

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LA CROSSE CITY EMPLOYEES UNION
LOCAL #180, AFL-CIO**

and

CITY OF LA CROSSE

Case 335
No. 65115
MA-13125

Appearances:

Mr. James G. Birnbaum, Birnbaum, Seymour, Kirchner & Birnbaum, Attorneys at Law, 300 North Second Street, Suite 300, P.O. Box 308, La Crosse, Wisconsin 54602-0308, appearing on behalf of the Union.

Mr. James W. Geissner, Director of Personnel, City of La Crosse, 400 La Crosse Street, La Crosse, Wisconsin 54601, appearing on behalf of the City.

ARBITRATION AWARD

The La Crosse City Employees Union Local #180, AFL-CIO and the City of La Crosse 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 City concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the posting of a part-time position. The Commission appointed Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in La Crosse, Wisconsin on December 2, 2005; it was not transcribed. The parties exchanged written arguments, the last of which was received on February 10, 2006.

ISSUE

The Union states the issue as:

“Did the City violate Article 27 of the collective bargaining agreement when in August 2005 it eliminated a full-time clerk position and created a regular permanent part-time position? If so, what is the remedy?”

The City states the issue as:

“Did the City violate Article 27 of the collective bargaining agreement when in August 2005 it posted a regular permanent part-time position? If so, what is the remedy?”

I state the issue as:

“Did the City violate Article 27 of the collective bargaining agreement when in August 2005 it posted a part-time Clerk/Stenographer II position in the Municipal Court? If so, what is the remedy?”

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 19 RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to hire ...to abolish positions ... to determine the methods, processes and manner of performing work, are vested exclusively in Management.

...

ARTICLE 27 REGULAR PERMANENT PART TIME EMPLOYEES

...

B. No regular permanent part time positions shall be created or used to eliminate full time positions.

...

H. If any one employee occupies two (2) regular permanent part time positions, the employee shall be considered a full time employee for all purposes.

...

BACKGROUND

This grievance involves a series of personnel transactions affecting various clerical positions within the City of La Crosse Municipal Court.

Susan Netwal began working for the city on January 6, 1989 as a temporary part-time clerical assigned to the Municipal Court. Netwal's position was subsequently eliminated, but restored at twenty hours per week as part of a grievance settlement on March 22, 1992.

In November 2000, the City and Union agreed to allow Netwal, now Susan Rose, to work up to forty hours per week for the purpose of computer conversion. Over the next several years, the Union, City and Rose routinely agreed to her assignment of extra hours, giving the court a support staff of three full-time positions (two Clerk Steno II's, one Municipal Court Clerk) and one part-time Clerk Steno II with effective authorization for full-time hours (Rose).

On June 10, 2004, Municipal Court Judge Dennis Marcou wrote the La Crosse Finance and Personnel Committee asking for immediate action to change Rose's position to full-time to address a workload problem arising from the recent resignation of the Community Services coordinator. Judge Marcou wrote, in part, as follows:

This position is the only permanent, part-time position left in the City, and it would be, in my opinion, in everybody's best interest to make it a full-time position.

We were planning to ask that Sue's position be changed to full-time when submitting our 2005 budget. The problem with the Community Service coordinator has forced us to make this request earlier than originally planned.

In November 2004, the City adopted a 2005 budget which provided for one Municipal Court Clerk and three Clerk Steno II positions, which the budget narrative noted was a "change from half-time position to full-time effective April 8, 2005." It then came to Judge Marcou's attention that, due to contractual provisions for internal bidding, Rose would not be able bid on the Clerk Steno II position if it were made full time. Accordingly, the common council on January 13, 2005, adopted a resolution transferring funds from the adopted budget to create a half-time position of Clerk Typist II, effective April 8, 2005. The City posted a job bid notice for Clerk Typist II (Part-time) in the Municipal Court on March 28, 2005; the accompanying Position Description was essentially identical to the Position Description of a Clerk Steno II, Rose's existing position.

