

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SUPERIOR CITY EMPLOYEES' UNION,
LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 143
No. 53705
MA-9439

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Ms. Mary Lou Alexander, Human Resources Director, City of Superior, appearing on
behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City or Employer, respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on March 13, 1996, in Superior, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the terms of the collective bargaining agreement and past practice by not posting three positions within the Street Division before awarding these positions to other employees?

PERTINENT CONTRACT PROVISIONS

The parties' 1994-96 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 8
PROMOTION

8.01 Promotions, according to the terms of this Agreement shall be made strictly in compliance with seniority among qualified employees. In the event a vacancy occurs, it will be filled according to seniority, provided the senior employee is interested in the position and can qualify as set forth hereinafter. The following rules regarding promotions shall apply:

- A) First consideration shall be given to employees in the department in which the vacancy occurs. In the event employees are not considered qualified by the Employer or if the employee wishes, he/she may be returned to their former position without loss of seniority rights. In this event, the next senior employee in that department, if interested, will be offered the position. In qualifying for the new position, employees shall serve a probationary period of up to ninety (90) days to demonstrate their ability to perform the work. During said period they shall be paid five percent (5%) less than the base rate for the position.
- B) The above procedure shall prevail until the position is filled. In the event no employee within the department is considered qualified, unit-wide seniority will prevail among qualified employees in filling that position.
- C) In the event no City employee is considered qualified by the Employer, the Employer may then advertise publicly for applicants for the position.

8.02 Employees of Local 244 may exercise their departmental seniority on a daily basis in bidding for jobs for that day, providing said employees are qualified to fill that particular position in question. Said bidding shall occur after 3:30 P.M. the previous day and before 7:00 A.M. that day, except when the Mayor declares an emergency in which case management reserves the right to assign work assignments without regard to bidding, but according to seniority and classification. Jobs on the paving crews and

garbage crews shall be bid on a weekly basis only. Bidding on the positions at the waste water treatment plant shall be done with the knowledge that change could take up to sixty (60) days to implement, providing that the bumping will only be allowed where there is a qualified replacement available at no additional cost to the City.

Any employee with a classification who is assigned to work within that classification and who exercises his/her seniority to bump to a lower classification, will receive the rate of pay attached to the lower classification for the time he/she worked in the lower classification. The exception to this would be that if the person assigned to the lower classification has the same rate as the person assigned to the higher classification and both individuals are qualified to perform either task. The most senior employee may exercise his/her right to bump to the lower classification and receive their normal rate of pay. The purpose is to assure that no additional cost is passed on to the City.

- 8.03** In the event a dispute arises regarding the qualifications of any employee, the matter may be submitted to the grievance and arbitration procedure of this Agreement.

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BACKGROUND

In the spring of 1995, the City decided to eliminate four maintenance positions at the City's Wastewater Treatment Plant. All four of these positions were filled at the time. Thereafter, city officials and local union representatives met to discuss the anticipated layoffs. At that meeting the parties found a way to avoid the anticipated layoffs. Specifically, they decided that four other then-vacant positions in the Department of Public Works (DPW) would not be posted and filled at that time. Instead, the four vacant positions would remain unposted and vacant for the time being so that the four employees whose positions were going to be eliminated at the Wastewater Treatment Plant could later bump into them (i.e., the four vacant DPW positions). Thus, the parties agreed that the four displaced Wastewater Treatment Plant employees would ultimately get the four vacant DPW positions without those positions ever being posted.

On October 18, 1995, City Human Resources Director Mary Lou Alexander notified Walt Benjamin, Mark Mohr, Dave Lambert and Joe Nelson in writing that their maintenance positions at the Wastewater Treatment Plant were going to be eliminated effective November 1, 1995. This

notice indicated that the City and the Union had previously agreed that the four employees could use their seniority to bump into other positions within the DPW. This notice indicated that the DPW positions which were available were one relief assistant operator position at the Wastewater Treatment Plant and three laborer positions in the Street Division. The four employees were directed to decide which position they wished to fill and to advise the Human Resources Department of their decision by October 25, 1995.

The four employees subsequently informed the Human Resources Department which position they wished to fill. The most senior of the four (Benjamin) elected to bump into the relief assistant operator position at the Wastewater Treatment Plant, while the other three (Mohr, Lambert and Nelson) elected to bump into the laborer positions in the Street Division.

On October 25, 1995, Human Resources Director Alexander sent the following memo to Local 244 President Chuck Miller regarding the layoff of the Wastewater Treatment Plant staff:

This letter will serve to document the City's position in regards to the layoff of four individuals performing the maintenance function at the WWTP due to an elimination of four positions. The effect on salary assignment of any of these individuals will depend upon their choice to exercise their bumping rights to another position in the Public Works Department.

