

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 VILLAGE OF ASHWAUBENON CLERICAL AND :
 DISPATCHER EMPLOYEES UNION :
 :
 and : Case 31
 : No. 46345
 : MA-6953
 VILLAGE OF ASHWAUBENON :
 :

Appearances:

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME,
Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on
 behalf of the Employer.

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ARBITRATION AWARD

The Employer and Union above are parties to a 1990-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the pay rate grievance of Bobbie Christus.

The undersigned was appointed and held a hearing on January 14, 1992 in Ashwaubenon, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on February 18, 1992.

STIPULATED ISSUES:

1. Did the Employer violate the collective bargaining agreement when it started the grievant at the 80% hiring rate when she was granted the municipal court secretary position?
2. If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VII

WAGES, NEW JOBS, AND JOB RATE

A. Wages shall be as indicated in the Wage Schedule attached hereto and incorporated herein by reference.

B. If any employee is required to take a temporary job with a lower rate of pay, the employee shall not be required to take a reduction in pay. Any employee who is required to take a temporary job with a higher rate of pay shall receive the higher rate for all hours in excess of eight (8) worked on such higher-rated job.

C. Prior to establishing a new job within the unit or materially changing the duties of an existing job within the unit, the Employer shall inform the

Union. Subsequent to Union notification, the Employer will evaluate the new or materially changed job and will inform the Union of the new rate and effective date. The Union may immediately enter into negotiations with the Employer concerning such rate. Changes in such rate agreed upon within sixty (60) days, or an extended time mutually agreed upon, shall be made retroactive to the effective date of the job changes or new job installation which occasioned the rate adjustment. The establishment of disputed wage rates under this provision shall be a subject of arbitration. This provision is effective only as to new or materially changed jobs noticed after ratification of this agreement.

D. Newly hired employees shall start at a wage equivalent to 80% of the then prevailing wage rate for the new employee's position. After six (6) months, the employee shall progress to 90% of the then prevailing wage rate for that position, and at one (1) year shall progress to 100% of the then prevailing wage rate for that position.

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ARTICLE XIX

GRIEVANCE AND ARBITRATION PROCEDURE

Purpose: The purpose of this procedure is to provide an orderly method of resolving differences.

Definition: A grievance is defined as any complaint by an employee involving interpretation, application or alleged violation of a specific provision of this Agreement, or where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice relating to wages, hours or conditions of employment.

Procedure:

Step 1: All complaints shall be submitted in writing to the Supervisor, with a copy to the Village President, within ten (10) days after the occurrence giving rise to the grievance. Action shall be taken by the Supervisor within ten (10) days of submission.

Step 2. If the complaint is not satisfactorily resolved in Step 1 above, the employee shall then submit the complaint in writing to the Village President, with a copy to the Chairman of the Finance, Personnel and Welfare Committee, within ten (10) days of the decision of the Supervisor. Action shall be taken by the Village President within ten (10) days.

Step 3. If the complaint is not satisfactorily resolved at Step 2, the employee shall submit the complaint to the Finance, Personnel and Welfare

Committee within ten (10) days of the decision at Step 2. The Committee will make a recommendation for response to the Village Board within ten (10) days of the submission at Step 3 and the Board shall issue a written decision within ten (10) days of receipt of the Committee's recommendations.

Step 4. If the complaint is not satisfactorily resolved at Step 3, either party may request arbitration within ten (10) days after receipt of the decision at Step 3. Said party shall file a request to arbitrate with the Wisconsin Employment Relations Commission (WERC). The WERC shall appoint an arbitrator from its staff to hear the differences of the parties and make an ultimate and binding decision regarding the interpretation or application of a specific provision of the Agreement. The party so petitioning shall send a copy of the request to arbitrate to the other party at the time said request is sent to the WERC.

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ARTICLE XXII

JOB POSTINGS

A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the termination, promotion, or transfer of existing personnel when the job continues to exist in the Table of Organization.

When new jobs are created or vacancies occur, such jobs shall be posted immediately and a job outline shall be included. For positions other than dispatcher, posting shall contain the following information: business location, hours of work, rate of pay. Only those employees meeting the qualifications shall be considered for the vacancy. Said posting shall be posted on bulletin boards at least seven (7) workdays before the vacancy is filled. Only employees meeting the minimum qualifications for said job shall be considered. If an employee is not working when a vacancy occurs, the Employer shall mail the posting to the employee's last known address.

For position of Dispatcher the posting procedure shall be as follows:

Upon notice of a vacancy the employer shall post a notice containing job outline, location, hours of work, and rate of pay. Only employees meeting the minimum qualifications shall be considered for the position. The posting shall remain available for at least seven work days before the vacancy is filled. All qualified employees interested in the immediate vacancy and resultant vacancies shall indicate their interest at this posting. Within seven work days of end of the posting period a meeting shall be held and

all employees who have indicated an interest and meet the minimum qualifications shall be notified of the meeting date and time. At such meeting the vacant position and resultant vacancies shall be filled consistent with the provisions of this article.

Probationary employees shall be eligible to bid for a posting. Probationary employees who are successful bidders shall serve 90 day's probation from the date of the new assignment.

The most senior qualified employee shall be given the opportunity to familiarize his/herself with that job.

Said vacancy shall be filled within five (5) workdays after the applicant is notified. The Employer shall notify the Union when the position is filled and who received the position. Said employee shall demonstrate his/her ability to perform the job posted within fifteen (15) workdays starting with the date of notification and if deemed qualified by the Employer shall be permanently assigned the job.

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DISCUSSION:

The facts are undisputed. Bobbie Christus was first hired in August, 1986 as a dispatcher in the Public Safety Department, and worked part-time for about two years, then full-time since. On or about March 5, 1991 the Village posted a new position for part-time court secretary, as follows:

JOB OPENING ASHWAUBENON MUNICIPAL COURT

PART-TIME COURT SECRETARY

Hours: 30 hours weekly-exact hours to be determined

Wages:\$7.65 first six months

 \$8.60 second six months

 \$9.56 after one year employment

Please see attached job description for details reference exact duties.

This pick will be done by seniority, whether full or part-time. According to the collective bargaining agreement between the Village of Ashwaubenon and the Village of Ashwaubenon Clerical and Dispatcher Employee's Union, Article IV - Seniority (A):

"Seniority means an employee's length of continuous service with the employer since his last date of hire."

. . .

The grievant applied for and was awarded the position on or about April 1, 1991. She was paid at the rate specified in the posting, i.e. \$7.65 per hour. Her prior pay rate had been \$9.99 per hour.

On August 21, 1991 the grievant filed her grievance, contending that she should not have been paid at the 80% rate applicable to a newly hired employe, and claiming backpay for the \$9.56 rate back to the first day of work in the new position. The grievance was referred to Municipal Judge Gary Wickert, who replied on behalf of the Village that the grievance was denied for the following reasons:

. . .

The position of Court Secretary was a new position, was posted in compliance with the Agreement with the wages clearly stated in the posting notice. When you chose to apply for the position, you became, in my opinion, a new employee for a new position. You in effect were "newly hired" by me, on behalf of the Village, to fill the new position. Therefore, as your Supervisor, your grievance is denied.

I think it is also worth noting that pursuant to the grievance procedure, Article XIX, Step 1, the complaint was to be submitted "within ten (10) days after the occurrence giving rise to the grievance."

Although the reasons stated in the preceding paragraph are, in my opinion, more than adequate to deny the grievance, it is further my opinion that the "occurrence giving rise to the grievance" was April 1, 1991, the date when you commenced your duties in the newly created position of Court Secretary. No complaint was made during the ten day period following April 1, 1991.

