BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SUPERIOR CITY EMPLOYEES UNION LOCAL 224, AFSCME, AFL-CIO	
and	Case 97 No. 41268 MA-5346
CITY OF SUPERIOR	

Appearances:

Mr. James A. Ellingson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 62, Rice Lake, Wisconsin 54868, appearing on behalf of City of Superior Employees Union Local 244, AFSCME, AFL-CIO.

Ms. Judith A. Jochem, Personnel Technician, City of Superior, 1407 Hammond Avenue, Superior, Wisconsin 54880, appearing on behalf of City of Superior.

ARBITRATION AWARD

Superior City Employees Union Local 244, AFSCME, AFL-CIO, hereinafter Union, and City of Superior, hereinafter City, were parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provided for arbitration of grievances concerning the application and/or interpretation of said agreement by an arbitrator appointed by the Wisconsin Employment Relations Commission from its staff. On November 10, 1988, the Union filed a request to initiate grievance arbitration of this dispute. On November 22, 1988, the City concurred with the request. On November 29, 1988, the Commission designated James W. Engmann, a member of its staff, as the impartial arbitrator to resolve this dispute. Hearing on this matter was scheduled for January 10, 1989. By agreement of the parties, hearing in this matter was postponed to February 28, 1989, and again to May 11, 1989. An arbitration hearing was held in Superior, Wisconsin, on May 11, 1989, at which time the parties were afforded the opportunity to introduce evidence and to make agreements as they wished. A stenographic transcript was not made of the hearing. The parties exchanged briefs and reply briefs, the last of which was received on July 26, 1989. Full consideration has been given to the evidence and arguments of the parties in reaching this arbitration award.

STATEMENT OF THE FACTS

Terrence E. Johnstone, hereinafter Grievant, was hired by the City as a temporary laborer in the Public Works Department on or about April 21, 1986. The Grievant was terminated on or about November 21, 1986. The Grievant was rehired as a laborer in the Public Works Department on or about March 30, 1987, and was terminated on or about December 11, 1987. The Grievant was again rehired on or about April 11, 1988. At the time of this hire, he was advised that he was being hired for eight weeks. He was terminated on or about June 3, 1988. The Grievant filed a grievance on June 2, 1988, alleging that the City violated Section 7.06 of the agreement by terminating him. Other facts pertinent to this case will be stated as necessary in the Discussion section of this Award.

PERTINENT CONTRACT LANGUAGE

WORKING AGREEMENT

> This Agreement is made and entered into this first day of January, 1988 by and between the City of Superior, a municipal corporation, hereinafter referred to as "City" or "Employer" and the Superior City Employees Union Local #244, WCCME, of the American Federation of State County and Municipal Employees, AFL-CIO, hereinafter referred to as "Union", for the purposes of enhancing material conditions of the employees, promoting the general efficiency of the City of Superior, eliminating political consideration from hiring policy and promoting the morale, well-being and security of employees.
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> ARTICLE III - MANAGEMENT RIGHTS
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> The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A) To direct all operations of the City.

B) To establish work rules and schedules of work.

C) To hire, promote, schedule and assign employees to positions with the City.

. . .

E) To lay off.

F) To maintain efficiency of City operations.

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J) To determine the methods, means and personnel by which City operations are to be conducted.

K) To take whatever action is reasonably necessary to carry out the functions of the City in situations and emergency.

ARTICLE IV - PROBATIONARY PERIOD

4.01 New employees selected for the purpose of filling a permanent position, shall be employed on a six-month probationary period to determine whether or not the new employee is suited and qualified for the job. During said period, the new employe will not be allowed any of the fringe benefits set forth in this Agreement and may be terminated without recourse through the Union. After satisfactory completion of the probationary period the new employee shall be entitled to such rights and privileges as are granted under this Agreement, computed from the starting date of the pro-bationary period.