Pursuant to the terms of the collective bargaining agreement, only full-time SEIU Local 180 employees with the City of La Crosse were eligible for bidding. One such employee, Brandee McKane bid on the position on March 31, but shortly thereafter withdrew her bid. With no other full time city employees bidding on the position, the City was free to offer the position to Rose, which it did, hiring her as a Clerk Typist II, Municipal Court, effective April 8, 2005, giving the Court a staff of three permanent full-time positions (the same positions and incumbents as in 2000), one part-time Clerk Steno II and one part-time Clerk Typist II, both held by Rose. Rose's duties in the Steno and Typist position were interchangeable.

On April 18, 2005, Human Resources Specialist Wendy Oestreich wrote Rose as follows:

RE: Change to Full Time Status

As of April 8th, 2005 you have been hired to fill a 2nd permanent part-time position in Municipal Court. Previous to this position you were a part-time employee scheduled to work 20 hours per week. Since you are now occupying two (2) regular permanent part-time positions you are considered a full-time employee. This change in status will result in an adjusted hire date, and also benefit eligibility changes.

Vacation, Longevity, Lay off: Due to the fact that you routinely worked more than the 20 hours for which you were initially hired for, we have adjusted your start date to reflect hours worked since 1986 (your initial start date with the City). To determine this Wisconsin Retirement System (WRS) was contacted to determine your years of creditable service, which is based upon hours worked, as reported by the City. Per WRS you have 10.43 years of service from 1986 through December 31, 2004. In addition you worked an equivalent of 8.36 full time weeks from January 1, 2005 through April 7th, 2005. Using this information your adjusted start date for vacation accrual, longevity benefits and lay off purposes shall be **September 6th, 1994** (approximately 10.59 years backed off of the April 8, 2005 full time date).

Longevity: Effective April 8th, 2005, you are eligible to receive longevity pay in the amount of 25 cents per hour added to your base pay, based on the adjusted hire date of September 6th, 1994 (10 years of full time service).

Vacation: Your vacation accrual for 2005 (4 weeks or 80 hours) was earned based on your part time work status of 20 hours per week worked in 2004. A full day of vacation in 2005 will require the use of 7.5 hours of vacation. In 2006 your vacation will be based upon the adjusted hire date of 9/10/94, or 12 years of continuous service (3 weeks of vacation or 112.5 hours).

Bidding Seniority: For bidding purposes, your City seniority date, as well as your departmental seniority date shall be the date of the appointment to full-time status, i.e. **April 8th, 2005**.

Work Schedule: Your work schedule is 37.5 hours per week.

Holidays: As a full time employee you are entitled to 7.5 hours of holiday pay on the designated holidays. Eligibility for holidays is covered in the 2002-2005 SEIU Local #180 collective bargaining agreement.

Sick Leave: You will begin earning sick leave at 7.5 hours per month (1 day per month). This will not be reflected in your May sick leave accrual. Any sick leave hours you have accrued, but not used, will remain in your sick leave bank as is.

Medical Benefit Plan: Currently you are now covered under your spouse's policy (a City employee). As a full time employee you now meet the eligibility requirements for the medical benefit plan, however there is a provision in the collective bargaining agreement (Article 3 – Medical Benefit Plan, paragraph P) which addresses married employees that both work for the City. If your spouse (as the subscriber) should retire before you, you would become the subscriber and your spouse would become the dependent without any waiting periods or limitations for pre-existing conditions. If this would occur, you would be considered an incumbent under Article 3, Medical Benefit Plan paragraph E-1.

In late July 2005, an incumbent Clerk Steno II in the Municipal Court, Gloria Molzahn, retired. On or about July 29, 2005, Judge Marcou wrote Oestrich as follows:

Ms. Wendy Oestreich
Human Resources Specialist

Re: Request to fill vacant position (Gloria Molzahn)
Request for clarification of Sue Rose's position

Dear Wendy,

I am hoping to alleviate some confusion resulting from Gloria Molzahn's retirement, and Sue Rose's recent reclassification from part-time to full-time.