The four individuals impacted are considered to be laid off effective October 31, 1995, however they may choose to elect to use their master seniority to bump to another position in the department for a position to be effective November 1, 1995. As we discussed there are four available vacant positions in the department, one at the WWTP and three in the Street Division. If they elect to bump to another position, they will be placed at the salary of the new position, as has been the past City practice upon elimination of positions and employees exercising bumping rights into another position.

This memo was copied to the four affected employees, among others.

October 31, 1995 was the last day for the four affected employees in their old positions at the Wastewater Treatment Plant. The very next day (November 1, 1995), the four employees moved into the vacant DPW positions referenced above (Benjamin to the relief assistant operator position at the Wastewater Treatment Plant and Mohr, Lambert and Nelson into laborer positions in the Street Division). Thus, the four employees bumped into the four vacant DPW positions which had been kept open for them.

FACTS

Jeff Tyykila, a bargaining unit employe, subsequently filed a grievance contending that the vacant DPW positions should have been posted for bidding before the Wastewater Treatment Plant employes whose positions were eliminated were allowed to bump into those vacancies. The grievance was later appealed to arbitration.

POSITIONS OF THE PARTIES

The Union makes the following argument on the grievant's behalf. The grievant believes that the three Street Division laborer positions which were kept open and vacant for the Wastewater Treatment Plant employes whose positions were eliminated should have been posted for bidding pursuant to Sections 8.01-8.03. The grievant wanted to bid on one of the positions but was denied the chance to do so since the positions were given to the Wastewater Treatment Plant employes whose positions were eliminated. In order to remedy this alleged contractual breach, the grievant wants the City to post the Street Division laborer positions in question for bidding.

The City contends that it did not violate either the contract or past practice by not posting the positions in question. The City asserts that the reason it did not need to post these particular positions was because it reached an agreement with the Union that these particular positions were not to be posted but were instead to be given to the Wastewater Treatment Plant employes whose positions were eliminated. The City avers that is ultimately what happened. According to the Employer this agreement supersedes any contractual requirement it may have to post the vacancies. It therefore requests that the grievance be denied.

DISCUSSION

It is undisputed that in 1995 the parties agreed that four then-vacant DPW positions would not be posted and filled at that time and that those positions would later go without being posted to the Wastewater Treatment Plant employes whose positions were going to be eliminated. The basis for this agreement was as follows. In the spring of 1995, the City decided to eliminate four maintenance positions at the Wastewater Treatment Plant. All four of these positions were filled at the time so this meant that the four incumbents were to be laid off. The parties then met to discuss the anticipated layoffs. At that meeting the parties found a way to avoid the anticipated layoffs. Specifically, they agreed that four then-vacant DPW positions would remain open and unfilled so that the four employes whose positions were going to be eliminated could bump into them. Thus, the parties agreed that the four Wastewater Treatment Plant employes would be given the four vacant DPW positions without those positions being posted. That is what ultimately happened: after their positions at the Wastewater Treatment Plant were eliminated, the four employes bumped into the four DPW positions which had been kept open for them.

Notwithstanding the agreement noted above, the parties have also contractually agreed that

vacant positions will be posted. This agreement is found in Article 8 wherein it implicitly provides that vacancies which the City intends to fill will be posted. Article 8 does not contain any exclusions or exceptions to this general principle. That being the case, the inference is that all vacancies which the City intends to fill will be posted.

At issue here is which of the foregoing agreements controls herein. If the parties' 1995 agreement to not post certain DPW positions is found controlling, then the Employer did not have to post the positions in question because it had an agreement with the Union to the contrary. On the other hand, if Article 8 is applied to the instant facts, then the Employer should have posted the positions in question.

Based on the following rationale, the undersigned concludes that the parties' 1995 agreement to not post certain DPW positions is controlling here. It is noted at the outset that the parties to a labor agreement (namely the Union and the Employer) may amend or add to it by subsequent agreement. While the labor agreement is certainly the chief instrument that guides the parties in their relationship, on occasion it becomes necessary to clarify, add to, or make exceptions to the labor agreement in some manner. This is what a side agreement does. Such side agreements are very common in labor relations. That is what happened here. The parties made a side agreement in 1995 that certain then-vacant DPW positions would remain open and that the Wastewater Treatment Plant employees whose positions were going to be eliminated would bump into those positions. In making this agreement, the parties understood that a consequence thereof was that the DPW positions in question would not be posted. That being so, they decided to disregard the Article 8 posting requirement as it relates to the positions at issue here. That was their call to make. Having done so, that agreement supersedes the Article 8 posting requirement and controls the outcome herein. It therefore follows that in this particular instance, the Employer was not contractually obligated to post the DPW positions in question because the parties expressly agreed in 1995 that the positions in question would go without being posted to the Wastewater Treatment Plant employees whose positions were eliminated. Hence, no contract violation occurred.

In light of the above, it is my

AWARD

That the Employer did not violate the terms of the collective bargaining agreement and past practice by not posting three positions within the Street Division before awarding those positions to other employees. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 11th day of September, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator