

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LOCAL 2239, WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO**

and

CITY OF RACINE

Case 737
No. 65084
MA-13118

Appearances:

Attorney Thomas G. Berger, District Representative, Local 2239, WCCME Council 40, AFL-CIO, PO Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of the Union

Attorney Scott R. Letteney, Deputy City Attorney, City Attorney's Office, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appearing on behalf of the Employer

ARBITRATION AWARD

Local 2239, Wisconsin Council of County And Municipal Employees, AFSCME, AFL-CIO, herein referred to as the "Union," and the City of Racine, herein referred to as the "Employer," having jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below; and the undersigned having held a hearing on April 5, 2006, in Racine, Wisconsin; and each party having filed post-hearing briefs; the last of which was received May 15, 2006.

ISSUE

The parties stipulated to the following issue:

1. Did the Employer, after reducing a posted position for lack of funds, violate the agreement when the funds "came back" by hiring a part-time person rather than reinstating the employee whose hours were reduced by a reduction in funding by the U.S. government?
2. If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

**ARTICLE IV
MANAGEMENT RIGHTS**

The City possesses the sole right to operate the City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the department covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to the following:

1. To direct all operations of the City government.
2. To hire, promote, transfer, assign, and retain employees in positions with the City and to suspend, demote, discharge, or take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the Agreement.
4. To maintain efficiency of City government operations entrusted to it.
5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.
7. To contract out for goods or services; however there shall be no layoffs or reduction in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such operations are to be conducted.
9. To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.
10. To take whatever action is necessary to comply with State or Federal law.
11. Overtime: The City has the right to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal employment and the public interest. Part-time and seasonal employees shall not be assigned overtime unless regular employees are working overtime or are unavailable.

**ARTICLE X
GRIEVANCE PROCEDURE**

- A. Definition of a Grievance: Should a difference arise between the City and the Union or an employee concerning the interpretation, application, or compliance with this Agreement, such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

. . .

- C. Time Limitations: The failure of either party to file a grievance, process a grievance, or appeal a grievance in a timely fashion as provided herein shall be deemed a complete settlement in favor of the other party. However, if it is impossible to comply with the time limits specified because of work schedules, illness, vacations, etc., these limitations may be extended by mutual consent of the parties confirmed in writing.

**ARTICLE XIII
JOB POSTINGS**

- A. Posting Procedure: Any job vacancy which occurs due to retirement, quit, death, new position, or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties and qualifications desired, rate of pay, work location or assignment, and shift. Sufficient space shall be provided for employees to sign (apply) for said job posting.

All job openings within the province of the bargaining unit shall be posted for five (5) working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) workdays after the close of the posting.

The City agrees to move the successful bidder into his/her new position as quickly as possible, but in no event later than thirty (30) calendar days after notification of his/her selection.

The job posting for any classification shall remain in effect for ninety (90) days following the award of the posted job and shall govern, without any reposting, any job openings occurring within said ninety (90) day period in that job classification.

- B. In accordance with Article XII, Seniority, total bargaining unit seniority shall prevail in all job postings except for shift changes which shall be based upon classification seniority. Shift changes shall not be subject to Section C and/or D below. If there is no successful bidder for a position, consideration will be given to bargaining unit members in the other Local 2239 unit before outside applicants.
- C. Probationary Period: Employees working on a job obtained through job posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous job should his/her ability to handle the new work prove unsatisfactory within this probationary period. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.
- D. Return to Previous Job: If within thirty (30) calendar days the employee is dissatisfied with the posted job and wishes to return to his/her previous job the Employer shall have the right to request the employee remain on the job until such time as the job is again posted and filled.

At no time shall this time exceed thirty (30) calendar days. In order for a Union employee to change jobs or classification while still in a probationary status, he/she must return to his/her must return to his/her previous job classification. This provision shall also apply to employees from the Police Department Union who post for and are awarded a job in this unit.

