

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DRIVERS, WAREHOUSE AND DAIRY
EMPLOYEES UNION, LOCAL NO. 75

and

CITY OF GREEN BAY (DEPARTMENT OF
PUBLIC WORKS)

Case 254
No. 51654
MA-8686

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by
Mr. John J. Brennan, appearing on behalf of the Union.
Ms. Judith Schmidt-Lehman, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Drivers, Warehouse and Dairy Employees Union, Local No. 75, hereinafter referred to as the Union, and the City of Green Bay, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Green Bay, Wisconsin, on December 8, 1994. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on January 30, 1995.

BACKGROUND:

On July 20, 1994, the City posted a vacancy for the position of sewer and bridge maintenance lead worker. The posting included the following statement:

The selection process will involve a review of related education, experience, an oral interview and a written exam to determine if the applicant is qualified. The most senior qualified person will be promoted to the Leadworker position.

The grievant was the most senior employe who signed the posting.

A written test was given and only one individual passed the test. The City decided not to use the written test and those who posted were given an oral interview. Two employes passed the oral interview and the most senior of these two was given the position and thereafter the grievant filed the instant grievance claiming the City did not recognize seniority nor grant him a thirty (30) day trial period and the matter was processed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Is the City in violation of the agreement by failing to offer the grievant the position of Sewer and Bridge Maintenance Lead Worker?

If yes, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 7

SENIORITY AND JOB POSTING

...

NEW JOBS AND VACANCIES:

All new jobs or vacancies shall be posted on the bulletin board immediately. Said bulletin shall remain posted at least four (4) working days, but no more than five (5) working days before operation begins. The City will put the specific time a posting will come down on all postings. In the event it becomes necessary to discontinue or suspend a job for a period of time, a notice to that effect shall be posted immediately. A copy of the above-mentioned bulletin shall be given to the Chairman of the Shop Committee prior to placing such job in operation; and in the case of suspension or discontinuation, a copy of such notice shall be given to the Chairman of the Shop Committee at the time of posting.

Employees desiring such posted job shall sign such

posted notice, and preference shall be given to the more senior employee from the seniority list in which the vacancy occurs (e.g. if there is a vacancy in Traffic Signs and Marking, then the senior employee signing from that section shall be given preference over employees on the other seniority list and vice versa). If no one from that list is interested or qualified, then the senior employees on the other list shall be given preference. Upon moving from one seniority list to another, an employee shall become the least senior person on that list with January 1, 1989 as their new seniority date. However, they shall retain departmental seniority for purposes of benefit accrual. In the event that an employee is on vacation or sick leave, the steward may sign such posting on behalf of the employee provided that the employee has given prior authorization.

DISPUTES:

When seniority is not recognized by the Employer, then such cases shall be submitted to the Shop Committee and a meeting held between the Committee and the Superintendents to review the case. If a satisfactory settlement cannot be reached between the two parties, then the case shall be referred to the Union officials for settlement. Temporary jobs shall be posted on a temporary basis not later than five (5) days after vacancy occurs and such employees who receive such temporary jobs shall work on such jobs until the regular employee holding such job comes back to work and then the employee who was working on the temporary job shall be reinstated back to the job s/he formerly held. Employees who receive a posted job shall be considered on probation for a period of thirty (30) calendar days.

FAILURE TO QUALIFY:

If an employee who receives a posted job does not qualify during the trial period or decides s/he wants his/her former position back during the trial period, the next older employee in seniority on the posting shall be used to fill the vacancy. Postings used in this manner shall be effective for ninety (90) days before a reposting is required. If an employee signs a job posting and then refuses to take the job or during the trial period decides to return back to his/her original job, the employee shall not be allowed to sign another job posting for a period of six (6) months.

REASSIGNMENT:

When a vacancy occurs within a classification, the employee filling that vacancy shall, along with the existing members of the classification, have the option of requesting reassignment within their respective classification. Management shall consider such request by seniority, but at all times reserves the right to assign equipment and duties within the classification.

SPECIAL CIRCUMSTANCES:

It is recognized that the Employer need not adhere to the job posting procedure in regards to the hiring of employees covered under the classification of "garage mechanics." The Employer will, however, afford the opportunity to fill mechanic vacancies or mechanic jobs that are created to present "Garage Mechanics" before hiring and placing new employees. The employees involved shall be considered qualified when taking the mechanics job.

The job of weed spraying shall be posted within the classification of employees assigned the responsibility of weed spraying.

For the purpose of job transfer from the Sanitation Section and the Sewer Section to the Street Section into the classification of laborer, the following procedure shall apply: Such opening to be posted on the bulletin board as required. Employees desiring such transfer shall sign such notice. Such transfers shall be determined by qualifications as determined by the Director of Public Works. Qualifications being equal, seniority shall govern.

UNION'S POSITION:

The Union contends that the plain language of the contract requires vacancies to be filled by strict seniority which is supported by the past practice. The Union submits that the City's assertion that this position had been filled by assignment in the past was not proven by any documentation. The Union claims that there is no reason and no contractual basis for excluding the lead worker position from the posting and job filling requirements, and moreover, the agreement specifically recognizes only one special circumstance, garage mechanics, where the posting procedure does not apply. The Union maintains that with the exception of garage mechanics, all positions set forth in Schedule A must be posted and filled by strict seniority. It

supports its interpretation by reference to the thirty day trial period in the "Failure to Qualify" language. It notes that the preference to seniority language in the contract has no mention of qualifications whatsoever, and the only interpretation that makes sense is that appointments are to be made by strict seniority with qualifications being determined during the thirty day trial period. It argues that if qualifications were compared with seniority in making the appointment, there would be no need for the "failure to qualify" language, and arbitrators disfavor any conclusion rendering contract language meaningless.

The Union noted that the City had referred to the "Disputes" language to assert that the case is not arbitrable, but it submits that this language is unintelligible and no evidence was offered to explain it. It suggests that this language simply means that if a dispute is not resolved, it is sent to the Union to grieve or not, and in this case, the Union has grieved the matter.

The Union denies that it ever acquiesced in any testing, either written or verbal. It points out that it objected immediately and the City has never before tested for any position set out in Schedule A. It maintains that it is irrelevant whether the City can test, given the clear language and practice of the parties that strict seniority applies. It alleges that testing is unlawful as it is a unilateral change in wages, hours and conditions of employment and modifies clear contract language and the City should not be awarded a right that it does not currently have. It points out the confused manner in which the testing was applied, giving a written test which it later threw out, followed by a subjective oral exam with subjective grading, which cannot be an appropriate basis for promotion.

The Union maintains the testing is improper from a comparison of the job descriptions of sewer and bridge maintenance worker and lead worker where the differences in job duties are minimal and the ability requirements are met by the grievant. It asks that the grievance be sustained and the grievant made whole.

CITY'S POSITION:

The City contends that the grievance is untimely and must be dismissed. It submits that the position was posted on July 20, 1994, and listed the application process as involving more than strict seniority and the Union knew the City intended to use testing and any challenge to testing should have been filed ten working days after the posting or on or before August 3, 1994. This was not done, so the City asks dismissal of the grievance as untimely.

The City maintains that it did not violate Article 7. It claims that the language of the contract does not require the application of strict seniority. It argues that if strict seniority was required, there would be no reason to state that "preference shall be given to the more senior employee . . ." or "If no one from that list is interested or qualified. . ." It asserts that by this language, the City is given explicit authority to use discretion in filling vacancies and the City is

only bound to give preference to those senior employees who are qualified. It claims the grievant was not qualified.

With respect to the Union's objection to testing, the City points out there is nothing in the contractual language prohibiting the employer from using testing techniques. It further notes that there is no history with regard to filling this specific vacancy which would prohibit the City from testing. The City submits that the history of the position is that the position was not posted but filled by appointment and as this is the first posting of it, the City retained discretion on how best to determine the qualifications of job applicants. The City claims that rather than go to outside recruitment when in-house applicants initially failed, it revised its procedures and the senior qualified applicant was given the position. It asserts that it did not violate the agreement and the grievance should be denied.

