BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUPERIOR CITY EMPLOYEES' UNION LOCAL #235, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 192
No. 64712
MA-12983

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Cammi Koneczny, Human Resources Analyst, City of Superior, appearing on behalf of the City.

ARBITRATION AWARD

Superior City Employees' Union Local #235, AFSCME, AFL-CIO, hereinafter referred to as the Union, and City of Superior, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The parties jointly requested the Wisconsin Employment Relations Commission to appoint Coleen A. Burns, a member of its staff, to act as arbitrator to hear and decide the instant grievance. Hearing was held in Superior, Wisconsin, on June 23, 2005. The hearing was not transcribed and the parties submitted post-hearing briefs, the last of which was filed on September 2, 2005.

ISSUES

The parties were unable to agree on a statement of the issues.

The Union frames the issues as follows:

Did the Employer violate the terms of the Collective Bargaining Agreement by not placing the Grievant on a ninety (90) working day probation period due to her bumping into a different classification and consequently not paying her at her previous salary during the ninety working day probationary period?

And if so; the appropriate remedy is for Management to confer with the Grievant and her immediate supervisor to determine if the Grievant has successfully completed the ninety (90) working day probationary period and to pay her at her prior rate of pay for this probationary period.

The City frames the issues as follows:

Did the City violate the AFSCME Local #235 Union Agreement when it did not require Krista Anderson to serve a probationary period in her Staff Assistant position in the Planning Department?

The undersigned frames the issue as follows:

1. Did the City violate the parties' collective bargaining agreement by not requiring Krista Anderson to serve a ninety (90) working day probationary period when she bumped from her Community Development Technician position into a Staff Assistant position and by not paying Krista Anderson at her Community Development Technician rate of pay during any required (90) working day probationary period?

2. If so, what is the appropriate remedy?

RELVANT CONTRACT PROVISIONS

ARTICLE 4
PROBATIONARY PERIOD

. . .

4.04 Probationary Period After Completion of the Initial Probationary Period: Employees appointed to a position after they have served their initial probationary period shall serve a probationary period of ninety (90) full days of actual work which shall be a trial period to demonstrate their ability to perform the work.

4.05 Salary Placement:

a) Promotions: During said period, they shall be paid at five percent (5%) less than the rate in the salary step which is closest to the rate of their former position, provided however, that employees shall not receive less than their rate in their former position. Following the successful completion of probationary period, the employee shall be paid at the rate in the salary step which is closest but higher than the rate of their former position.

b) Transfers: If the employee moves to a position in the same job class, during said period, they shall be paid at the same rate prior to transfer. Following the successful completion of probationary period, the employee shall advance to any higher steps in the salary range according to their time served in the job class.

c) Reduction in Salary: If the employee moves to a position where the top step of the salary range of the new position is less than the top step of the salary range of the current position, during said period, they shall be paid at the same rate prior to the move to the new position. Following the successful completion of the probationary period, the employee shall move to the step closest to the salary step of the prior position. If this step is not the top step in the salary range, the employee shall advance to any higher steps in the salary range according to their time served in the new job class.

. . .

ARTICLE 9
LAYOFFS AND REHIRING

9.01 In the event the City of Superior considers scheduling a layoff, the matter shall first be submitted to the Union Committee so that the parties can agree on an orderly, acceptable process. Strict application of unit-wide seniority will prevail, providing that the remaining are qualified to perform the available work or unless exceptional circumstances occur which would prohibit the parties from following the unit-wide list. The following procedures shall be utilized:

. . .

D) The salary for the employee exercising bumping rights will be that of the same salary step of the salary range for the job class bumped to as the step attained in the job class prior to layoff.

E) Employees who move to a position which is not the same job class they hold or not a lower level job class in the series as referenced in Appendix A of this working agreement of their current position where they have completed a probationary period will serve a 90 working day probationary period.

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APPENDIX B:

CLASSIFICATION BY SERIES

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Secretarial Series**
Staff Assistant
Administrative Assistant (Confidential)

Assessment/Appraisal Series
Assessment/Technician**
Property Appraiser

Stenography Clerical Series**
Steno Clerk I
Steno Clerk II
City Clerk Assistant
Election Coordinator
Deputy City Clerk

. . .

