BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 76, AFSCME, AFL-CIO

and

CITY OF TWO RIVERS

Case 78
No. 51612
MA-8673

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the City, and Mr. Michael Aldana, on the brief.

ARBITRATION AWARD

The Union and the City named above requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a grievance regarding job postings. The undersigned was appointed and held a hearing on December 15, 1994, in Two Rivers, Wisconsin. The parties completed filing briefs by October 3, 1995.

ISSUES:

The parties raise the following issues:

> The Union asks: Did the Employer violate the 1992-94 collective bargaining agreement by posting job qualifications which were not required of all applicants and by the manner in which the Employer filled the vacancy? If so, what is the remedy:
>
> The City asks: Did the City violate the provisions of Article V, Section I(1) of the 1992-94 contract with Local 76 in the manner in which it posted and filled a vacancy for the position of certified plant operator in April of 1994?
>
> The City further asks whether the contract was violated by Local 76 in grieving and pursuing to arbitration the issue regarding the filing of the vacancy, and if so, what is the remedy?
>
> The Union then questions whether the City may file a grievance against the Union and asks whether the City's second issue is

arbitrable.

CONTRACT LANGUAGE:

ARTICLE V - EMPLOYMENT

. . .

I. Promotions:

1. Job Posting: Higher positions will be filled from within the Service whenever possible. Announcements of opening (Notice of Position Vacancy) will be made on employee bulletin boards and will be posted for a period of five (5) working days. An employee interested in a position posted for promotion shall sign his/her name on the posting form as evidence of his/her desire for the promotion and the time and date that he/she signed his/her name.

2. Job Award:

a. The most senior applicant, if qualified, shall be given the promotional opportunity within a reasonable time after the completion of the posting period.

b. When the City decides to fill the head lineman and foremen positions, promotions will be determined on the basis of relative skill, ability, experience and other qualifications. Where qualifications are relatively equal, seniority shall be the determining factor.

. . .

4. Disputes: Disputes in regard to employee qualifications, satisfactory completion of the trial period, and non-recognition of seniority shall be determined in the grievance procedure. It is agreed that job qualifications shall be on a fair and practical standard related to the work of the position. Should an applicant (aggrieved) prevail in a grievance hearing, upon the satisfactory completion of a trial period, he/she shall receive all lost wages and benefits he/she might otherwise have received.

. . .

ARTICLE IX - GRIEVANCE PROCEDURE

A. Time Limitations: The failure of a party to file or appeal a grievance in a timely fashion as provided herein shall be deemed a settlement of the grievance. A party who fails to receive a reply in timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. However, if it is impossible

to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

B. Names of Union and City Officials: The Union shall provide the City with a list of the members of the grievance committee in writing and further present the City with a list of the local Union officials assigned to various aspects of the grievance process. The City shall also provide the Union with a list of City officials assigned to process grievances.

C. Definition of Grievance: A grievance shall mean a dispute concerning the interpretation, application or enforcement of this contract.

D. Steps in Procedure: All grievances which may arise shall be processed in the following manner:

Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to his/her immediate Supervisor (e.g., Electric Distribution Supervisor, Park, Cemetery and Recreation Direction, Public Works Supervisor and Water and Sewerage Supervisor) no later than twenty one (21) calendar days after the Union knew or should have known of the cause of such a grievance. In the event of a grievance, the employee shall perform his/her assigned work task (unless his/her health or safety is endangered), and grieve his/her complain later. The immediate supervisor, within five (5) working days, shall orally inform the employee and the Union representative of his/her decision.

Step 2: If the grievance is not settled in the first step, the employee and/or his/her representative may prepare and file a written grievance with the Department Head within fourteen (14) working days (If the Department Head is the immediate Supervisor, the grievance shall automatically proceed to Step 3). A written grievance shall contain the name and position of the grievant, a statement of the grievance, the relief sought, the date the incident or alleged violation took place, the specific section of the contract alleged to have been violated, the signature of the grievant and the date. At this meeting the employee may be represented by up to (but not to exceed) two (2) members of the Union and a representative of Council 40 AFSCME. The Department Head will

review the record and further investigate the grievance and inform the grievant and the Union in writing of his/her decision within fourteen (14) calendar days after the conference with the Grievant and the Union.

Step 3: If the grievance is not settled in the second step, the decision may be appealed in writing to the City Manager. This appeal must be made within fourteen (14) calendar days. The City Manager will inform the aggrieved employee and the Union in writing of his/her decision within fourteen (14) calendar days after receiving the grievance.

E. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 3, the employee and grievance committee (or the representative of Council 40 AFSCME) must notify the City in writing within twenty one (21) calendar days that they intend to process the grievance to arbitration.

. . .

ARTICLE II - COOPERATION

The Employer and Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. The Employer agrees to maintain the amenities of work (e.g., coffee breaks, etc.) not specifically referred to in this Agreement. An amenity is defined as a routine practice which is mandatorily bargainable.

ARTICLE III - MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include the following:

A. To direct all operations of City government.

. . .

C. To hire, promote, transfer, assign and retain employees.

. . .

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

. . .

BACKGROUND:

In April of 1994, the City posted a notice for an opening of a position of a certified plant operator in the wastewater department. The posting, which gave the first opportunity for the job to current employees, stated:

WASTEWATER TREATMENT DEPARTMENT

CITY OF TWO RIVERS

NOTICE OF POSITION OPENING

As per Article V, Section I(1) of the Two Rivers Local 76 Union Agreement, employees interested in the position of **Certified Plant Operator** in the Wastewater Department may sign below. The job description is attached to this notice and extra copies are available in the Engineering Department. The official notice period will be from April 6 to April 12, 1994.

NAME DATE

_____

_____

_____

_____

Aaron Petri signed the posting on April 6, 1994 and signed off on April 27, 1994. He withdrew his name after talking with the Water and Wastewater Superintendent, Raymond Schultz, and after discussing the possibility of being cross-trained in the wastewater plant. Petri works in the water treatment plant and does not have the Class 4 certification.

The job description is four pages long. The only relevant portion of it for this grievance is the first part that states:

NATURE OF WORK

This is a skilled work position in the maintenance and operation of the wastewater treatment plan and related facilities on an assigned shift basis. Work involves a variety of tasks in the operation,

> maintenance and repair of wastewater treatment facilities utilizing skills acquired on the job and through special training courses. Certification as a DNR Class 4 wastewater treatment operator with subclasses a,c,e,f,g,i and j is required. The work is performed in accordance with established procedures and requires knowledge of operating and maintaining a variety of mechanical equipment. Works under the supervision of the Water/Wastewater Superintendent and Director of Public Works.
>
> . . .

When Petri declined the job, the City advertised in local newspapers for the position. It placed advertisements in three local newspapers and The Milwaukee Journal's Sunday edition, as well as the Wisconsin Job Service. The newspaper advertisements stated the following:

> Certified Wastewater
> Treatment Plant Operator
> Two Rivers Wastewater Utility
>
> The Two Rivers Wastewater Treatment Utility will be accepting applications until 4:30 p.m., Friday, May 20th, 1994, for a full-time DNR certified Wastewater Treatment Plant Operator. Desirable qualifications include DNR certification Grade 4 with all appropriate subclasses and experience in the maintenance and operation of lift stations. Two Rivers residency and high school diploma/GED equivalent required. Must possess valid Wisconsin driver's license with all applicable CDL endorsements or the ability to obtain the CDL endorsements. Application forms and additional information may be obtained at the Engineering Department at City Hall, 1717 East Park Street, Monday-Friday between the hours of 8:00 a.m. and 4:30 p.m.

The main difference between the two postings is that the internal posting appeared to require certification as a DNR Class 4 wastewater treatment operator with subclasses a,c,e,f,g,i and j, and the newspaper advertisements stated that desirable qualifications would include DNR certification Grade 4 with all appropriate subclasses and experience in the maintenance and operation of lift stations.

The City hired Richard Ganzel for the position. He was not a City employee before being hired for this position.

Union Vice-president and Steward Chris Behrendt is also an operator at the wastewater

treatment plant and has been there since 1985. Behrendt asked the Department of Public Works for a list of employees' levels of certification. On December 7, 1994, Water and Wastewater Superintendent provided the list. It shows the following:

Robert Brull Grade 4: A,B,C,D,E,F,G,H,I,J

Charles Denor Grade 4: A,B,C,D,E,F,G,H,I,J

Larry Lambries Grade 4: A,C,E,F,G,I,J
Grade 1: Surface Water
Grade 1: Distribution System

Chris Behrendt Grade 2: General
Grade 2: A

Richard Ganzel Grade 2: A,B,D,E
Grade 1: Ground Water
Grade T: Surface Water

Raymond Schultz Grade 4: A,B,C,D,E,F,G,H,I,J
Grade 1: Surface Water
Grade 1: Distribution System

Paul Lemke none

Ganzel, the successful applicant, had a Grade 2 level of certification when he was hired. Schultz told him that he would have to get the Grade 4 certification while on the job. Behrendt was hired from the outside also, and does not hold Grade 4 certification yet.

Lambries was an internal applicant and did not hold all of the subclasses when he transferred into the position, but got the subclasses while on the job. Lambries signed a posting in 1993 that included the job description of certified plant operator and stated: "Certification as a DNR Class 4 wastewater treatment operator with subclasses a,c,e,f,g,i and j is required." When Lambries signed the posting, he was a Grade 2 operator with some of the subclasses in Class 4, but he moved over to the wastewater plant with the understanding that he would obtain his Class 4 certification in a reasonable period of time, which he did about a year after he was on the job. The Union was aware of Lambries' situation, because there was another grievance regarding it.

In Case 74, the grievance before Arbitrator Nielsen, the Director of Public Works, Michael Lewis, testified that under the old job description, certification was desirable and could be achieved after the employee was on the job for awhile, but that the job description now requires certification as a condition precedent. 1/

1/ TR. Vol. 1, page 93, from Case 74.

Lemke is the plant mechanic. He signed a posting for certified plant mechanic in April of 1994, and his job description states: "Certification as a DNR Class 4 wastewater treatment operator with subclasses a,c,e,f,g,i and j is required." Lemke received the position, despite his lack of certification, with the understanding that he has to go to school to become certified.

Behrendt testified that he spoke with Paul Mott and Tim Schramm, both in public works maintenance, who apparently expressed some interest in the position but did not sign for it. Behrendt stated that Mott and Schramm came to him and said that they would have liked to sign for the position but they could not because they did not have the requirements asked for in the posting. Mott signed a posting in 1993, the one which Lambries also signed and got.

No one spoke to Schultz or Lewis about the position.

Lewis testified that when the City hires for a certified plant operator, it hires people who are expected to go back to school and take the necessary classes to become a certified Grade 4 operator within a reasonable period of time. Employees are trained to obtain their certifications, with the City paying for training courses and textbooks, as well as mileage and on-the-job training.

Lewis said that the language of the newspaper advertisements which included the phrase "desirable qualifications" was meant to draw the greatest number of applicants possible to obtain the best qualified candidate for the position. Lewis said that while it was the practice of the City to promote people who did not have all of the certifications to that job, outside applicants would not know that, and the City wanted to open up the field. Both internal and outside applicants would have to obtain the certifications pursuant to the job description within a reasonable period of time after being on the job.

Schultz testified that the City does not require employees to have the DNR Grade 4 certification when they receive these positions, because the City allows so much time to get the certification. Schultz said that it normally takes three to four years to get the training on actual duty, as well as attending courses and passing about eight tests. Schultz assumes that it takes one from four to five years to get the necessary certifications.

The City requires wastewater plant operators to obtain the DNR Class 4 certifications or license because of the possible consequences that the City could incur for noncomformance of the wastewater plant. There are fines, penalties, sewer moratoriums or sanctions for not meeting DNR permits and requirements.

Procedural Background:

Behrendt filed the first step of the grievance with Schultz on May 27, 1994, which was when he informed Schultz that the Union was going to file a grievance over the difference between the internal and external postings. Schultz told Behrendt "no," meaning that he was denying the grievance. Step 2 of the grievance went to Michael Lewis, the Director of Public Works. This was dated June 6, 1994, and Lewis had 14 calendar days to respond. On June 21, 1994, Behrendt

moved the grievance to Step 3 with the following note to City Manager Stephen Nenonen:

> We received no reply at Steps 1 & 2, and assumed this grievance was being denied. This is the third step. Please contact Jerry Ugland, staff representative, about a hearing on this matter.

Behrendt attached the grievance to the above note.

On June 23, 1994, Lewis responded to the Step 2 grievance as follows:

> This is in reply to your grievance dated June 6th, which I received on June 6th. You allege in the grievance that "management used double standards in the posting of the Certified Wastewater Treatment Plant Operator position. These double standards set higher standards for bargaining unit members than non-bargaining unit members." You claim that this action "violates article V,I,1 and any other relevant parts of the contract." The union is asking that "management shall repost the Certified Wastewater Treatment Plant Operator position. Cease and desist from any further double standards of the posting procedure. Make any affected employee whole. Award the position according to Article V, I, 2."
>
> In regards to your letter to Mr. Stephen Nenonen, City Manager, you assert that you did not receive a reply at Steps 1 & 2 of the Grievance Procedure. You did receive a verbal reply from Mr. Ray Schultz, Water/Wastewater Superintendent for Step 1, which was denial. According to Article IX-Grievance Procedure, under Step 2, I have fourteen (14) working days from the time the grievance is submitted to respond. Therefore, the deadline to respond under Step 2 in this case is Friday, June 24, 1994.
>
> We posted this position with identical certification requirements as with two previous postings for the wastewater treatment plant. For certified plant operator, Larry Lambries signed and was transferred to the plant and for certified plant mechanic, Paul Lemke signed and was transferred. No one except for Aaron Petri signed for nor even asked Ray Schultz about this most recent posting (Mr. Petri later signed off). Considering this fact, and considering the fact that either Mr. Lambries nor Mr. Lemke had all of the certifications required at the time of their transfer, we don't think that anything in the job description scared or discouraged anyone into not signing the posting this time. Therefore, we did not violate any union member rights under the contract and we posted this job as per past practice.

> Since no one in the union was interested, we advertised for the job. Listing job qualifications as desirable is routinely done in job advertisements. We don't want to discourage an outside candidate, not similar (sic) with City operations, from applying for a job just because he doesn't have "all" the requirements. We didn't deny Mr. Lambries nor Mr. Lemke the opportunity to transfer on this basis either.
>
> We were able to obtain an excellent operator in Mr. Richard Ganzel, even though he is only certified at Grade 2. He is committed to earning the Grade 4 certification as soon as possible as you are aware that we want all operators certified at the wastewater treatment plant.
>
> We don't feel it's necessary to repost for the position nor did we violate any union members rights under the contract. Grievance is denied.

Lewis admitted that he misread the contract and thought he had 14 working days to respond instead of 14 calendar days.

The Step 3 hearing was held on August 3, 1994. At that time, Nenonen handed the Union a letter which states:

> The City of Two Rivers hereby files a grievance and demand of restitution against A.F.S.C.M.E. Local 76 for violating Article II Cooperation, Article III Management Rights, Article IX Grievance Procedures and any other relevant parts of the Collective Bargaining Agreement dated January 1, 1992 - December 31, 1994 between the City of Two Rivers and Local 76 A.F.S.C.M.E., AFL-CIO. As the staff representative of this union, you are hereby served notice of this grievance.
>
> Union employee Chris Behrendt, as a union steward, did willfully circumvent the grievance procedure by skipping Step 2 in the process described in Article IX Grievance Procedure. This action also violates Article II Cooperation and Article III Management Rights.
>
> This action imposed costs upon the City for legal fees, staff costs, and other to be specified damages. The City hereby requests the union to cease such actions violating the agreement and to make the City whole reimbursing all incurred costs for such actions.

> Please inform me of a mutually agreeable date and time we can meet to discuss a resolution to this contract violation.

At the Step 3 hearing, the Union pointed out that the Step 2 response was 14 calendar days, not 14 working days. Behrendt recalled that Nenonen said he would rethink the situation and get back to the Union.

Union Staff Representative Gerald Ugland sent a letter to Nenonen on September 14, 1994, which states:

> On August 3, 1994 we met for a Step 3 hearing on the referenced grievance. At that time you submitted a pre-drawn response to the grievance before our discussion was complete. After hearing the Union's arguments you indicated that you would reconsider your response to the grievance. We have been waiting for a response. However, we know that you have been on vacation, so we have been liberal in allowing time for your response.
>
> Please indicate when you will have finished your reconsideration and when you will be responding to the referenced grievance.

On September 16, 1994, Nenonen sent Ugland a letter stating only that "The grievance was denied on August 3, 1994." Ugland then notified Nenonen on September 22, 1994, that the grievance was being appealed to arbitration.

Nenonen testified that he felt the Union was violating the contract language in Article II regarding cooperation, as well as Article III, Section A, C, and K, as well as Article IX, the Grievance Procedure for failing to respond to the written grievance filed by the City. Nenonen stated that the City is requesting that the Arbitrator order the Union to cease and desist from filing frivolous grievances, to reimburse the City costs for filing this grievance, to determine the right of the City to grieve sections of the contract, or to indicate if there is no such right.

THE PARTIES' POSITIONS:

The Union:

The Union contends that the Employer circumvented the job posting rights of bargaining unit members by posting a different requirement for the internal applicants than for external applicants for the position of wastewater treatment plant operator. The Employer's claim that the Union should understand that certification is not required is in direct contraction to sworn statements in a previous arbitration hearing on the issue of whether the Employer was justified in imposing the requirement of Level 4 certification with subgrades.

The Union argues that the posting clearly called for certification as a DNR Class 4 wastewater treatment operation with subclasses a,c,e,f,g,i and j as being required, because the job

description contains language of "required experience and training" and that job description was attached to the internal posting. Further, the job description notes that desired experience and training is two years experience as a DNR class 4 wastewater treatment plant operator with subclasses. Thus, for internal applicants, two years of experience was desired but certification was required. However, the Union complains that when the City advertised the position in local newspapers, it stated that certification was desired, not required.

The Union asserts that the contract implies that the Employer will reveal necessary qualifications to employees, pointing to the language regarding setting qualifications that are fair and practical. Application of qualifications for the position now occupied by Lambries are in dispute and in arbitration.

In a case pending before Arbitrator Nielsen, that Union is asking whether the Employer violated the labor contract by requiring Class 4 wastewater treatment plant operator certification of applicants. Behrendt got his position as a plant operator without special qualifications, and Timothy Schramm understood that employees could work toward certification after being awarded the position. In the Lambries' grievance, the Union challenges the first application of the certification requirement on the posting. One applicant, Kevin Perry, did not have the certification background as did Lambries.

The Union notes that the job description for the present case stated that certification as a Class 4 operator is required, and the experience as a Class 4 operator is desired. The Employer says it was trying to draw the greatest number of applicants to get the best qualified candidate when it advertised the position. The Union does not deny Lewis' claim that internal applicants are allowed to attain certification after they become applicants, a practice that existed before the Lambries grievance. In the Lambries' grievance, Lewis testified that the job description changed, and that certification was desirable under the old job description but it is now a condition precedent under the changed job description.

The collective bargaining agreement provides that the Employer will fill positions with present employees whenever possible. The Union states that the Employer made the position more difficult to attain for existing employees by setting a standard for them which was above the standard for external applicants. It was possible to set the same standard for present employees as for outside applicants.

The Union also argues that there is no contractual basis for the Employer to grieve against the Union. The Union followed the grievance procedure, as Lewis admitted during the hearing.

The Union asks that the grievance be sustained, that the position be re-posted and filled according to Article V, that the successful applicant receive lost wages and fringe benefits back to the end of the original posting period, and that the standard for posting be the same for external applicants as it is for internal applicants.

<u>The City:</u>

The City argues that the newspaper advertisement for the position does not violate any provision of the parties' bargaining agreement. The Union takes an untenable position that the City must use identical language in a newspaper advertisement for bargaining unit positions that it used for internal postings for the same positions. While there is no contractual support for such a position, there is no actual difference in the language used, and this frivolous grievance must be dismissed.

When the City posted the vacancy according to Article V, Section I(1), only one bargaining unit member signed for the job, but then withdrew his name. The City then sought to draw the greatest number of applicants from outside, and its past practice of hiring or promoting individuals who did not have all of the certifications needed for a position could not have been known outside of the City. Therefore, the word "desirable" more accurately described the City's intentions regarding qualifications for the position. The labor agreement does not put any contractual restrictions on the City's right to seek external applicants for vacant bargaining unit positions once unit members have been provided the chance to bid for the vacancy. The Union does not serve as the City's copy editor of newspaper advertisements.

The City retains the right under its management rights clause to hire employees as it determines appropriate. Article V, Section I(1) does not abrogate any right retained by the City to determine how it should advertise for vacant unit positions. The Union may not grieve the contents of an advertisement for a unit position, because there is no contractual foothold for the allegation that the contract has been violated. If the arbitrator were to uphold this grievance, in future grievances, the Union might claim excessive detail in external ads which put internal applicants at an "information" disadvantage; insufficient detail in external ads; length of time that the City ran external ads which put members at a "time" disadvantage; or grievances over which newspapers were used or which media were used.

Both the internal postings and external postings were based on the same job description. Union Steward Behrendt admitted that he was not certified at Grade 4 when he was hired as an operator and is not yet so certified. The City wonders how Behrendt can claim that any employee is deterred from applying for operator positions under such circumstances? The Union is well aware that job qualifications described as "required" in internal postings could be obtained after an applicant was awarded the position. Lambries and Lemke were awarded similar or identical positions in the wastewater treatment plant without having all of the qualifications which the City ultimately requires. The internal posting did not state that DNR Class 4 certification was required at the time or hire of promotion. The City grants qualified applicants the time and money to become certified.

While the Union contends that the internal posting had a dampening effect on internal applicants, the Union failed to produce a single employee to testify that he or she was discouraged from applying. No one approached management as to the meaning of the word "required" in the posting. The City again asks what provision of the labor contract has been violated? There are no contractual provisions which restrict the manner in which the City can advertise externally for unit positions. The word in question -- "desirable" -- as it relates to qualifications did not misinform employees and did not lower standards for external applicants. The City asserts that the grievance

must be dismissed.

The City further argues that the filing of this grievance violates the Union's obligation of cooperation with the City as stated in Article II. The City calls the grievance clearly frivolous, as the Union was well aware that the City had previously promoted other employees who did not have all of the necessary certifications at the time of hire or promotion, and it could have confirmed that this flexibility would be applied to this vacancy had any Union member inquired of management.

An employer's right to file a grievance against a union has been long established. The Union's unwarranted conduct forced the City to spend taxpayers' resources to defend this action, and this is precisely the type of needless and meritless grievances which the "cooperation" clause is intended to encompass. The City asks that this grievance against the Union be upheld, that the Union be ordered to cease and desist from filing frivolous grievances, and that the Union pay for attorneys' fees and all other costs incurred by the City in defending itself against this ridiculous and unnecessary grievance.

In a reply brief, the City continues to call the grievance frivolous and reiterates that the Union has failed to demonstrate any provision of the bargaining agreement that was violated by the newspaper advertisement. While the Union points to Article V(4), that section does not apply to the scope of this grievance, because this grievance does not challenge the propriety of the Operator job description -- that issue has been left for another arbitrator in another case. These two arbitrations are different. In the earlier grievance, the question was whether the City could post a position so as to replace a retiring certified treatment plant operator who was certified at DNR Grade 4 and Pay Range 8 with another Grade 4 certified operator also at Pay Range 8, and the job qualifications required such certification. The City calls any comparison to the testimony and evidence in the earlier arbitration a smoke screen to disguise the futility of this grievance.

Moreover, the City continues, the internal posting did not refer to any job qualifications or describe them as either desirable or required. The City attached the job description, which was too long to reprint in a newspaper ad. The City also notes that the Union failed to established any connection between the internal posting and the dearth of internal applications for the position.

DISCUSSION:

The issue presented by the Union is controlled by Article V, Section I(1), where the City has promised that "higher positions will be filled from within the Service whenever possible." The job that was posted -- a certified wastewater treatment plant operator -- was a higher position within the meaning of Article V, and the City does not dispute that it was required to post the position internally first.

However, where the City posted the job with one set of qualifications for inside applicants, and a lesser standard for outside applicants, it clearly violated Article V. This case is not about what the City may require for the job itself -- that is the subject of another grievance. But the City may not set standards higher for insiders than it does for outsiders, without first lowering the

standards for insiders. To allow the City to lower its qualifications when it advertises a job to the outside world without first giving bargaining unit employees the chance to take the job at the lower standard of qualifications would be to allow the City to bypass Article V. The City cannot create exclusionary barriers to prevent senior employees getting the open position.

While the City says this is all frivolous and nonsense because bargaining unit employees know that one can obtain certifications after they are on the job and outsiders would not know that, this matter is not frivolous at all. Getting a fair shot at a job is not a frivolous matter, and having fair knowledge about the job's requirements is not a frivolous matter. To stretch the City's logic to its ultimate conclusion, the City could put up any requirements for insiders that it did not ask of outsiders, on the theory that insiders could always ask the City if it really meant what it said on the posting.

It would seem that the City could have easily stated in both postings that certifications could be obtained while on the job, if that is indeed what it meant. There is some question whether that is what the City means, since Lewis has testified in a prior case that the certification was a condition precedent.

At any rate, the City says that it did not want to discourage outside applicants. No reason to discourage inside applicants, either, then, particularly where the labor contract gives inside applicants a preference to fill vacant positions.

