BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 67, AFSCME, AFL-CIO	:	Case 357 No. 44461 MA-6307
and	:	
CITY OF RACINE	:	

Appearances:
Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, P.O. Box 624, Rac
Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, 730 Washingt

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO (hereinafter Union) and the City of Racine (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On August 24, 1990, the Union filed a request to initiate grievance arbitration with the Commission. Said request was concurred in by the City. The Commission appointed James W. Engmann, a member of the Commission's staff, as the impartial arbitrator in this dispute. The Union and the City met with the Arbitrator on October 31, 1990, for the purpose of resolving this dispute through mediation. Said effort was not successful. A hearing was held on February 7, 1991, in Racine, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was transcribed, a copy of which was received on May 21, 1991. The parties submitted briefs, the last of which was received on July 2, 1991, and they waived the filing of reply briefs on July 18, 1991. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

In June 1990 a vacancy occurred in the position of Building Complex Maintenance Worker for the Building Complex that includes the Safety Building, City Hall and City Hall Annex. The posting for this position required that the applicant have a Stationary Engineer Class III licence upon starting the job. The vacancy was on the second shift on which only one Building Complex Maintenance Worker was assigned to work. At hearing, the parties stipulated to the following:

1. There were members of Local 67 who made application for the position in dispute.

2. The individual who was awarded the position in this dispute was not a member of the Local 67 bargaining unit.

None of the members of Local 67 who made application for the position in dispute had a Class III license. In July 1990 the position not was awarded to the senior member of Local 67 who had applied for the position.

Earl Falkner is a Stationary Engineer who now works on third shift. When he started as a Stationary Engineer, he did not hold a Class III license. However, he worked on first shift with three other employe's who did have Class III licenses.

Lenny Hand is a Stationary Engineer working on second shift. When he started as a Stationary Engineer, he worked for one month without a Class III license. Another employe on second shift, Chet Zimmerman, had a Class III license and received the rate of pay for Stationary Engineer for that one month period.

When Chuck Dennis started working as a Stationary Engineer on the second shift, he did not hold a Class III license. As noted above, Zimmermann worked the second shift and he did have a Stationary Engineer license. Three other employes were also in the Building Complex on the second shift. Dennis never repaired, drained, or adjusted the boiler. Twice a night he had to make a check of all the pressure gauges and water levels. There were times when he performed this function when Zimmerman was not on the premises. Dennis was allowed six months in which to receive a Class III license. During this time, Zimmerman did not monitor the boiler readings but worked, instead, as a cleaner. In addition to monitoring the boilers, Dennis also worked as a cleaner.

Lee Schmidt works in the Forrest Recreational Department. Previously, he worked at the zoo. He was the only zoo keeper on second shift. On an hourly basis he was required to check the pressure gauges and water levels of the boilers at the zoo. He did not hold nor was he required to get a Class III license. If there was a problem with the boiler, he was to call the zoo director. He never repaired, cleaned, drained or adjusted the boilers.

PERTINENT CONTRACT LANGUAGE

ARTICLE II
Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operated City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

2.To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees, for just cause.

. . .

5.To introduce new or improved methods or facilities.

. . .

8.To determine the methods, means and personnel by which such

operations are to be conducted.

. . .

10.To take whatever action is necessary to comply with State or Federal Law.

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ARTICLE XI
Hours and Wages

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F.Wage Rates.

1.The rate schedule marked Exhibit 'A' is hereby made a part of this Agreement and shall govern the wages to be paid employees covered by this Agreement.

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ARTICLE XII
Job Postings

A. Posting Procedure. Any job vacancy which occurs due to retirement, quit, death, new position or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties, and qualifications desired, rate of pay, work location or assignment and shift. Sufficient space shall be provided for employees to sign (apply) for said job opening.

All job openings within the province of the bargaining unit shall be posted for five (5) working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) work days after the close of the positing.

The City agrees to move the successful bidder to his new position as quickly as possible but in no event later than thirty (30) calendar days after notification of his selection.

. . .

C. Preference. Preference will be given first to the employees in the department and second to regular bargaining unit employees in other departments for posted jobs before a seasonal or temporary employee is considered. Screening of a man on the basis of seniority and ability to perform the duties of the job still applies.

ISSUE

At hearing, the parties were unable to stipulate to the framing of the

issue. The parties did stipulate that the Arbitrator would frame the issue in the Award.

The Union would frame the issue as follows:

Did the City of Racine violate the collective bargaining agreement and the long-standing past practice of the City by failing to award the position of Stationary Engineer at City Hall to the senior applicant?

If so, what is the appropriate remedy?

The City would frame the issue as follows:

Did the Employer violate the collective bargaining agreement by requiring that the person filling the Building Complex Maintenance Worker position to have a stationary engineer's Class III license upon starting work?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the City violate the collective bargaining agreement when it awarded the position of Building Complex Maintenance Worker to someone other than the senior bargaining unit applicant?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union

The Union argues that it is the long-standing past practice of the City to promote the senior applicant into positions such as the position in dispute, allowing said individuals between 60 days and one year to obtain a Stationary Engineer III license and, in some cases, never requiring the individual to obtain the license. Specifically, the Union argues that, under certain circumstances, custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties' "whole" agreement, citing Elkouri and Elkouri, How Arbitration Works (4th Edition, 1985) at 437; that a past practice must be "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties", citing Celanese Corporation of America, 24 LA 168, 172 (Justin, 1954); and that this is the case in the matter before this Arbitrator.

The Union also argues that the City is not under legal obligation requiring individuals working with boilers to hold a Class III license.

As for remedy, the Union requests that the grievance be sustained and that the senior applicant for the position in dispute be awarded the position and that said applicant be made whole.

Employer

The Employer argues that it did not establish a practice that allowed a Building Complex Maintenance Worker to work without a stationary engineer's

Class III license. More specifically, the Employer argues that the vacancy in question is not a stationary engineer's position; that the opening was for a Building Complex Maintenance Worker position; that the Building Complex Maintenance Worker requires a stationary engineer's licence; that the position of Building Complex Maintenance Worker is two steps above the position of stationary engineer; that none of the members of the unit who applied for the position had the Class III license; and that the City has not allowed a Building Complex Maintenance Worker to work without a Class III license unless the circumstances provided the opportunity for the person to work with a licensed engineer already on the same shift

The Employer requests that the grievance be denied.

DISCUSSION

The posting on the position in question required possession of a Class III license upon appointment. Bargaining unit employes posted for the position. None of them had a Class III license. The City did not award the position to any of these employes because they did not meet the qualifications. The Union grieves the denial of the position to the most senior applicant under Article XII, Section C, alleging a past practice that allowed appointed employes time to secure the Class III license.

Past practice, as such, is insufficient to imply terms and conditions upon an express contract, such as the collective bargaining between these parties; however, under certain condition a past practice can indeed be binding on the parties. The Union cites a standard definition of past practice as follows:

> In the absence of w written agreement, "past practice," to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. 1/

The Union argues that these elements are present in this case and that it has proven a violation of said past practice by the County.

The Union cites the examples of Ed Falkner, Lenny Hand, and Chuck Dennis as proof of a past practice that Stationary Engineers have been hired in the past without a Class III license and given time to secure it. Each of these employes was, indeed, hired without a Class III license and given time to secure it. Yet the City argues persuasively that each of these employes was hired on a shift on which another Class III license holder was already working. Therefore, these Stationary Engineers could be given time to secure a Class III license since another employe with a Class III license was on the same shift. Falkner was hired on first shift on which three other license holders worked. Lenny Hand was on second shift without a license for one month, during which time Chet Zimmerman, who holds a Class III license, also worked. Dennis was also hired on the second shift, the shift worked by Zimmerman.

The Union makes much of the fact that Dennis may have done his duties at times when Zimmerman was not on the premises. Even accepting this argument, this is only one instance, certainly not enough to qualify as a practice. The Union also cites the case of Lee Schmidt, but said case is distinguishable in several ways. Schmidt was a zoo keeper at the zoo, not a stationary engineer at the Building Complex.

Indeed, the City also argues persuasively that the positions cited by the Union were Stationary Engineers, but the position posted was for a Building Complex Maintenance Worker. The Union did not show any past practice in regard to this position.

At most, the Union could prove a past practice that for the position of Stationary Engineer on shifts where other Stationary Engineers are working, the City has allowed on occasion candidates time to secure the Class III license. That is not the situation here. In this case we have a Building Complex

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1/ Celanese Corporation of America, 24 LA 168, 172 (Justin, 1954).

Maintenance Worker hired to work on a shift on which no other Class III licensed employes are on duty. The Union did not show one example of this situation in which the City allowed the applicant for the position time to secure a Class III license.

To apply the definition quoted above, the past practice as alleged by the Union is not unequivocal since it has not shown one instance of the past practice being followed in the fact situation here present. Nor is the past practice clearly enunciated and acted upon, again for the same reason. Finally, the alleged past practice is not readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The Union also argues that the City is under no legal compulsion to require Class III license. Assuming this is correct, this does not limit the City's right to require more than the law requires, in this case, a Class III license.

For the reasons stated above, the Arbitrator issues the following

AWARD

1. That the City did not violate the collective bargaining agreement when it awarded the position of Building Complex Maintenance Worker to someone other than the senior bargaining unit applicant.

2. That the grievance is hereby denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of October, 1991.

By James W. Engmann /s/
James W. Engmann, Arbitrator

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