BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GENERAL DRIVERS AND DAIRY EMPLOYEES, UNION LOCAL 563 and CITY OF NEENAH (PARK DEPARTMENT)	Case 51 No. 42018 MA-5530

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law

Mr. James B. Gunz, City Attorney, City of Neenah, 211 Walnut Street, Neenah, Wisconsin 54956, appearing for the City.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the City, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Neenah, Wisconsin on June 26, 1989. The hearing was not transcribed. The parties submitted briefs which were received August 18, 1989.

ISSUE

The parties were unable to stipulate to a statement of the issue. The arbitrator frames the issue as:

> Did the City violate the collective bargaining agreement by not filling the Park Maintenance I position posted on March 20, 1989? If so, what is the appropriate remedy? 1/

BACKGROUND

When the long-time incumbent of the position of Pool Custodian retired on February 10, 1989, 2/ the City announced it did not intend to fill the position, but instead would replace the employe by filling a new Park Maintenance II position. The City believed it could increase its productivity by replacing the Pool Custodian, who had been assigned to a single building, with an employe who could be used throughout the department and who, unlike the Pool Custodian, could operate heavy equipment. The unit employes considered the Pool Custodian a desirable position, and the Union grieved the elimination of the position. On March 1, the grievance was discussed at a meeting between representatives of the City and the Union. For reasons that will be apparent in the discussion below, it is unnecessary to give the details of the two conflicting versions of
the meeting.

Sometime between March 1 and March 20, the Park Maintenance II position was posted and filled. On March 20, the following notice was posted:

CITY OF NEENAH PARK AND RECREATION DEPARTMENT

JOB POSTING NOTICE

> The City of Neenah Department of Park and Recreation is considering filling a vacancy at the classification of Park Maintenance I. This job posting is being made pursuant to Article 10 of the Collective Bargaining Agreement between the City of Neenah and Teamster Local 563. The final determination, as to whether to fill this particular job, has not been made at the time of the posting of this notice. The City of Neenah specifically reserves the right not to fill this job. All interested applicants may apply by signing this

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1/ Although the Union also argued the City violated the contract by removing the posting after only four days since the fifth day, Friday, March 24, was a holiday, that issue was not included in the original grievance, and furthermore, the Union conceded at the hearing that it was not aware of any employe who would have bid on the posting if it had remained posted another working day. The question of the fifth day of the posting is, therefore, not included in the issue addressed in this award.

2/ All dates herein refer to 1989 unless otherwise noted.

notice in the space provided below.

Duties, job requirements and qualifications are available from Tom Baer, Park Maintenance Superintendent.

A valid Wisconsin drivers license is required.

The rate of pay for this position shall be $11.44 per hour.

To be posted on: March 20, 1989
Job posting to be removed on: March 24, 1989
* PLEASE NOTE: Under normal working conditions, this job will be on layoff from late December until early April.

On March 28, 1989, the City posted the following notice:

March 28, 1989

Notification of Job Discontinuance

In accordance with Article 10 Section B of the agreement between City of Neenah and Teamsters Local #563 covering the Park & Recreation Department notice is given that the Park Maintenance I job posted March 20, 1989 is being discontinued as of today March 28, 1989.

James G. Hrubecky
Director Parks & Recreation

The City did, in fact, cancel the posting for the Park Maintenance I position. The Union grieved that cancellation, and that grievance is the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

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ARTICLE 10 - JOB POSTING

A. A new job or vacancy shall be filled as follows:

(1) Posted on the bulletin board five (5) working days before the job operation begins.

(2) Copy furnished Steward.

(3) Employees desiring posted job shall sign notice.

(4) Men oldest in seniority within the Department shall be given a trial period of up to thirty (30) calendar days in which to qualify for such job.

(5) Trial period may be extended additional thirty (30) calendar days by request of the employee's superintendent.

B. Job discontinuance or suspension shall be handled as follows:

(1) Posted on bulletin board.

(2) Copy furnished Steward.

C. When seniority is not recognized in job preference the case shall be subject to the grievance procedure.

D. Temporary vacancies shall be handled as follows: (Less than thirty (30) days)

(1) Posted on the bulletin board within the Department for five (5) working days.

(2) Held by the temporary replacement until the regular employee returns to work.

(3) Temporary replacement reinstated back in job formerly held.

(4) This section shall not be used to circumvent the procedures as set forth in Section "A" of this Article.

E. Vacancies may be filled for a maximum of five (5) working days without posting or without regard to seniority.

F. In the filling of vacancies or new jobs not completed under the above posting procedures; the City of Neenah agrees that first preference for such vacancies or new jobs will be offered to the senior city employee covered under other agreements between the City of Neenah and Local 563 (except the Water Department) who signs the posting for said job.

Any such job shall be posted on all bargaining unit bulletin boards for a period of five (5) working days. Copy of successful bidders shall be furnished to the Union. The successful bidder shall be given a trial period of up to thirty (30) calendar days in which to qualify for such job.

In the event any employee is unable to qualify for a job under this procedure, he shall be entitled to return to his former bargaining unit and job without loss of seniority, (sic) In the event any employee should qualify for a job under this procedure, he shall retain his length of service with the City for benefit accrual purposes but shall acquire seniority in the new bargaining unit as of his date of employment on said unit.

POSITIONS OF THE PARTIES

The Union

The Union asserts the City violated the contract by posting the position for only four working days and by not sending the Union a copy of either the posting or the denial. While the Union concedes that, under normal circumstances, an employer has the right to determine whether a vacancy exists and whether it should be filled, it argues that the City does not have the right to post a position and subsequently decide not to fill the position depending upon which employe bids the position. The Union insists that, in this case, management's distaste for the contract provision that gave bidding rights to the members of the sanitation department, and its distaste for the most senior bidder, was the motivation for the decision to remove the posting. Furthermore, that Union claims the City has never posted a position and then not filled the vacancy.

Finally, the Union insists that only its version of the March 1 settlement discussion between the Union and the City has any logic and credibility and, therefore, that the arbitrator must find that the parties made an agreement that the Park Maintenance I position would be posted.

The City

The City claims that the Union's real plan in this arbitration proceeding is to litigate the substance of the February 20, 1989 grievance. The City attributes the parties' directly contradictory versions of the March 1 meeting to miscommunication in which there was no meeting of the minds. Given the City's view of the non-meritorious nature of the February 20 grievance, the only resolution acceptable to the City would have been an agreement to post the vacancy created by the retirement of the Pool Custodian at the Park Maintenance II rate instead of a Park Maintenance I; therefore, the City could not have made the agreement alleged by the Union. The City points to the contract provision regarding job discontinuance or suspension and asserts its rights to not fill a position are not restricted by its having once posted the position, especially in light of the reservation contained in the posting. It also points to the internal management discussion on the need to fill the position that took place for three months. The City discounts the Union's suggestion that the elimination of the vacancy was based on improper use of summer employes or Director Hrubecky's alleged dislike of contractual cross-posting language.

DISCUSSION AND ADDITIONAL FACTS

At the outset, it is important to note what is not in dispute in this case. The parties are not disputing whether the City has the unilateral right to determine if a vacancy exists and when it will be filled. Rather, the parties dispute the related, but distinct question of whether, under the facts of this case, the City has the right to cancel a position once it has been posted. 3/

If the City had the right it claims, that right would limit the effect of an explicit contract provision, Article 10, Job Posting, Section A., Paragraph 4, which provides that the most senior bidder will be given a trial period. Pursuant to the City's theory, it would be able to post a position, and then cancel the posting if it did not like the most senior bidder. If this were the case, the City would have severely limited the explicit contractual right to

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3/ Although the parties presented extensive evidence regarding the March 1 meeting, and argued strenuously, especially in opening statements at the hearing, each in support of its version of the meeting, the resolution of this dispute does not depend upon the resolution of the factual question of what agreement, if any, was reached at that meeting. Regardless of whether or not there was an agreement to post a Park Maintenance I vacancy, the legal question remains the same: Once the City, for whatever reason, had posted a Park Maintenance I position, did it have the right to cancel the posting?

exercise seniority when bidding for job postings. Consequently, in order to prevail, the City must demonstrate by explicit evidence, and not merely by inference, that the parties intended this severe restriction.

To support its argument, the City points to Article 10, Section B, and asserts its March 28 Notification of Job Discontinuance was valid because it complied with that provision. The City's reliance on this provision is misplaced, however, for Section B merely sets forth procedures for publishing job discontinuance (that is, such notices will be posted on the bulletin board and a copy will be furnished to the steward). This provision does not indicate whether these procedures will be effective in cancelling a posting that has already been initiated. In short, the City is unable to point to any contract provision that gives it the right to initiate a job posting and later discontinue it.

The City also points out that the March 20 posting contained a reservation of the right to not fill the position. That reservation cannot dispose of this dispute, however, for it is a unilateral action, and as such, cannot invest in the City the right to cancel a posting if such a cancellation would violate the contract. This is true even though the City made a similar statement in an August 8, 1988 job posting, for in that earlier instance, the posting was not cancelled, and no conclusions can be reached regarding the City's right to cancel postings based on that instance. Consequently, analysis of this question cannot end at a review of the job posting document which contained the City's reservation regarding the ultimate filling of the position.

The City seeks to justify its posting cancellation by evidence that it was reviewing its staffing needs. Indeed, the record clearly shows that the creation of a Park Maintenance II position in lieu of the Pool Custodian position would give the City the greater efficiency and productivity which resulted from the flexibility of the Park Maintenance II employe's being able to work at several work sites as compared to the Pool Custodian who remained at the pool. Additionally, the Park Maintenance II employe, unlike the Pool Custodian, would be able to operate heavy equipment. Public Works Director James Hrubecky even estimated the increased efficiency as being as high as five-sixths of a full-time employe, and it is credible that the City might not have had to fill a Park Maintenance I position.

Since the City believed it was experiencing a reduction in staffing needs, it could have chosen to not post the Park Maintenance I position. Instead, it posted the position despite this potential for not needing to fill it, and cancelled the posting eight days later even though no new developments in the staffing situation had arisen in the interim. Indeed, there is no evidence that the City knew anything more about its staffing needs on March 28 than it knew on March 20. The evidence reveals only that the discussions during this period between Hrubecky and City Attorney James Gunz related to the legal rights of City in removing the posting. I conclude that staffing considerations that might have explained not posting the position at all, cannot, given this sequence of events, justify cancelling the posting once it had been made.

At the hearing, when asked why the City posted the position at all since it ultimately cancelled the posting, Hrubecky answered that he believed he had to post the position by a certain time if he were to fill it. To the contrary, the only Article 10 requirement as to timing of posting appears under Section A, Paragraph 1 which requires that new jobs or vacancies must be posted five working days before the job operation begins. Nor was there evidence of any other agreements between the parties that constrained the City to post the position by a certain date, nor was there evidence of any grievances filed over this issue. From this record, then, it is impossible to find that the City was compelled to post the position in order to comply with the collective bargaining agreement, and the City cannot justify its cancellation of a posting by its unsupported belief in such an obligation.

In summary, the City did not have the right to cancel the posting it had initiated on March 20. Such a cancellation was not justified under Article 10, Section B or any other contract provision. The City's unilateral statement, reserving the decision to not fill the position, did not create such a right. Finally, there is no evidence of new developments in staffing needs that arose between March 20 and March 28, and the City did not have a substantial basis to

believe it was required to post the position by a certain date. The City, therefore, was obligated to complete the posting and filling procedure it initiated on March 20, 1989.

In the light of the record and the above discussion, this arbitrator issues the following

AWARD

1. The City violated the collective bargaining agreement by not filling the Park Maintenance I position posted on March 20, 1989.

2. The City shall complete the posting and filling procedure it began on

March 20, 1989, and shall make whole the employe awarded the position pursuant to this order for all wages and benefits lost as a result of this contract violation.

3. Jurisdiction shall be retained by the undersigned solely for the purpose of resolving any disputes regarding remedy. Such jurisdiction shall be relinquished on December 7, 1989.

Dated at Madison, Wisconsin this 6th day of November, 1989.

By ______________________________
Jane B. Buffett, Arbitrator