

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

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

and

CITY OF SUPERIOR

Case 202
No. 66883
MA-13670

(Linda Byrnes Grievance)

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, on behalf of the Union.

Attorney Harley Prell, City Attorney, and **Ms Cammi Koneczny**, Human Resources Administrator, City of Superior, 1316 N. 14th Street, Superior, Wisconsin 54880, on behalf of the City.

ARBITRATION AWARD

Superior City Employees' Union, Local #235, AFSCME, AFL-CIO (herein the Union) and the City of Superior (herein the City) are parties to a collective bargaining agreement dated January 5, 2006 and covering the period from January 1, 2006 to December 31, 2008. On April 5, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the claim of Linda Byrnes (herein the Grievant) for back pay subsequent to a reclassification. The undersigned was appointed to hear the dispute and a hearing was conducted on June 19, 2007. The proceedings were not transcribed. The parties filed initial briefs by July 20, 2007, and reply briefs by October 1, 2007, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Did the Employer violate the terms of the Collective Bargaining Agreement and the long standing past practice when it delayed action on the Grievant's reclassification and back pay? The City consequently agreed to the reclassification but only pay the Grievant the new higher adjusted wage rate effective from October 4, 2006 and not back to the original date of the Grievant's application for reclassification December 9, 2005.

And if so, the appropriate remedy is to make the Grievant whole by paying the Grievant at the Records Technician rate from December 9, 2005 to October 4, 2006.

The City would frame the issues as follows:

Did the City violate the AFSCME Local #235 Union Agreement by not compensating Linda Byrnes retroactive to December 9, 2005 on her reclassification from City Clerk Assistant to City Clerk Records Technician?

The Arbitrator characterizes the issues as follows:

Did the Employer violate the Collective Bargaining Agreement or past practice when it did not act on the Grievant's December 2005 reclassification request until November 2006 and then only awarded her back pay from October 4, 2006?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 5 CLASSIFICATION

5.01 The Union may at any time request in writing to the Human Resources Director for a review of the allocation of any position. An investigation shall be made of the position and the Human Resources Director may affirm or alter the allocation with the approval of the Human Resources Committee and City Council.

...

5.03 A) Regular part-time and full-time employees will be fully classified for the entire year and will not receive less per hour when assigned to work in lower classifications. When working in higher classifications than his/her appointed class, he/she will receive the pay attached to the higher classification.

BACKGROUND

Linda Byrnes, the Grievant herein, has been employed by the City of Superior and has been a member of Local 235 since 1992. She has held a number of clerical positions with the City and, in November 2005, was employed as a City Clerk Assistant at a wage of \$14.84 per hour. At that time she approached the City Human Resources Director, Mary Lou Andresen, and discussed a reclassification of her position on the basis that her position had taken on a number of new duties and that other positions had recently received reclassifications. Ms. Andresen asked her to submit a proposal for the reclassification in writing, which she did. Ms. Andresen then forwarded the request to the City Clerk, Margaret Ciccone, and asked for a response by December 9 as to whether there had been a change in job duties for the position significant enough to merit a reclassification. Ms. Ciccone demurred and stated she would not be able to respond before February 2006.

In January, Ms. Andresen forwarded the request to the Union to seek its input on whether a reclassification was merited. Ms. Byrnes again spoke to Ms. Andresen in January and was told she was waiting for the response from the City Clerk. Also in January, Ms. Byrnes asked the Human Resources Committee to expedite the request, but they declined to do so. At the end of January, Ms. Andresen retired before she was able to complete the review of Ms. Byrnes' reclassification request and she did not make a recommendation regarding the request prior to her retirement. After Ms. Andresen retired, the Human Resources Department was reorganized and Cammi Koneczny, who had been Ms. Andresen's assistant, was appointed to the newly created position of Human Resources Administrator, but Ms. Koneczny did not immediately address the reclassification request after undertaking her new duties. In August, the Mayor requested that Ms. Koneczny expedite the review and have a recommendation ready for the September meeting of the Human Resources Committee. Ms. Koneczny replied that she could not have the new job description completed by the September meeting and the matter was pushed back to the October meeting, at which point a reclassification was approved and sent on to the City Council. On November 8, 2006, the City Council voted to reclassify Ms. Byrnes to the position of City Clerk Records Technician and her wage rate was increased to \$17.64 retroactive to October 4. At that time her wage rate as a City Clerk Assistant was \$15.14 pursuant to a general wage increase that went into effect on January 1, 2006.

At the time of her reclassification, Ms. Byrnes requested back pay at the City Clerk Records Technician rate to December 9, 2005, based on Ms. Andresen's request to the City Clerk for input on the request by that date and her understanding of the existing practice in similar cases. The request was denied and Ms. Byrnes filed a grievance on November 21, 2006. The grievance was denied and the matter proceeded forward through the contractual steps to arbitration.

Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union contends that this is a matter of fundamental fairness. The Grievant's reclassification request went unaddressed for 10 months, meanwhile the City took action on 35 other reclassification requests during the same period, most within a month or two of the request. The Grievant's job duties were the same throughout the period so her pay should reflect that. The Union understands that there may have been legitimate reasons for the delay, including turnover in the Human Resources Department, but then the City should have given the Grievant back pay retroactive to her request. In this regard, the Union notes that, after being promoted to replace Ms. Andresen in April 2006, Ms. Koneczny received back pay retroactive to Ms. Andresen's retirement in January.

The Union further asserts the existence of a past practice regarding payment of back pay upon reclassification. The Union produced evidence of three employees who were reclassified, two during the period in which the Grievant's request was pending, who were given back pay subsequent to reclassification. Further, the City granted the reclassification, supporting the justification for the wage lift at the time of the request. It is also irrelevant that the Grievant was immediately placed at the top of the pay scale and was not required to serve a probationary period. This was not a trade off for denial of back pay, but a recognition that since she had been performing the duties already, she was entitled to top pay and did not need a probationary period.

The City

The record reflects that the Union is incorrect in many assumptions about the reclassification process. While the Grievant did make a reclass request in November 2005 and discussed it with Mary Lou Andresen in December, there was no determination made on where the request should be approved until much later, largely due to the inability of the City Clerk to quickly respond to the request for feedback and Ms. Andresen's retirement in January 2006. In any event, the request was not forwarded to the Human Resources Committee for consideration until October 2006. As Ms. Andresen testified, this is not an unusually long time for review of a reclassification request. At no time was the Grievant told the reclassification would be approved or, if approved, would include a wage increase. The Grievant testified that she was not assured of a wage increase, but was only hopeful for one.

There is no past practice of giving back pay after reclassification back to the date of the initial request. The evidence offered by the Union was to the effect that back pay is paid retroactive to the date of approval by the Human Resources Committee. That is what took place here – back pay was paid to October 2006 even though the City Council approved the change in November.

The union contract doesn't guarantee reclassifications, state a time within which reclassifications will be addressed, nor provide for back pay. It does state that reclassifications must be approved by the Human Resources Committee and City Council, which was done. The Grievant was also benefited by not having to serve a probationary period and by being placed at the top of the wage scale, over the objections of the Union for favoritism. By moving directly to the top of the wage scale, the Grievant received a 14.1% wage increase. To award her back pay in addition would be unwarranted.

The Union in Reply

The Union asserts that the internal management differences over the merits of the Grievant's reclassification cited by the City are irrelevant. All that is relevant is that the Grievant was awarded a reclassification. The Union also asserts that the delay in granting the reclassification was unwarranted and unjust. There was no sound basis for a delay of ten months, which is clear from the fact that City Councilor Dalbec had to pressure the Human Resources Department to move the matter forward after he became aware of the delay. The Grievant's job had changed substantially and the reclassification was justified, but should have been advanced in a reasonable time. The record also shows that the Grievant did not receive favorable treatment. She was advanced on the wage scale and not required to serve a probationary period because she had been performing the job duties for a long time. Further, the record reveals that other employees received back pay to the date they began performing their duties and so should the Grievant.

The City in Reply

The Union fails to justify its request for back pay to December 9, 2005. The request for reclassification was made in November 2005 and the draft job description wasn't produced until December 29, which was still significantly different than the final description developed in October 2006. The Union also failed to show any example of a long standing past practice of giving employees back pay to the date of their reclassification requests. The examples used were non-Union positions and different circumstances and so are irrelevant. The Grievant requested, and received, a reclassification and the Union provided no evidence that other requests for reclassification were handled more expeditiously. It has failed to establish a violation of contract and the grievance should be denied.

DISCUSSION

The Union's contention in this matter is two-fold. First it asserts that the contract language regarding reclassification imposes a duty of good faith on the City, which was violated by an overly lengthy delay in awarding the Grievant her reclassification, thus entitling her to back pay. Second the Union maintains that there is a binding past practice of awarding reclassified employees back pay at their increased wage from the outset of the reclassification process, which the Union asserts was December 9, 2005 in this case. As a remedy, the Union is seeking an award of back pay of the difference between the wage rates of her former and

new positions for the period from December 9, 2005 to October 4, 2006, which the Union calculates is equivalent to \$3,930.00

The pertinent contract language, found in Article 5.01, gives the Union the right to request a review of a position's allocation from the Human Resources Director. In such a case, the Human Resources Director then must conduct an investigation to determine whether a reclassification is warranted and, if so, make a recommendation for reclassification to the Human Resources Committee and City Council, which must approve any reclassification. Beyond that, the language does not specify a timetable within which the investigation and approval process must occur.

As the Union notes, there is an expectation in all contracts that they are entered into in good faith. In this context that means that, even though the language does not provide a timetable, the Employer will act on the request in a reasonable time and will not unduly delay the process. The question then becomes whether the ten months that passed between the time the Human Resources Director began the investigation process and the City Council approved the Grievant's reclassification was unreasonable.

First, it must be noted that the contract language is explicit that requests for review of positions may be made by the Union and nothing in the language gives such a right to an individual employee. Further, the testimony of former Human Resources Director Mary Lou Andresen establishes that the Grievant's individual request for reclassification was highly unusual. Thus, after having requested information in December 2005 about the Grievant's position and duties from her direct supervisor, City Clerk Mary Ciccone, Ms. Andresen then met with the Union representative on January 5, 2006 to obtain the Union's position on the request. Also, according to Ms. Andresen, the City Clerk was unable to respond to the request for information before February. Ms. Andresen retired as Human Resources Director at the end of January, which led to a reorganization of the Human Resources Department and the ultimate promotion of Ms. Andresen's assistant, Cammi Koneczny, to replace her as department head. Ms. Koneczny testified that after she became Human Resources Administrator the Grievant's reclassification request was delayed for a variety of reasons, including the fact that the City Clerk had not yet provided the requested information, the Mayor had indicated a desire to put the process on hold due to budget concerns and the fact that she was in the process of acclimating to her new duties. Ms. Koneczny also stated that she, as well as Ms. Andresen, did not believe the reclassification was warranted. In August 2006, the Mayor and City Councilman Dennis Dalbec told Ms. Koneczny they wanted the Grievant's reclassification addressed and on September 13, Dalbec told her he wanted the matter on the agenda for the Human Resources Committee meeting on September 18. Ms. Koneczny testified she was unable to complete the revision of the job description by September 18, so the matter was put off until October, at which time the Committee approved the reclassification and forwarded the matter to the City Council for attention in November.

The essence of the duty of good faith in this case is that the City act reasonably with respect to its obligation to process reclassification requests. Here, there were a number of

extraneous factors that contributed to the length of the review process, including the fact that the Grievant did not go through the Union with her request, which was at the least unorthodox, causing the Human Resources Director to have to contact the Union separately for its input. Also, the reorganization of the Human Resources Department and changeover in the department head resulted in a delay while Ms. Koneczny became acclimated to her new position. There was also uncontroverted testimony from both Ms. Andresen and Ms. Koneczny that the reclassification review process often takes several months to complete. Meanwhile, the evidence offered by the Union, while showing that the time from recommendation by the HR Director to approval by the HR Committee is typically not more than a month or two, did not indicate how long the process typically takes from initial request to approval. There is no way on this record to determine how long any of the reclassifications cited by the Union were in the works before the recommendations were sent to the Human Resources Committee. On this record, therefore, I am unable to say that the fact that the City took 10 months to complete its review of the Grievant's reclassification request and act thereon was a breach of its duty of good faith under the contract.

The second question is whether there is a binding past practice between the parties of paying back pay to employees after reclassification from the time of the initial reclassification request. In order to qualify as binding, any such practice must have existed and been consistently applied for some time and have indicia of having been mutually understood and agreed to by the parties. Here, the evidence indicates that there were a number of reclassifications approved by the Human Resources Committee within the same general time period that the Grievant's request was being reviewed. There is, however, no pattern to suggest any overriding policy or practice of awarding back pay to reclassified employees to any specific date. In fact, several of the reclassifications, and corresponding wage lifts, were prospective. Also, two of the circumstances of back pay being awarded cited by the Union, that of two library managers and Ms. Koneczny, herself, involve management employees and, so, do not support a past practice argument with the bargaining unit. The instances of Terri Kalan, who received back pay after being reclassified to Records Management Specialist, and Carol Noonan, who received back pay after reclassification to Community Development Technician in 2001 are supportive of the Union's position. Nevertheless, there is no record of consistency in the awarding of back pay sufficient to find the existence of a binding practice of doing so.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The Employer did not violate the Collective Bargaining Agreement or past practice when it did not act on the Grievant's December 2005 reclassification request until November 2006 and then only awarded her back pay from October 4, 2006. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 11th day of February, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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