BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SEYMOUR EMPLOYEES UNION, LOCAL 455, AFSCME, AFL-CIO	
and	Case 13 No. 42531 MA-5714
CITY OF SEYMOUR	

Appearances:

Mr. James Miller, Staff Representative, AFSCME, Council 40, appearing on behalf of the Union.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dennis Rader, appearing on behalf of the City.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the City respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to hear the instant grievance. A hearing was held on September 25, 1989 at Seymour, Wisconsin. The hearing was transcribed and the parties filed briefs which were received by November 10, 1989. Based on the entire record, the undersigned issues the following Award.

ISSUE

The Arbitrator frames the procedural issue as follows:

> Is the instant grievance untimely?

The parties stipulated to the following substantive issue:

> Did the Employer violate the collective bargaining agreement when it failed to post and fill the grade 4 position? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1988-90 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 4 - MANAGEMENT RIGHTS

> Except as otherwise provided in this Agreement, the management of the City and its business, and the direction of its work force, is vested exclusively in the Employer. Such rights include, but are not limited to the following:
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> . . .
>
> f. To determine the amount and quality of work needed.
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> g. To determine to what extent any process, service or activity shall be added, modified or eliminated.
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> . . .

ARTICLE 6 - PROMOTIONS AND JOB POSTING PROCEDURE

A. Definition: A vacancy shall be defined as any current position which is vacant for any reason or any new position created in the Department of Public Works, Water Utility and or Wastewater Treatment Plant.

B. Posting: All vacancies shall be posted for five (5) working days on the bulletin boards. Such posting shall include the classification, qualification, wage rate for the vacant position and adequate space for employees desiring to apply for said vacancy.

C. Award: The most senior applicant who meets the qualifications for the vacancy shall be provided a thirty (30) day trial period during which he/she may demonstrate his/her ability to perform the job and to receive any necessary training. . . .

. . .

ARTICLE 22 - PAY CLASSIFICATIONS

A. There shall be six (6) pay classifications to include the Department of Public Works, Water Utility and Wastewater Treatment Plant. Even though employees are differentiated with reference to pay classifi-cations, all employees of the Department of Public Works, Water Utilities and Wastewater Treatment Plant are obligated to perform all work assigned to them by the department heads without regard to the duties and work normally associated with any pay classification. The pay classifications set for forth hereinafter.

. . .

C. Pay Classification:

. . .

2. . . . Light Equipment Operator . . .

. . .

4. Equipment Operator

FACTS

Five employes work in the City's Street and Sanitation Department and perform a variety of tasks. There are no specific job descriptions for these individuals or their positions.

George Hauser use to be the Department's Equipment Operator (a grade 4 position). Among other duties he operated the grader, backhoe and front end loader. Hauser retired in 1984 and his position was never posted or filled. Hauser's job duties were then assumed by other employes in the Department. There are currently no employes in the Equipment Operator classification.

Joe VandeVoort was hired in 1983 as a Light Equipment Operator (a grade 2 position). Among other duties, he now operates the Department's grader, backhoe and front end loader. He filed the instant grievance contending he should be made the Equipment Operator (grade 4) that Hauser once filled on the grounds he is now doing the work Hauser formerly performed.

In the last round of contract negotiations the Union proposed that employes working at a higher classification be paid at the higher rate. This proposal was ultimately dropped during negotiations.

POSITIONS OF THE PARTIES

The Union addresses the Employer's timeliness argument by characterizing the instant matter as a continuing grievance (i.e. each day that the job was not posted constituting a new contract violation). With regard to the merits, the Union contends that the City has not posted the vacant Equipment Operator position and that this work is now being done by someone other than an Equipment Operator (namely the grievant, a Light Equipment Operator). Thus, in the Union's view, the Employer violated the contract when it failed to post and fill the Equipment Operator position which was vacant. In support thereof, it notes that Hauser, who was a grade 4 Equipment Operator, operated the grader, backhoe and front end loader and that the same work is now being done by the grievant, a grade 2 Light Equipment Operator. According to the Union, what has happened here is that the Employer has promoted the grievant for the purposes of work to grade 4 Equipment Operator but maintained his rate of pay at grade 2 Light Equipment Operator. The Union submits that fairness demands that if an employe is asked to do work that is paid at a higher rate, the employe should then be paid for doing the work at the higher rate. As a remedy for the alleged contract violation, the Union asks that the vacant position be posted and that the grievant be made whole for any lost wages/benefits dating back to the filing of the grievance. The Union specifically notes that it is not seeking backpay beyond the filing of the instant grievance.

The City initially contends that the grievance was untimely filed. In this regard the City notes that it has been five years since the event which supposedly gave rise to this grievance took place (namely Hauser's retirement and the Employer's failure to post and fill his position). With regard to the merits, it is the Employer's position that there is no vacancy in the Equipment Operator (grade 4) classification which it is obligated to post. In the Employer's view, it has the right to determine when a vacancy occurs. According to the Employer, the posting procedure should not be taken out of context without considering the Employer's rights under the Management Rights clause because the posting procedure is only a procedure and is not intended to be a limitation on management's right to staff. The City further argues that the grievant should not receive through arbitration what could not be obtained through negotiations. In this regard the City notes that in the last round of contract negotiations the Union made, and ultimately dropped, a proposal to have employes paid for working out of class. The City submits that the Arbitrator should follow the lead of numerous other arbitrators who have concluded that a proposal raised in negotiations but not attained cannot survive as a basis for a grievance. It therefore requests that the grievance be denied.

DISCUSSION

Timeliness

Contrary to the Employer's argument, the event which gave rise to this grievance is not Hauser's retirement from the City five years ago and the City's failure to post and fill the position at that time. Rather, it is the City's assignment of certain work Hauser performed to VandeVoort at no additional pay. Part of the Union's contention herein is that the Employer is not paying VandeVoort at the appropriate wage rate for doing work Hauser formerly performed. Inasmuch as this disputed assignment continues to the present day, it follows that there are no timeliness problems with this grievance. Therefore, it is held that the instant grievance is not untimely.

The Merits

The threshold issue herein is whether Hauser's retirement from the Equipment Operator (grade 4) position in 1984 created a vacancy which the Employer was contractually obligated to fill. The general rule in this regard is that an employe's departure from the work force does not automatically create a new vacancy. When an employe departs, management has the right to decide whether or not the employe's departure creates a vacancy. This prerogative is reserved to the employer here by the Management Rights clause (Article 4) which grants the Employer the right to determine the amount of work it needs and what level of service or activity can be eliminated. In the absence of a contract provision limiting these management rights in regard to filling vacancies, as,

for example, a clear requirement to maintain a certain number of positions in each classification, it is management's right to determine whether a vacancy exists and whether and when it shall be filled. 1/

Nowhere in this labor agreement is there any contractual provision which requires the Employer to fill every vacancy or maintain a certain number of positions in each classification. Contrary to the Union's implicit argument, Article 6 A does not guarantee that all vacancies will be filled. On its face, that provision neither contradicts the management rights noted above nor restricts the City from determining how many positions it chooses to fill. If management determines that a vacancy exists within the meaning of Article 6 A which is to be filled, then and only then do the posting and filling procedures found in Article 6 B and C apply. Said another way, unless management determines that a vacancy exists, no right which is contingent on the existence of a vacancy may be exercised. Since here the Employer decided not to fill Hauser's Equipment Operator position after he retired, it follows that the Employer was not contractually obligated to post and fill that position.

Attention is now turned to the Union's argument that since Hauser retired, the grievant has assumed Hauser's duties but not his pay grade. In this regard it appears from the record that some of Hauser's duties were assigned to the grievant after Hauser retired, namely being grader, backhoe and front end loader operator. However, just because the grievant now performs these duties does not mean he is automatically entitled to Hauser's pay grade on either a temporary or permanent basis. In order for this to happen there must be a contractual basis for same; simple fairness will not suffice. Here, there is no contractual provision which obligates the Employer to pay employes at a higher rate for working out of their classification, and in fact, such a proposal was unsuccessfully raised by the Union in the last round of negotiations. To the contrary, the City is specifically authorized to assign additional duties to employes without additional pay. This right is found in Article 22 A wherein it provides: "even though employees are differentiated with reference to pay classifications, all employees of the Department of Public Works . . . are obligated to perform all work assigned to them by the department heads without regard to the duties and work normally associated with any pay classification." This clause clearly gives the City the specific right to assign work without regard to the duties normally associated with a pay classification. That being so, the City can assign the grievant duties formally performed by Hauser without any additional pay.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the instant grievance is not untimely;

2. That the Employer did not violate the collective bargaining agreement when it failed to post and fill the grade 4 position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 30th day of November, 1989.

By _____
Raleigh Jones, Arbitrator

1/ Elkouri and Elkouri, How Arbitration Works, 3rd Ed., p. 478.