

**In the matter of arbitration between
International Union of Operating
Engineers, Local No. 49 [Michael
Wilson] and City of La Crescent,
Minnesota**

OPINION AND AWARD

BMS Case No. 08-PA-0052

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IUOE
Mike Wilde, Esq.
General Counsel
Minneapolis, Minnesota

On behalf of City of La Crescent, Minnesota
Christopher M. Hood, Esq.
Flaherty & Hood
St. Paul, Minnesota

JURISDICTION

In accordance with the Labor Agreement between the City of La Crescent, Minnesota and the International Union of Operating Engineers, Local No. 49, Pine Creek Golf Course Unit; and under the jurisdiction of the State of Minnesota, Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly on November 28, 2007 at the City Hall, La Crescent, Minnesota. Post-Hearing Briefs were filed by the parties on December 14, 2007 and received by the arbitrator on December 18, 2007. The decision was rendered by the arbitrator on January 8, 2008.

ISSUES AT IMPASSE

The Union states the issue as:

Whether the City violated Article 11.6 establishing recall rights and the recognition clause when they elected to have part-time seasonal workers do the groundkeeping duties that Mr. Wilson performed for 25 years, rather than recall Mr. Wilson? [Post-Hearing Briefs of Union at 1].

The City states the issues as:

1. Is the Union’s grievance procedurally arbitrable under the CBA?
2. Is the Union’s grievance substantively arbitrable under the CBA?
3. Substantively, did the City have the authority to manage its operational structure, resources and personnel by declining to fill the position of groundskeeper at the golf course for the 2007 season?
4. Was the City’s managerial authority in this case restricted by a binding custom or past practice? [Post-Hearing Brief of City at 2-3].

The potentially relevant contractual provisions include:

RELEVANT CONTRACTUAL PROVISIONS

Article II – Recognition

- 2.1 The EMPLOYER recognizes the UNION as the exclusive representative for:

“All employees of the City of La Crescent, Minnesota, working at the Pine Creek Golf Course, who are public employees within the meaning of Minn. Stat. 179A.03, subd. 14, excluding supervisory, confidential, essential, and all other employees.”

Article III – Definition

- 3.61 Job classification Seniority: Length of continuous service in a job classification included in the unit in accordance with ARTICLE II – RECOGNITION. Job Classification seniority shall reflect the length of continuous employment in an individual job classification from the date the employee assumed his/her current job classification title.

- 3.8 **TEMPORARY EMPLOYEE:**

Personnel employed by EMPLOYER for less than 120 calendar days, who hold positions of a basically seasonal character shall be defined as temporary employees and are not covered by the agreement.

ARTICLE IV – Employer Authority

- 4.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to determine whether services shall be provided, purchased or leased, to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules and to perform any inherent managerial function not specifically limited by this **AGREEMENT.**

- 4.2 Any term and condition of employment not specifically established or modified by this **AGREEMENT** shall remain solely within the discretion of the **EMPLOYER** to modify, establish or eliminate.

Article XI – Seniority

- 11.1 Seniority rosters shall be maintained by the EMPLOYER on the basis of job classification seniority and EMPLOYER seniority as defined in ARTICLE III, DEFINITIONS, Section 3.6
- 11.2 The EMPLOYER will provide the UNION with an updated seniority roster annually which shall be posted by July 1st and which will include the job classification and EMPLOYER seniority for each employee. If no written objections are filed with the EMPLOYER within ten (10) calendar days of posting, the list shall become final and binding for all employees.
- 11.3 Employees who separate from employment shall lose their seniority except when such separation is due to lay-off. An employee shall be considered separated from employment in case of resignation, retirement, discharge and unauthorized absence for a period of three (3) or more consecutive workdays.
- 11.4 An employee who is rehired following separation from employment shall be considered a new employee for purposes of seniority.
- 11.5 The EMPLOYER shall be the sole authority in determining which job classification(s) and work unit(s) are to be affected by a lay-off. Employees shall be laid-off on the basis of job classification seniority only when the job-relevant qualification factors between employees are equal. In case job classification seniority between two employees is equal, EMPLOYER seniority shall prevail.
- 11.6 Employees laid-off by the EMPLOYER shall retain recall rights for a period of two (2) years from the date of lay-off. If an opening occurs in the job classification from which the employee was laid-off within the two year recall period, the employee will be recalled to fill that position provided that at the time of recall the employee meets the qualifications and other conditions of employment as determined by the EMPLOYER. It shall be the employee's responsibility to keep the EMPLOYER informed of the employee's current address. The EMPLOYER shall notify employees on lay-off to return to work by certified mail. The employee must return to work within two (2) weeks of receipt of this notification or lose recall rights. In such case the EMPLOYER may fill the vacant position to which the employee was recalled.

FINDINGS OF FACT

1. Michael Wilson worked as the groundskeeper at the Pine Creek Golf Course in La Crescent, Minnesota for 25 years. He was hired in 1982. Mr. Wilson worked for the entire golf season, typically from March to November every year.

The Union contends that Mr. Wilson was “laid off from employment during the winter months”. [Post-Hearing Brief of Union at 2]. The City of La Crescent, Minnesota contends Mr. Wilson’s “position terminated each and every year when the golf course closed for the season”. [Post-Hearing Brief of City at 5].

In March of 2007, the City announced to Local 49 Business Representative Clayton Johnson that it would not be returning Mr. Wilson to his position as groundskeeper when the course opened in the Spring of 2007. [Post-Hearing Brief of Union at 2]. On or about April 5, 2007, Mr. Clayton Johnson met with Mr. William Walker, City of La Crescent Administrator for Step 1 in the grievance process. At that meeting, the City and the Union agreed to “waive Step 2 and 3 of the Grievance Procedure and to file a petition for Mediation with the State Bureau of Mediation Services for their assistance in resolving this grievance”. [Union Exhibit No. 2].

Nevertheless, Mr. Johnson sent a letter dated April 10, 2007 to Mr. Waller stating:

RE: Step 2 Grievance Procedure – Mike Wilson

Dear Sir:

Step 1 of the Grievance Procedure was denied on April 5th, 2007. Local 49 is therefore filing Step 2 of the Grievance Procedure as per Article VII of the current Agreement between the City of La Crescent and the Pine Creek Golf Course. Please direct this letter to the City of La Crescent’s Step 2 Employer-designated Representative. This grievance is in regards to 49 member, Mike Wilson being laid off from the Pine Creek Golf Course. On March 28, 2007, during our contract negotiation meeting, the City made it clear that they do not have any intentions of calling Mike Wilson back to work. Your intentions that were stated at this meeting were to have other city employees (not 49 bargaining unit employees) perform the Groundskeeper duties. This is a violation of the Agreement, Article II – Recognition as Local 49 is the Exclusive Representative for the employees and classifications listed in the Pine Creek Golf Course contract. It is also a violation of Article XI – Seniority, Section 11.6. The position of groundskeeper is listed as a job classification under Appendix A, Wages, in the Local 49 contract with the City of La Crescent. The Union’s resolution to this grievance is to return Mike Wilson to his groundskeeper duties and issue him all back pay owned to him for any groundskeeper’s work which was done from April 2nd, 2007 until this grievance is resolved.

Sincerely,

Clayton J. Johnson
IUOE Local #49 Area Business Representative
[Union Exhibit No. 3].

Over a period of the next several months the parties met according to the Steps required in the CBA, but could not resolve the grievance. On July 12, 2007, Mr. Clayton Johnson, IUOE Local #49 Area Business Representative, notified Mr. Waller “as per Step 5 of the Grievance Procedure . . . this grievance is being appealed to arbitration”. [Union Exhibit No. 10].

2. On March 12, 2007, in response to a growing deficit in the City of La Crescent Enterprise Fund which finances the operations at the City-owned Pine Creek Golf Course, the City passed a resolution that “restructured” [City Post-Hearing Brief at 1] the City’s operations at the golf course by shifting responsibility for maintaining the golf course to employees in the City’s Public Works Department. According to the City, as a consequence of the City Council’s decision, the seasonal groundskeeper position at the golf course was left unfilled for the 2007 golf season.

3. William Waller, the City Administrator, testified that the seasonal employees who mowed the grass at the golf course in 2007 were employees of the Public Works Department; that on days when they did not mow grass at the golf course, they worked in other areas of the City for the Public Works Department; and, that the City hired the same number of seasonal Public Works employees in 2007 as it did in 2006. Mr. Waller also noted that in addition to not filling the groundskeeper position in 2007, he did not fill two part-time, non-Union positions. Mr. Waller further testified that after the golf course re-opened following catastrophic flooding in the region in mid-August 2007, golf course Superintendent Roy Lemke assumed responsibility for most of the duties Mr. Wilson had performed at the course prior to 2007.

Mr. Michael Wilson, the Grievant, testified that his duties included the mowing, maintenance and upkeep of the fairways, rough and greens at the Pine Creek Golf Course. He also performed general maintenance and whatever other duties were called upon for the upkeep of the course.

Clubhouse Manager Cheryl Kloss testified that as of April 18, 2007, Phil Dahlen and Seth Webinger, seasonal workers in the Parks Department, were both scheduled to perform the groundskeeper duties for 8 hours a day on Monday, Wednesday and Friday. Lyle Bloom and Steve Wilks, also seasonal workers with the Parks Department, completed the same duties on Tuesday and Thursday for 8 hours per day. Ms. Kloss further testified that the seasonal employees who mowed the golf course in 2007 did not perform all of the duties that Mr. Wilson traditionally performed. Ms. Kloss further testified that golf course Superintendent Roy Lemke also participated in the golf course's maintenance in 2007.

4. The basic contentions of the Union are:

a. Mr. Wilson worked at the golf course for the entire golf season since 1982 and every year was "laid off" from employment during the winter months. This continuous annual cycle of work and lay-off was repeated by the City when it took over ownership of the Pine Creek Golf Course in 1991.

b. It is undisputed that the seasonal employees at the Parks Department essentially filled the same position that Mr. Wilson had performed for 16 years while under contract with the City.

c. Mr. Wilson's benefit of job security is the essential focus of this case and is clearly established by the contract language and 16 years of continuous service at the City's golf course.

d. Mr. Wilson's annual separation from golf course duties is obviously "an annual winter lay-off".

e. The exact groundskeeper duties performed by Mr. Wilson were cumulatively performed by no less than four seasonal workers, working 8 hours per day, from April 18-November 2, 2007. These employees were working at the Pine Creek Golf Course with considerably less seniority than Mr. Wilson. In short, the City attempted to circumvent the Recognition Clause of the CBA, and Mr. Wilson's seniority lay-off and recall rights under the CBA, by utilizing a contingent workforce of individuals who, by legal definition, are "employees" under Article XI of the CBA. Regardless of the

City's questionable financial decisions to spend more payroll funds than paid to Mr. Wilson, from April 18, 2007 Seth Webinger, Phil Dollin, Lyle Bloom and Steve Wilke filled the same position that was protected by the Seniority and Recall rights of Mr. Wilson. At the end of May 2007, the same positions were filled by Seth Webinger and Kyle Turknow until August 18, 2007. Then throughout September and October until the course closed on November 2, 2007, Rick Woods completed the groundskeeper position. Each of these several employees over the 2007 golf season generally filled the groundskeeper position for which Mr. Wilson had specific Recall rights under the CBA. [See generally Union Post-Hearing Briefs 1-12].

6. The basic contentions of the City are:

a. The Wilson grievance is procedurally inarbitrable because Mr. Wilson is not an employee of the City, and lacks standing to pursue this Complaint.

b. The grievance is substantively inarbitrable because it does not involve a dispute or disagreement as to the interpretation or application of the express terms and conditions of the Collective Bargaining Agreement.

The City's decision not to fill the groundskeeper position in 2007 was an exercise of its inherent managerial rights, which are not subject in mandatory bargaining.

The Collective Bargaining Agreement expressly preserves the City's inherent managerial rights and in no way restricts them.

c. Substantively, the City complied with the Collective Bargaining Agreement at all times and its exercised its inherent and statutory rights to manage its operational structure and personnel resources in deciding not to fill the groundskeeper position for the 2007 season.

d. There are no enforceable customs or past practices that would operate to limit the City's inherent right to manage its resources as it did in this case.

DECISION AND RATIONALE

The dispute between the Union and the City involves whether Mr. Wilson was “laid-off” in November 2006 [Union position]; or, whether Mr. Wilson was no longer an “employee” of the City because he was “terminated” in November 2006. [City’s position].

The Union contends that for every year since 1982 Mr. Wilson was “laid off from employment during the winter months”. [Post-Hearing Brief of Union at 2]. The City counters the “laid off for seasonal purposes” argument of the Union [and thus, by the Union’s reasoning, in possession of recall rights under Section 11.6 of the Collective Bargaining Agreement], by arguing that the testimony offered at the arbitration hearing shows that “[Mr.] Wilson’s position terminated each and every year when the golf course closed for the season”. [Post-Hearing Brief of City at 5].