- F. Effective January 1, 2002, employees who post for an equal or lower paying position shall be required to remain in said position for a period of 18 months assuming the employee is awarded said position. This provision shall not apply to employees who post for and are awarded an equal or lower paying position and are subject to Article XIII, Sections C and D of this Agreement. There shall be no restriction for employees who post for a higher rate of pay position.

ARTICLE XV TEMPORARY ASSIGNMENTS

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

perform the work shift of that division for the duration of the reassignment. If a temporary reassignment will last more than five (5) workdays, the assignment will be based upon seniority, subject to ability to perform the assigned task.

- B. In the event an employee is temporarily assigned to a lower pay rated job, he/she shall continue to receive the pay rate of his/her regular job.
- C. In the event an employee is temporarily assigned to a higher pay rated job for eight continuous work hours, he/she shall receive the higher rate of pay while on such temporary assignment, except when the employee is being trained. When the employee is trained, determined to be qualified by the Administrative Manager (or his designee) and working on the job alone with the complete responsibility, he/she shall receive the higher rate. However, the City shall not utilize two (2) or more employees in an assignment to abridge this article.
- D. Temporary assignments shall not exceed thirty (30) days.
- E. Whenever an employee is assigned to a position not covered by this Agreement, said employee shall receive the rate of pay of the position so assigned or ten percent (10%) more than their current rate of pay, whichever is less. Only one employee shall be assigned the duties of the position not covered by this Agreement. All other provisions of this Article XV shall apply to this Section.

ARTICLE XVI

LAYOFFS AND BUMPING

- A. Employees shall be laid off in inverse order of their length of service and shall possess the right to be reemployed in order of their seniority in positions for which they can qualify for a period of three (3) years following layoff. The City agrees to give two (2) weeks advance notice to employees being laid off.
- B. An employee selected to be laid off shall have the right to bump the least senior bargaining unit employee in an equal or lower paying job classification of such employee's choosing, providing such employee has more seniority than that person, unless the skill, ability and efficiency of the lesser senior person substantially outweigh consideration of length of service, and also provided such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal posting procedure. If there is a vacancy in the job

classification the employee chooses to bump into, said vacancy shall be considered to be the least senior bargaining unit employee in that job classification.

- C. An employee who is bumped in accordance with paragraph B above shall be afforded the same bumping rights provided in paragraph A above, but if such employee is unable to bump any other employee such employee shall be placed on layoff.
- D. Where two (2) or more employees have the right to bump, the above bumping rights shall be exercised by such employee in the order of their seniority from most senior to least senior.
- E. An employee bumping into a new position shall serve the normal probationary period for that position. An employee who does not satisfactorily complete the probationary period shall not be allowed to again exercise bumping rights, but shall be placed on layoff. During such probationary period an employee may voluntarily choose to be placed on layoff, but shall then not be allowed to again exercise bumping rights resulting from that layoff.
- F. An employee who is bumped out of his/her position shall have the preferential right to return to such position if for any reason it should be come vacant within sixty (60) days from the time the employee is bumped from it.

FACTS

The City of Racine operates a program through its health department named "Women, Infants and Children" which is herein referred to as "WIC." The program provides assistance to new mothers with respect to nutrition, breast feeding, medical care and other assistance. The Union represents various employees in the program including the Grievant and other clerical positions associated with the program. The program held office hours 8 hours per day, five days per week, Monday through Friday, until the reduction discussed below.

Grievant Maricela Tellez was first hired as a regular part-time Clerk-Typist II for the program in October, 1998. At the time, the clerical staffing for WIC was one part-time Clerk-Typist II and one full-time Clerk-Typist II. In about December, 1998, the full-time Clerk-Typist II position became vacant. The Employer posted the full-time position and Ms. Tellez successfully applied for the position.

Ms. Tellez served in the full-time position until the events in this case. She performed the following duties as listed on the position description for Clerk-Typist II. (See, Union Ex. 1)

Essential Duties:

Performs daily set-up and shutdown of WIC operations which includes assessing the Daisy system on computer, printing daily reports and appointed schedules, and record keeping.