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ARTICLE V - CLASSIFICATION

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5.06 Seasonal employees in the Park and Recreation Department only shall be paid at a reduced rate when performing specific tasks at specific locations:

A. Municipal Golf Course.

B. Boulevards - preening and cultivating of boulevards, (i.e., around sign posts, trees and shrubs, etc.)

C. Skating Rinks

Said employees may perform general laboring duties at the locations mentioned herein. To qualify for the reduced rate, they shall not operate any equipment other than a power hand mower or a small garden tractor with one blade. All other duties performed shall be compen-sated pursuant to Addendum I. The wage rate for these special duties shall be: $4.04 per hour during the first season of employment, (4.16 after 1-1-89 and 4.28 after 1-1-90); $4.35 per hour during the second season of employment, (4.48 after 1-1-89 and 4.61 after 1-1-90); $5.05 per hour thereafter, (5.20 after 1-1-89 and 5.36 after 1-1-90). Seasonal employees shall be covered under Article VI beginning with the second season of employment.

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ARTICLE VII - SENIORITY

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7.03 A regular employee is hereby defined as a person hired to fill a permanent full-time position requiring the services of said employe for the normal work day and work week as spelled out hereinafter, for twelve (12) months each year and who has satisfactorily completed the probationary period.

7.04 A part-time employee is an employee hired to fill a position that requires a lesser number of hours in any weekly or semi-monthly pay period than established for a regular employee. This employee shall be related to a category defined as extra help, and shall acquire no seniority except as provided in 7.09 of this Article.

7.05 A seasonal employee is an employee who is on the payroll only during the season in which his/her services are required. This employee shall be related to a category defined as extra help and shall require no seniority as provided in 7.02 above except as provided in 7.09 of this Article.

7.06 A temporary employee is a person hired for the purpose of filling a temporary position of any kind, the duration of which shall not exceed ninety (90) days. Successive appointments to temporary positions shall not be made under this provision, except to fill a vacancy caused by illness or extenuating circumstances as agreed between the parties.

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7.09 Part-time and seasonal employees of the City who work 1,400 hours or more in any calendar year shall be granted vacation pay, sick leave, and holiday pay in proportion to the number of hours worked. Sick leave in this category shall not be accumulative. Example: An employee who earned six days of vacation in 1,400 hours would receive nine-twelfths of six days of vacation.

7.10 An employee who accumulates six months or more of continuous employment in any calendar year in a part-time or seasonal capacity shall accumulate seniority based on his/her starting date of employment of that year. This seniority shall accumulate from year to year only if he/she is employed in succeeding years for a minimum of six months. This seniority shall be on a departmental basis and shall be designated as an extra-help seniority list.

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ARTICLE IX - LAYOFFS AND REHIRING

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9.05 In hiring additional employees, former qualified employees who have been laid off within two (2) years prior thereto, without delinquency or mis-conduct records on their part, shall receive preference over all other persons.

9.06 Notice of recall for any employee who has been laid off shall be sent by certified mail (return receipt) to the last known address of the employee. An employee on layoff shall notify the City of any change in his/her address. Within ten (10) work-ing days from delivery of the notice to the last reported address, the employee shall report for work.

ARTICLE X - DISMISSALS

10.01 The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.

10.02 In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.

10.03 All disciplinary action and discharges shall be subject to the grievance and arbitration pro-cedure of this Agreement.

ARTICLE XI - GRIEVANCE PROCEDURE

Crucial to the cooperative spirit with which this Agreement is made between the Union and the City of Superior is the sense of fairness and justice brought by the parties to the adjudication of employee grievances. Should any employee feel that his/her rights and privileges under this Agreement have been violated, he/she shall consult with his/her Union Grievance Committee. The aggrieved employee and the Grievance Committee shall, within ten days of the date the grievance occurred, present the facts to the employee's immediate supervisor or department head.

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11.05 The arbitrator shall hold hearings and take testimony regarding the dispute and shall render his/her decision, which shall be considered final and binding to both parties to this Agreement. The arbitrator, in making his/her decision, shall neither add to, delete from, nor amend any of the existing provisions of this Agreement.

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ARTICLE XXVII - ENTIRE AGREEMENT

27.01 This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supercede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless certified in writing by the parties hereto.

ISSUE

The parties stipulated to the framing of the issue as follows:

Since Terry Johnstone worked over 90 days in a temporary position and also worked over six months in both 1986 and 1987, should he be hired immediately for a full-time position with the City of Superior and be made whole for any losses from the date of the grievance?

POSITION OF THE UNION

On brief the Union argues as follows. The Grievant was employed by the City of Superior in the sign shop. He worked for seven consecutive months in 1986, eight and one half consecutive months in 1987 and eight consecutive weeks in 1988. The position on the sign shop seems to have been informally extended by the City beyond the normal 90 day period for temporary employees. The Grievant testified that the former Mayor had given him verbal assurances that he (Grievant) would receive the next full-time position in the Department of Public Works.

The Grievant was caught in a classic bind in this case. He was unclear as to his work status and rights. He received some correspondence from the City but really did not know if that correspondence was correct. He did not want to "rock the boat." He never discussed his situation with the Union and put his trust in the former Mayor. When the former Mayor was defeated for reelection, the Grievant was understandably concerned that his seasonal work at the sign shop might be disrupted and that he might not get the next full-time position at the DPW.

The Grievant testified that he did not file a grievance when he received notice from the City that he was only to work eight weeks in 1988. He was afraid that he might not get the eight weeks work if he filed a grievance. He also testified that the City had not taken any action on which to base a grievance. The action on which he based the grievance was when he was actually laid off from his position. The Grievant was also adversely affected when another employe was hired by the new Mayor as a regular full-time employee at the DPW. This new employe had never accrued any seniority under 7.10 of the Union contract. As such the Union argues that the grievance is timely and in addition that this is a continuing grievance. Every day that the new employe works instead of the Grievant is the basis for a new grievance.

The Union case in this matter is primarily built upon inductive reasoning. The Grievant was not a regular full-time employee under 7.03 of the contract. He was not a seasonal employee under 7.05 of the contract. He was not a temporary employee under 7.06 of the contract since he worked more than 90 days. The only classification that seems to fit is that of part-time employee. This is covered under 7.04, 7.09 and 7.10 of the contract. Since the Grievant worked more than six months or more of continuous service in both 1986 and 1987 he earned two years of seniority. This seniority should have allowed him to maintain his seasonal position at the sign shop and to bid on

the regular full-time position which the City simply gave to the new employe. The City erred when it unilaterally made the sign shop an eight week position and when it did not post the regular full-time position at the DPW.

The City has sought to justify its position by indicating that the Grievant was a temporary employee and that his tenure as a temporary employee had a life of its own. There is no record that the City informed the Union about the status of the Grievant or that the Union concurred with any extensions under 7.06 of the contract. The City has also pointed to the fact that another employe worked for an extended period of time as a temporary employee. One case does not set a waiver. There is no written agreement on any waiver or new policy that would be required under 27.01 of the contract.

For the above cited reasons the Union urges the Arbitrator to sustain the grievance and to order the stipulated remedy.

On reply brief the Union argues as follows. The Union requests that the Arbitrator ignore any improper references to alleged facts which are not contained in the record of the hearing.

The City argues that although it violated Section 7.06 of the contract, which provides that temporary positions should not be filled longer than 90 days, there is no penalty provided in the contract. As such the City flaunts its violation of the contract in the face of the parties while cautioning the Arbitrator that he cannot do anything about the violation.

The opposite of temporary is permanent. If a temporary position can only be filled for 90 days, then a person who has worked 91 days cannot be temporary. On the 91st day of work an employee is a permanent Employee. They would have at least part of a probationary period to fill but the City through its inaction creates a permanent position once an employee works on the 91st day. This case is similar to when the City allows a probationary employee to work six months and one day. That employee becomes a permanent employee and is entitled to job security and the proof of "just cause" in disciplinary and discharge proceedings.

The City appears to argue that they have the sole right to determine who are permanent full-time employees. As such they appear to argue that they can use temporary employees as they see fit to avoid the payment of regular wages and fringe benefits. Such a position is absurd. Arbitrators routinely rule whether employers are using part-time employees improperly to circumvent the hiring of full-time employees. This is part of the issue in this case.

For the above cited reasons the Union urges the Arbitrator to find for the Grievant and to grant the stipulated remedy.

POSITION OF THE CITY

On brief the City argues as follows. The City acknowledges that the grievant was allowed to work more than 90 days and more than six months during two years of his employment. So were other temporary employees. The Union was well aware of this and did not question the practice until 1988. At that time the City had already determined to strictly enforce the contract provisions which allow a temporary employe to work only 90 days.

The Union also tries to argue that the current Mayor does not have the authority to hire and must abide by a political promise made by the former Mayor. The Union concern regarding the language in the working agreement clause of the contract "to eliminate political consideration from the hiring" is hypocritical; after all, that is what the grievant is attempting to do here. If the Union had emphasized the length of time as they did in the filing of the grievance and the stipulation, this argument could be addressed. Yet the very fact that we're addressing a "political promise" is the Union's argument for giving him a job. The Grievant stated during the hearing that the former Mayor had the authority to hire who he wanted. Yet now he feels the current Mayor does not.

Except where restricted by statute or collective bargaining agreements management retains the unqualified right to hire or not to hire. Arbitrators have ruled that where the contract neither explicitly nor by strong implication restricted the right of management to hire new employees, they have refused to read a restriction into the contract. The Union is asking this arbitrator to read that into this contract when it does not exist.

Finally the Union tries to argue that the Grievant was unaware that he was hired as a temporary and just thought he was laid off. The Grievant was receiving temporary wages and was well aware that he was not hired to fill a full-time position. Evidence brought forth during the hearing clearly defeats this argument.

Utilizing any of these three arguments to give the Grievant a full-time job would not be consistent with past practice, remedies outlined in the contract or relevant case law. None of these arguments entitles the Grievant to a full-time job. Nowhere in the contract does a violation of 7.06 entitle

anyone to a full-time job. The right to hire has always been a right of management. The only restrictions have been bargained and written into contracts, which this local has not been willing to do. Instead they are attempting to expand the contract through the grievance process.

The Union's reason for filing the Grievance is to get the grievant a full-time job, not based on any contract language, but on a political promise. The Union is clearly attempting to take away a fundamental right exclusive to management unless restricted by contract language. The City must prevail unless the Union can show that clear, unambiguous contract provisions or past practice entitles the Grievant to a full-time job. There is no past practice or contract provisions that require the City to hire the Grievant or any other individual, nor do the Union's arguments prove undeniable that the Grievant is entitled to a full-time job. This failure results in only one conclusion, denial of the grievance.

On reply brief the City argues as follows. In regard to political consideration, the very fact that the Union raises this point is hypocritical. The former Mayor/Personnel Director had the authority to hire whom he wanted, but, according to the Union, the current Mayor/Personnel Director does not. Regarding the political promise made by the former Mayor, the City does not question the former Mayor's intention; however he is no longer the Mayor/ Personnel Director and therefore does not control hiring decisions. Even the former Mayor acknowledged that in the very letter the Union uses as its strongest support for this argument. This letter shows the former Mayor's support for the right of the current Mayor/Personnel Director to make his own decisions regarding the hiring of full-time employees. His letter was merely to encourage the current administration to consider hiring (which it did) the Grievant and to inform the City of the circumstances surrounding this grievance. Nowhere in this letter does the former Mayor say that his political promise or his intentions that the Grievant was considered as the next permanent hiree requires the current Mayor/Personnel Director to hire the Grievant. He realizes that the current Mayor/Personnel Director makes these decisions and his personal wishes are irrelevant.

As to the issue of a full-time employee who was laid off, the Grievant still pleads ignorance regarding his work status, which is just as ludicrous now as it was during the hearing. The very fact that the Grievant went to both the current and former Mayor/Personnel Director proves he was well aware that he was not a full-time employee and therefore could not be laid off.

As to the issue of a part-time employee with seniority rights, the Union is trying to argue that the Grievant was a part-time employee and therefore gained seniority for a full-time position. The Grievant's personnel action forms and the letters he received made it very clear he was not hired as a part-time employee.

DISCUSSION

The Union alleges that the City has violated several sections of the agreement, including at least Sections 7.06, 7.09, 7.10, 9.05 and 9.06. First, however, the City alleges that the grievance as filed is untimely.

The Grievant was advised on or about April 4, 1988, that he was being hired for eight weeks beginning April 11, 1988. The Grievant was terminated on June 2 or 3, 1988. He filed his grievance on June 2, 1988. Article XI of the agreement require that the aggrieved employe and the Grievance Committee shall present the facts to the employe's immediate supervisor or department head within ten days of the date the grievance occurred. The City argues that since the Grievant knew on April 11, 1988, that he would be terminated after eight weeks, the ten days started running then. The Union argues that the action on which the grievance is based is the termination of employment, that until that time the City had not taken any action on which to base a grievance. I concur with the Union. The Union is not grieving the fact that the City told the Grievant he was only hired for eight weeks; it grieved the fact that the City terminated him after eight weeks. So I find the grievance actually before me to be timely.

But timeliness is in question in another way objected to by the City. The Union argues that since the City employed the Grievant for more than 90 days in both 1986 and 1987, the City violated Section 7.06. In fact, the Union argues that since the City employed the Grievant for more than six months in both 1986 and 1987, the Grievant should be granted seniority rights under Section 7.10 and should be considered a regular employe with seniority rights as six months is the probationary period for new regular employes. The City argues that since the Union did not grieve this issue in 1986 or 1987, it is time-barred now to do so and has waived any contractual rights it may have had.

I agree. The question of whether the City violated Section 7.06 of the agreement in both 1986 and 1987 by employing the Grievant in a temporary position for longer than 90 days without agreement by the Union is not before me. It is time-barred. Nor is the question before me of whether the City violated Section 4.01 of the agreement in 1986 and 1987 by employing the

Grievant in a temporary position for longer than the probationary period of six months for it, too, is time-barred. Finally, the question of whether the City violated Section 7.10 of the agreement by not granting the Grievant seniority rights for working longer than six months in 1986 and 1987 is not before me because it is time-barred.

Therefore I must take the Grievant as he is in April of 1988. As the Union points out, the Grievant is not a regular employe. But, contrary to the Union, the Grievant is not a part-time employe under Section 7.04 of the agreement. He was not hired "to fill a position that requires a lesser number of hours in any weekly or semi-monthly pay period than that established for a regular employee." As the Union points out, the Grievant is not a seasonal employe under Section 7.05 of the agreement but, again, contrary to the Union, the Grievant is a temporary employe under Section 7.06 of the agreement. There is no dispute that in 1988 the Grievant was hired "for the purpose of filling a temporary position of any kind, the duration of which shall not exceed ninety (90) days." This, according to the agreement, is a temporary employe. As a temporary employe, the Grievant had no right to benefits under Section 7.09 of the agreement and under Section 7.10 of the agreement the Grievant did not accumulate seniority. Since the City employed the Grievant as a temporary employe in 1986 and 1987 and the Union did not grieve the matter, the Grievant was terminated from a temporary job and not laid off from a permanent job. Since he was not laid off in either 1986 or 1987, he has no right to receive hiring preference under Section 9.05 of the agreement, nor does he have a right to recall from layoff under Section 9.06 of the agreement.

The Union also argues that the former Mayor, who also served as Personnel Director, had given the Grievant a verbal assurance in 1986 that he would receive the next full-time position in the Public Works Department. The City argues that when another person was hired in May of 1987, the Grievant did not grieve the hiring. Nonetheless the Union points to language in the preamble to the agreement stating that the parties enter into the agreement for the purposes of, among others, "eliminating political consideration from hiring policy." The record does not support any sort of finding that the Grievant was terminated or not hired for any sort of political consideration. The Union also eludes to the just cause standard for dismissals under Section 10.01 of the agreement. However, the Grievant was not disciplined or discharged; he was terminated from a temporary position so Section 10.01 of the agreement does not apply.

Based on the foregoing facts and discussion, the Arbitrator renders the following

AWARD

1. Even though Terry Johnstone worked over 90 days in a temporary position and also worked over six months in both 1986 and 1987, the City of Superior is not required to hire him immediately for a full-time position nor is the City required to make the Grievant whole for any losses from the date of the grievance.

2. That the grievance is hereby dismissed.

Dated at Madison, Wisconsin this 19th day of October, 1989.

By _____
James W. Engmann, Arbitrator