As you know, Sue Rose used to be part time. As of April 8, 2005, her status changed to full time, with all of the benefits. This was done by resolution to the F & P Committee, and then to the Council. We had all spent a good deal of time on this issue with the intended result of having four full time clerks in my office instead of three full time and one part time. It was assumed by everyone (including Human Resources, the Union, me, and Sue Rose) that the change would make Sue a full time employee with full time benefits. It is my understanding, still, that she is so classified, and does have all benefits bestowed on other full time employees, except health insurance. At that, she does not have health insurance simply because her husband, Tom Rose, is also employed with the City and he has those benefits allocated through his department. If Tom was not employed here, Sue would have health insurance as well.

The problem may be one of semantics, but I would like to resolve any confusion and, perhaps, streamline the process for filling Gloria Molzahn's position. In

your letter to Sue Rose of April 18, 2005, you advised her that “since you are now occupying two (2) regular permanent part-time positions you are considered a full time employee.” My understanding was that we presented a resolution to add a part-time position because it may have been the only way to allow Sue to remain in Municipal Court and get full-time status.

The problem, perhaps, creeps in now that we are looking to fill Gloria’s position. Sue is afraid that she is not actually a full time employee, but merely two part-time employees who the city considers to be occupying a full time position. If that is the case, then Sue Rose wants to bid on Gloria’s position, which pays the same, but which is definitely a full time position. If that occurs, then we would be without a replacement for Gloria for 30 days, until it would be filled by Sue, and then for another 30 days (at least) until we could find a replacement to fill Sue’s former position. Assuming we did this, whoever would bid on Sue’s old position(s) would have the same cloud hanging over him or her that Sue is worried about. Is she/he a full-time employee, with all of the same rights and benefits of other full-time employees? Or is she/he just considered full-time, only because she/he is holding down two part-time positions?

One of the desired consequences of changing Sue’s status was, supposedly, the elimination of the last regular permanent part-time employee with the City. However, if Sue is not 100% full-time in every sense of the word, does that mean she is holding down two regular permanent, part-time positions? And if Sue gets Gloria’s job, would the City have to bid out Sue’s position as two part-time positions? And what if two people bid on one each? How do I accommodate that, and why would I want to?

In any event, would it be possible to address all of these concerns by requesting a clarification that Sue Rose is full time, occupying a full time position, like we intended, and that the part-time positions no longer exist. This would afford her the protection and peace of mind necessary for her not to bid on Gloria’s position. That way, we would only have to fill Gloria’s position, and only be shorthanded for the one thirty day period. The other part of the resolution would simply be, then, to fill Gloria’s position (by someone other than Sue).

If this is possible, could you prepare the necessary resolution to the F & P Committee for inclusion in the August 4, 2005 meeting?

If not, or should you have any questions or comments, please feel free to contact me at any time.

On August 3, Mayor Mark Johnsrud approved filling the full-time Clerk Steno II position in the Municipal Court. On August 5, 2005, Rose bid on the position. On August 8,

the mayor approved the filing of the part-time Clerk Typist II position, which the City posted for internal bidding on August 11. On August 12, the City changed Rose's status from holding the two part-time positions, Clerk Steno II and Clerk Typist II, to holding the position of full-time Clerk Steno II. Her job duties and base rate (\$15.48 hourly according to the job posting, \$15.40 according to the budget work sheet) remained the same. On August 15, 2005, Local 180 President Steve Reget filed a grievance alleging the City had violated Article 27-B and the "contract as whole" by the "creation of permanent part-time position in municipal court to/and eliminating full time position." As settlement, the Union sought to have the city "bid full time position in municipal court."

On August 19, Oestreich issued the City's Step 2 response, as follows:

RE: City's Grievance Answer – Step 2
Grievance: 02-Local 180-05
Grievant: Steve Reget
Dated: 8/15/05
Date Received: 8/18/05
RE: Posting of Permanent PT Position

Dear Steve:

Our office received the above mentioned grievance on August 18, 2005. In the grievance the union alleges that the City has created a permanent part-time position in Municipal Court to eliminate a full time position. The grievance further states that Article 27, paragraph B, Regular Permanent Part-Time Employees, and contract as a whole has been violated. Remedy is to create a full-time position and bid it as one.

The history of the two permanent part-time positions in Municipal Court is as follows:

- Municipal Court historically had one part-time position of Clerk Steno II (held by Sue Rose)
- A Resolution was introduced to Common Council in January, 2005 requesting that a "*half-time (1/2) position be created to deal with the increased work load.*"
- The Common Council approved the resolution stating that "*a half time (1/2) position of Clerk Typist II be created in the 2005 Municipal Court operating budget effective April 8th, 2005.*"
- Sue Rose applied (through external application process) for the position, and was hired for the 2nd position of half-time (1/2) Clerk Typist II.

- The employee now occupied a ½ time position of Clerk Steno II and a ½ time position of Clerk Typist II – two permanent part-time positions.
- Per Article 27, paragraph H, “if any one employee occupies two (2) regular permanent part-time positions, the employee shall be considered a full time employee for all purposes.” Sue now had bidding rights, which she exercised in bidding to Gloria Molzahn’s vacant full time position. This clause is specific to indicate that the *employee* shall be considered a full time employee for all purposes. It clearly does not state that the *positions* shall be considered a full time *position*.
- The two permanent part-time positions, Clerk Typist II and Clerk Steno II are now vacant.

The City does not agree with the union’s interpretation of Article 27, paragraph B. The permanent half-time (1/2) position of Clerk Typist II was created in April 2005. This position was a new position to the department – no full time position was eliminated. At no time was a part-time position created to eliminate a full time position. The facts listed above demonstrate otherwise.

The City is under no obligation to make the two (2) permanent part-time positions into one (1) full time position as requested by the Union. No contract violation has occurred, therefore the grievance is hereby denied.

There were no internal bidders for the Clerk Typist II position, and on November 7, 2005, the City hired an external candidate for the position. The part-time Clerk Steno II position has remained vacant.

POSITIONS OF THE PARTIES

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

The City violated the express terms of Article 27(B) when it eliminated a full-time position of Clerk-Steno II, created on November 22, 2004, and replaced it with a permanent part-time position on August 11, 2005. The City acted to save money, even though the Municipal Court could not perform its essential duty without the full-time position.

Article 27 was specifically negotiated to protect the integrity of the bargaining unit’s full-time positions. The Union only agreed to the inclusion of part-time employees in the unit after the parties agreed to protection against the occurrence where a full-time position was reduced to part-time.

When it became clear the City did not intend to fill the permanent full-time Clerk-Steno II position it had created, Municipal Judge Marcou protested. The purpose and fear which precipitated the inclusion of Article 27(B) was expressly realized in the City's actions in attempting to reduce its commitments to the regular full-time Clerk-Steno II position by only bidding out a part-time Clerk Typist II position.

If the City is permitted to replace this full-time position with a part-time position, then what is the meaning of this contractual provision?

Further, the City's claim of the existence of two regular permanent part-time positions in the Municipal Court was a subterfuge, part of a strategic manipulation between Judge Marcou and the Personnel Department in which the union did not participate. The result of the subterfuge was that, for all practical purposes, at the time Rose technically held two part-time positions, she *de facto* occupied one full-time position, which the Union had no basis for challenging at that time.

Because the Union did not participate or endorse that subterfuge, it is not estopped from challenging the City's actions now to eliminate the full-time position and replace it with a permanent part-time position.

Because the City through the collective bargaining agreement restricted its right to reduce regular full-time positions to regular part-time positions in the manner it has done in this case, the appropriate remedy is an order for the City to restore the status quo and bid the Clerk Steno II position as a full-time position.

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

Consistent with arbitral authority of reserved management rights and the express language of the collective bargaining agreement, the City's right to manage and direct the work force encompasses the right to hire, reduce the level of service, abolish positions and determine methods of performing the work. Absent a finding that the City exercised its management rights in an arbitrary or capricious manner or in bad faith, its decisions must be upheld.

When the City in August 2005 decided to post only one of the two vacant Municipal Court positions, no full-time position was eliminated. Here, the City had exercised its right to create the second part-time position (the Clerk Typist II), but then only fill one of the two part-time positions when Rose posted into the full-time position made vacant by Molzahn's retirement.

Further, the collective bargaining agreement does not require the City to create full-time positions from part-time positions, even if the part-time positions are in the same department. The agreement mandates that an employee with two regular part-time positions shall be treated as a full-time employee for all purposes. This is not the same as treating two part-time positions as a full-time position.

The collective bargaining agreement discourages the City from creating a workforce of part-time employees because it requires that an employee with two part-time positions gets treated as if a regular full-time employee. The Union has conceded that Article 27 does not require the city to post a full-time position if an employee holding two part-time positions in different departments leaves city service. There is no contractual basis for the Union's claim that a different result is required here because the two part-time positions were filled by an employee in the same department.

Further, the arbitrator lacks the authority to grant the Unions' requested remedy, because the City cannot be required to create a position that had not been budgeted. There is funding only for 3.5 positions; if the Union is correct and the city can only create full-time positions, the part-time position will be eliminated and the court left with only three full-time positions.

Nothing in the collective bargaining agreement prohibits the City from filling multiple part-time positions with the same employee. The collective bargaining agreement only requires that if the City awards multiple part-time positions to the same employee, the employee must be treated as a full-time employee. If the employee leaves one or both of the part-time positions, even if they are both in the same department, there is no contractual obligation on the city to fill either or both of the part-time vacancies. There certainly is no requirement that the City fill both part-time positions with the same employee. Accordingly, the grievance should be dismissed.

In its reply, the Union asserts further as follows:

The City's argument that it can decide whether to create part time or full time positions misses the point. Its claim of an unrestricted right to create or abolish positions at will is contrary to the express terms of the collective bargaining agreement, which forbid the creation or use of a permanent part time position to eliminate full time positions. It is virtually undisputed that the City, motivated by a desire to save money, indeed created a full time Clerk Steno II position in its 2005 budget, which it then unilaterally changed and eliminated and replaced with a part time position.

The creation of two part time positions to replace the budgeted full time position in one department violates article 27(B), as is evident from the City's use of 27(H). The facts – that Susan Rose occupied two regular part time positions, that the city created a full time Clerk Steno II position and then considered these two positions to be separate is evidence the city was creating and/or using permanent part-time positions to eliminate a full-time position.

The City also errs in asserting that the arbitrator lacks authority to grant the requested remedy; its argument that the City cannot be required to create a position that has not been budgeted lacks both legal and factual merit. The arbitrator has full authority to enforce the collective bargaining agreement; the only appropriate remedy for the City's violation is to order the status quo, namely the creation of the full time Clerk Steno position.

In its reply, the City asserts further as follows:

The Union errs in its mistaken belief that article 27(H) results in the consolidation of two part-time positions into one full-time position when filled by the same employee; it does not. Rather, it provides that an individual holding two part-time positions becomes a full-time employee. Two different part-time positions do not become one full-time position even if filled by the same employee, whether in the same or in different departments. The Union is also wrong that the only purpose of filling two part-time positions would be to save money; in fact, because an employee filling two part-time positions gets full-time status and benefits, such a course does not save the City money.

The City chose not to fill one of two part-time positions which became vacant when Rose assumed the full-time position and vacated her two part-time positions. The City has the right to determine staffing, and has the right not to fill budgeted positions despite the opposition of the elected department head. The City filled the vacant full-time position created by a retirement, and chose not to fill one of two part-time position which Rose previously held. Article 27(B) does not apply, and the grievance must be denied.

DISCUSSION

The City of La Crosse undertook two personnel transactions which resulted in Susan Rose becoming a full-time Clerk Steno II in the Municipal Court, and one more transaction after that hire. First, in early 2005, it created a part-time position of Clerk Typist II which it awarded to Rose; as she was already a part-time Clerk Steno II, this resulted in her becoming a full-time employee. Then it awarded Rose the vacant full-time position of Clerk Steno II in August, 2005. Finally, it posted the part-time Clerk Typist II position, leaving the part-time Clerk Steno II position vacant. It was this last transaction – the decision to post the part-time Clerk Typist II position, and leave the part-time Clerk Steno II position vacant – that the union

has grieved, contending it violates the contractual mandate (Art. 27, Sec. B) that “no regular permanent part time positions shall be created or used to eliminate full time positions.”

Union witnesses testified without rebuttal that the intent behind this language was to preserve full-time clerical positions from being reduced or eliminated through the increased use of part-time positions.

I agree with several points the Union makes in its written arguments. I agree that the City’s claim of the existence of two regular permanent part-time positions was a subterfuge; I agree that the City cannot substitute or replace full-time positions with part-time positions.

The problem for the Union is that it has grieved the wrong transaction. The time for it to have challenged this course of events was when the City created a part-time Clerk Typist II position with the same position description as the part-time Clerk Steno II position, and did so purely to avoid creating a full-time position. I think the Union is right in characterizing this as a “subterfuge,” a ruse to avoid the bidding procedures which would have arisen if a full-time position were created.

The City first created a full-time position in its adopted 2005 budget, which it then eliminated in favor of two permanent part-time positions with identical position descriptions. For whatever reasons, however, the Union did not grieve at that time. The status quo thus became two full-time Clerk Steno II’s and one full-time Municipal Court Clerk, one part-time Clerk Steno II and one part-time Clerk Typist II (both held by Rose). Holding two part-time positions gave Rose the status of a full-time *employee* “for all purposes” pursuant to Article 27, Section H. Contrary to the Union, though, it did not make her *position* a full-time position.

The next transaction was Rose’s appointment in August, 2005 as a full-time Clerk Steno II, replacing an incumbent who retired. This then left her two part-time positions vacant.

The City chose to fill only the part-time Clerk Typist II position, and leave vacant the part-time Clerk Steno II position. That is, the actual transaction is far different from that referenced in the Union’s statement of the issue; contrary to the Union, the City did not “eliminate(e) a full-time clerk position and creat(e) a regular permanent part-time position.”

As the City asserts, absent specific provisions to the contrary, it retains the management right to abolish positions, reduce the level of services, and determine the methods and manner of performing work. Article 27, Section B is just such a specific provision, preventing the City from creating or using regular permanent part-time positions to eliminate full-time positions. On its face, it appears that is what the City did by its budget amendment in January-March 2005, when it eliminated the full-time position of Clerk Steno II (which had been approved in the adopted budget) and created a part-time Clerk Typist II with identical duties, all for the purpose of ensuring that Rose was the successful applicant. The Union appears to acknowledge this at page 3-4 in its reply brief.

But that is not the personnel transaction before me. Nor is the question of whether the Municipal Court has sufficient staff to carry out its duties before me; that is a matter for the elected officials, and ultimately the voters, in the City of La Crosse. All that is before me is the City's decision to leave vacant the Clerk Steno II after Rose assumed the full-time position.

Article 27, Section B of the collective bargaining agreement prevents the City from creating or using a permanent part-time position to eliminate a full-time position. But it does not prevent the City from eliminating a part-time position that it feels it no longer needs or can no longer afford.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, I issue the following

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 5th day of May, 2006.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

