

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WISCONSIN PROFESSIONAL POLICE :
 ASSOCIATION AFFILIATE LOCAL 38-76 : Case: 62
 RHINELANDER PROFESSIONAL POLICE : No: 46799
 ASSOCIATION : MA-7070
 :
 and :
 :
 CITY OF RHINELANDER :
 :

Appearances:

Gary W. Wisbrocker, Business Agent, Wisconsin Professional Police Association, E1125 South Radley Road, Waupaca, WI 54981, appearing on behalf of the Wisconsin Professional Police Association Affiliate Local 38-76 Rhinelander Professional Police Association.

Philip I. Parkinson, City Attorney, City of Rhinelander, City Hall, 135 South Steven

ARBITRATION AWARD

Wisconsin Professional Police Association Affiliate Local 38-76 Rhinelander Professional Police Association (hereinafter Association) and the City of Rhinelander (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission from its staff. On January 3, 1992, the Association filed with the Commission a request to initiate grievance arbitration. Said request was concurred in by the City. On January 30, 1992, the Commission appointed James W. Engmann, a member of its staff, to act as the impartial arbitrator in this matter. A hearing was held on March 19, 1992, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed. The parties submitted briefs, the last of which was received April 2, 1992, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

On September 16, 1982, the Wisconsin Employment Relations Commission certified the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association as the collective bargaining representative for a unit consisting of all regular full-time and regular part-time law enforcement employes with the power or arrest employed in the Police Department of the City of Rhinelander, excluding supervisory, managerial, executive, confidential, and all other employes.

From at least 1983 through at least 1991, the City hired a patrol officer to fill in for officers on vacation and to cover special events. From 1983 through 1990, the City hired an officer named Jack Hunter for the following dates:

- 6/01/83 to 11/25/83
- 5/24/84 to 12/31/84
- 5/09/85 to 02/06/86

6/21/86 to 01/26/87
5/28/87 to 10/09/87
3/23/88 to 09/15/88
5/25/89 to 12/02/89
3/08/90 to 07/21/90

On July 31, 1991, the City hired Brian Zohimsky, hereinafter the Grievant, as a sworn officer with the powers of arrest. On or about October 22, 1991, the Association filed the grievance in this matter, alleging that the City set the wages and benefits received by the Grievant without regard to the collective bargain agreement and with negotiations. Said grievance was processed through the contractual procedure without resolution and is properly before the Arbitrator.

In a letter to the Grievant dated January 9, 1992, Chief of Police Tony N. Paris wrote as follows:

This is to inform you that your last day of employment will be January 13, 1992 until further notice.

I wish to take this opportunity to commend you for the excellent job you did while working as a part-time officer for the Rhinelander Police Department.

You have conducted yourself in an efficient and professional manner at all times and I have received many comments from the public on your professionalism. I therefore wish to commend you for a job well done.

If you still are interested, you will be given first consideration for the near future part-time employment.

PERTINENT CONTRACT LANGUAGE

SECTION 2.01 - RECOGNITION

The Employer recognizes the "Association" as the exclusive collective bargaining agent in matters of pay, hours of work and conditions of employment for all regular full-time and regular part-time law enforcement employees with the power of arrest employed in the Police Department of the City of Rhinelander, excluding supervisory, managerial, executive, confidential and all other employees.

. . .

SECTION 4.01 - PROBATION

New Police Officer(s) without prior service shall serve one (1) year probationary period. During this time they may be discharged with cause without recourse. Upon satisfactory completion of the probationary period and approval of the Police and Fire Commission, the Police Officer shall have all rights and privileges granted under this agreement, computed from the starting date of employment.

SECTION 4.02 - REGULAR POLICE OFFICER

A regular Police Officer is one who has successfully completed his probationary period, (one (1) year) and is in a permanent position with the Department.

SECTION 4.03 - PART-TIME CIVILIANS

The part-time civilian is hired by the Chief of the Police Department and approved by the Police and Fire Commission.

A. Part-time civilians are those people hired to fill in during the absence of regular Police Officer(s) (most often vacation season).

ISSUE

The parties stipulated to framing the issue as follows:

Are the individuals hired by the Police Department to cover vacancies temporary employes or part-time police officers?

