

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 662

and

CITY OF GLENWOOD CITY

Case 6

No. 69146

MA-14500

(Part-Time Employee Grievance)

Appearances:

Ms. Sara J. Geenen, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, appearing on behalf of Teamsters Local Union No. 662.

Mr. Tom Schumacker, Attorney, Bakke Norman Law Offices, 990 Main Street, P.O. Box 54, Baldwin, Wisconsin, appearing on behalf of City of Glenwood City.

ARBITRATION AWARD

Teamsters Local Union No. 662 hereinafter "Union" and City of Glenwood City, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign an Arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot was assigned the case and a hearing was held on December 2, 2009 in City of Glenwood City, Wisconsin. The hearing was not transcribed. The parties offered oral arguments at the conclusion of the hearing whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and left it to the arbitrator to frame the substantive issues. I frame the issues as:

Did the City of Glenwood City violate the collective bargaining agreement when it failed to recognize employee Kevin Olson as a regular part-time employee effective January 1, 2009? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1
RECOGNITION AND FAIR SHARE

Section 1. Recognition. The Employer hereby recognizes and acknowledges that the Union is the exclusive representative in collective bargaining with the Employer (excluding supervisory employees) for all full-time and regular part-time Public Works and Clerical employees for the City of Glenwood City. Employees working at least 1020 hours shall be considered regular part-time employees for this purpose. The intent and purpose of this Agreement being to:

1. Establish certain hours, wage and working conditions of employment.
2. Establish procedures for the resolution of disputes concerning this Agreement's interpretation and/or application.

...

ARTICLE 2
MANAGEMENT RIGHTS

The Employer retains the right to operate and manage its affairs in its sole discretion. The rights, power and authority which the Employer has not modified by this Agreement, are retained solely by the Employer.

...

ARTICLE 3
CONDITIONS OF EMPLOYMENT – PROBATIONARY PERIOD

Section 1. Probation. A new employee shall be covered under the provisions of this Agreement, but shall serve a one (1) year probationary period during which the employee may be discharged without recourse to the grievance procedure. After successful completion of the probationary period, the employee shall be placed on the seniority list and his/her seniority date, for the purpose of bargaining unit seniority and benefits, shall be established based on the most recent date of hire.

Section 2. Any employee hired as a seasonal, casual, or part-time worker shall not become a seniority employee under these provisions, where it has been agreed by the Employer and Union that he/she was hired for seasonal, casual or part-time work. The word "seasonal" as used herein is meant to cover

situations such as holidays, summer worker or like situations. The word “casual” or “part-time” as used herein, is meant to cover situations such as replacements for absenteeism and vacations.

...

ARTICLE 7
GRIEVANCE PROCEDURE

...

The arbitrator shall consider and decide only the issues submitted in writing by the Employer and Union. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modify, or vary in any way the applicable law, rules, or regulations having the authority to modify, add to, or delete from the express terms of this Agreement.

...

ARTICLE 13
VACATIONS

Section 1. All full-time employees shall be entitled to and receive paid time off vacation benefits as follows, based on the employees anniversary years.

- Five (5) paid vacation days per year starting the first day of employment.
- Ten (10) paid vacation days per year after two (2) years of employment.
- Fifteen (15) paid vacation days per year after ten (10) years of employment.
- Fifteen (15) paid vacations days plus one (1) additional day for each additional year of employment up to a maximum accumulation of twenty (20) days.

Regular part-time employees shall receive vacation on a prorated basis.

...

ARTICLE 14
HOLIDAYS

Section 1. The following shall be recognized as holidays for purposes of this Agreement: ½ Day New Year’s Eve Day, New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, and one (1) Floating holiday.

All employees who are employed in the pay period in which any of the above holidays occur shall receive eight (8) hours of pay for each of the above holidays.

...

ARTICLE 19
HEALTH AND WELFARE

Section 1. After ninety (90) days of employment the Employer agrees to pay all full-time eligible employees a cash payment (with appropriate deductions) in lieu of receiving health insurance. Effective 1/1/09 the employees shall receive a monthly cash payment of \$500.00 (less appropriate deductions). Cash payment in lieu of insurance for regular part-time employees shall be provided on a pro-rated basis.

...

APPENDIX "A"
Wages and Classifications

Section 1. Wages

Effective 1/1/09 and 1/1/2010 the Deputy Clerk and Department of Public Works Employee shall receive a wage adjustment of \$1.00.

In addition to the above wage adjustment, all covered Employees shall receive an additional 3% wage increase on top of the wage adjustment effective 1/1/09 and 1/1/2010.

	Hourly Wage	
<u>Deputy Clerk</u>	<u>1/1/2009</u>	<u>1/1/2010</u>
	\$14.94	\$16.42
<u>Public Works Department</u>	<u>1/1/2009</u>	<u>1/1/2010</u>
	\$17.14	\$18.68
<u>Part-time Employees</u>	<u>1/1/2009</u>	<u>1/1/2010</u>
	\$12.88	\$13.26

All eligible employees shall receive hourly back pay compensation on a separate check, payable the first pay period following the signing of this agreement, at the rate of 50 cents per hour for all paid hours 2008.

All eligible employees shall also be entitled to retroactive pay back to 1/1/09, at the negotiated rate of pay, including the additional monthly stipend pay.

The Employer shall pay for all costs for physicals, certifications, and/or licenses, and required Commercial Driver's License, less the sum that the employee would have paid previously for a regular driver's license.

BACKGROUND

The Union and City entered into bargaining for an initial collective bargaining agreement in July 2009 following at least 15 negotiating sessions spanning a couple of years. The Union was represented by Business Agent Tim Wentz and Deputy Clerk Therese Kopacz. Initially, the City was represented by the mayor and City Council. Part-way through the negotiations, Councilman Dave Graese and Attorney Bill Nickoli, then an attorney at the Bakke Norman Law Offices, intervened and began representing the City.

The parties reached a tentative agreement on March 26, 2009. Present at the meeting were Nickoli for the City and Wentz and Kopacz for the Union. Graese was not in attendance. Nickoli drafted the Summary Tentative Agreement document which he and Wentz initialed. The document read as follows:

3-26-09

*2 year Deal
Language*

*2009-2010
per 3-26-09 proposal
(attached)
Includes OT language*

*50 cents Back pay for 2008 all hours paid
To be paid w/ separate check
With 1st payroll after signing*

*Increase stipend for Insurance by
\$100 per month*

Wage Adjustment

*3% each year for all
Positions including PT*

*In addition Clerical and DPW
will receive \$1.00 increase on
1-01-09 prior to 3% indicated
above and on 1-01-10 will
receive \$1.00 increase prior to 3%
indicated above*

*PT pay added to schedule for
Recycle Center start 12.50 with
adjustment of 3% each year*

Back pay + stipend to 1-01-09

The Union ratified the agreement. Sometime thereafter, Nickoli's professional relationship with Bakke Norman Law firm ended and another attorney with the firm began representing the City. The City Common Council voted to ratify the collective bargaining agreement with the Union on July 6, 2009. The Grievant did not receive a wage increase or any other benefits described in the labor agreement. The Union informed the City that it believed the Grievant was entitled to these items.

At a July 20, 2009 Committee meeting of the Whole, the City Common Council addressed the "recycling hours". The minutes on this topic indicate:

In regards to the reduction of hours for the part time recycling employee, the Mayor recommended eliminating the Wednesday hours for that position, and having Dave Booth or MN cover those hours. The mayor stated that this reduction is aimed at becoming more efficient, and this is just one area where inefficiencies need to be addressed. With no objections being raised by the council the Mayor will give the direction to Dave Booth to reduce the part time position hours.

On July 30, 2009 the Union filed a Complaint with the Wisconsin Employment Relations Commission alleging that the City had violated Wisconsin Statutes Section 111.70(3)(a)1., 2., 3., 4., and 5 in as much as the City unilaterally reduced the regular part-time employee's hours and decided to use a supervisor and full-time employee working overtime to complete the Grievant's duties. That complaint is being held in abeyance pending the outcome of this grievance.

FACTS

The City of Glenwood City provides municipal services to its residents including the operation of a Recycling Center. The Recycling Center is managed by Dave Booth, Supervisor of Public Works.

The Grievant, Kevin Olson, was hired to a position at the Recycling Center in September 2009 after filling in on Saturdays for five months for an employee that was not at work due to illness.¹ The Grievant's work schedule is Tuesdays from 1 p.m. to 7 p.m.,

¹ The Grievant had worked for the City in 2007, but moved away from the area.

Wednesdays from 6:30 a.m. to 3 p.m. with a one-half hour lunch, Thursdays from 7:30 a.m. to noon and Saturdays from 6:30 a.m. to 1 p.m. The Grievant's hourly wage is \$12.50.

The parties ratified their first collective bargaining agreement in June 2009. Thereafter, the City processed retroactive compensation, but the City did not compensate the Grievant for any back pay, did not adjust his hourly wage by 3% and did not pay him an insurance stipend.

The Grievant filed his grievance on August 7, 2009 alleging a violation of Article 1, Article 8, Article 19 and any other article that may apply explaining:

I have worked the required amount of hours the past year to become a member of the Union and have not received any of the benefits under the contract agreement (back pay and wage increase) also stipend increases. I feel the City has avoided its obligations under the contract. This is an on-going issue.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The issue in this case is whether the Grievant was entitled to the negotiated regular part-time pay and benefits as contained in the parties' collective bargaining agreement effective January 1, 2009.

This is a contract interpretation case. The parties' dispute arises out of the meaning of their labor agreement. Contract interpretation is the ascertainment of meaning. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 430 (2006). Language is clear when it is susceptible to one convincing interpretation, but may be deemed ambiguous if there is more than one plausible interpretation. *Id.* at 434. If the plain meaning of the language is clear, it is unnecessary to resort to extrinsic evidence. *Id.* In this instance, I will first look to the language of the parties' agreement, but I will also rely on the negotiating documents and testimony since this is a first contract.

I start with the language of the Recognition Clause. The purpose of a recognition clause is to identify which employees are represented by the bargaining unit and are therefore subject to the terms and conditions of the labor agreement. The first sentence of the clause identifies who is recognized as a bargaining unit member – “full time and regular part-time” employees – and then goes on to further define a regular part-time employee as someone “working at least 1020 hours”. The City relies on this language to conclude that the Grievant was not a bargaining unit member as of January 1, 2009, and therefore not entitled to certain benefits of the newly ratified labor agreement. The City asserts the Grievant was obligated to work 1020 hours before he could be recognized as a regular represented part-time employee and therefore entitled to all terms and conditions of the collective bargaining agreement.

Article 2 sets forth the criteria an employee must meet before he/she is covered by the labor agreement. The Grievant must be a “regular part-time” employee who is “working at least 1020 hours”. The parties do not define a “regular part-time” employee, but define a “part-time” employee in Article 3 as an employee who serves as replacement for employees on vacation or absent. The Grievant testified and the City confirmed that the Grievant worked less than forty hours per week and that after September 2008 he was assigned the same schedule each week. Given that the Grievant works a regular schedule; that that schedule amounts to less than full time hours in a week; that the Grievant was not working in the place of an employee that was on vacation or who was absent as of January 1, 2009; and the fact that the City is not challenging this criteria, I conclude that the Grievant is a regular part-time employee.

The next question is whether the Grievant is “working at least 1020 hours”. The City reads this language to mean that the Grievant must work 1020 hours to be eligible for coverage and acknowledges that the Grievant met this eligibility criteria in October 2009.² I do not find that the language of Article 2 requires that the regular part-time employee must have completed 1020 hours of work in order to attain bargaining unit status. The City’s reading of the language fails to take into account the parties’ use of the term “working” rather than “worked”. If someone is “working,” then they are doing something in the here and now or otherwise stated, in the present, whereas the term “worked” indicates that the work is complete and occurred in the past. See also NORTHWEST UNITED EDUCATORS, Case 28, No. 54993, MA-9858 (Davis, 9/97).

This conclusion is strengthened by Article 3, Conditions of Employment – Probationary Period, wherein the parties created a probationary period of one year for “new employees” and specifically stated that new employees “shall be covered under the provisions of this Agreement”. Thus, the parties did not expect new employees to complete any required number of hours before being considered a bargaining unit member. Instead, they only need be hired at which time they are covered. The language of the Probationary Period supports the Union’s position.

While not necessary given the clarity in the language of the collective bargaining agreement, I next look to bargaining history or in this case, the tentative agreement entered into by the parties since this is the first and only collective bargaining agreement. The City argues that back pay and the stipend were not intended as benefits granted to the Recycling Center employee. In looking at the tentative agreement, the document reviews the essential terms starting with the years of coverage, language and moves to the financial aspects including back pay, insurance stipend and wages. The parties next specified which positions would receive an additional one dollar increase and the Recycling Center part-time employee position was not identified. The next clause is relevant to the part-time recycling position.

² The parties stipulated that as of the week of October 10, 2009 the Grievant had worked 1020 hours in the 2009 calendar year.

The tentative agreement states that “PT pay added to schedule for Recycle Center start 12.50 with adjustment of 3% each year”. This is clear and does not afford the City any leeway or discretion as to whether the regular part time wage is to increase by three percent as of the first of each year of the agreement. The document then separates this clause from a clause which reads, “Back pay + stipend to 1-01-09”. This clause not only follows specific language relative to the Recycling Center part-time employee, but also does not differentiate or specify which positions are included or excluded. Given the proximity to the Recycling Center part-time employee, it is reasonable to conclude that it applies to that position. And, given the parties’ ability to identify and exclude certain positions from certain benefits, i.e. the Recycling Center position was excluded from the one dollar per year increase, it is reasonable to conclude that had the parties intended to deny the Recycling Center part-time employee back pay, a three percent wage increase and the insurance stipend, then they would have done so. The language of the tentative agreement supports the Union’s position.

AWARD

1. Yes, the City of Glenwood City violated the collective bargaining agreement when it failed to recognize employee Kevin Olson as a regular part-time employee effective January 1, 2009.
2. The appropriate remedy is to compensate the Grievant for all benefits, wages, back pay and the insurance stipend retroactive to January 1, 2009.
3. I will retain jurisdiction for 60 days to resolve any questions involving application of this award.

Dated at Rhinelander, Wisconsin, this 26th day of February, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator