpretation, application, or compliance with this agreement, . . ." Given Article XV, E's specific treatment of bargaining unit employees assigned positions not covered by the agreement, I believe this grievance to be arbitrable.

Historically, the City has filled temporary vacancies in non-bargaining unit positions as it saw fit. It has employed external hires and internal employees without regard to seniority. Much of this occurred before Article XV, paragraph E was amended, although it appears the City filled a vacancy in the Police Department following modification of the contract.

The negotiation of paragraph E certainly appears to address this practice. The paragraph specifically addresses circumstances where an employee is assigned to a position not covered by the agreement. It goes on to set the rate of pay. The second sentence prohibits the employer from using multiple employees to dilute the temporary assignment of non-bargaining unit work. The last sentence in paragraph E invokes "all other provisions of this Article XV . . ." to this Section. The reference to "this Section" appears to be a reference to paragraph E.

At hearing, James Kozina testified that the purpose of paragraph E was to clarify the rate of pay to be given to a bargaining unit employee filling a non-bargaining unit vacancy. That testimony is certainly compatible with the first sentence of paragraph E, and is consistent with the second sentence of paragraph E. It ignores the last sentence of paragraph E. Similarly, in its post-hearing brief, the Employer ignores the last sentence of paragraph E.

In its post-hearing brief, the Employer contends that the confidential position is not one covered by the collective bargaining agreement. While it is true that confidential positions are not in the unit or covered by the terms of the contract generally, paragraph E specifically addresses positions outside the unit. The Employer notes that historically it has selected

employees for these temporary non-bargaining unit positions regardless of seniority or collective bargaining provisions. That too is accurate, but Article XV, paragraph E was negotiated by the parties in the years immediately preceding the grievance. It appears that most instances referred to by the Employer preceded the negotiation of paragraph E.

The Employer contends that should the Union prevail, it would be required to post non-bargaining unit vacancies, a result not called for by any provision of the collective bargaining agreement. This argument is conclusory and overbroad. That is, the very question posed by the last sentence in paragraph E is whether or not such positions must be posted if filled by a bargaining unit employee.

In this instance, the Employer filled the temporary vacancy with Mauer because it determined that Mauer could do the core of the confidential work while still performing the essence of her regular position. It did not consider Banker for the job because Banker holds a position that lacks the same flexibility. The decision is both logical and efficient. This is not a case where the Employer regarded the work to be so sensitive that it could not be trusted in the hands of a bargaining unit employee. Both Mauer and Banker are in the same bargaining unit. Neither is this a case where the Employer contends that Banker lacks either the skills and/or ability to do the confidential work. The parties have stipulated to the contrary.

The question raised in this dispute is whether the parties have negotiated over how bargaining unit employees may be reassigned to non unit work. I believe they have. I read paragraph E to apply to circumstances where a bargaining unit employee is assigned to a non unit position. As such, it significantly alters the historic practice of the parties. Under such circumstances, the first sentence sets the rate of pay. The second sentence limits the number of employees to whom such work may be assigned. The third sentence also regulates such assignments, by invoking the balance of Article XV. Significantly, this sweeps in par. A. Under the terms of par. A. the employer has the right to assign and reassign. However, a reassignment that lasts more than 5 workdays is based on seniority, subject to ability. This reassignment lasted more than 5 days. Accordingly, it is covered by the seniority provision.

This Award concludes that the employer is obligated to follow the seniority provision in this assignment because the assignment exceeds 5 days, and involves a bargaining unit employee who has the ability to perform the assigned task. Nothing in this Article requires the employer to fill the vacancy. Nothing in this Article requires the employer to select a bargaining unit employee. When the employer determines to fill a temporary vacancy with a bargaining unit employee, all provisions of Article XV are applicable.

AWARD

The grievance is granted.

REMEDY

The grievant is entitled to be made whole for the wages lost as a consequence of not being offered the temporary vacancy work.

Dated at Madison, Wisconsin, this 8th day of October, 2004.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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