Greets clients and visitors.

Explains WIC rules and procedures personally, over the telephone, or by letter.

Schedules appointments for new and repeat WIC participants.

Performs WIC applicant certification duties.

Issues drafts to WIC participants.

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Ability to interpret Spanish language verbally and in the written form is strongly desired.

In November, 2003, the State of Wisconsin cut the funding for WIC for the calendar 2004 year. The Employer notified Ms. Tellez that it would reduce the operational hours of the program from five days per week to four days per week, 8 hours Monday, Tuesday, Thursday and Friday. It notified her and the Union accordingly of its intent to reduce her position from 40 hours per week to 32 hours per week on those days. The result would also include a loss of benefits, most notably, the complete loss of health insurance coverage. It is unclear whether the part-time Clerk-Typist position was filled at the time, but the effective result would have been to eliminate the full-time position and keep the part-time position (possibly with hours modifications).

It is the undisputed practice of the parties to treat regular part-time positions as separate from regular full-time positions of the same classification. Accordingly, Ms. Tellez would normally have been entitled to exercise her seniority right to bump into a full-time Clerk-Typist II or lower position in accordance with the Agreement's layoff provisions. (See, Section XVI).

On January 6, 2004, the Union, Ms. Tellez and the Employer signed a memorandum of understanding which provides as follows (See, Joint Ex. 3):

It is hereby agreed by the undersigned parties, the City of Racine (Employer), Local 2239, Clerical/Technical (Union) and Maricela Tellez (Employee), that the following conditions shall apply effective January 1, 2004:

- 1) The Employer shall provide the Employee with pro-rated health insurance benefits based on the number of hours worked per week for a period not to exceed March 31, 2004.
- 2) The Employee's hours are being reduced in 2004 due to lack of funds for her position.
- 3) After March 31, 2004, the Employee shall be provided the opportunity for health insurance under COBRA, including paying the full premiums.
- 4) The Memorandum shall be non-precedential and shall have no effect on any other agreements or disagreements among the parties, the current collective bargaining agreement between the parties notwithstanding.

Dated this 6th day of January, 2004.

This agreement was signed by the Grievant and the representatives for the Union and Employer.

The effect of this agreement, among other things, was to define the Employer's reasons for the reduction in hours and to at least temporarily waive Ms. Tellez's right to bump and to vary from the practice under the comprehensive collective bargaining agreement which would have required the Employer to post the part-time position.

Thereafter, Ms. Tellez was assigned to work four days per week, 8 hours per day, weekdays except Wednesdays. The WIC program office was ordinarily closed on Wednesdays at all times thereafter. Ms. Tellez's duties remained the same. Ultimately, Ms. Tellez's health insurance benefit ran out under the MOU, and Ms. Tellez discontinued health insurance under COBRA because she could not afford the cost of the insurance. At all material times thereafter, Ms. Tellez vigorously sought additional hours with the WIC program, the Health Department in general or otherwise from the Employer.

In March or April, 2005, the Employer posted for another part-time Clerk-Typist II to work in the WIC office. When Ms. Tellez learned that the Employer intended to post for another part-time Clerk-Typist II to work in the WIC office, she filed a grievance seeking reinstatement of the full-time 40 hour per week Clerk-Typist II position that she had originally posted into in late 1998. Ms. Tellez seeks to be made whole for all lost wages and benefits.

Alfredo Maldonado was hired and began working August 1, 2005, in the newly created part time position. Mr. Maldonado worked 28 hours per week, 20 of which were in the WIC office and the remaining 8 were in the Health Department. Mr. Maldonado's hours in the WIC office were: 8 hours Tuesdays and Thursdays and 4 hours Friday. He worked in the Health Department for 4 hours on Monday and Friday. Ms. Tellez's hours were unchanged by the new Clerk-Typist II position.

POSITIONS OF THE PARTIES

Union

The Employer violated the labor agreement when it failed to reinstate Ms. Tellez to full-time status upon receipt of additional WIC funds. The Union and Employer met several times to discuss Ms. Tellez's grievance. The City never listed reasons or explanations as to why they were not reinstating Ms. Tellez' to full-time status. Ms. Tellez testified that she offered suggestions on how she could shift some of her clerical job duties to Wednesday when the WIC office was closed to WIC participants so she could regain full-time status. Her suggestions were either ignored by the City's Health Department or she was told "no." Ms. Tellez liked her position in the WIC office and wanted desperately to stay there so she accepted the reduction in hours and loss of benefits. She was waiting for the funding and subsequently her hours and benefits to be returned. However, when the funds returned, she was not returned to full-time status.

Former Union President Kathleen Banker testified that Ms. Tellez's original full-time position was never eliminated nor was it reposted as a changed job. The testimony also showed that this was the first time the City had reduced the hours available for a job. When the City received additional WIC funding, the Union argues that the City created a new part-time Clerk Typist II position to work in the WIC office instead of reinstating hours and benefits to Ms. Tellez. If the City had given Ms. Tellez her hours and benefits back, a grievance would not have been filed. Additionally, if the City had notified Ms. Tellez that her full-time position had been eliminated and therefore she could have exercised her seniority and bumping rights to maintain full-time status, she would have had options to consider and there may not have been a grievance. However, the City did neither.

The Union concludes that the Employer violated the labor agreement when it did not reinstate Ms. Tellez to full-time status upon receipt of additional funds for WIC. There was a further violation of the contract when the Employer did not notify the Union of a change in the position formerly held by Ms. Tellez from full-time to part-time as required in Article XIII "Job Postings" of the contract. Additionally, the Employer violated Article X, Section C of the grievance procedure when it failed to respond to correspondence from the Union in a timely fashion. The Union believes that the Employer abused Ms. Tellez's dedication to young members by their actions. The Union requests that the Arbitrator uphold the grievance and make Ms. Tellez whole for losses of wages and benefits.

City

The City stresses that this grievance is only about the Union's claim that the City violated the labor agreement by creating a new Clerk Typist II position in the WIC Clinic in the summer of 2004. The reduction of Ms. Tellez's hours and any issue related to the change in any circumstances of her employment of 2004 are neither part of, nor relevant to, the issues in the instant matter. Further, it is a factual misstatement to suggest that any funding that was

lost by the City for the WIC Clinic that caused the reduction in the operating hours of the Clinic “came back” at any time. While there were fluctuations in funding, any increases in funding were not targeted at, or intended to be used for, Ms. Tellez’s position. Further, the funding that permitted the part-time position to be created came as a result of the WIC Director position being vacant for some time which created additional funds. Additionally, the funding decreases caused the WIC Clinic to be closed one day per week, which had the natural consequence of reducing Ms. Tellez’s position to four days per week. Any increase in funding was insufficient to allow the WIC Clinic to reopen for a fifth day per week. Therefore, any funding increase could not result in restoring Ms. Tellez’s position to a full-time position.

Only the language of Article IV, “Management Rights” of the agreement is relevant to the determination of this grievance. In particular, paragraph 8 is at the heart of the issues. The City has the right and responsibility to determine the “methods, means, and personnel” by which City operations are to be conducted. Mr. Bagley testified that the City could not afford to reopen the WIC Clinic for a fifth day per week. However, because of the nature of work conducted on the other four days, a second clerk was needed, even if the Clinic was opened on Wednesdays. Changing Ms. Tellez’s position to full-time would not have satisfied the need for a second clerk. Therefore, the City properly fulfilled its responsibilities to select the means by which it would conduct WIC Clinic operations.

The Employer did not violate Article XIII, “Job Postings” of the agreement. This article deals with job postings procedure. The City contends that there was no evidence, discussion, or argument that suggests that the Clerk Typist II position was not properly posted or that any other procedure in Article XIII was not followed in the creation, posting, or filling of that position.

The City did not violate Article XV, “Temporary Assignments” of the agreement. There was no discussion of Article XV and how it relates to this grievance at the hearing. The City contends that any argument that Ms. Tellez’s job change was intended to be temporary is against the clear language of the Memorandum of Understanding signed in January 2004. Further, by stipulation of the parties, the change in her position is not part of this grievance and therefore such a claim cannot be made.

The City concludes that it did not violate the agreement when, after reducing Ms. Tellez’s position for lack of funds, it filled a part-time position rather than reinstating her to full-time status after funds increased. The City’s decision to add a part-time position in the WIC Clinic was permitted under Article IV as well within Management’s Rights. The City followed the Job Posting requirements under Article XIII at all times. This grievance is not related to Article XV, Temporary Assignments. Therefore, the City requests that the grievance be denied.

DISCUSSION

1. Scope of Issue

It is crucial to identify the scope of the issue before me. The decision of the Employer to reduce Ms. Tellez's position from full-time, five days per week to part-time, four days a week is not before me. The parties reached a resolution with respect to that issue years ago. This case is also not about changing a full-time position to multiple part-time positions. That has not occurred here. This case is not about creating a part-time position alone. This case is also not about Ms. Tellez's (or any other employee's right) to bump when a full-time position they are in is replaced by a part-time position. The parties are in agreement that an employee has that right. I find here, because of the unusual circumstances of this case, that Ms. Tellez must be offered an opportunity to exercise the right she had when her position was downgraded. This is about the scope of Ms. Tellez's rights to be returned to her full-time position in the light of the fact that the Employer could, if it chose to do so, return her to that position.

2. Return to Full-Time

The core of this dispute really turns on the Memorandum of Understanding which the parties executed January 6, 2004. This constituted a settlement agreement with respect to Ms. Tellez's grievance rights when the funding was cut and the position was eliminated. Ms. Tellez could have challenged whether the decision to reduce her position from full-time was proper under the collective bargaining agreement and, if so, asserted that she had rights to bump into another full-time position. This settlement agreement is a binding settlement agreement which is enforceable under the well-established case law of the WERC under Section 111.70(3)(a)5, Stats. This type of settlement is subject to the parties' arbitration provision and, therefore, it is properly before me. Article 4 of the settlement agreement does not preclude arbitration, because Article 4 does not preclude grievances concerning the enforcement of the agreement. The dispute here is in the nature of a dispute to enforce the agreement. Finally, the agreement is still in effect.

The agreement contained a representation that the Employer's reason for reducing Ms. Tellez's hours was that it was a result of a lack of funds. Ms. Tellez's testimony that she relied upon the same in not pursuing her bumping rights is fully credited. The agreement does NOT contain any representation or promise that the Employer would restore her position to full-time were the "funds" to return. Similarly, if the arbitrator were to put Ms. Tellez in the position she was in had she been laid off and forced to exercise her bumping rights at the time, neither party has pointed to any provision in Article XVI, the layoff provision or elsewhere in the agreement which would prohibit the Employer from maintaining or creating part-time positions while employees are on layoff. Such provisions are not uncommon in collective bargaining and, therefore, this arbitrator concludes that the parties did not intend to make such a prohibition.

The essence of the Union's argument is really that Ms. Tellez relied upon the representation made by the Employer in Section 2 of the agreement that the reason for the reduction in Ms. Tellez's hours at the time was because of a lack of funds. The concept is one of promissory estoppel. The elements for promissory estoppel are set forth in *SILBERMAN V. ROETHKE*, 64 Wis.2D 131, 143 (1974). They are:

- (1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
- (2) Did the promise induce such action or forbearance?
- (3) Can injustice be avoided only by enforcement of the promise?

