

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF MARINETTE

and

GENERAL TEAMSTERS LOCAL UNION NO. 662

Case 105
No. 69260
MA-14543

(Back Pay/Bumping Grievance)

Appearances:

Attorney Scott D. Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, s.c., 1555 North Rivercenter Drive, P.O. Box 12933, Milwaukee, Wisconsin 53212, appearing on behalf of Local 662.

Attorney Jonathan I. Sbar, City Attorney, City of Marinette, 1905 Hall Avenue, Marinette, Wisconsin 54143-1716, appearing on behalf of the City of Marinette.

ARBITRATION AWARD

Local No. 662, hereinafter referred to as the Union, and the City of Marinette, hereinafter referred to as the City or the Employer, are parties to a Collective Bargaining Agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On October 21, 2009 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the alleged failure of the City to pay the proper amount of back pay to Nan Kehoe (Grievant) following her transfer to another City position. This case was filed in conjunction with a related case, No. 69260, which contained similar allegations against the City of Marinette relating to City employee Lana Bero. The parties requested a panel of five Commission Arbitrators and the undersigned was selected by the parties from that panel and appointed as the Arbitrator to hear and decide both matters. Hearing was held on the matter on January 20, 2010 in Marinette, Wisconsin, at which

time the parties were given the opportunity to present evidence and arguments. Both matters (No. 69259 and No. 69260) are properly before the Arbitrator. The hearing was not transcribed. The parties filed initial post-hearing briefs and replies by February 10, 2010, marking the close of the record. A duplicate original of this Award shall be placed in the companion file No. 69260 and shall constitute the Arbitration Award in that case. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were not able to stipulate to the issues to be decided by the Arbitrator and left it to the Arbitrator to frame the issues.

The City states the issues as follows:

1. Did the City violate Article 8 of the Agreement by paying employees who have bumped into a position with lesser seniority the same hourly salary as the employee who was bumped?
2. Does the City owe back pay to employees Nan Kehoe and Lana Bero, and if so how much?
3. In the event of an adverse ruling as to Issue #1, is the City within its rights to reduce the hourly pay of the two employees who bumped into positions with higher hourly pay, and reduce their hourly pay back to the hourly pay they were making prior to the bump?

The Union states the issues as follows:

1. Did the City violate the Agreement by limiting the bumping rights of the employees and by failing to apply the proper wage rate to employees who exercise bumping rights?
2. If so, what is the appropriate remedy?

The Arbitrator states the issues as follows:

1. Did the City violate Article 8 of the parties' Agreement by limiting Kehoe's and Bero's bumping rights to positions within the Recreation Department immediately following their layoffs on September 1, 2009?

2. If so, what is the appropriate remedy?
3. Did the City apply the proper wage rates and back pay to employees Kehoe and Bero following the exercise of their contractual bumping rights subsequent to their layoffs on September 1, 2009 and thereafter?
4. If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2
RIGHTS OF MANAGEMENT

Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, suspend, or discharge for proper cause, or transfer, and the right to determine the table of organization; the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction, is vested exclusively in the Employer. The Employer agrees, however, to notify the Union prior to the effective date of any change in the Table of Organization.

. . .

ARTICLE 8
SENIORITY

. . .

Temporary layoffs, considering the job classification needs of the department section, shall be made on a department section basis only, but in the event of a reduction-in-force layoff, the laid off employee shall have the right to transfer to other department sections by "bumping" or (sic) the exercise of his greater overall or total service seniority. The bumping employee shall be required to demonstrate his ability to perform the job to which he has been transferred within a period of thirty (30) calendar days and if deemed qualified, after such period, the transfer shall be made permanent.

Employees may be temporarily transferred from one section to another without loss of seniority or other rights in their section of origin.

...

ARTICLE 17
GRIEVANCE PROCEDURE

If an employee or the Union has a grievance pertaining to the employee's work or working conditions, or pertaining to the meaning or application of this agreement, the grievance shall be handled in the following manner:

...

Step 4. In the event that a satisfactory resolution is not reached through Step 3, a request shall be made within thirty (30) days to the Wisconsin Employment Relations Commission for an arbitrator. The WERC shall provide a list of five (5) grievance arbitrators and each side shall be allowed two (2) strikes (alternating with the grievant making the first strike). The arbitrator shall not have authority to add, subtract from, or modify any terms of the agreement, or to establish or change any wage or rate of pay. The arbitrator's decision shall be binding upon the parties.