POSITION OF THE PARTIES

The Association argues that it has shown through witnesses and exhibits that the City is playing a game of words when it refers to the Officer's position as "temporary" and not "part-time". In City Exhibit 1 and Association Exhibit 1, the City refers to the Officer as a part-time patrol officer. The Police Chief testified that in addition to the hourly wage, the Officer was paid for holidays, call time and overtime, benefits enjoyed by the full-time patrol officers.

The Association believes that the position taken by the City in using the word "temporary" in place of "part-time" is an attempt to undermine the intent of the collective bargaining agreement by not allowing the Association or part-time patrol officers any discussion concerning the part-time patrol officers' wages, hours of work and conditions of employment. Therefore, the Association requests the Arbitrator to find that the employment of part-time patrol officers by the City falls under the collective bargaining agreement and that the City has a duty to bargain the employes' wages, hours of work and conditions of employment. The Association seeks that it and the Officer be made whole.

The City argues that it did not violate the working agreement in that the Officer was not a sworn part-time police officer and was not covered by the working agreement between the parties.

The City argues that the testimony and the exhibits establish that the Officer was a limited term employe and not a regular employe, either full-time or part-time, as defined in the agreement. City Exhibit 1 establishes that the City has a long history of hiring temporary employes to fill in vacancies. The Officer was only the most recent employe on that list. The evidence and exhibits establish that the Officer was not a regular employe. He was not presented to the Police and Fire Commission, nor was he given a probationary period, nor did he work one year. Joint Exhibit 4 is an example of how the Association attempted to bargain this issue into the 1991 working agreement and were ultimately unsuccessful. They are attempting to do by grievance what they

were unable to do at the bargaining table.

The City requests that the grievance be denied and that the Arbitrator determine that the action of the City are not covered by the working agreement that presently exists between the City and the Association.

DISCUSSION

The Commission certified and the City recognized the Association in Article II - Recognition of the collective bargaining agreement as the exclusive bargaining representative for all regular full-time and regular part-time law enforcement employes with the power of arrest, excluding supervisory, managerial, executive, confidential and all other employes. The question that the parties have posed for the Arbitrator to answer is whether the individuals hired by the Police Department, specifically the Grievant, are temporary employes or part-time police officers.

From 1983 through 1991, the City hired an additional officer every year. The median start date for the nine years was May 25, and the median end date was December 2. The average length of employment was approximately six months. The record is therefore clear that the officer so hired was a seasonal employe. A

seasonal employe can be either a temporary employe or a part-time employe. The City argues that the seasonal employe is temporary while the Association argues that the employe is part-time.

The determinative factor in deciding whether an employe is deemed a regular part-time employe, as opposed to a casual employe, is the regularity of employment. Manitowoc County, Dec. No. 8152-J (WERC, 11/90). The record is clear that from July 31, 1991, through January 13, 1992, the Grievant worked a schedule comparable to that of a regular full-time employe. According to the collective bargaining agreement, that means his normal tour of duty was eight hours and his normal work period was 20 work tours in a 28 day period. This regularity of employment for the five and one-half months he worked for the City strongly suggests that the Grievant was a regular employe under Article II - Recognition.

The City argues, however, the Grievant was not a regular employe in that he was not presented to the Police and Fire Commission nor was he given a probationary period. The record is not clear as to whether the Grievant was given a probationary period. But while the record is clear that the Grievant was not presented to the Police and Fire Commission, the determination that an employe is a regular part-time employe under Article II - Recognition is not dependent upon such a presentation.

A temporary employe is defined as an employe who lacks an expectation of continued employment. Manitowoc County, Dec. No. 25851-A (WERC, 3/91); City of Phillips (Police Department), Dec. No. 26151 (WERC, 9/89); Manitowoc County, Dec. No. 15250-B (WERC, 11/77). A regular part-time employe, if employed on a seasonal basis, is a temporary employe if the employe does not have a reasonable expectation of returning to the employment in the following season. Town of Vernon, Dec. No. 24967 (WERC, 4/88); City of Rice Lake, Dec. No. 20791 (WERC, 6/83); City of Edgerton, Dec. No. 11340 (WERC, 10/72). The question therefore becomes whether the Grievant had a reasonable expectation of returning to work the following season. If he did not, he was a temporary employe but, if he did, he was a regular part-time employe under Article II - Recognition.

The City argues that the Grievant was a temporary employe and that the City has a long history of hiring temporary employes to fill in officer vacancies. Indeed, a former employe named Jack Hunter was hired every year from at least 1983 through 1990 to fill the position for which the Grievant was hired in 1991. The Grievant, according to the City, was only the most recent employe on the City's limited term or temporary employe list.

Yet this evidence cuts the other way. The record is void of any evidence regarding why Jack Hunter was not employed in 1991. But an inference can be made from the fact that the City hired him at least eight years in a row: that is, if the seasonal employe does an acceptable job, the City will hire the employe the following year. Jack Hunter certainly had a reasonable expectation of continued employment; indeed, he was continually re-employed year after year for at least eight years. The Grievant, looking at the City's history of re-employing it seasonal employe year after year, could expect that he would also be re-employed if he performed acceptably.

Nor does the record show that the City dissuaded him from forming such a belief. Indeed, the Chief's termination letter to the Grievant informed him that, until further notice, his last day of would be January 13, 1992, called him a part-time officer, commended him on a job well done, and told him he would be given first consideration "for the near future part-time employment."

Based upon all this, it can be concluded that the Grievant had a reasonable expectation of returning to employment the following season and, therefore, was

not a temporary employe but a regular part-time employe under Article II - Recognition.

But Article IV - Personnel Procedures states in Section 4.02 - Regular Police Officer that a regular police officer is one who has successfully completed his probationary period and is in a permanent position with the Department. The parties presented no testimony or evidence as to the meaning or bargaining history of this language, nor did the testimony or evidence give any insight into how said language has been applied in the past. It must be noted, however, that this language does not distinguish between regular full-time and regular part-time employes.

As I find the Grievant to be a regular part-time employe under Article II - Recognition, I determine that he should be treated under Article IV - Personnel Procedures as a regular full-time officer is treated. Thus, he should receive the salary and benefits that a full-time police officer would receive on probation. As there is no testimony or evidence in the record as to how this section operates between the parties, I am unable to be more specific at this time.

I do note, however, that the criteria under Section 4.02 - Regular Police Officer is successful completion of the probationary period and being in a permanent position with the Department. Section 4.01 - Probation states that officers without prior service shall serve a one year probationary period. The records suggests that the Grievant was a new police officer without prior service. As to the permanent position with the Department, it is clear that a position that has been in existence for at least nine years is a permanent, though seasonal, position.

The City notes that the Association attempted to bargain the issue of part-time officers during negotiations for the 1991 collective bargaining agreement but was unsuccessful. The City argues that the Association is now attempting to gain through grievance arbitration what it could not get at the bargaining table. But the fact that the Association was attempting at the bargaining table to correct a perceived wrong does not limit the Association's ability to grieve the matter when the wrong it perceives actually occurs.

At hearing, the City also stated that Section 4.03 - Part-Time Civilians was applicable to this matter. Since the City presented no testimony or evidence regarding this Section nor offered any argument as to its applicability in this matter, I assume the City has abandoned whatever position it had regarding said Section.

As the record is undeveloped in certain areas, the Award will of necessity be less that specific; however, I will retain jurisdiction through at least September 30, 1992, to resolve any disputes the parties may have over the remedy. If any matter regarding this Award remains unresolved, one or both parties should request in writing with a copy to the other side that I retain jurisdiction beyond September 30, 1992. Said request must be received on or before September 30, 1992. Said request will be automatically granted. If neither party advises me in writing on or before September 30, 1992, that this matter remains unresolved, I will relinquish jurisdiction of this matter as of October 1, 1992.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. The individuals hired by the Police Department to cover vacancies are not temporary employes or but are part-time police officers.
2. The Grievant shall be made whole consistent with the provisions of Article IV - Personnel Procedures.
3. The Arbitrator retains jurisdiction over this matter through at least September 30, 1992, to resolve any disputes regarding this Award.

Dated at Madison, Wisconsin, this 1st day of July, 1992.

By _____
James W. Engmann, Arbitrator