Accounting Series**
Account Clerk
Accounting Technician
Senior Accounting Technician

Building Permit/Inspection Series
Building Permit Technician**
Code Compliance Officer

. . .

Police Records Clerk Series**
Police Records Clerk
Senior Police Records Clerk

** In the event of a layoff incumbents of these classes bumping to the General Clerical Series are not required to serve a new probationary period.

BACKGROUND

Krista Anderson, hereafter Grievant, has been employed by City since March of 1994. Until March 29, 1995, the Grievant was a Part-time Clerk in the Finance Department. From May 1, 1995 through August 23, 1995, the Grievant was a Clerk/Steno in the Engineering Department. The Grievant then assumed the position of Clerk/Steno in the City Clerk's Office

and remained in that position until early 1997, when her position was reclassified to Election Coordinator.

Effective December 31, 2003, the City eliminated the Union's bargaining unit position of Election Coordinator held by the Grievant. The Grievant bumped into the Union's bargaining unit position of Community Development Technician and held this position until it was eliminated by the City on December 31, 2004. The Grievant bumped into the Union's bargaining unit position of Staff Assistant, effective January 1, 2005.

At the time that her position of Community Development Technician was eliminated, the Grievant had an hourly wage rate of $16.87 per hour. Effective January 1, 2005, the hourly wage rate of the Community Development Technician was $17.29. When the Grievant bumped into the Staff Assistant position, her hourly rate of pay was $14.84.

On or about January 14, 2005, a grievance was filed in which the Grievant asserted that the City violated Articles 9.01(E) and 4.04(C) of the parties' collective bargaining agreement by not placing her on a ninety-day probationary period, beginning January 3, 2005, and by not paying her at her Community Development Technician rate of pay for the ninety-day probationary period.

In denying the grievance, Human Resources Director Mary Lou Andresen stated, *inter alia*:

> . . . Article 9.01(E) defines when a 90 working-day probationary period will be served. Since you have completed the probationary period for a Community Development Technician, a higher level technical clerical position to a Staff Assistant, you are not required to serve a probationary period for the Staff Assistant. Further, Article 9.01(D) provides "the salary for the employee exercising bumping rights will be that of the same salary step of the salary range for the job class bumped to as the step attained in the job class prior to the layoff." This is the language that would apply and therefore since you are not serving a probationary period and since 9.01(D) is controlling, Article 4.05(c) does not apply. You were placed at the same step of the Staff Assistant salary range that you attained as a Community Development Technician which is the top step of the Staff Assistant.

In denying the grievance, the Mayor stated, *inter alia*,

> . . .
>
> I am convinced by past practice that with demotions which have occurred through layoff, we have not required new probationary periods for similar situations. By example, Jean Dotterwick bumped from a Staff Assistant (asterisked series) to a Community Development Clerical Assistant (non-

> asterisked series.) Dotterwick did not serve a new probationary period and did not receive the Staff Assistant wage for any period of time while working as a Community Development Clerical Assistant. The treatment of Dotterwick was based upon the Human Resources Department's determination that no new probationary period was needed. No grievance was filed on this action. Angela Harker in her layoff bumped to a Clerk position (in the General Clerical Series) from a Community Development Clerical Assistant in the Rehabilitation series (non asterisked). Harker was not required to serve a new probation period and did not receive the Community Development Clerical Assistant wage while working as a Clerk. This was based upon the Human Resources Department's determination that no new probationary period was required. No grievance was filed.
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> . . .

Subsequently, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The City violated the clear contract language of Article 9.01(E) by not placing the Grievant on the required ninety working day probationary period when she started working as a Staff Assistant. The City also violated the clear contract language of Article 4.05(C) by not paying the Grievant at her Community Development Technician rate of pay while she served the required probationary period.

The asterisks noted in Appendix B carve out exceptions during layoffs as to specific positions where a probationary period does not need to be served. A review of Appendix B establishes that an employee moving from the position of Community Development Technician to Staff Assistant is not exempted from serving a ninety day probation period.

The Union has never agreed that the placement of asterisks in Appendix B were in error. The parties have had ample opportunity to correct the alleged error because it existed in several preceding contracts.

The City's contractual management rights are curtailed by the clear contract language. The City's policies are superseded by the labor agreement. Neither the career lattice charts constructed by the City or the materials related to the Comparable Worth and Reclassification grievance from ten years ago, are relevant to the enforcement of the parties' collective bargaining agreement.

Layoffs have only happened in 2003 and 2004, during the duration of the current agreement. Thus, there is no past practice. The examples recited by Human Resources Director Andresen were not known to the Local leadership.

The City has violated the parties' collective bargaining agreement. The Grievant has served successfully in her Staff Assistant position for well over ninety days. Accordingly, the appropriate remedy is to make the Grievant whole for all wages and benefits lost due to the City's failure to place the Grievant on the contractually required ninety day probationary period.

City

During her tenure with the City, the Grievant has been employed as Clerk, Clerk-Steno, Elections Coordinator, Community Development Technician and Staff Assistant. The Grievant successfully completed probationary periods in the Clerk, Clerk-Steno and Community Development Technician positions.

The Grievant served a probationary period when she bumped into the Community Development Technician position to demonstrate that she could perform the higher level financial tasks not performed in her previous positions. When the Grievant sought to bump into the Staff Assistant position, Human Resources Director Andresen reviewed the Grievant's qualifications and work history and determined that a probationary period would not be required. The Grievant has met or exceeded all of the knowledge, abilities and requirements of her Staff Assistant position, as shown by her position description.

Under the language of the contract, the City has the right to determine whether or not a probationary period was required when the Grievant bumped into the Staff Assistant position. Prior arbitration awards have upheld the City's right to determine qualifications for a position. The Union has failed to demonstrate that the Grievant lacked qualifications for the Staff Assistant position, such that a probationary period would be justified.

As a result of meetings between Union leadership and Human Resources, the Union was made aware of the layoffs and bumping that occurred in 2003. At no time did the Union question qualifications, probationary period requirements or wage rates for employees that bumped.

The City has not violated the collective bargaining agreement. The grievance should be denied.

DISCUSSION

The instant dispute arose when the Grievant was laid off from her position of Community Development Technician and bumped into a position of Staff Assistant. The Union, contrary to the City, asserts that the City violated the parties' collective bargaining agreement by not requiring the Grievant to serve a ninety (90) working day probationary period in the Staff Assistant position and by not paying the Grievant at her Community Development Technician rate of pay while she served this probationary period.

This dispute arose as a result of a layoff. Article 9 of the parties' labor contract specifically addresses "Layoffs and Rehiring." Specific contract language governs general contract language. Thus, to resolve this dispute, the undersigned must first turn to the language of Article 9.

The introductory paragraph of Article 9.01 concludes with the statement: "The following procedure shall be utilized:" The word "shall" is directory. Under the language of Article 9.01, management does not have discretion to disregard any of the "following procedure," unless such discretion is expressly reserved to management by provisions of Article 9.

The "following procedure" includes:

> **(E)** Employees who move to a position which is not the same job class they hold or not a lower level job class in the series as referenced in Appendix A of this working agreement of their current position where they have completed a probationary period will serve a 90 working day probationary period.

Appendix A establishes the wage schedule for each Job Code/Classification Title, but does not reference "series." Appendix B sets forth classifications by series and contains the following language:

> **In the event of a layoff incumbents of these classes bumping to the General Clerical Series are not required to serve a new probationary period."

Upon review of the contract language agreed upon by the parties, the undersigned is persuaded that the reference to Appendix A in Article 9.01(E) is a typographical error and that the correct reference is Appendix B.

In the present case, the Grievant moved from the classification of Community Development Technician to the classification of Staff Assistant. Accordingly, the Grievant moved to a position which is not the same job class that she held.

As set forth in Appendix B, the classification of Community Development Technician is within the Rehabilitation Series, as are two other classifications, *i.e.*, Community Development Clerical Assistant and Community Development Specialist. The classification of Staff Assistant is within the Secretarial Series, as is one other classification, *i.e.*, Administrative Assistant (Confidential).

During her tenure with the City, the Grievant has held a number of positions. It is not evident that she held any classification in the Rehabilitation Series other than Community Development Technician. By moving from Community Development Technician to Staff Assistant, the Grievant did not move into a lower level job class in the series of her current position where she had completed a probationary period.

The City argues that there are errors in Appendix B asterisking. This argument cannot be sustained on the basis of the record presented at hearing. Applying the existing language of Appendix B, movement from Community Development Technician to Staff Assistant is not movement that is exempted from the probationary period under Appendix B.

In summary, the Grievant moved to a position which is not the same job class she held and which was not a lower-level job class in the series as referenced in Appendix B of the Working Agreement of her current position where she had completed a probationary period. Article 9.01(E), states that, under such conditions, the Grievant "will serve" a 90 working day probationary period. The word "will," like the word "shall," is directory. Under the language of Article 9.01(E), the Grievant is required to serve a 90 working day probationary period.

The parties have offered no bargaining history with respect to the establishment of their contract language. It is not evident that, prior to the 2003-05 contract, there were any layoffs that were subject to the provisions of Article 9. Accordingly, as the Union argues, there is no relevant past practice. As the Union also argues, the City's general management rights, as well as the City's unilateral policies, are subject to curtailment by the language of the parties' collective bargaining agreement.

It is not clear that the Union was provided with sufficient information to determine whether or not Dotterwick and Harker were required to serve the contractually required probationary period. Thus, assuming *arguendo* that, in the Dotterwick and Harker situations relied upon by the City, the language of Article 9 would have required these employees to serve a 90 working day probationary period, such a fact would not establish that the parties had a mutual understanding that management has discretion to waive the probationary period requirement. It would, however, indicate that the City was not seeking to provide the Grievant with more favorable treatment.

In summary, under the language of Article 9 of the parties' 2003-05 labor contract, when the Grievant was laid off from her position of Community Development Technician and bumped into the position of Staff Assistant, the Grievant was required to serve a 90 working day probationary period in the Staff Assistant position. Inasmuch as the language of Article 9 does not expressly provide management with discretion to waive this requirement, the City violated the parties' collective bargaining agreement when it did not require the Grievant to serve a 90 working day probationary period in the Staff Assistant position.

The undersigned turns to the question of whether or not the City violated the parties' collective bargaining agreement by not paying the Grievant at her Community Development Technician rate of pay during the 90 working days in which she should have been required to serve probation. As discussed above, under the language of Article 9.01, "the following procedures shall be utilized." One of these "following procedures" is Article 9.01(D), which states:

D) The salary for the employee exercising bumping rights will be that of the same salary step of the salary range for the job class bumped to as the step attained in the job class prior to layoff.

The Grievant received her Staff Assistant position by exercising bumping rights. Given the specificity of the Article 9.01(D) language, as well as the Article 9.01 mandate that the "following procedures shall be utilized," the Grievant's Staff Assistant position pay rate is established by Article 9.01(D) and not, as the Union argues, by Article 4.05(C). The City did not violate the parties' collective bargaining agreement by not paying the Grievant at her Community Development Technician wage rate during the 90 working days that should have served as her probationary period.

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

AWARD

1. The City violated the parties' collective bargaining agreement by not requiring Krista Anderson to serve a ninety (90) working day probationary period when she bumped from her Community Development Technician position into the Staff Assistant position.

2. The City did not violate the parties' collective bargaining agreement by not paying Krista Anderson at her Community Development Technician rate of pay during the time in which she should have served a ninety (90) working day probationary period in her Staff Assistant position.

3. Inasmuch as Krista Anderson has successfully served in the Staff Assistant position for more than ninety days, Krista Anderson is not obligated to serve any additional probationary period in her position of Staff Assistant in the Planning Department.

4. No other remedy is appropriate.

Dated at Madison, Wisconsin, this 29th day of November, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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