

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 97, AFL-CIO

and

CITY OF WAUKESHA

Case 169
No. 65133
MA-13130

(Seniority List)

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044316, Racine, Wisconsin 53404-7006, appearing on behalf of AFSCME Local 97, AFL-CIO.

Donna Hylarides Whalen, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188, appearing on behalf of the City of Waukesha.

ARBITRATION AWARD

The City of Waukesha and AFSCME Local 97, AFL-CIO are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the employer concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance concerning the definition of seniority. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Waukesha, Wisconsin on November 14, 2005; it was not transcribed. The parties submitted written arguments on November 21, and requested an expedited award.

ISSUE

The Union states the issue as:

“Did the employer properly assign seniority dates to employee Kenneth Oswald?
If not, what is the appropriate remedy?”

The Employer states the issue as:

“Does employee Kenneth Oswald have more Article 8 seniority than employee Kevin Warras?”

I state the issue as:

“Did the employer violate the collective bargaining agreement when it posted a seniority list showing Kenneth Oswald’s seniority date as April 20, 1998? If so, what is the appropriate remedy?”

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8 – SENIORITY

- 8.01 The Employer agrees to recognize seniority as a factor in promotions, demotions, transfers, layoffs, recalls from layoff, filling vacant positions, and vacation preference, provided in each such case that employees have the skill and ability to perform the available work.
- 8.02 The Employer shall furnish semiannually as of January 1 and July 1, a seniority roster of all employees in the bargaining unit to the secretary of Local 97. Such lists shall be kept up-to-date and posted where they may be inspected by the employees.
- 8.03 An employee shall lose his/her seniority rights for any one of the following reasons:
- (A) If he/she quits;
 - (B) If he/she has been discharged for cause;
 - (C) If he/she fails to report to work within ten (10) working days (sent by certified, return receipt mail to last address on file) upon recall from layoff, unless unable to do so due to illness or injury (substantiated by a doctor’s statement) or other justifiable circumstances;
 - (D) If an employee fails to report for three (3) consecutive days without notifying his/her immediate supervisor and without a reasonable excuse for the absence;
 - (E) If any employee performs no work for the Employer for one (1) year and is not on military leave or other approved leave of absence;

- (F) If an employee does not report for work within forty-eight (48) hours after the termination of an authorized leave of absence. An extension of time will be granted by the Employer or its designed if the employee could not report for work within the forty-eight (48) hours but reports to work within a reasonable time.
- 8.04 If it becomes necessary to reduce the number of employees of the Employer such layoff shall be accomplished by first laying off the seasonal employees and probationary employees, then employees with the least seniority will be laid off providing the more senior employee is capable and qualified to perform the available work. Recalls from layoff will be in the reverse order of layoff, providing the employee being recalled is capable and qualified to perform the available work.
- 8.05 In all matters involving promotions, layoffs and recalls for layoff, length of continued service shall be given primary consideration. Skill and ability will be taken into consideration only where the senior employee does not possess the skill and ability to perform the available work or qualify as set forth elsewhere in this Agreement.
- 8.06 Employees laid off in a reduction of force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be greater than three (3) years.

...

OTHER RELEVANT CONTRACTUAL PROVISIONS

The City has several other collective bargaining agreements which include language regarding the creation and termination of seniority, as follows:

- “Seniority is defined as length of continuous service dating from an employee’s most recent date of hire in a Department job covered by this Agreement.” – Wisconsin Professional Police Association;
- “In determining seniority ... the employee’s seniority date will be defined as the continuous length of time the employee has with an OPEIU local covered by an Agreement with the City.” – Office and Professional Employee International Union;
- “In all matters involving layoffs, and recall from layoffs, length of continuous service within the Library shall be given primary consideration.” – AFSCME (Library) ;

- “In all matters involving layoffs, and recall from layoffs, length of continuous service within the Department shall be given primary consideration.” – AFSCME (Building Inspection);
- “Seniority shall for the purpose of this Agreement, be defined as an employee’s length of continuous full-time service since their last date of hire.” – AFSCME (Public Works/Parks et al);
- “Seniority shall for the purpose of this Agreement, be defined as an employee’s length of continuous full-time service since their last date of hire.” – AFSCME (Wastewater)

BACKGROUND

Among its various enterprises, the City of Waukesha maintains and operates the Prairie Home Cemetery. This grievance concerns the seniority date for an employee who worked for a period in a bargaining unit position, was promoted to a non-represented supervisory position, then returned to the bargaining unit. The Union asserts that the employee’s seniority date should be the date he returned to the unit; the city has credited him with seniority dating to his original hire.

On April 20, 1998, Kenneth Oswald was hired as a Groundskeeper III, a position covered by the collective bargaining agreement between AFSCME Local 97 and the City. He held that position until June 24, 2000, when he accepted appointment as Cemetery Grounds Supervisor, a newly created position outside the bargaining unit. At the time, neither union nor management officials informed Oswald of any affect this promotion would have on his seniority.

During July 2000, the union complained to the Cemetery Director that Oswald was doing bargaining unit work. The union filed a grievance to this effect, and in February 2001 the parties reached a settlement in which the city agreed that non-unit employees would not engage in bargaining unit work absent exigent circumstances.

Union members continued to monitor Oswald, and later that summer he informed management that he wished to leave his supervisory position and return to the bargaining unit. On August 18, 2001, the City demoted Oswald from Grounds Supervisor to Crew Leader, a bargaining unit position. Since that time, the supervisory position has remained vacant.

Upon his return to the bargaining unit, Oswald became the third person represented by Local 97 in this unit, along with Michael DeMarcantonio and Kevin Warras.

DeMarcantonio is a former employee of the city incinerator. In 1991, the city and AFSCME reached a side letter of agreement which established the conditions for employees when the city closed its incinerator that year. As to seniority, the agreement provided that

“Employees recalled from layoff will retain full seniority upon entering other City employment, represented by AFSCME, for benefit purposes only.”

In May 2005, pursuant to an obligation under the collective bargaining agreement, the cemetery director posted a seniority list. Consistent with the 1991 side letter agreement, the Prairie Home Cemetery seniority list showed DeMarcantonio, originally hired by the City to work at the incinerator in March 1981, with a seniority date of April 27, 1992, reflecting the date he was hired by the cemetery after the incinerator closed. Warras’ seniority date was listed as April 16, 2001, his date of hire. Oswald was credited with a seniority date of April 20, 1998, his initial date of hire with the city. With the cemetery anticipating a layoff in early December, 2005, the seniority list has assumed great importance to all involved.

Initially, Union local president Bruce Wery agreed with the posted seniority list, and so informed Oswald. But on June 15, 2001, the Union filed a grievance alleging “improper listing of names on seniority list,” asserting that crediting Oswald with seniority back to his initial hire constituted a violation of Sections 1.10, 8.01, 7.02, and “any other articles that may apply.” As remedy, the Union sought that “seniority be adjusted to reflect current seniority status,” namely a new seniority date of August 18, 2001, the day he returned to the unit as a represented employee. This would have the affect of placing Oswald third on the list, and thus first to be laid off. After Cemetery Manager David Brenner denied the grievance on August 2, the Union advanced the grievance to Step Two.

On August 17, 2005, City Administrator James Payne denied the grievance as follows:

Re: AFSCME Grievance of 5/15/2004, Cemetery Seniority List

Dear Mr. Maglio,

A Step 2 grievance hearing was conducted on August 15, 2005 regarding the above matter. Present for the union and representing the department were you, Union President Bruce Wery and members of the Union’s executive committee. For the City David Brenner, Cemetery Manager was present.

The grievance is about the posting of a seniority list for the three current Cemetery employees. One of the three employees had taken a voluntary promotion to a position not covered by the Union’s bargaining agreement, but in the Cemetery, in 2000-01, lasting about 14 months. The employee returned to his former position in the Cemetery and within the bargaining union following his tenure in the non-union position.

The Union argues that because the employee left the bargaining unit he lost his seniority as applied to union matters such as layoffs or promotions. Thus, his position on the seniority list should be third and not second as posted.

The City argued that the contract does not define seniority but does specifically set forth the reasons someone could lose seniority. Taking a position outside the bargaining unit is not one of the reasons specified in the contract for losing seniority. Therefore the common definition of seniority should be applied and the employee given credit for all his employment with the City.

The contract does not define seniority in the case of the cemetery. In other AFSME (sic) contracts seniority is defined as “continuous full-time service since (the employee’s) last date of hire.” This could be considered the “textbook” definition of seniority. There is no mention of bargaining unit or other narrowing of this definition as might be seen elsewhere in the City/AFSCME contract. As both a standard and AFSCME accepted definition, and lacking a definition in the Cemetery contract or other modification of this standard, I am not able to create any other definition simply to suit some specific situation.

In light of this I am denying the referenced grievance.

Sincerely,
James C. Payne
City Administrator

The Union thereupon made a timely request for the matter to be advanced to arbitration before the Wisconsin Employment Relations Commission.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

Once Kenneth Oswald left his bargaining unit job for a non-represented position, he severed his bargaining unit seniority. His seniority date should be August 18, 2001, the date he left his supervisory, non-represented position and accepted a job represented by the Union. While Oswald did not quit employment by the city cemetery, he did quit the bargaining unit, thus effectively severing his seniority rights.

The collective bargaining agreement also provides that an employee who performs no work for city for one year or more severs seniority rights. The agreement covers bargaining unit members. It infers that one severs bargaining unit seniority if they do no perform work for the employer in a represented position for one year or more. By working in a non-represented position for approximately eighteen months, Oswald exceeded that threshold.

Read in its entirety, the collective bargaining agreement supports the position that Oswald quit his job in June 2000 when he accepted a non-represented position. His seniority was severed. His return to the bargaining unit on August 18, 2001 established that day as his new seniority date.

Although there is no example of a represented employee moving to a management position then returning to the bargaining unit, the situation that arose with the closing of the incinerator supports the Union view. In that instance, the parties agreed that incinerator employees recalled from layoff retained full seniority for benefit purposes only, and that all past bargaining unit seniority was forfeited. One such employee, Michael DeMarcantonio, now works at the cemetery, with a seniority date of April 27, 1992 – the date he started at the cemetery, not his original date of hire at the incinerator, in 1981.

The collective bargaining agreement clearly indicates the Union does not represent management. It also clearly states that seniority is severed if an employee quits, as was the case when Oswald quit his bargaining unit position to accept a non-represented job. It further clearly states that an employee loses all seniority rights by not working for the City, arguably in a bargaining unit position, for more than a year.

Based on the language of the collective bargaining agreement and the 1990 settlement regarding the incinerator, the grievance should be sustained and Oswald's seniority date changed to reflect bargaining unit seniority of August 18, 2001, the day he began anew as a Union worker at the cemetery.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

Adopting the Union's position would require the arbitrator to include the phrase "If he/she is promoted to a supervisory position" within the terms of Section 8.03, an amendment to the collective bargaining agreement which would violate the provisions of Section 6.03 prohibiting the arbitrator from adding to or modifying the agreement. Inserting new language of that sort would usurp the role of the parties.

Similarly, as seniority is defined as the "length of continued service," and not service in a particular bargaining unit or even in a bargaining unit position, adopting the Union's argument would amount to an improper amendment to Section 8.05.

Seniority is too valuable to be taken away by implication. When the agreement is silent, seniority should not be forfeited without substantial reason. Only specific provisions of the agreement can diminish or affect seniority rights.

The express inclusion of one or more class in a written instrument must be taken as the exclusion of all others. The parties have listed specific conditions under which seniority does not accrue; promotion out of the unit is not one of them. An award that promotion outside the unit severs seniority would again constitute an improper addition to the agreement.

While this is a case of first impression for the parties, and there is no direct past practice, the position that seniority means departmental seniority is supported by the 1991 side letter concerning seniority for employees at the incinerator.

The Union's position in this matter is nothing less than draconian. The city has offered to recalculate Oswald's seniority to deduct the period he served in a supervisory capacity, but the Union rejected that offer; there is no support for the position that all of Oswald's seniority should be extinguished.

DISCUSSION

This grievance concerns the seniority date for an employee who worked for a period in a bargaining unit position, was promoted to a non-represented supervisory position in the same department, then returned to the bargaining unit. The Union asserts that the employee's seniority date should be the date he returned to the unit; the City has credited him with seniority dating to his original hire.

The crux of the problem comes from the fact that the collective bargaining agreement does not define seniority, but rather only addresses how seniority rights are lost.

It is well-settled that seniority rights are created by the collective bargaining agreement. ALLENWOOD STEEL CO., 4 LA 52 (Brandschain, 1946); KANSAS CITY WATER POLLUTION CONTROL DIVISION, 100 LA 535, 538 (Berger, 1993).

The collective bargaining agreement provides that an employee loses seniority if "he/she quits." The central question therefore is whether by accepting promotion to a supervisory position, Oswald quit. The employer cites numerous arbitration awards holding that the transfer to a non-unit position, absent other factors, does not mean the employee has "quit." I believe this to be the majority view.

"Neither common understanding nor industrial usage regards leaving the bargaining unit for a supervisory job at the same location as a 'voluntary quit.' That phrase usually requires an employee-initiated, permanent severance of the entire employment relationship." UNITED TELEPHONE CO., 99 LA 621, 623 (Gordon, 1992). Accord, HURON CEMENT DIV ("It is the firm opinion of the Arbitrator that ...'quit' ... means a termination of employment with the Company and not merely withdrawing from a job in the Bargaining Unit.") See also, DIAMOND NATIONAL CORPORATION, 36 LA 1245.

“In examining reported decisions on the subject of seniority retention upon return to the bargaining unit, the majority of arbitrators are in accord with the conclusion made herein that in the absence of a specific contractual provision that seniority would be lost on transfer to supervision, the employee retains the seniority he acquired while serving in the Bargaining Unit prior to promotion.” HURON CEMENT DIV., 52 LA 285, 287 (Karbaker, 1968). “(I)f the parties intended that seniority rights of former supervisors shall be forfeited, then they would have done so with a clear and direct statement to that effect. In other words, valuable and long-standing seniority rights cannot be abrogated unless the point is made clear in the negotiating sessions and clearly expressed in Contract language which followed.” INTERNATIONAL PAPER CO., 70 LA 1246, 1249 (Taylor, 1978). “(R)eturning bargaining unit employees have a right to whatever seniority was accumulated while in the bargaining unit, provided the controlling agreement contains no provision which eliminates the consideration of such seniority. Only by specific provisions in the collective bargaining agreement can (seniority rights) be diminished, affected or wiped away.” GREAT LAKES DIESEL CO., 75 LA 1077, 1079 (Di Leone, 1980)

There is also a legitimate public policy reason why unit employees should be able to accept a promotion without losing their accrued seniority. “Seniority rights carry with them a high value to the working man. To require their complete forfeiture as a condition of an employee accepting a job with the company outside of the unit would not only place an unreasonable penalty upon the employee, but would be an unrealistic deterrent to management in preferring its own employees for promotional opportunities rather than going outside and hiring new people.” DIAMOND NATIONAL CORP., 36 LA 1245, 1249 (Schmidt, 1961), cited in THE NATIONAL CASH REGISTER Co., 48 LA 743, 745 (Volz, 1967).

It is far from certain that an employee looking at the language of Article 8 would conclude that accepting a promotion outside the unit would entail losing her or his accrued seniority. The undisputed testimony at hearing was that neither union nor management officials informed Oswald prior to his move that accepting the promotion would mean the loss of his accrued seniority. As was said of another employee:

(I)f this employee is to be deprived of one of the principal benefits derived from his fifteen years of employment with the company in the bargaining unit, he should have been made fully cognizant of this consequence at the time he agreed to accept the Supervisory position. It seems grossly unfair to first inform him now that, unknowingly, he had forfeited this right. In the absence of an agreement between the parties that employees are to lose seniority under such circumstances, the Arbitrator feels constrained to conclude that the parties did not intend this result.

It is clearly the consensus among Arbitrators that, when the Contract is silent, seniority is not lost by an employee who has been promoted to a position with the Company outside of the Bargaining Unit. While such prior decisions are not binding upon this Arbitrator, they are extremely persuasive. There appears to

be no valid reason for reaching a different conclusion in this case. SIGNAL OIL & GAS CO., 43 LA 97, 101 (Block 1964).

I have reviewed the cases cited by the Union, and find them unpersuasive in the dispute at hand.

In STERILON CORP., 40 LA 531 (Shister 1963), the collective bargaining agreement explicitly provided that employees who transferred from bargaining unit positions “to a supervisory position shall accumulate seniority while in such supervisory position.” Noting that management had tried unsuccessfully to broaden that provision to cover employees who transferred to “another position within the Company,” the arbitrator held that an employee who transferred to a non-supervisory position did not continue to accumulate seniority. In FORD MOTOR CO., 26 LA 898 (Platt, 1956), the collective bargaining agreement permitted retention of seniority by employees transferring to a classification “excluded from the contract unit.” The umpire ruled that the purpose of this clause was to protect employees who transferred outside the jurisdiction of any union, so that employees who transferred to a classification coming within the jurisdiction of another union were not able to retain their seniority.

