BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 97, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF WAUKESHA

Case 171
No. 65885
MA-13353

(Kevin Warras – Cemetery Layoff Grievance)

Appearances:

Jack Bernfeld, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of the Union.

Donna Hylarides Whalen, Assistant City Attorney/Human Resources Manager, 201 Delafield Street, Waukesha, WI 53188-3646, appearing on behalf of the City.

ARBITRATION AWARD

The City of Waukesha (hereinafter referred to as the City or the Employer) and Local 97, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the layoff of Kevin Warras from the City's Prairie Home Cemetery. The undersigned was so designated. A hearing was held December 4, 2006, in Muskego, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No stenographic record was made of the hearing. The parties submitted post hearing briefs, and reply briefs, the last of which was received on January 12, 2007, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the Arbitrator makes the following Award.

ISSUE

The parties were unable to stipulate to a statement of the issue, and agreed that the arbitrator would formulate the issue in his Award. The Union sees the issues as:

1. Did the City violate the collective bargaining agreement by employing seasonal employees while a regular employee was laid off with recall rights? If so,

2. What is the appropriate remedy?

The City identifies the issues as:

1. Did the City violate Article 7, Section 4 or Article 8, Sections 1, 4 or 5 of the collective bargaining agreement when it recalled the Grievant to a seasonal position in March of 2006? If so,

2. What is the appropriate remedy?

The issue formulated by the Union more accurately describes the overall dispute between the parties, which focuses on the City's right to have seasonal employees while a regular employee is on layoff, as opposed to whether the City was right or wrong in offering that laid off employee seasonal employment. Accordingly, I have adopted the Union's proposal as the statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 - RECOGNITION

1.01 The Employer Recognizes the Union as the exclusive bargaining agency for all regular full-time and regular part-time employees of the Prairie Home Cemetery, Waukesha, Wisconsin, excluding all executive, managerial, supervisory and confidential employees are certified by the WERC under date of March 12, 1984, Decision No. 3236-ME-2290, and all other employees.

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The Union recognizes that except as specifically limited by this Agreement, the Commission has the right to manage and direct the work force which includes but is not limited to the right to

hire, promote, layoff, demote or transfer employees, discipline or discharge employees for just cause, to determine the number of departments and types of services to be performed, to introduce, change or eliminate equipment, machinery or process, to subcontract work, to determine the number of positions and classifications, to abolish and/or create positions, to direct the job activities of the employees, assign work to employees, to schedule hours of work and shift assignments, to determine the size of the work force including the number of employees assigned to any particular operation and to establish reasonable rules and regulations. The rights of the Employer to subcontract work are limited so that no employees shall be laid off or suffer a reduction of hours as a result of such subcontracting. All other rights of management are expressly reserved to management even though not enumerated above. Nothing contained in this section shall be construed to divest the Union or any employees of any rights granted by any provisions of this Agreement.

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ARTICLE 6 - GRIEVANCE AND ARBITRATION PROCEDURE

6.01 A grievance is a claim or dispute raised by a Cemetery employee concerning the interpretation or application of this Agreement.

. . .

6.02 . . .

The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to add to or modify the terms and conditions of this Agreement or to decide on issues not submitted.

. . .

ARTICLE 7 - PROBATIONARY PERIOD – EMPLOYMENT STATUS

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7.04 Seasonal Employees

(A) Seasonal employees are those hired for a period not to exceed eight (8) consecutive months in order to meet seasonal workload variations. Employer has the right to hire one eleven month seasonal. Seasonal employees who

worked satisfactorily during the last season shall be offered available positions prior to the hiring of any new seasonal employees. Seasonal employees shall have the responsibility to keep the Cemetery Manager notified as to their address and phone number and notification to the employee's last reported address shall satisfy the Cemetery's obligation under this section. Seasonal employees shall be given a minimum of one calendar week written notice prior to layoff or the end of their seasonal employment. No regular employee shall be laid off prior to layoff of the eleven month seasonal.

(B) Seasonal employees are not entitled to any fringe benefits, except named holiday pay when they are working. Holiday pay for seasonal employees will be at fifty percent (50%) pay. Holiday pay for seasonal employees working the second season and thereafter will be at one hundred per cent (100%) pay.

(C) Seasonal employees have no seniority and will not appear on any seniority list.

(D) Seasonal employees will be eligible for union membership.

(E) A seasonal employee who continues working beyond eight (8) months shall be considered a permanent employee and his/her seniority shall date from the most recent date of hiring. A seasonal employee shall not be replaced by another seasonal employee in order to deny an employee permanent status under this paragraph.

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ARTICLE 8 - SENIORITY

8.01 Seniority/Definition: The employer agrees to recognize seniority as a factor in promotion, 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.

. . .

8.04 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 there (sic) 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 recall from layoffs, length of continuous 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.

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ARTICLE 9 - PROMOTION, TRANSFERS AND RECLASSIFICATION

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9.08 Employees on layoff shall be given first opportunity to fill any vacancy in or below the classification they held in (sic) prior to layoff, provided they have remained capable and qualified to do the work.

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SCHEDULE A
CLASSIFICATION AND SALARY SCHEDULE

. . .	Factor	Start Rate	After Probation	After 1 Year
CREW LEADER				
		. . .		
1/1/06	2.95%	$20.99	$21.71	$22.32
		. . .		
GROUNDSKEEPER III				
		. . .		
1/1/06	2.95%	$20.17	$20.89	$21.34
		. . .		
HORTICULTURALIST				
		. . .		
1/1/06	2.95%	$20.17	$20.89	$21.34
		. . .		

SEASONAL EMPLOYEE	Start	Second Season	Subsequent Season
1/1/2004-06	$7.50	$7.75	$8.25

> The above seasonal rates are a wage floor. The Director has discretion to pay more than the floor based upon experience of the hire and prevailing wages in the Waukesha area.
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> . . .

BACKGROUND

There is no particular dispute about the facts underlying this grievance. The City provides general municipal services to the people of Waukesha, Wisconsin, including the operation of a cemetery. The Union is the exclusive bargaining representative for the City's cemetery employees. Prior to the end of 2005, the Cemetery employed three full-time employees. This work force was supplemented by between 5 and 7 seasonal workers from spring through late fall. The Grievant, Kevin Warras, was employed at the cemetery as a full-time horticulturalist for five years, until his position was eliminated in the budget at the end of 2005 and he was laid off. This was the first layoff in the 22 year history of the parties' collective bargaining relationship.

In April of 2006, the City hired seasonal laborers for the upcoming spring and summer. Although Warras was offered first opportunity at a seasonal position, he was not recalled to his regular position when the seasonal employees were hired on. The instant grievance was filed, contending that Section 8.04 of the contract ("…layoff shall be accomplished by first laying off the seasonal employees and probationary employees …") does not allow the City to employ seasonal employees while any regular employee is laid off. The City denied the grievance, contending that the contract does not prohibit the hiring of seasonal employees while a full-time employee is laid off due to a permanent position elimination. It was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

At the arbitration hearing, in addition to the facts recited above, the parties presented testimony that established that seasonal employees are covered by the collective bargaining agreement, and have negotiated wages and benefits, although the wage rates are simply a floor, and the benefits are limited to holiday pay for holidays worked. Seasonal employees do not have seniority rights, except to the extent that they are given preference over new hires in filling seasonal positions. Seasonal employees typically work the same schedule as full-time employees during the months they are employed, and share in most of the work of the regular employees. The contract has a general time limit of 8 months on how long a seasonal may be employed, although in 2003, the Union agreed to allow one 11 month seasonal position. That position has never actually been filled.

Cemetery Manager David Brenner testified that he recommended elimination of the Horticulturalist position as a cost saving move, and that the specialized duties of that position are not performed by seasonal employees, and some are no longer performed at all. The principal duties of the Horticulturalist had been to design flower beds, repair them as needed, identify and treat plant diseases, and oversee the pruning of trees. The Parks and Recreation Department took over responsibility for identifying and treating plant diseases, and the Cemetery discontinued the work of designing flower beds. The Crew Leader and Groundskeeper took over pruning, and the Groundskeeper became responsible for repairing specific flowerbeds. Brenner testified that he had not assigned any additional duties to seasonal employees in 2006, and produced charts showing that the number of seasonal hours in the cemetery in 2006 has markedly decreased from the hours worked in 2005, down to just over 3,000 from 4,500.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the City is ignoring the clear intent and logical implication of the contract language. The contract requires that seasonal employees be laid off before any regular employee. This is consistent with the entire scheme of the contract, under which seasonal employees have no seniority, no posting rights, no recall rights and generally occupy a position inferior to that of regular employees. While the contract permits the use of seasonal employees, it is clear that they cannot be used to the detriment of regular employees' contractual rights and security.

The City's position is that the requirement to layoff seasonal employees before regular employees does not come into play in this case because the layoff took place in the off season, and there were no seasonal employees to layoff. This is an absurd result. The logic of it is that if the position elimination took place in June, all seasonal employees would have to be laid off before Warras could have been laid off, but because it took place in December, there is no relationship between the employment of seasonal employees and the layoff of the regular employee. If the parties had not intended some relationship between the employment security of regular employees and the availability of seasonal employees, they would never have made this linkage in the first place. The City's interpretation reduces the contract language to a mere procedural nicety, and an illogical one at that, rather than a substantive safeguard. That tortured and formalistic reading of the contract has been considered and rejected in other cases involving similar provisions – for example by Arbitrator Stern in Marathon County, and Arbitrator Gratz in Dodge County. This arbitrator too should reject it.

The Position of the City

The City takes the position that the contract is clear and unambiguous, and that the plain meaning of the document requires denial of this grievance. Article 8 establishes the order of layoff, and it requires that seasonal employees be laid off before any regular employees, and junior regular employees before senior regular employees. This layoff occurred in December of 2005, when there were no seasonal employees. The Grievant, Mr. Warras, was the junior regular employee, and it was his position that was eliminated. On its face, the City complied fully with the contract.

The Union extrapolates from the language of Article 8 to argue that no seasonal employees may be employed while a regular employee is on layoff, but that is not what the contract says, and the remainder of the contract is actively inconsistent with that notion. Article 9, Section 8, provides for recall to vacancies in either the classification the employee held when laid off, or a lower classification. It clearly contemplates that there may be vacancies in the lower classification of seasonal. Here, the Grievant's position was permanently eliminated, so he could not have been recalled to that classification. The Grievant was offered recall to the lower classification of seasonal before any other person was offered a seasonal position. He declined. By offering him the available work, the City fully complied with the collective bargaining agreement.

The City notes that, in order to find in favor of the Union, the arbitrator must read out of the contract the specific rights of management to eliminate and create positions, and to determine the number of positions in the work force. That violates the norms of grievance arbitration against legislating new language, as well as the specific prohibition in the contract against modifications under the guise of interpretation.

This is not a case where the City used the seasonal employees to replace the laid off employee or to facilitate the layoff. The duties of the Horticulturalist were either eliminated or assigned to other regular full-time employees. None of them were assigned to seasonal workers, nor were the seasonal workers' hour increased to accommodate additional duties. The only work performed by seasonal employees in 2006 that overlapped the work of the Horticulturalist was lawn mowing and the like, which all employees in all classifications perform. The Horticulturalist position was eliminated, and the arbitrator cannot grant this grievance without ordering the re-establishment of that job, something that invades the exclusive province of management and exceeds the arbitrator's authority.

The Union's Rebuttal

The Union denies that it is seeking to have the arbitrator ignore the Management Rights provision, but asserts that that provision must be read as part of the overall collective bargaining agreement, not as some sort of trump card. The City has the right

to eliminate and create positions, subject to the clear limitation in Article 8 on the use of seasonal employees while a regular employee is on layoff. The two must be harmonized, and prohibiting the employment of seasonal workers while Warras is laid off does not require the City to create any position or eliminate any position. Neither, contrary to the City, would recalling Warras to full-time employment require the re-establishment of the Horticulturalist position. If the City elects not to have the specialized services of the Horticulturalist, the Grievant could as easily be classified as a Groundskeeper, a continuing position in the workforce. The point is not how he is classified, but that he be allowed to work in a regular full-time capacity before any seasonal employees may be employed. This is the bargain the City has made, and it cannot now be heard to complain that it is an inconvenient bargain.