DISCUSSION:

As to the timeliness of the grievance, the City has asserted that the grievance is about the City's testing requirements which were listed in the posting and it was not timely filed. A review of the grievance simply states that the City did not recognize the grievant's seniority nor give him a thirty day trial for the position. 1/ It does not mention any testing and in fact the written test results were thrown out. Further, the grievant did not object to the testing. The grievant found out on August 16, 1994, that he did not get the job and filed the grievance on August 19, 1994, clearly within the contractual time limits. 2/ The claim raised by the grievance did not arise until the grievant was made aware he did not get the job, so the grievance is timely.

With respect to the merits, Article 7 of the contract applies and requires the posting of all vacancies. A review of the contractual language on posting leads to the conclusion that it is not a model of clarity. The provision entitled "New Jobs and Vacancies" provides that all vacancies will be posted and employees desiring such posted job must sign the posting. The contract then states that preference will be given to the more senior employee from the seniority list in which the vacancy occurs. The undersigned interprets this to mean that there are at least two seniority lists; one in Traffic Signs and Marking, and the other, all other employees. When a vacancy occurs in Traffic Signs and Marking, the more senior employee on that list gets preference over the more senior employee on the other seniority list, even if s/he is junior to that employee, and vice versa.

The next sentence states that if no one from that list is interested or qualified, then senior employees from the other list shall be given preference. The City claims that this requires

1/ Ex. 2.

2/ Tr. 20, Ex. 1.

applicants to be qualified as determined by it. However, it could also mean that none were qualified after the trial period set forth in the "Failure to Qualify" section or has been disqualified for six (6) months for refusing a different job after signing a posting. The exact intent is not clear but if a person does not qualify during the trial period or decides to return to his/her former position, the contract provides that the next older employe in seniority on the posting shall be used to fill the vacancy. There is nothing stated about qualifications. It does not logically follow that where the senior employe is determined initially not to be qualified by the City, the next senior gets the job without regard to qualifications. Additionally, the "Disputes" section starts by stating, "When seniority is not recognized by the Employer, a meeting between the Shop Committee and Superintendents will be held." The inference here is that seniority must be followed and if it is not, then a meeting to discuss it must occur. The next sentence of "Disputes" is unclear as to intent and was not clarified at the hearing, but it is difficult to conclude that it means that the Union officials alone will resolve it. Thus, the City's assertion that because the Union did not resolve it, the grievance procedure is not applicable, is rejected. 3/

It is a general principle that the contract must be construed as a whole. Furthermore, contrasting paragraphs of a Section of the contract are significant. Under "Special Circumstances" in Article 7, the contract states as follows:

For the purpose of job transfer from the Sanitation Section and the Sewer Section to the Street Section into the classification of laborer, the following procedure shall apply: Such opening to be posted on the bulletin board as required. Employees desiring such transfer shall sign such notice. Such transfers shall be determined by qualifications as determined by the Director of Public Works. Qualifications being equal, seniority shall govern.

This provision clearly provides for consideration of qualifications which are determined by the Director. The provision is silent on a trial period. If the parties intended this to apply to other transfers, they could have stated so clearly just as they have done here. It appears that the City used this procedure in filling the lead worker position but the language in the "New Jobs and Vacancies" section does not provide for this. As the language is different, the sections must be given different interpretations. It is concluded that Article 7 provides that the senior employe who posts for the lead worker position will be given a thirty day trial period to qualify for it. Here, the City did not follow the proper procedure and violated the agreement.

3/ Tr. 10. The City did not renew this argument in its brief.

The undersigned agrees with the Union that the issue of testing is irrelevant to this particular case because the senior signer of the posting is given thirty days to prove his qualifications and need not demonstrate them by a prior test or oral interview. Under the "Special Circumstances" noted above, a test or oral interview may be proper because the

contract states the City determines the qualifications, whereas this provision does not appear in the "New Jobs and Vacancies" section, and thus, the grievance must be sustained as the "New Jobs and Vacancies" section requires the more senior bidder be awarded the position.

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

AWARD

The City violated the agreement by failing to offer the grievant the position of Sewer and Bridge Maintenance Lead Worker. The City shall immediately offer the grievant the position of Sewer and Bridge Maintenance Lead Worker and give him a thirty day trial period to qualify. If the grievant accepts the position and qualifies, he shall be made whole for any loss of pay retroactive to August 10, 1994.

Dated at Madison, Wisconsin, this 23rd day of March, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator