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

Case 197
No. 43741
MA-6057

Appearances:
Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.
Mr. Mark A. Warpinski, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1989-1990 collective bargaining agreement which provides for arbitration of certain disputes. The Union, with the concurrence of the City, made a request that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning the position of voting machine mechanic. The undersigned was appointed and held a hearing on April 27, 1990, in Green Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. Following the distribution of a transcript, the parties completed their briefing schedule on June 22, 1990, and the record was closed.

ISSUES

The Union frames the issue as follows:

> Does the contract language and/or the effect of custom and past practice require that the position of voting machine mechanic be properly assigned to only public works employees? If so, what will be the remedy?

The City raises two issues:

1. Is voting machine mechanic work bargaining unit

work?

2. Did the City violate the contract by awarding the temporary voting machine mechanic work to someone other than the Grievant? If so, what is the remedy?

The Arbitrator frames the issues as follows:

> Did the City violate the collective bargaining agreement by failing to award the position of voting machine mechanic to the Grievant? If so, what is the appropriate remedy?

BACKGROUND

This dispute centers on the filling of a temporary position called voting machine mechanic. The voting machine mechanic works in that position for about six weeks in one year and 12 weeks in the alternate year, depending on schedules for elections. The City has three people working as voting machine mechanics. They receive special training from the manufacturer of the machines, or some on-the-job training, to learn the work of setting up the machines for each election and maintaining the machines.

The parties agree that from 1964, when the City first got voting machines, up until 1990, all the people who filled the position of voting machine mechanic came from the Department of Public Works (DPW).

Initially, the position was not posted. Employees in the DPW were asked if they were interested in the job. Lawrence Kujava, an employee in the DPW, testified that he was asked by a foreman if he wanted the job, and he took it and has held it ever since 1972. However, positions for voting machine mechanics later became posted in the DPW. DPW employees would sign the posting, take a test, and those that passed the test had an interview before receiving the position.

The position of voting machine mechanic is a desirable one -- it pays a higher hourly rate ($12.44 versus $11.79) and has about 10 hours of overtime per week. The voting machine mechanics do not perform work in the DPW while working on their temporary assignment, although they did at one time in the past, and they cannot work overtime in the DPW. The budget for the position of voting machine mechanic comes from the City Clerk's office, not the DPW. The City Clerk's office is part of the Finance Department.

On December 26, 1989, the City posted a notice of temporary assignment for the voting machine mechanic position. Grievant Dan Joslin, an employee in the DPW for 16 years, signed the posting and took a mechanic's aptitude test. He was then interviewed for the position and told by City Clerk Paul Janquart that he had the position and that Janquart would notify his supervisor.

Joslin testified that Janquart told him he would be starting the work in February of 1990 for the spring primary elections. However, about a week later, Joslin was told by Janquart that the DPW Director, Dick Hall, would not release him for the voting machine mechanic duty. Joslin then filed a grievance.

Joslin had tried once before, in 1982, to get the position of voting machine mechanic. However, Bruce Van Horne, who had less seniority than Joslin, got the job at that time, even though Joslin passed the aptitude test. With the exception of garage mechanics, employees in the DPW are entitled to positions for which they post on the basis of seniority.

City Personnel Director Paul Jadin took part in discussions about filling the position at issue in this grievance from the point at which the position became available. Jadin, Janquart and Hall discussed the prospects of filling the position from the DPW, and Hall indicated that he was having manpower problems. The DPW had lost eight employees through attrition over the last two years. Jadin, Janquart and Hall decided to make other arrangements for 1990, after agreeing that the DPW was not going to be able to free up personnel. Jadin then contacted other departments which had mechanics or had people potentially qualified. He contacted the Parks Department and the Transit Department, as the Transit Department had about a dozen bus mechanics. Transit Department Director Gary Gretzinger agreed to spare someone for the voting machine mechanic job, and Keith Stange of the Transit Department got the job.

Up until 1990, the postings for the positions at issue have always been limited to the DPW. The parties have never negotiated over the position.

POSITIONS OF THE PARTIES

The Union

The Union argues that the City has unilaterally changed a condition of employment and a past practice of 25 years standing. The Union agrees that the labor contract does not directly address the position of voting machine mechanic. The dispute centers on whether the past practice of the parties makes the position of voting machine mechanic a position available only to employees covered by the contract.

The Union asserts that the practice of always drawing voting machine mechanics from the DPW is well known and clearly acquiesced in by both parties. The City's action of always filling the position with someone from the DPW is clear, unambiguous, and unequivocal. The past practice has been clearly enunciated and acted upon. The 25 year period is a reasonable period of time to establish a fixed practice.

Once the job was posted and awarded to the Grievant, it was inequitable for the City to renege, the Union submits. City officials apparently knew that DPW personnel would be

unavailable but the City posted the position in the DPW anyway, allowing DPW employees to bid on it and take the examination for the job.

The Union counters the City's argument that the position is not bargaining unit work by noting that the contract provides for waiving the regular posting procedures for garage mechanics in Article VII, Special Circumstances. Employees with less seniority may become garage mechanics in certain circumstances, because mechanics need certain skills, the same reason seniority does not necessarily apply to filling the voting machine mechanic position.

The Union asks that the Grievant be awarded the position of voting machine mechanic and be made whole for all wages and benefits lost as a result of the failure to award him the position.

The City

The City acknowledges that the Director of the DPW has acquiesced in departmental employees volunteering for work as voting machine mechanics for at least the last 18 years, but argues that the Arbitrator should not redraft the contract to engraft terms and conditions not agreed to by the parties. Although the City did not object in the past to DPW employees volunteering for the work, the City is not restrained now from refusing to allow DPW employees to perform those duties.

The City has permitted two DPW employees to continue working as voting machine mechanics. However, due to a reduction in the work force of the DPW, the Director determined that he could not spare a third person. The reduction in work force was a reasonable factor for the Director to consider in determining whether the Grievant should have been allowed to perform the work in dispute.

The City notes that the table of organization of the DPW does not mention the position of voting machine mechanic. However, the contract has specific references regarding seniority. The City submits that the fact that employees are not given the position of voting machine mechanic on the basis of seniority flies in the face of the written agreement which provides that the most senior person is entitled to a position. The City points out that the Grievant did not object in 1982 when an employee less senior to him volunteered for the voting machine mechanic job.

Moreover, the City asserts that volunteers are under the direct supervision and control of the City Clerk while performing duties as a voting machine mechanic. Wages for the position are paid out of the City Clerk's budget, not the DPW's budget. Employees cannot be forced to accept work as a voting machine mechanic. The City contends that its acquiescence in employees volunteering for the work does not constitute an assignment of work. It is an activity that the City can discontinue at any time.

The City concludes that the Grievant has no contractual entitlement to the position, that the

Employer reserves the right to prohibit people from volunteering for the position, and that the grievance should be denied.

In its reply brief, the City takes issue with the Union's contention that the City directed two DPW employees in 1964 to act as voting machine mechanics, asserting that three employees volunteered for the position. The City also objects to the Union's suggestion that the City has acknowledged that the position is covered by the bargaining agreement inasmuch as the City did not object to the arbitrability of this grievance. The City notes that it has contended that the position is not within the bargaining unit, and if the Arbitrator agrees with that position, the question of arbitrability of the grievance has been implicitly answered.

The City states that it sought volunteers for the voting machine mechanic position in 1964, and from that time through the present, no mention was made that the position and a rate of pay be placed within the bargaining agreement. The contract shows that the parties devoted much time to defining the classifications and rates of pay to be accorded those classifications. Since the Union neglected for 26 years to include the voting machine mechanic position within the classification of jobs covered, the City urges the conclusion that the parties did not consider the position to be covered under the contract by way of past practice.

Additionally, the City notes that the Union did not object to the Citywide posting of the position and that neither the Grievant nor the Union objected when employees other than DPW employees attended the test for the position.

The City argues that it was reasonable to refuse to allow the Grievant the work because the DPW was undermanned, and that the level of staffing is a legitimate management concern.

DISCUSSION

It is generally accepted by arbitrators that, in the absence of written contractual language, a binding past practice --- one that cannot be unilaterally discontinued during the term of the contract --- must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The question in this case is whether the practice of using DPW employees to perform the work of voting machine mechanics has attained the status of a past practice and is as binding and effective as if it had been specifically written into the contract or become part of the essence of the parties' agreement. I find that the practice has all the classic earmarks of a binding past practice.

The practice has been in effect since 1964 --- clearly a reasonable period of time. The practice is further unequivocal, clearly enunciated and acted upon, and accepted by both parties. While the City argues that it only acquiesced in DPW employees volunteering for work as voting machine mechanics, it misses the point --- whether it acquiesced in the practice or initiated it, the City's very acquiescence satisfies the Arbitrator that the practice was accepted by both parties over

the 25 year period.

The next question is whether the past practice is subject to being changed during the term of the contract. The City argues that it had a legitimate management reason to choose an employee outside the DPW where the DPW is undermanned. The City has only shown that the Department lost eight employees in the last two years through attrition. It does not show that it cannot replace those employees, that it cannot perform current levels of services, or that it is presented with some hardship in allowing DPW employees to continue to work as voting machine mechanics. The City appears to have the Arbitrator speculate that the change in the past practice is necessary because of understaffing. However, the Arbitrator is unwilling to engage in such speculation on this record, where two DPW employees have been left on the voting machine mechanic duty, where there is no affirmative showing of necessity to change the past practice in such a manner that the City should be allowed to withdraw an offer once given to the Grievant, and where the City is not oppressed by honoring the past practice during the term of an existing bargaining agreement.

The City raises the question of whether the voting machine mechanic work is bargaining unit work, and the short answer to that is that the City has considered it bargaining unit work for the last 25 years. At the least, the City has considered it to be within the scope of the bargaining unit's work, and the Arbitrator will not disturb that interpretation.

The City has also argued that to accept the Grievant's position in this case would lead to an incongruous result, where the contract has specific references to the rights of seniority but employees seeking the position of voting machine mechanics must be qualified and are not given the position on the basis of seniority. However, the contract allows for qualifications to take precedence over seniority in the classification of garage mechanic in Article 7, where it calls for the following:

> 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 presented "Garage Mechanics" before hiring and placing new employees. The employees involved shall be considered qualified when taking the mechanics job.

Therefore, the parties have recognized in their contract that certain mechanics need qualifications to perform the work, just as they have accepted the fact that voting machine mechanics must be qualified and that those qualifications are more important than seniority. A finding in favor of the Union does not fly in the face of the labor contract, but rather conforms to its general principles.

When a practice has been established as well as this one has, a timely repudiation of such a past practice is better made during the negotiation of a successor agreement than during the term of an existing agreement. 1/

I conclude that the Union has established that past practice of using DPW employees to perform the work of voting machine mechanic is a valid past practice which is part of the essence of the parties' total agreement, and I will sustain the grievance. The appropriate remedy is for the City to assign Grievant Joslin the next available work as voting machine mechanic and to make him whole for all wages and benefits lost during 1990 when Joslin was prevented by the City from performing work as voting machine mechanic.

AWARD

The City violated the collective bargaining agreement when it refused to give Grievant Dan Joslin the position of voting machine mechanic.

The City is ordered to assign to Dan Joslin the next available work as voting machine mechanic and to make him whole for all wages and benefits lost during 1990 as a result of the failure to assign Joslin to the position of voting machine mechanic.

I will retain jurisdiction in this matter for 60 days from the date below to resolve disputes concerning the application of this Award.

Dated at Madison, Wisconsin this 2nd day of July, 1990.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

1/ See Southern Gage Co., 80 LA 950, at 956, (Singer, Jr., 1983).