If Mr. Wilson was “laid off”, then Mr. Wilson does, in fact, have recall rights under Section 11.6 of the Collective Bargaining Agreement. On the other hand, if Mr. Wilson was “terminated each and every year”, then the City’s argument as to procedural inarbitrability is correct.

So the question is, was Mr. Wilson “laid off” or was he “terminated”? There was no termination letter sent to Mr. Wilson. Rather, there was a City Council Resolution on March 6, 2007, stating “[F]urther be it resolved, that the adopted 2007 golf course budget has been adjusted to reflect the transfer of the outside maintenance from the golf course to the City Public Works Department”. [City Exhibit No. 8]. Mr. Wilson did not know he was not going to come back to his job until March of 2007 when Union Business Agent Clayton Johnson was informed by City Administrator William Waller that Mr. Wilson would not be returning to his position as groundskeeper at the golf course. The City contends that past practice does not limit the City’s inherent right to manage its resources as it did in this case. That is generally true. However, the continuous annual cycle repeated by the City and the previous owner of the golf course shows by a preponderance of the evidence that Mr. Wilson was, in fact, laid-off from employment during the winter months. Therefore the case is procedurally arbitrable

because Mr. Wilson, by express language in the CBA, has certain Recall rights as a “laid-off”, “employee” under Article 11.6 of the Collective Bargaining Agreement. The City agreed in the CBA to give up certain inherent managerial rights, at least with respect to employees in lay-off status. Contrary to the City’s argument, past practice does show that for 16 years since the City has owned the golf course, Mr. Wilson was, in fact, in lay-off status during the winter months when the golf course was closed. He was never notified in November of each year that he was being “terminated”. Each and every year since 1982 (his first year of employment) and since 1991 (the first year the City of La Crescent owned the golf course), Mr. Wilson had a reasonable expectation that he would be called back from his lay-off in March of the following year when the golf course typically re-opened. If he had been informed he was “terminated”, perhaps he could have found a new position. But his reasonable expectations were premised on the fact that he had been “laid-off” in November and had seniority rights under the CBA to be recalled when the golf course reopened in March of the following year. He was not once told orally or in writing in November during the 16 years that the City owned the golf course that he was being “terminated”. He reasonably assumed, and the facts show by a preponderance of the evidence that the City did likewise, that he was “laid-off” in November with recall rights under the CBA. Because Mr. Wilson has Seniority rights and recall rights under the contract he has standing to file the grievance. Under this reasoning, the case is procedurally arbitrable.

The City also contends that the case is not substantively arbitrable because the City has inherent managerial rights under Article IV of the Collective Bargaining Agreement. Such rights, contends the City, are not subject to mandatory bargaining in Minnesota. Yet, the City agrees that it may bargain over its inherent managerial rights and give up some of its inherent managerial rights, if it chooses. [Post-Hearing Brief of City at 8]. Even the language of Article IV, Employer Authority, recognizes that other Articles in the CBA can limit the Employer’s authority, i.e. “inherent managerial function not specifically limited by this Agreement”.

The City contends it has not voluntarily given up any of its inherent managerial authority in this Collective Bargaining Agreement. The City argues the Union's grievance is grounded in the Union's contention that the City had an obligation to re-hire Mr. Wilson as groundskeeper at the golf course at the start of the 2007 golf season. "However, nothing in the Collective Bargaining Agreement creates such an obligation on the City's part. To the contrary, the CBA expressly preserves the City's inherent and statutory right to manage its operational structure and personnel resources in its discretion". [Id. at 9]. While it is true that Article IV maintains inherent managerial rights, nevertheless, the City chose to bargain over such rights when it gave Seniority rights and Recall rights to laid-off employees. Mr. Wilson was a laid off employee who had a claim to his job "if an opening occurs in the job classification from which the employee was laid off within the two year recall period". In such a case, "the employee will be recalled to fill that position provided at the time of recall the employee meets the qualifications and other conditions of employment". The City's past practice shows it treated Mr. Wilson as a "laid-off" employee. As a consequence, Mr. Wilson has "Recall" rights under Article IV of the CBA. An "opening" in 2007 did occur when a number of seasonal employees were assigned to do the essential work of groundskeeper.

The essential duties of Mr. Wilson's job were being fulfilled by other City employees over whom he had seniority. His duties included mowing, maintenance and upkeep of the fairways, rough and greens at the Pine Creek Golf Course. He performed general maintenance and whatever other duties were called upon for the upkeep of the course. Despite the City's reduction in the workforce, the City golf course opened in the Spring of 2007. Such groundskeeper duties, being an essential operation for any golf course, were still being performed on a regular schedule. But during the golf season of 2007 seasonal employees typically performed these essential groundskeeper duties. In fact, these seasonal employees filled basically the same position that Mr. Wilson had performed for 16 years while under contract with the City. The City contends that it did not fill the groundskeeper position in 2007, but rather restructured its operations to obviate the need for a groundskeeper that season. But the continuity

of the groundskeeper duties in this case is unmistakable. A functioning golf course requires upkeep and maintenance. Chief among these are the basic groundskeeper duties that Mr. Wilson performed every single year of his employment. He mowed and maintained fairways, the rough, tee boxes and greens. He also performed tasks necessary for the general upkeep of the golf course grounds. Many of these duties were the same duties performed by an accumulation of temporary seasonal workers according to the testimony of club house manager, Cheryl Kloss. These employees worked at the Pine Creek Golf Course and had considerably less, if any, seniority rights than Mr. Wilson. They were performing his work while he was on “lay-off” status. The City circumvented the Recognition Clause of the Collective Bargaining Agreement and Mr. Wilson’s Seniority, Lay-off and Recall rights by utilizing a contingent workforce of individuals who, by definition, are “employees” under the Collective Bargaining Agreement. It is not the work title that the individual seasonal employees carry; rather, it is the actual work assigned and performed that these “employees” did. Ms. Kloss’ testimony proved by a preponderance of the evidence that much of the work performed by the seasonal employees during the 2007 golf season was the exact work performed by Mr. Wilson.

Among the terms and conditions that the parties bargained for in the Collective Bargaining Agreement is job security i.e. Seniority and Recall rights. “One of the most significant limitations on the exercise of managerial discretion is the requirement that employee seniority be recognized in job assignment, promotions, lay-offs, and other personnel actions”. *Elkouri and Elkouri, How Arbitration Works, 6th Edition* at 836 (BNA, 2003). “Every seniority provision reduces, to a greater or lesser degree, the Employer’s control over the workforce” *Id.* In this Collective Bargaining Agreement the Employer and the Union agree that laid-off employees have a right to recall “if an opening occurs in the job classification from which the employee was laid off within the two-year recall period”. The Employer agrees to provide recall rights for such a laid-off employee by agreeing to call back the most senior employee. “The chief purpose of a seniority plan is to promote maximum security for workers with the longest continuous service”. *Id.* at 837 citing *Darin and Armstrong*, 13 LA 843, 845 (Platt,

1950). From a Union perspective, seniority is a basic objective in a Collective Bargaining Agreement. Contrary to this objective, Management -as part of its inherent managerial authority-might prefer unrestricted authority to hire whomever it desires. As examples, Management may prefer to hire based on cost savings, flexibility, newer skills. But seniority rights may prevent such management actions. Whatever seniority rights employees have, they exist only by virtue of the Collective Bargaining Agreement that is in existence between the Union and the Employer. *Id.* at 840 citing *Allen Wood Steel Co.*, 4 LA 52, 54 (*Brandschain Wissler and Irwin*, 1946). In this CBA the City gave up certain inherent employer authority to hire whomever it wanted for a specific job under Article IV when it agreed in Article XI to Seniority rights and Recall rights. Mr. Wilson's Recall rights under the Article 11.6 of the Collective Bargaining Agreement are vital and essential to job security to both him and the Union. Article IV, Employer Authority, must be read in conjunction with Article XI, Seniority and Recall, to understand the restrictions the City has agreed by contract to place on itself. To read Article IV, Employer Authority, in the manner argued for by the City would eliminate the Seniority and Recall rights of a laid-off employee delineated in Article XI. The City has voluntarily limited its inherent managerial authority by contract when it agreed to Seniority and Recall rights.

Based on the above analysis, it is held that Mr. Wilson is awarded full back pay and benefits for the 2007 golf season. Should the City determine that the Pine Creek Golf Course will be open for the 2008 golf season, Mr. Wilson will continue to maintain his Article 11.6 Recall rights. The arbitrator will maintain jurisdiction over this case for 90 days to assist with any questions that may arise under the remedy granted. There will be a set-off against unemployment benefits and other monies earned in employment for work done by Mr. Wilson during the 2007 golf season, his typical time of employment.

Dated: January 8, 2008.

Joseph L. Daly
Arbitrator