BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SOUTH MILWAUKEE CITY EMPLOYEES,
LOCAL NO. 883, AFSCME, AFL-CIO

and

CITY OF SOUTH MILWAUKEE

Case 91
No. 52994
MA-9188

Appearances:

Mr. Joseph G. Murphy, City Attorney, 2013 Fourteenth Avenue, South Milwaukee, Wisconsin, 53172-0308, for the City.

Podell, Ugent & Cross, S.C. 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202, by Mr. Robert E. Haney, for the Union.

ARBITRATION AWARD

South Milwaukee City Employees, Local No. 883, AFSCME, AFL-CIO, "the Union", and City of South Milwaukee, "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, on September 12, 1995, 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 South Milwaukee, Wisconsin on October 30, 1995. The parties filed briefs and reply briefs, the last of which was received December 20, 1995.

ISSUE

The parties were unable to stipulate to a statement of an issue.

The Union stated the issue as:

> When the City decides to eliminate a position and subcontract work, is it required to post the position?

The City stated the issue as:

> Is the City required to post vacancies?

Based on the grievance filed in this matter, the Arbitrator states the issue as:

> Did the City violate the collective bargaining agreement when it did not post a vacancy in the Building Service Helper when it became vacant in March, 1995?

The Union proposed as appropriate remedy that the position be posted.

BACKGROUND

The two Building Service Helper positions became vacant in March, 1995 after employe Mark Bundalo took a leave of absence to accept a different position with the City and the second incumbent, Robert Gagnon resigned his position. At that time the City did not post the vacancies, but engaged the services of Dan Plautz Cleaning Services. The City responded to a Union inquiry by stating that it would be using Plautz for a temporary period ending May 31, 1995. When the cleaning services continued to be performed by Plautz after May 31, 1995 the Union filed a grievance, alleging a contract violation and demanding for relief that the vacancies be posted. The matter remained unresolved and is the subject of this arbitration award.

RELEVANT CONTRACT PROVISIONS

> ARTICLE IV
>
> SECTION 1 - MANAGEMENT FUNCTIONS
>
> Except as expressly limited in this Agreement, all management functions are reserved to the Municipality. Disputes over the application of this provision shall be submitted under ARTICLE VII, SECTION 4 (Step III of Grievance Procedure) of this Agreement.
>
> SECTION 2 - CONTRACTING AND SUBCONTRACTING
>
> The Union recognizes that the Municipality has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right to contract or subcontract is vested in the Municipality. However, the right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members.

. . .

ARTICLE VI

SENIORITY

SECTION 10 - VACANCIES

. . .

B. When a vacancy occurs in any of the departments listed in Article I, Section 4, Paragraph C, the job shall be posted simultaneously for two (2) full working days within all departments.

. . .

SECTION 11 - TEMPORARY TRANSFERS

Temporary transfers of employees for the purpose of expediting production or to fill vacancies caused by absenteeism, illness, injury, vacation or leaves of absence, shall not be subject to job posting and shall continue for the duration of the specific existing temporary condition. If the vacancy becomes permanent, it shall be posted.

POSITIONS OF THE PARTIES

The Union

The Union claims there is no good faith reason for the City to contract out the cleaning work, no evidence of cost savings or change in the nature of the work. The Union asserts the real motive was to circumvent the due process requirements of employe discipline. This circumvention would be undermining the Union and therefore is prohibited by Article IV, Section 2. The only other possible explanation for the sub-contracting is that the City believed no one would bid for the position if it were posted. If the City is basing its right to subcontract on that theory, it must first show diligent efforts to fill the position, that is, it must first post the position.

The Union believes the City's obligation to post the vacant position is abrogated only if the City eliminates the position altogether because there is no work to be performed, a situation that has not occurred.

As to the timeliness issue, the Union asserts it delayed filing a grievance based on a reasonable belief that the City intended to post the position in time for it to be filled by a bargaining unit member prior to the May 31 expiration of the temporary engagement of the cleaning services. After that date passed without the position being filled, the Union made inquiries of the City and received a response on June 14, 1995 that the City did not intend to fill the position. The Union filed the grievance within two days of receiving that information, and therefore it should be considered timely filed.

The City

The City contends that it is not required to post vacant positions (either temporary or permanent), which it has decided to eliminate. The City points to Article IV of the contract which it asserts gives it the right to contract with a private service. This right is limited only by the prohibition on contracting for the purpose of discriminating against a Union member or undermining the Union. The City asserts there is no basis for a finding that the City intended either to discriminate against a Union member or undermine the Union. According to the City, the comment of an alderman that "it is easier to dismiss a service than an employe" does not indicate an intent to undermine the Union, but merely reflects the facts of the matter. Moreover, the contracting of private cleaning service was done for the purpose of evaluating that cleaning option, and as a temporary action, cannot be seen as undermining the Union. Finally, the Union's interpretation of Article VI, Section 10 produces an absurd result which must be rejected.

DISCUSSION

In arguing that the disputed position must be posted, the Union relies primarily on the vacancy language of Article VI. According to the Union's theory, the position must be posted unless the work associated with it has diminished or disappeared. This theory takes a provision that details the procedural steps required when a vacancy is filled, and transforms it into a provision that requires the filling of all vacancies.

This Arbitrator rejects this interpretation that would guarantee the perpetuation of any position for which work exists. The contract does not support a conclusion that the City has relinquished the control involved in its determination of the number and kind of employe positions it needs. The arbitration awards cited by the Union do not alter this conclusion. Those cases stand for the principle that the employer has the right to refuse to fill the vacancy if the work has, in the language of one of them, dwindled, but they do not necessarily stand for the obverse. That is, while the Union is acknowledging that the City may determine to not fill a vacancy if the work has disappeared, it does not necessarily follow that the quoted language requires the City to fill the vacancy if the work has not diminished or disappeared.

The parties' contract language provides for a posting procedure "when a vacancy occurs".

Accordingly, the procedural requirement does not arise unless the vacancy exists, and the procedural requirement does not in itself create the vacancy. The City is not obligated to maintain all positions forever. The collective bargaining agreement, then, does not require the City to post a vacancy if the City concludes one does not exist.

The second provision implicated in this dispute is Article IV, Section 2, Contracting and Subcontracting. The plain language of the provision gives the City the general right to contract for its operations. That right is modified, however, by the prohibition on subcontracting for the purpose of undermining the Union or discriminating against Union members.

The Union argues that the decision to contract out the cleaning work was not made in good faith. It points to the statement of an Alderperson who said, at an October 3, 1995 meeting, that if there were a problem with a worker, the cleaning service could have a replacement within a week. Two other alderpersons were at the meeting and did not contradict the statement.

The evidence shows that the initial decision to subcontract the position was taken in April, six months before the October meeting when the comments were made. There is no other evidence of the City's reasoning for its decision. The April 6, 1995 letter from the City Clerk to the Chairman of the Wages, Salaries and Welfare Committee mentions the cost of the cleaning service, but there is no mention of a comparison with the cost of filling the vacancies with City employes nor is there a statement that a subcontractor is being used to save money. The June 14, 1995 letter from the City Administrator to the Union Staff Representative states that the work is being contracted out to "evaluate the various options for completing these tasks, including filling the positions and contracting out with a janitorial service."

A review of this scant evidence of the City's motivation for subcontracting the work is insufficient to support a conclusion that the City intended to undermine the Union. A reasonable inference can be drawn that the Alderperson's remark implied a belief that it was more difficult to correct performance problems for the City's own employe who is covered by the collective bargaining agreement than for a contractor's employe. However, those remarks, as the City argues, were a factual statement, 1/ that a cleaning service could replace a problem worker quickly. This one statement does not amount to an anti-union campaign, nor, much less, does it indicate that the City's motivation for using the subcontractor was such an anti-union campaign. Accordingly, the decision does not violate Article IV, Section 2 the prohibition of subcontracting for the purpose of undermining the Union.

1/ This statement may or may not be accurate, but it reflects the Alderperson's belief as to a factual matter.

Having found that the City's action in failing to post a Building Service Helper position did not violate either the vacancy provisions of Article VI Section 10 B and Section 11, or the contracting provisions of Article IV, Section 2, the undersigned issues the following

AWARD

1. The City did not violate the collective bargaining agreement when it did not post a vacancy in the Building Service Helper when it became vacant in March, 1995.

2. The Grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin, this 7th day of August, 1996.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator