BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, COUNCIL 40

and

VILLAGE OF ROTHSCHILD

Case 18
No. 63745
MA-12699

(Temp/Seasonal Employee Hired while Bargaining Unit Members on Layoff Grievance)

Appearances:

Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 711 Wall Street, Schofield, Wisconsin 54476**,** appearing on behalf of the Rothschild Village Employees Local 1287-A.

Neil Torney, Village President, Village of Rothschild, 211 Grand Avenue, Rothschild, Wisconsin 54474, appearing on behalf of the Village of Rothschild.

ARBITRATION AWARD

AFSCME, Council 40 hereinafter "Union" requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between it and the Village of Rothschild, hereinafter "Village," 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 September 17, 2004, in Rothschild, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on November 15, 2004, at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute.

The Union frames the substantive issues as:

> Did the Employer violate the collective bargaining agreement when it hired summer help in 2004 without recalling and replacing laid off employees? If so, what is the appropriate remedy?

The Village disagreed with the Union's framing of the issues and requested that the Arbitrator frame the issue.

Having considered the evidence, testimony and arguments of the parties, I frame the issue as:

> Whether the Village violated Article 6 of the collective bargaining agreement when it hired summer help during the Summer of 2004? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1. The management of the business of the Village and the determination and direction of the working force including the right to plan, direct and control Village functions; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules; to maintain the efficiency of employees; to establish and require employees to observe Village rules and regulations; to hire, lay-off, or relieve employees from duties; to maintain order, suspend, demote, discipline, and discharge employees for just cause, are the rights solely of the Village, its Board of Trustees, and President.

. . .

Section 5. The Village shall have the right to hire part-time summer help.

. . .

ARTICLE 6 – SENIORITY, PROMOTION, LAY-OFF SEVERANCE

. . .

Section 2. Part-time or temporary employees shall be allowed to work up to a maximum period of five (5) months. At the completion of the five (5) month period the employee shall be released and shall not be rehired for at least five (5) months from the release date. In the event the employee is released prior to the end of the five (5) month period, he or she shall not be returned to work until at least five (5) months have expired since the last date of termination.

The Union shall be notified in writing, of the status of each employee who is hired; i.e., full-time or regular part-time (3 month probation), part-time or temporary.

Section 3. All promotions of employees shall be in an orderly procedure as provided herein. When a vacancy occurs the open job shall be posted on all bulletin boards giving a summary of the duties, qualifications and the rate of pay, one (1) week prior to making such promotion. Any employee interested in such promotion may sign the posting. The employee having the greatest seniority and is qualified shall be given the position. When in the judgment of management, skill and ability is approximately equal seniority will govern. The Village will inform the Union of the reasons for selecting applicants out of seniority prior to awarding the job. If after thirty (30) days or less the employee fails to qualify or if he/she wishes to return, he/she shall be returned to the former job and the next applicant shall be placed on the job until a qualified person is found. Present employees shall be given preference before any new employee is hired.

Section 4. When it becomes necessary to reduce the work force, lay-offs shall be by seniority, taking the employees covered by this Agreement and laying off first the employees with the least seniority and working up the seniority list until the necessary reduction has been achieved, provided however, that the senior employees are able to perform the work. The last person laid off shall be the first person rehired and so on in the order of seniority. Employees on lay-off shall have recall right for eighteen (18) months.

. . .

BACKGROUND AND FACTS

The Grievants are Debra Ehster and Marilyn Scheel.

Ehster is a six year employee of the Village currently employed in the position of Secretary/Clerical Assistant to the Clerk of Court. Ehster held this position for approximately nine months when she was first hired by the Village and subsequently posted into a Truck Driver/Laborer position. Ehster held the position of Truck Driver/Laborer until December 31, 2003, when her position was eliminated and she exercised contractual bumping rights to return to the clerical position. The Truck Driver/Laborer position requires the incumbent to hold a Commercial Drivers License (CDL). Ehster currently earns $7.34 less per hour in the clerical position than she did in the Truck Driver/Laborer position.

Scheel was employed by the Village for five years in the Secretary/Clerical Assistant to the Clerk of Court position that Ehster currently holds. On December 31, 2003, when Ehster bumped into the Clerical Assistant position, Scheel was laid off. Scheel had less seniority than Ehster.

The Village has a 25-year history of hiring summer help to assist employees in the Public Works Department. In 1985, the Union and the Village codified the practice and included a section in the parties' labor agreement addressing the hiring of summer help. In recent years, the Village has hired four summer helpers. Summer help perform menial work tasks including lawn mowing, painting signs and fire hydrants, hand-held weed spraying, cleaning, and raking responsibilities. These unskilled work functions are performed under the direction and supervision of the public works employees. Summer employees earn $7.00 per hour their first summer of employment subject to a 25¢ per hour increase each year of seniority. Summer help do not receive benefits and are not bargaining unit members.

On or before April 15, 2004, the Village decided to fill only two summer help positions for the 2004 summer due to poor economic conditions. Of the two employees, one worked a 40-hour work week and the other worked three days per week. The Village did not offer a summer help position to Scheel.

In 1986, the Union filed a grievance with the Village on behalf of Al Olson. Olson was a public works employee who was in layoff status when the Village hired summer help. The parties settled the grievance.

Additional facts, as relevant, are included in the DISCUSSION section below.

ARGUMENTS OF THE PARTIES

Union

The Union asserts that the clear and unambiguous language of the seniority, layoff/recall, promotion, and job posting articles of the labor agreement were violated when the Village failed to recall the Grievants from layoff during the Summer of 2004.

The Union first notes that the layoff language is a strict seniority clause. This clause, coupled with the promotion language that gives preference to present employees over new employees, creates job security for bargaining unit employees. In April 2004, when the Village determined additional employees were required to perform summer assignments, the contractually required response would have been to return Ehster to her former Public Works laborer position and recall Scheel to her clerical position. The Village's decision to replace laid off bargaining unit employees with summer help undermined the spirit, letter and intent of the layoff/recall language of the parties' agreement. The Village's right to hire summer help when harmonized with the layoff language results provides the Village the right to hire summer help only during periods when no bargaining unit employees are in contractual layoff status.

The Village's action cannot be sanctioned in that it would provide for a harsh, absurd and non-sensical result. If sanctioned, the Village will be free to annually lay off several employees and replace them with lower paid summer helpers.

There is arbitral support for the Union's position. In a very similar case to this one, Marathon County was found to have violated its labor agreement when it laid off an Equipment Operator I and subsequently hired approximately 100 seasonal summer helpers. MARATHON COUNTY (PARKS DEPARTMENT), WERC DEC. NO. A/P M-94-66 (STERN, 1994). Arbitrator James Stern rejected the County's economic argument and sustained the grievance awarding the grievant a make-whole remedy.

The bargained-for purpose of the summer help language was to provide the bargaining unit employees with additional help during the summer months. Inclusion of the language in the labor agreement was no more than a codification of the yearly practice of hiring summer help. There is unchallenged testimony that the intent of the language was not to replace or supercede the clear and unambiguous requirements of Article 6 requiring recall of bargaining unit personnel prior to new hiring.

Finally, the parties' past practice supports the position advanced by the Union. Just as the Village erred in 1986 when it placed Al Olson on layoff and proceeded to hire non-bargaining unit summer helpers, it has done so again.

Village

The Village does not believe that any provision of the current collective bargaining agreement has been violated. The management rights clause, Article 3, Section 5, provides the Village the right to hire part-time summer help and Section 1 of that same Article provides the Village with broad authority ". . . to plan, direct and conduct Village functions; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules; to maintain the efficiency of employees; . . ." The Village's hiring of part-time summer help was consistent and authorized by these articulated management rights.

The Village has a 25-year practice of hiring part-time summer help with the full knowledge of the Union. The Village has transferred non-skilled tasks generally performed by bargaining unit members to the part-time summer help to free up time for the bargaining unit members to perform skilled work in their area of expertise. These part-time summer helpers are not bargaining unit members and are limited to five (5) months of Village employment. There is a distinction to be drawn between part-time summer help and union positions. The Village acknowledges that if and when a full-time union position is created, it must call back employees on layoff. The Village does not believe it has any contractual obligations to laid off employees when hiring part-time summer help.

For the above reasons, the Village does not agree that it has violated any provision of the labor agreement and therefore requests that the grievance be dismissed.

Union Reply

The Union notes that parties have identified the threshold question as whether or not Article 3 provides blanket authorization for the Village to hire summer help, regardless of whether bargaining unit employees are on layoff status.

The Union challenges the Village's reliance on Article 3, Section 1. Article 3, Section 1, is a general clause which must be harmonized with the remainder of the collective bargaining agreement. When read in conjunction with the more specific language of Article 6, the Union asserts the Village has acted inappropriately. The Union does not believe the labor agreement supports the Village's hiring of full-time summer helpers to perform the duties and responsibilities of laid off bargaining unit employees.

Finally, the Union challenges the Village's characterization of the summer help as part time. Although the positions were seasonal and temporary in nature, the employees worked side by side with Union personnel on a work schedule consistent with that of full-time public works employees. In addition, these summer helpers performed some of the very same duties and responsibilities of the regular full-time employees.

For all of the above reasons, the grievance should be sustained and the impacted employees made whole for their losses.

DISCUSSION

The issue to be determined is whether the Village has violated the terms of the labor agreement when it hired summer help while Grievant Ehster was in the clerical position and Grievant Scheel was laid off.

At the outset, it is necessary to identify what the Union is not asserting. The Union is not arguing that the Village should have offered the summer help positions 1/ to the laid off employees. Rather, the Union is arguing that the work performed by the summer help was bargaining unit work which could and should have been performed by Ehster, the laid off Public Works employee. Moreover, had the Village recalled Grievant Ehster, as it should have, then she would have vacated the clerical position that she had bumped into when her position was eliminated and thus, Grievant Scheel would have been recalled to perform the Clerical Assistant position.

1/ The Village refers to the summer help as "part-time" while the Union argues that the employees were in fact "full-time." In as much is it is irrelevant to the ultimate issue whether these employees are referred to as part-time or full-time, I do not address this distinction.

The Union argues that the clear and unambiguous language of the labor agreement required the Village to recall Ehster to the truck driver/laborer position and recall Scheel to the clerical position. I disagree. There is no limitation in the labor agreement that prohibits the Village from hiring summer employees while regular employees are on layoff. Moreover, there is no language in the labor agreement that provides Ehster the right to return to the truck driver/laborer position after she bumped Scheel out of the clerical position.

Article 3**,** Section 5 provides the Village with the right to hire summer employees. The fact that the parties included this language in the bargaining agreement establishes first, that the work the summer employees are doing is bargaining unit work, and second, that the Union is not in a position to challenges the Village's exercise of this right except if there is other language within the parties agreement that limits the manner in which the Village exercises this right.

The Union first points to Article 6, Section 4 as limiting language. The Union contends that the portion of the second sentence, "the last person laid off shall be the first person rehired and so on in order of seniority" applies to this situation. Section 4 addresses the procedure that will be followed when the Village reduces the workforce. The first sentence of the section

defines the parameters of the section by stating that lay offs are by seniority "taking the employees covered by the Agreement." The Union acknowledges that summer help are not covered by the recognition clause. See Joint Exhibit 6. The next sentence, which is the sentence that the Union relies upon, defines how the parties intend for employees on layoff to be returned to work. When the second sentence is read with the first sentence of the section, the clear language of the agreement establishes that the contractual hiring limitations when a bargaining unit employee is laid off do not apply to summer help and therefore, the Village has not violated this section of the labor agreement.

The Union next relies on the language of Article 6, Section 3 and specifically the last sentence which reads, "[p]resent employees shall be given preference before any new employee is hired." This sentence follows seven sentences that explain the posting procedure that will be followed when filling a vacancy. There was no evidence offered at hearing to indicate that the Village has ever posted summer positions. Given that summer help positions are not covered by the labor contract and the Village has not posted these positions in the past, this sentence has no meaning as it relates to the hiring of summer help.

The Union requests that the Arbitrator harmonize the language of Sections 3 and 4 and find that the strict seniority language negates the Village's action. Harmonizing the contract language does not change the result. The two sentences which the Union rely on are parts of paragraphs. Meaning is to be ascertained from the instrument as a whole, not isolated sections or portions. Elkouri and Elkouri, How Arbitration Works, 6th Edition p. 462-463 (2004). When the two sentences are read in relation to the entire sections and the two sections read in relation to one another and the entire labor agreement, there is no support for the Union's position.

With regard to the Union's assertion that the circumstances of this grievance are the same as those contained in MARATHON COUNTY (PARKS DEPARTMENT), WERC DEC. NO. A/P M-94-66 (STERN, 1994), the Union is in error. In MARATHON COUNTY (PARKS DEPARTMENT), Id., the labor agreement contained contractual language that stated all seasonal, temporary and part-time employees would be laid off before the regular employee work force was reduced. There is no such language in the labor agreement between the Union and the Village. As such, MARATHON COUNTY, Id., is distinguishable.

The Union argues that when the right to hire summer help was added to the management rights clause, it was not intended to permit replacement of bargaining unit members with non-unit summer help. Accepting the unchallenged testimony that the intent of the language to "merely a codification of the yearly practice of summer help hiring," the fact of the matter remains that the parties have not negotiated language that limits the Village's exercise of its right to hire seasonal employees while bargaining unit personnel are on lay off.

Finally, the Union argues that an interpretation consistent with the Village's position would lead to a harsh, absurd or nonsensical result since the Village would be free to conduct annual layoffs and replace the bargaining unit employees with Summer help. Even if I were to believe that the Village would do this, which I do not given the CDL requirements and skilled

nature of the work that the public works employees perform, I do not subscribe to arbitral rewriting of a labor agreement. Should the Union desire to limit the Village's hiring of summer help when regular employees are in layoff status, it must gain this language at the bargaining table.

AWARD

1. No, the Village did not violate Article 6 of the collective bargaining agreement when it hired summer help during the Summer of 2004.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 3rd day of February, 2005.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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