If the City posted internally and got no applicants, then advertised externally and still got no applicants, it may need to lower the qualifications. But to do so without first coming back and giving the bargaining unit members the first shot at the job violates the contract. The City has promised that these positions will be filled from within the Service whenever possible. This is a strong commitment to bargaining unit members to give them preference for vacancies. The City has, by its conduct, attempted to circumvent this promise. It may not do this.

To remedy the violation, I will order the City to re-post the vacancy for the certified plant operator in the wastewater plant, the position which Ganzel filled. Since the City hired Ganzel without all the certifications that it "required," it should post the position noting that the certifications are desired but may be obtained within a reasonable period of time after being on the job. This remedy does not mean that the City may never require certification as a condition precedent -- that is still the subject of another grievance between the parties. However, this is the remedy needed to correct this particular contract violation, where the City lowered the qualifications for outsiders. This remedy is sufficient to right the wrong.

While the Union has asked that the successful applicant receive lost wages and fringe benefits back to the end of the original posting period, that is an excessive remedy for this violation. No individual bargaining unit members came forward and testified that they were harmed by the posting, and Petri did not have the certifications but signed the internal posting anyway before withdrawing his name.

The Union has also asked that the standard for posting be the same for external applicants

as it is for internal applicants. The City bears the risk of violating the contract when it gives outside applicants a different standard than inside applicants. Both parties also asked, as part of their issues, whether the contract was violated by the manner in which the City filled the vacancy. At this time, it is impossible to tell, without first determining whether there would be bargaining unit applicants had the job been posted with the same qualifications and requirements as the posting which resulted in the hiring of Ganzel. The parties will have to take one step at a time. First, the re-posting.

Employer's Grievance:

In a most unusual move, the City has filed a grievance against the Union for refusing to cooperate with it by filing this grievance over the job posting. It appears that the City's first contention was that the Union was circumventing the grievance procedure by skipping Step 2 and moving the grievance too quickly to Step 3. The City misread the grievance procedure's time lines, and the Union moved it correctly on time. When the Union pointed out to the City that the City misread the contract, the City did not back off its grievance but pursued it in this arbitration proceeding and claimed that the Union was violating the contract language regarding cooperation with the City.

Now that's frivolous. It's time that people learned to say, you're right, I'm wrong, never mind.

Nonetheless, the City has asked whether it may use the grievance procedure, and the Union has agreed to submit this question as part of this case.

There is no contract language which shows any intent that the parties ever contemplated that the Employer would use the grievance procedure. The City has cited cases where arbitrators have ruled that employers may use the grievance procedure. In those cases, however, the language of the grievance procedure differs and sometimes explicitly states that the employer may also use the grievance procedure against the union. In other cases, the language defining a grievance is very broad, referring to any and all disputes, while at the same time promising no lock outs. Thus, arbitrators in those cases involving the private sector have determined that the employer's right to use the grievance procedure is a quid pro quo for promising no lock outs, thereby allowing the employers some remedy. 2/

The language of Article IX neither explicitly allows the City to file a grievance nor does it contain the broader phrase about "any and all disputes." A lock out in the public sector is not a weapon. The public employer provides essential public services, and a lock out would be contrary to its own interests. Further, the public sector employer here may file a prohibited practice against the Union if it believes that the Union is violating the labor contract, and the City knows this. For those reasons, I do not believe that the grievance procedure should be interpreted to allow the City

2/ See, for example, Chase Bag Co., 42 LA 153 (Elkouri, 1963); Kessler, Inc., 88 LA 1273 (Glazer, 1987); and Maxwell Air Force Base, 97 LA 1129 (Howell, 1991).

to file a grievance against the Union, unless and until it negotiates language that would more clearly allow it to do so. This is not a matter of denying management some inherent right which is not expressly prohibited by contract, since grievance procedures are creatures of contract and no inherent rights to file grievances against unions existed in the absence of labor contracts.

AWARD

The Union's grievance is sustained.

The Employer's grievance is denied and is not arbitrable.

> The Employer violated the provisions of Article V, Section I(1) of the 1992-94 collective bargaining agreement in the manner in which it posted a vacant position for a certified plant operator in the wastewater department. As a remedy, the Employer is ordered to re-post the position of certified plant operator in the wastewater department which was originally posted in April of 1994, with the specific notation on the job posting that the certification requirements are desirable but may be obtained while on the job.

Dated at Madison, Wisconsin this 15th day of November, 1995.

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