...

BACKGROUND

Prior to September 1, 2009, Grievants Kehoe and Bero had been employed by the City in what was known as the "Tot Lot" program. This was a program for 4 and 5 year old children and fell within the Recreation Department. It had been in place for several years. Both Grievant's positions were part time positions.

On August 25, 2009 the City Common Council voted to close the "Tot Lot" program due to budgetary considerations. This resulted in the elimination of the positions filled by the Grievants and, on September 1, 2009 they were both laid off. The City advised them that they had "bumping rights" under the terms of the Agreement and that they were allowed to bump into positions held by less senior employees. They were further advised that, pursuant to the City's interpretation of the Agreement, their bumping rights extended only to less senior positions within the Recreation Department and that they were prevented from bumping into less senior positions outside of that department. (The City also interpreted the Agreement to provide that a bumping employee would receive the wage of the position into which they bumped as opposed to the wage of the position the

employee held prior to the bump.) There was only one job in the Recreation Department (Recreation Center Utility Maintenance) held by a less senior employee than either Grievant, and because Grievant Kehoe was more senior than Grievant Bero, Grievant Kehoe bumped into that

Page 5
MA-14543

position effective September 1, 2009. She held that job for a period of thirty days at which time she was deemed to be unqualified due to the physical requirements of the job. Consequently, she was returned to layoff status on October 1, 2009. Grievant Bero assumed layoff status effective September 1, 2009 because she had no one to bump within the Recreation Department.

Prior to August 31, 2009 both Grievants filed grievances contesting the City's interpretation of the bumping and wage rate issues. The grievances were initially denied and eventually appealed to the Personnel & License Committee pursuant to the terms of the parties' Agreement. The Personnel & License Committee granted the grievances as to the bumping portion of the grievances, i.e. the Committee agreed that the Agreement provided the Grievants with the ability to bump into less senior positions *inside or outside* of the Recreation Department. As to the issue of wages, the Committee failed to grant any back pay but, per City Attorney Sbar's letter dated October 9, 2009 did take the position that a bumping employee should "receive the pay of the employee who is bumped." Both Grievants were notified of this decision by the Committee on October 9, 2009.

On October 26, 2009 Grievant Bero notified the City that she intended to bump into the position of Deputy Clerk effective on November 2, 2009. On November 5, 2009 Grievant Kehoe notified the City that she intended to bump into the position of Building and Grounds Worker effective November 8, 2009. Both Grievants have now successfully passed the thirty day trial period in their respective new positions and are currently employed in those positions.

Grievant Bero's hourly wage rate in her new position exceeds that of her prior wage rate at the Tot Lot, while Grievant Kehoe's hourly rate is less than the wage rate in her previous position at the Tot Lot. Grievant Kehoe now seeks back pay from October 1, 2009 through the date she started her new position, November 8, 2009. She also seeks reinstatement of her former Tot Lot wage. Grievant seeks back pay from September 1, 2009 through the date she started her new position, November 2, 2009.

THE PARTIES' POSITIONS

The Union

Grievant Kehoe was entitled to exercise her seniority bumping rights by bumping into the Building and Grounds Worker position on September 1, 2009 but was prevented from doing so until November 8, 2009. She should receive back pay for wages lost at her regular hourly wage rate of \$16.91 per hour. As for Grievant Bero, she should have been able to bump into the Deputy City Clerk position on September 1, 2009 had the City not improperly restricted her right to do so. She is, therefore, entitled to back pay for the period from September 1, 2009 through November 1,

2009 at the rate of her new wage of \$17.99 per hour less unemployment compensation she received during her layoff period.

Page 6
MA-14543

The City's defense to the application of the seniority issue is two-fold: (1) that the City is operating on a tight budget and needs to cut costs, and (2) that the Agreement does not permit an employee such as Grievant Kehoe from retaining the wage rate she has earned by reason of lengthy service. Both must fail because arbitrators have long recognized that a "plea of poverty" does not excuse non-compliance with contractual obligations and because the City asks the Arbitrator to ignore the decision of the Personnel & License Committee not to award back pay. This runs contrary to basic contract remedial law which recognizes back pay as a remedy to indemnify employees by making them whole for losses incurred by the violation of contractual obligations.

The contract wage rates are "starting" rates and in this case neither Grievant is a new or "starting" employee. If Grievant Kehoe is forced to take the lower wage rate of the position into which she bumped she would be punished because she would lose the benefit of her seniority which resulted in gradual wage increases over time and because she had "filled in" in the past for the position she now holds. Having had the benefit of Grievant Kehoe's experience for many years the City would now have the Arbitrator reduce the wage rate she has earned through her lengthy service in lieu of a lower rate. Nothing in the Agreement implies that an exercise of seniority will result in a wage reduction. Had the City wanted such a result it could have negotiated it.

The City

A bumping employee should receive the hourly pay of the employee they bump. The parties have long ago recognized that different jobs merit different rates of pay and have set forth the values of each job classification in the Agreement. Because of this it makes no logical sense for the City to enter into an agreement whereby workers who, due to seniority, position elimination and bumping are paid a higher wage per hour for what is agreed by both parties is a job which merits less pay. If this were the case, why not just have everyone make the same hourly wage? Over time the differences in pay rates become more pronounced. For instance, the highest paid worker in the City earns \$24.42 per hour and the lowest earns \$12.25 per hour. If the worker earning \$24.42 per hour were to bump into the position earning \$12.25 per hour and receive the higher wage rate this would create an anomaly making the Union's interpretation of Article 8 unreasonable. The parties did not negotiate a method for arriving at an adjustment to the rate of pay following a bump.

As for back pay, it should be granted based on four things: a) the ruling should provide that the proper amount of pay can be determined; b) the City should be given credit for unemployment compensation earned; c) credit should be given to the City for time spent working at the City in two separate positions; and d) the City should get credit for the time during which the employees were deciding which job to bump into.

In the event the Arbitrator's decision is adverse to the City's position, employees who bumped into higher paying jobs should have their pay reduced accordingly. The Union refutes this

Page 7

MA-14543

proposition citing a sentence in Article 8 saying: "Employees may be temporarily transferred from one section to another without loss of seniority or other rights in their section of origin." This is not a "temporary transfer" and thus this language does not apply.

The Union cannot have it both ways with some bumping employees taking the new wage rate and other bumping employees paid at their prior rate.

DISCUSSION

The Union filed its grievances on behalf of Grievants Kehoe and Bero on September 14, 2009. The wording of that grievance was broad in its application. It read: "Ms. Kehoe was forced into a position not of her choosing. She did not "post" into a lower classification." The settlement requested by the Union was "To be made whole for any lost benefits to close Tot Lot." (Grievant Bero's grievance appears to have been bootstrapped to the Kehoe grievance.) The initial grievance was broad enough to encompass the issues of whether the Grievant's should have been able to bump into positions other than within the Recreation Department and whether they were entitled to any back pay once having done so. The issue of the appropriate wage rate to be applied to Grievant Kehoe morphed into the existing grievance over the life of the grievance prior to reaching the arbitration level. Hence, that issue is considered here along with the original two.

I first turn my attention to Issue #1, whether the City violated the rights of the Grievants when it initially limited their right to bump into positions restricted to those available within the Recreation Department. The answer is yes, and the parties have resolved this issue. Prior to October 9, 2009 the grievance was advanced to the Personnel & License Committee. This Committee granted that portion of the grievance relating to the ability of its employees to bump into positions outside of the Recreation Department. The Union did not take exception to that portion of the Committee's decision and, consequently, the parties now have a meeting of the minds as to the meaning of Article 8 of the Agreement as it pertains to the scope of positions into which employees of Local 662 may bump. As set forth by Mr. Sbar, the City's attorney, in his letter to the Union dated October 9, 2009, the Committee's ruling (and thus the agreed upon meaning of Article 8 in this respect), is:

The Committee has ruled that you have the right to "bump" into any Teamsters Clerical Local 662 position with lesser seniority than you, subject to the provisions of Article 8 set forth below.

The provision Sbar referred to as “set forth below” referred to the Article 8 requirement that a bumping employee be required to demonstrate his/her ability to perform the job into which he or she bumps within a period of thirty days. This provision of Article 8 is not in dispute here.

Page 8
MA-14543

I turn now to whether the City applied the proper wage rates and back pay for each Grievant. I first consider whether the wage rate applied to each was proper. In the case of both Grievants, the City applied the wage rate of the position into which each Grievant bumped. In Bero’s case, the Union agrees that her wage rate is proper since she received an *increase* in her wage following the bump. In Grievant Kehoe’s case, the Union says the application of the wage rate of the position into which she bumped is improper because she bumped into a position with a *lower wage rate* than the rate she had been receiving prior to the layoff. According to the Union, “Nothing in the contract implies that reductions in wages will result from the exercise of seniority.” The question, then, is whether an employee who chooses to exercise his or her right to bump into another position held by a less senior employee as a result of a reduction-in-force layoff should be paid at the rate the bumping employee had prior to the bump (his or her old position) or the rate attached to the new position (his or her new position).

The Union’s argument, that the Agreement does not imply that a reduction in wages will result from the exercise of seniority, is quite right. The Agreement does not imply that. The Agreement also does not imply that an employee who bumps into another position should maintain his or her prior wage rate. The Agreement is silent on this matter. The Union argues that the rates set forth in the parties’ Agreement are “starting” rates and since neither Grievant is a new or “starting” employee the contract rates should be modified in some way. The Union suggests that the City should not be allowed to receive the benefit of the Grievants’ longevity and experience without taking into consideration the gradual wage increases they achieved over time. Even if this argument were persuasive, which it is not, the Union has not given the undersigned any guidance on how one might compute a wage rate giving credit for the Grievants’ longevity nor does the Agreement address the issue. Also, the Undersigned does not believe he has the authority to add such a computation of wages to the existing Agreement. Therefore, the Union’s argument in this regard is rejected.

Arbitrators often are expected to give meaning to provisions which are not clear in situations which were not contemplated by the parties when they negotiated the agreement. So long as the arbitrator applies principles reasonably drawn from the terms of the agreement, as opposed to manufacturing new terms not covered at all by the agreement, (s)he does not improperly assume arbitral authority. SEE VINDICATOR PRINTING CO., 48 LA 213, 218-19 (Smith, 1966). In this case the Undersigned believes that the determination of proper post-bumping wage rates falls squarely within the Article 17 mandate requiring the Arbitrator to determine what is within “. . . the meaning or application of this agreement.” Viewing the Agreement as a whole, as I must do, I find ample evidence to support the City’s argument regarding post bumping wage rates. Most

importantly, the parties themselves have established through contract negotiations the wage rates they believe are merited for each individual position in the bargaining unit. Both parties agree that the position into which Grievant Kehoe bumped merits a contractual wage rate of \$14.31 per hour and the position into which Grievant Bero bumped merits a wage rate of \$17.99 per hour. I note

Page 9

MA-14543

that the hourly rates set forth under Appendix A of the Agreement, introduced into evidence at the hearing, set forth a wage rate for each position which is somewhat less than the above but since both parties agree on the wage rates set forth above this is the rate I will use. Given the foregoing it is obvious that the parties agree on the appropriate hourly wage rate for each of these positions. The Union, though, says I should ignore the above rate for Grievant Kehoe because it is less than she was making before her bump. As mentioned above, the Union argues that Grievant Kehoe should not lose any gross income because of her exercise of seniority and should receive her prior rate of pay. The Union bases this argument on the language found in Article 8 which provides for the temporary transfer of an employee from one section to another without a loss in seniority or other rights, presumably pay. This section of the parties' Agreement, however, does not apply to bumping situations. It applies to the transfer of an employee at the direction of the City for a temporary period of time. The City argues that if I were to accept the Union's argument and apply the prior wage rate to Grievant Kehoe following her bump, I would have to apply the pre-bumping wage rates to every employee who bumped into another position. These employees would then be forced to return wages they have already been paid, causing an unfair result for them. Such a result would be unreasonable. An even more unreasonable result, says the City, is the hypothetical situation where the highest paid employee (roughly \$24.00 per hour) bumps into the lowest paid position (roughly \$12.00 per hour) resulting in the City having to pay that individual over \$24.00 per hour for a job both parties agree merits an hourly pay wage of \$12.00. The Undersigned agrees that these potential scenarios would result in situations never contemplated by the parties and ones which would produce unreasonable, inequitable and absurd results. These results would also ignore the wage rates the parties placed on each position - wage rates reached through negotiations between the parties. This would constitute a modification of the Agreement and a change in the rates of pay which I am not authorized under the terms of the Agreement to do. Thus, I find that the City's decision to apply the wage rates of the positions into which the Grievants bumped to each of the Grievants was proper.

Turning to the issue of back pay, there is no question that each Grievant is entitled to some back pay as a result of the City's initial failure to allow them to bump into positions outside of the Recreation Department. This decision resulted in a delay in their ability to bump into positions for which they were qualified and the value of that delay is compensable. The question is how to determine that value. As I have found above, the appropriate wage rate for each Grievant is the rate attached to the position into which they bumped. The City argues that neither should be given credit for the time they took to select and start their new positions. The Agreement does not provide for a time limit within which a laid off employee must decide whether to bump and, if so, which position to bump into. Obviously, it will take some time for them to consider their options. If the Agreement had required, for instance, that the City provide a list of potential positions to each Grievant a

reasonable time prior to the layoff and required that each employee decide prior to the actual layoff which position they would bump into, this issue would be moot. It didn't though. Once again, the parties are presented with a situation for which they did not provide. The record does not reflect

Page 10
MA-14543

that the City attempted to impose a time period on them once it made the decision that they could bump into positions beyond the Recreation Department. On the contrary, City Attorney Sbar's letter of October 9, 2009 invites each Grievant to ". . . notify me as soon as possible if you believe you are entitled to transfer into another position. . ." and "If you need any or all of the job descriptions for the Teamsters Clerical Local 662 positions with lesser seniority than you, please let Ronnie know and she can provide them to you." This language does not imply any particular sense of urgency. As it stands the record provides only the fact that the employees took the time they took and, *after the fact*, the City decided that they took too long. In this instance I am reluctant to impose a time period upon the parties. This is an issue the parties themselves should negotiate and I thus leave it to the parties for their consideration and ultimate agreement if they desire to clarify the issue. I also note that each Grievant advised the City of the positions they wished to bump into somewhat in advance of the actual bumping date in order to give the employees they would be displacing time to consider their bumping options.

Computation of Back Pay

Grievant Bero:

In the case of Grievant Bero the computation is fairly straight forward. She was laid off on September 1, 2009 and began her new job following the bump on November 2, 2009. Her new wage rate was \$17.99 per hour. She works 37.5 hours per week. Had the City not initially prevented her from bumping into positions beyond the Recreation Department, she could have theoretically bumped into her new position immediately. The record does not suggest that she would have done otherwise. Therefore, the value of Bero's back pay remedy is:

The number of paid work days between September 1 and November 2 times her daily gross pay and benefits (based upon the number of hours she works each day) based on \$17.99 per hour, less any income she received during that period of time (including unemployment benefits). There shall be no reimbursement from the Grievant to the City due to any overpayment made to the Grievant, if any, during this period of time.

Grievant Kehoe:

In her case, the computation is somewhat more involved due to the fact that she worked for roughly 30 days during the period of her layoff. She was laid off on September 1, worked in another position for 30 days until October 1, and was on layoff status from October 1 until she began her new job on November 9. She works 20 hours per week. Had the City not initially prevented her from bumping into positions beyond the Recreation Department, she could have

theoretically bumped into her new position immediately. The record does not suggest that she would have done otherwise. The computation for Kehoe's pack pay remedy is:

Page 11
MA-14543

The number of paid work days between September 1 and November 9 times the daily gross pay and benefits (based upon the number of hours she works each day) based on \$14.31 per hour, less any income she received during that period of time (including income and benefits received during her employment with the City from September 1 through October 1 and including unemployment benefits, if any.) There shall be no reimbursement from the Grievant to the City due to any overpayment made to the Grievant, if any, during this period of time.

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The City did violate Article 8 of the parties' Agreement by limiting Kehoe's and Bero's bumping rights to positions within the Recreation Department immediately following their layoffs on September 1, 2009.
2. The appropriate remedy is to allow the Grievants the opportunity to bump into positions outside of the Recreation Department. This remedy has been implemented.
3. The City did apply the proper wage rates to each Grievant. The City did not apply the proper back pay to employees Kehoe and Bero following the exercise of their contractual bumping rights subsequent to their layoffs on September 1, 2009 and thereafter.
4. The appropriate remedy is for the City to apply back pay to each Grievant as set forth in this Award and to pay each Grievant in accordance therewith.
5. The Arbitrator shall retain jurisdiction of this matter for a period of sixty days pending implementation of this award.

Dated at Wausau, Wisconsin, this 15th day of April, 2010.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
7563