The Village had posted in 1990 a position of part-time accounting clerk, in which the posting read similarly to the posting for court secretary quoted above, and specified under "wages": "Starting 80% of \$9.10/hour". This position was filled by an employe bidding from another job, and no grievance was filed. Union representative Miller testified, without contradiction, that the Union was unaware of the fact that the Employer was paying 80% as the starting rate for an existing employe who transferred from another job, adding that what brought the present instance to the Union's attention was that dispatchers were relatively highly paid and Christus had gone from a higher to a substantially lower rate.

The parties stipulated that in all respects but wages, the grievant's status remained the same, and she retained the higher level of vacation and other rights including seniority which she had built up.

The Union contends that Article XXII does not refer to employes serving a probationary period when they obtain a position through job posting, but rather of giving the employe time to familiarize with the job. The same language does refer to probationary employes who sign for a job while on probation serving a probationary period from the starting date in the new position. Only "newly hired" employes serve a 180 day probationary period, pursuant to Article III, and this indicates that the grievant was not newly hired, because she was not a new employe and retained the benefits and seniority she had built up in her prior position. The Union argues, therefore, that the term "newly hired" does not apply to an employe who bids for a job while already employed by the City in another position. The Union request that the grievant be made whole for any loss of wages and/or fringe benefits.

The Employer contends that Article VII, Section D is the only Article dealing with wage progression in the Agreement, and that the parties' intent on its face is that this provision would cover employes moving into new positions.

The Village notes that the Union filed no grievance after the Village had acted similarly in 1990, while the grievant accepted this position with full knowledge of the fact that she would start at 80% of the maximum rate. The Village further argues that the grievant waited almost six months to grieve the matter. The Village requests that the grievance be denied.

On these facts I am inclined to believe that employes work for the Village of Ashwaubenon out of a sense of public service, and not for the money.

The language "newly hired" on its face indicates that it is intended to apply to employes who are not already employed by the Employer. Numerous formulations of language exist which would allow the parties, if they wished, to include within the 80% pay rate employes "transferred", "promoted", "bid into", "who posted for", etc. a new position while already employed; but to say based on the bare language in this Agreement that "newly hired" applies to employes who are neither new, nor just hired, distorts the commonly accepted meanings of both "new" and "hired".

Since I find the contract language clear on its face, the evidence of past practice offered by the Employer is not entitled to weight as against the clear meaning of the contract's terms. Two points, however, must be noted in this context. First, one instance does not a practice make, as has been

observed many times in arbitration. More troubling, however, is the fact that the Employer did not seek in either case to conceal its intent, and indeed posted notices clearly indicating its intent to fill from within but nevertheless pay at the 80% rate. This indicates that management is not acting in bad faith, and also indicates that the grievant was even more on notice as to the cause of the grievance than would normally be the case when one receives a paycheck.

The contract violation involved is of the type commonly called a "continuing" violation. 1/ There is therefore insufficient basis to find the grievance untimely and dismiss it on that ground; furthermore, the Employer did not insist on timeliness as a threshold issue. Appropriateness of remedy, however, is before me as an issue, and under these circumstances it is clearly inappropriate for me to require a remedy extending before the date of the grievance; I could do so only at the cost of ignoring clear contractual language in Article XIX requiring that grievances be filed within ten days of the date of the occurrence. Even under the "continuing" violation doctrine, a late grievance is entitled to a remedy only as of the date the grievance was presented. I therefore conclude that the Employer is obligated to pay at the higher rate only from August 21, 1991 onwards.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Employer violated the collective bargaining agreement by starting the grievant at the 80% hiring rate when she was granted the Municipal Court Secretary position.

1/ The term refers to violations which do not occur on a single date certain (such as discharge), but instead recur at intervals, such as a miscalculated pay rate which is then used in every succeeding paycheck.

2. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, adjust the grievant's pay rate retroactively to August 21, 1991 to the full rate for the position, and shall pay backpay and correct its records accordingly.

Dated at Madison, Wisconsin this 9th day of April, 1992.

By _____
Christopher Honeyman, Arbitrator