The lack of funds actually did occur. However, a representation of that nature to an individual employee is relatively rare in labor relations. It is not written as a recital, but rather as a provision of the agreement. Thus, one could conclude that the Employer made the representation to Ms. Tellez for the purpose of her relying upon it. Ms. Tellez did just that. She stayed in a job she loved even though it left her without the employee benefits, namely health insurance, which a full-time employee would enjoy. The Employer does have an obligation under those circumstances, but I conclude it is limited. The obligation the Employer had to Ms. Tellez was to consider whether to restore her to full-time status when sufficient funds became available to make her full-time. However, it was not precluded from using funds for another purpose if it did so for a legitimate management purpose.

The Employer relied upon the testimony of Mr. Bagley. Mr. Bagley was the Laboratory Director and Clinical Manager. He had retired from the City after 19 years. He had the Clinical Director title and duties added to his position when the Clinical Director retired. The former Clinical Director retired and was not available. She did not testify in these proceedings. Mr. Bagley testified on his knowledge and expertise concerning the entire department. His testimony was forthright and credible. However, he was not present when the decision was made about hiring the part-time person. If the Employer had any obligation under the settlement agreement, it was to consider restoring Ms. Tellez to full-time should circumstances. Nothing in the provisions of the collective bargaining agreement cited by the Union would have given Ms. Tellez any greater rights. The evidence in this case was that sufficient funds were freed up by Clinical Director Vavrek retirement and the choice not to fill her position. Because Mr. Bagley was not there, he could not say whether or not there was any consideration given to Ms. Tellez's concerns. Under the circumstances of this case, I conclude that the Employer did not make a reasoned decision whether to restore her to full-time.

The evidence in this case from Mr. Bagley is clear. The Employer made the choice to add another part-time position for legitimate business reasons. At least part of the reason for the establishment of the part-time position was the availability of the new employee to do

clerical work for the laboratory on Mondays and Fridays, half days. Another part of the consideration was operating the WIC clinic with employees present only four days per week with additional clerical and bi-lingual support available when clients were present at the WIC clinic. This precluded Ms Tellez from working those hours. He credibly testified it was impractical to return the WIC clinic to five days (with our without the presence of clients). I am satisfied that the Employer's reasons for taking these actions were entirely based upon legitimate management factors. It was impossible to foresee the specific circumstances which did occur at the time the parties negotiated the settlement agreement. In any event, the actual decision did not violate the settlement agreement, the management right's clause of the collective bargaining agreement, or any other provision of the collective bargaining agreement. I conclude that even had the Employer considered returning Ms. Tellez to full-time status, it would have made the decision to create the part-time position anyway because of the pressing needs for clerical services. Accordingly, the Employer did not violate the collective bargaining agreement or the settlement agreement by hiring a part-time person.

3. Bumping Rights

This does not mean that the settlement agreement is without effect. The better view of the settlement agreement is that Ms. Tellez retains her right to bump into another position under the provisions of the labor contract. She was full-time at the time the settlement was created and she remained in her position on a part time basis in reasonable reliance upon the Employer's representation that the reduction was for lack of funds. The only way this agreement can no be enforced is if Ms. Tellez is afforded her right to bump into another position under Article XVI being treated if she were in a full-time position. That remedy would complete the enforcement of the settlement agreement. Accordingly, since the Employer violated the settlement agreement by not considering returning Ms. Tellez to full-time status, the Employer is ordered to afford her the opportunity to bump under Article XVI as if she were leaving a full-time position

AWARD

That since the Employer violated the settlement agreement by not considering Ms. Tellez for return to full-time status, it is ordered to afford her an opportunity to bump under Article XVI, as if she were leaving a full-time WIC clerical position. The Employer did not violate the agreement by creating the instant part-time position. Once the offer is made, the settlement agreement shall be treated as if it has been fully performed.

Dated at Madison, Wisconsin, this 15th day of June, 2006.

Stanley H. Michelstetter /s/

Stanley H. Michelstetter II, Arbitrator

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