These two cases involve language in their collective bargaining agreements and factual situations significantly different from that before me. Accordingly, they have only minor application to the dispute at hand.

The union’s argument is, however, fully supported by the decision in GRAND SHEET METAL PRODUCTS CO., 27 LA 30 (Kotkin, 1956), in which the arbitrator interpreted a collective bargaining agreement which provided that “an employee shall cease to have seniority ... if they voluntarily quit.” Noting that the terms of the collective bargaining agreement defined the employment status only for members of the bargaining unit, the arbitrator held that an employee who took a different position with the company but outside the bargaining unit lost all seniority. *Accord*, RKO RADIO PICTURES, INC., 11 LA 268, 275 (Aaron, 1948), in which the arbitrator interpreted a contractual provision that “continuous employment” for seniority purposes could be broken by voluntary resignation or dismissal for cause. “This provision relates to continuous employment with the bargaining unit,” the arbitrator held, “and that acceptance of a transfer outside the bargaining unit is equivalent to a voluntary resignation.”

These decisions are well-written and reasonable. However, based on my review of the literature, I conclude that they clearly represent the minority viewpoint of arbitrators, most of whom have held that to “quit” means to sever the employment relationship entirely, and that something as valuable as seniority rights must not be abrogated without explicit grounds. I believe those cases present a more compelling rationale which best balances the four interests at stake – the union’s, the employer’s, the individual employee involved, and the other bargaining unit members.

The union also cites the parties' experience when the city closed the incinerator in 1991. While the union is correct that this agreement eliminated seniority for purposes other than benefit calculation for affected employees, I do not believe this situation provides a meaningful past practice for the instant dispute. First, a single experience almost fifteen years prior does not satisfy the conditions needed for a binding past practice, namely that it be clear, unequivocal and mutually understood. Further, the facts are far from directly on point, in that employees at the incinerator were members of a separate bargaining unit, in contrast to Oswald, who was returning to his former unit at the cemetery.

The union also cites 8.03(E), arguing that the phrase "performs no work for the Employer for one (1) year..." necessarily means "performs no work in a bargaining unit position for one year..." Admittedly, there is some logic to the union's analysis, in that the collective bargaining agreement defines only the conditions of employment pertaining to bargaining unit employees. Given the vital matter at stake, however, the abrogation of an employee's accrued seniority should be based on explicit statements, rather than implicit analysis. Inasmuch as he continued to work for the city without interruption, it is hard to believe Oswald would have understood that he stood to lose his accumulated seniority on the basis of 8.03(E).¹

I do agree, however, with a corollary to the analysis that the collective bargaining agreement encompasses only activity undertaken while a member of the bargaining unit. Seniority is defined by the collective bargaining agreement, and, absent explicit provisions to the contrary, can only grow during the time an employee is within the bargaining unit. Although the collective bargaining agreement does not define how seniority is created, by definition it can only exist by virtue of time spent while a member of the bargaining unit. Oswald therefore did not continue to accrue seniority while outside the bargaining unit in his supervisory position.

In summary, I believe that an employee's voluntary removal from the unit for the purpose of accepting a promotion does not constitute quitting and thus does not abrogate seniority already accrued, but that bargaining unit seniority accrues only during the time of employment as a member of a bargaining unit. I have thus ordered a remedy which continues the seniority Oswald accrued prior to accepting the supervisory position, but prevents its increase it by the time he spent outside the unit. I am mindful of the mandate at section 6.02 of the agreement that I am not to "add or modify the terms and conditions" of the contract, or to decide an issue not submitted, but believe that this remedy draws its essence from the agreement and is necessary to implement its text and spirit.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

¹ I express no opinion on the relationship between sections 8.03(E) and 8.06, which enables employees who have been laid off – and are thus not performing work for the employer – to continue their seniority status for a period of up to three years.

AWARD

That the grievance is sustained in part and denied in part. Oswald's seniority date shall be recalculated on the basis of his April 20, 1998 hire as a Groundskeeper III, minus the time he spent outside the bargaining unit as a supervisor.

Dated at Madison, Wisconsin, this 5th day of December, 2005.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