The City's Rebuttal

The City distinguishes the two arbitration awards relied upon by the Union, and argues that they have no bearing on the outcome of this case. In those cases, seasonal employees were not covered by the collective bargaining agreement, and seasonal employment was not integrated into the contract's system of recall and layoff. Here, the contract specifies the wages, hours and working conditions for seasonal employees, and provides that laid off employees may be recalled to lower classifications. One such classification is seasonal employee. These were critical factors in Arbitrator Stern's decision in Marathon County, and the City submits that if that contract had read as this contract reads, Arbitrator Stern would have reached a different conclusion.

Dodge County turned in part on the arbitrator's determination that the employer had failed to determine whether there was a combination of available part-time positions that would have avoided the layoff of a full-time employee. Here that would require the arbitrator to decide that seasonal positions could be offered to the Grievant. That makes no sense as a basis for decision, since the seasonal positions are full-time during the season, and Mr. Warras was, in any event, already offered such a position. Moreover, the arbitrator in Dodge County relied on evidence of past practice and bargaining history, neither of which is present in this case. Finally, neither of those cases involved the right of the Employer to create and eliminate positions. That right is specifically reserved to the Cemetery, and it cannot be abrogated by the arbitrator's decision.

DISCUSSION

The dispute in this case is whether the City may continue to employ seasonal employees while full-time employee Kevin Warras is on layoff. Section 8.04 of the collective bargaining agreement speaks to reductions in bargaining unit personnel, and provides in part:

> 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…

The City asserts that this language provides for the order of layoff, but does not restrict the staffing pattern after the initial layoff. That interpretation does considerable violence to the clear language of the contract.

The City would have Section 8.04 of the contract read as a procedural provision, merely specifying the order in which employees must initially be laid off, without in any way affecting the City's right to use seasonal employees thereafter. This requires me to insert the word "initially" in the first sentence of Section 8.04, adding language to the contract in contravention to the limits on my authority.[1] More troubling, read in that fashion, the provision is completely pointless. Under the City's interpretation, had the layoff taken place in the midst of the summer, the City would have been able to layoff the seasonal employees, then Warras, and the next day recall all of the seasonal employees. The City may argue that this is not what happened here, but there is no conceptual difference between the example given and laying off Warras while the seasonal employees are on layoff and recalling all of them at the start of the season. Either Section 8.04 is a substantive limit on the right to use seasonal employees while full-time employees are on layoff or it is not. If it is not, then it is the completely empty exercise described here. Parties are normally presumed to intend that the words they use in a contract have meaning, and the City's interpretation of Section 8.04 leaves that provision devoid of any real meaning.

As Arbitrator Gratz observed in the Dodge County Award cited by both parties, the common usage of the term "layoff" in labor relations does not mean the act of giving notice of a layoff. Rather it means the placement of an employee on a leave and severing the employee from the payroll.[2] It refers to the status of being laid off, and thus the contract's specification that seasonal and probationary employees be laid off before full-time employees would require that such employees not be used while the full-time employee remains on layoff.[3] The City objects that such an interpretation

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[1] Section 6.02 of the collective bargaining agreement contains the customary prohibition on arbitrators adding to or modifying the contract: "The arbitrator shall have no authority to add to or modify the terms and conditions of this Agreement…"

[2] See Dodge County, MA-12183 (Gratz, 2/45/2004) at page 12.

[3] The City argues that Dodge County can be distinguished because the arbitrator there relied in part on bargaining history and past practice. While Arbitrator Gratz discussed those items of proof, he first concluded that the language itself barred employment of part-timer while full-timers were on layoff, then observed that "None of the bargaining history or past practice evidence supports the unusual interpretation urged by the County, and some of it persuasively undercuts that proposed interpretation." Thus his decision did not turn on bargaining history or past practice.

interferes with its Management Rights "to abolish and/or create positions" under Section 2.01 of the collective bargaining agreement, in that the City has "abolished" the Horticulturalist position, and has "created" seasonal positions. The City argues that reading Section 2.01 to require the full-time employment of Warras as a pre-condition to using seasonal employees effectively prevents it from abolishing his job and/or creating the seasonal positions.

The City's reading of Article 2 is incomplete. The first and last sentences of Section 2.01 recognize that the exercise of Management Rights is limited by the terms of the collective bargaining agreement. Preceding the enumeration of rights is the common statement that such rights are reserved "except as specifically limited by this Agreement..." At the end of the enumeration, the parties again specify that the rights of management are limited by the other terms of the contract: "Nothing contained in this section shall be construed to divest the Union or any employees of any rights granted by any provisions of this Agreement." Section 8.04 contains rights "granted by" ... "this Agreement." Moreover, reading Section 8.04 to prohibit the employment of seasonal employees while full-time employees are on layoff does not strip the City of its basic rights to create and abolish positions. The City may create seasonal jobs and it may abolish the Horticulturalist job. Had Kevin Warras resigned from City employment or transferred to a different position, the City would have had every right to abolish his job and still employ seasonal employees. Or, it may abolish his job, lay him off and refrain from employing seasonal employees. It may abolish his job, create a new full-time position bundling some of the Groundskeeper or other work, recall him to that position, and still employ seasonal employees. What it may not do is fill the seasonal jobs while a full-time employee is on layoff. Granting the City's complaint that this is cumbersome and inefficient, any inefficiency is the result of the parties' express agreement, and the evident purpose of this language is to create disincentives to laying off full-time employees.

The City argues that, because seasonal employees are covered by the contract,[4] and a classification of seasonal employee exists in the contract's pay scales, it had the right to lay off Warras and employ seasonal employees, so long as it first offered to recall him to a seasonal job. It points to Section 9.08, which provides in part that "Employees on layoff shall be given first opportunity to fill any vacancy in or below the classification they held ... prior to layoff..." If that were true, there would again be

[4] The City seeks to distinguish Arbitrator Stern's Award in Marathon County on this basis, as the seasonal employees in that case were not part of the bargaining unit and thus the arbitrator gave no weight to the County's offer of recall as a seasonal. Arbitrator Stern did note that the seasonal employees were not included in the bargaining unit, but he rejected the County's recall argument as lacking any support in the contract, and not reflecting a wide spread or well known practice. Likewise, in this case, the contract does not say "unless the full-time employee is offered seasonal employment" or words to that effect. In either event, I have not relied on Marathon County in reaching my own conclusion as to the meaning of this contract. I rely instead on the fact that the City's theory that recall to a seasonal job tolls its obligations under Section 8.04 is inconsistent with the language of that Section.

no need of Section 8.04. Seasonal employees do not have seniority, and if seasonal employment is treated as just another classification, any laid off full-time employee could automatically displace them. Rather than banning the use of seasonal employees in the event of a full-time employee's layoff, Section 8.04 would operate as an automatic bumping provision turning the full-time employee into a seasonal employee. Section 8.04 does not say that and logically could not lead to that result. If seasonal employees must be laid off before any full-time employee, turning the full-time employee into a seasonal employee does not evade the problem. The City would still be employing a seasonal employee while a full-time employee was laid off.

Section 8.04 has been in the collective bargaining agreement for a very long time, and it may well be that the use of seasonal employees was not as important a part of the cemetery's operations when it was first bargained as it is now. Be that as it may, the provision is clear, and it prohibits the use of seasonal employees while a full-time employee is on lay-off. It follows that the City violated the collective bargaining agreement during those months during 2006 when it employed seasonal employees while the Grievant, Kevin Warras, was on layoff. It also follows that there is no contract violation during the months that seasonal employees are not employed. The appropriate remedy would be to cease and desist from employing seasonal employees while Kevin Warras is on layoff, and to make him whole for the months during 2006 that seasonal employees worked while he was on layoff.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The City violated the collective bargaining agreement by employing seasonal employees while a regular employee was laid off with recall rights.

The appropriate remedy is to (1) cease and desist from employing seasonal employees while a regular employee is laid off with recall rights, and (2) make Kevin Warras whole for his losses during the period in 2006 during which seasonal employees were employed by paying him his regular wages for those times, less interim earnings, and providing him the benefits specified in the contract for full-time regular employees for those periods.

The arbitrator will retain jurisdiction over this matter for the sole purpose of clarifying the remedy if requested.

Dated at Racine, Wisconsin, this 9th day of February, 2007.

Daniel J. Nielsen /s/

Daniel J. Nielsen, Arbitrator

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