

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF RACINE (CITY HALL)

and

LOCAL 2239, AFSCME, AFL-CIO

Case 507
No. 54526
MA-9706

Appearances:

Mr. Guadalupe G. Villarreal, Assistant City Attorney, 730 Washington Avenue, Racine, Wisconsin, appearing on behalf of the City.

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

The City of Racine (City Hall), hereinafter referred to as the City, and Local 2239, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request to initiate grievance arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over whether the City awarded a position to an employee in a timely manner. Hearing on the matter was held in Racine, Wisconsin on January 7th, 1997. A stenographic transcript of the proceedings was received by the undersigned on January 17, 1997. Post hearing arguments were received by the undersigned by February 18, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties agreed to leave framing of the issue to the Arbitrator. The undersigned frames the issue as follows:

"Did the City violate the collective bargaining agreement when it failed to award a April 30, 1996 posted Account/Data Entry Clerk III position until August 19, 1996?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE XIII

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 employee to sign (apply) for said job posting.

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 posting.

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

The job posting for any classification shall remain in effect for ninety (90) days following the award of the posted job and shall govern, without any reposting, any job openings occurring within said ninety (90) day period in that job classification.

B. In accordance with Article XII, Seniority, total bargaining unit seniority shall prevail in all job postings except for shift changes which will be based upon classification seniority. Shift changes shall not be subject to Sections C and/or D below.

C. Probationary Period: Employees working on a job obtained through job posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous job should his/her ability to handle the new work prove unsatisfactory within this probationary period. This provision

shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

D. Return to Previous Job: If within thirty (30) calendar days the employee is dissatisfied with the posted job and wishes to return to his/her previous job, the Employer shall have the right to request the employee to remain on the job until such a time as the job is again posted and filled. At no time shall this time exceed thirty (30) calendar days. In order for a Union employee to change jobs or classifications while still in a probationary status, he/she must return to his/her previous job classification. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

E. For the purposes of job posting only, the employee in the Cemetery Department will not be considered to be eligible to move to jobs within the collective bargaining unit until the employee has a minimum of three (3) years of service within the Cemetery Department.

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BACKGROUND

Amongst its various governmental functions the City operates a Finance Department which undertakes the City's accounting function, payroll, treasury and purchasing. The director of the department is Jerome J. Maller and the Finance Department employes approximately 28 to 30 employees. At the commencement of the hearing in the instant matter the parties stipulated to the following facts:

1. An Account/Data Entry Clerk III (SU-9) position was posted on April 30, 1996.
2. The closing date of the posting was May 8, 1996.
3. The following applicants signed up for the posting:

<u>Name</u>	<u>Seniority Date</u>
Armintta Franklin	01/12/81
Pat McMillian	07/13/87
Helen Fowler	03/14/88
Joanne Harris	06/30/88

Monica Dixon	07/05/88
Kim Gatzke	02/27/89
Gigi Morris	03/04/91
Debbie Michalek	04/21/92
Linda Espinoza	07/12/93

4. The applicants are listed above in the order of seniority with the most senior employee at the top.
5. Applicants Armintta Franklin and Helen Fowler voluntarily withdrew their names from consideration for the position.
6. Interviews were conducted on June 12, 1996 of five (5) applicants:

Pat McMillian
Helen Fowler
Joanne Harris
Monica Dixon
Kim Gatzke
7. On September 3, 1996, Pat McMillian started in the position of Account/Data Entry Clerk III.

The posted minimum qualifications for the Account/Data Entry Clerk III position were as follows:

Minimum Qualifications:

High school diploma or equivalency. Two years of formal education in bookkeeping and three years of data entry and responsible bookkeeping work desired, especially with mainframe applications. Knowledgeable in word processing and spreadsheet applications. Must possess accurate mathematical ability. Typing/data entry speed of 40/wpm (net) with accuracy. Ability to possess and maintain professional appearance and work ethics, with the ability to establish effective working relationships with other employees and the public. Knowledge of municipal governmental organization. Must be willing to accept cross training and display leadership and future supervisory ability. Possess confidence and ability to take control of difficult situations by anticipating problems and analyzing alternative solutions, while working in a demanding environment.

On June 12, 1996 Maller, his assistant Dan Debonis and Bill Dyes of the City's Personnel

Department interviewed the candidates who signed the posting. At the conclusion of the interviews the City concluded none of the candidates who posted for the position met the minimum qualifications for the position. On approximately August 19, 1996 the City awarded the position to Pat McMillian and McMillian began working in the position on September 3, 1996. At the hearing the City contended McMillian did not meet the minimum qualifications for the position. This resulted in her probationary period being extended.

On July 1, 1996 the Union filed the instant grievance alleging the City had violated the collective bargaining agreement when it had failed five (5) days after the close of the posting to notify the successful bidder and the City's failure to notify the Union nor the grievant after the June 12, 1996 interviews as to who the successful bidder was. On July 22, 1996 the grievance was denied without any explanation. On August 1, 1996 the Union appealed the denial to the second step of the grievance procedure and the second step appeal was denied without explanation on August 12, 1996. On August 23, 1996 the matter was appealed to the third step of the grievance procedure. On September 5, 1996 the City denied the grievance stating...

"The City has complied with Article XIII by moving the successful bidder. As far as the "make whole" provision, the City believes that a legitimate dispute had arisen concerning this posting and therefore the City does not believe monies should be paid for work not performed. It appears that the successful bidder may have the opportunity to work overtime in the future."

Thereafter the matter was processed to arbitration in accord with the parties' grievance procedure.

Union's Position

The Union contends the City violated the collective bargaining agreement when it failed to award the position in dispute to McMillian in a timely matter. In support of its contention the Union points to Article XIII, Section A., of the parties' agreement. Therein it states: "The successful bidder or the Union shall be notified within five (5) working days after the close of the posting. The City agrees to move the successful bidder to his/her new position as quickly as possible but in no event later than thirty (30) calendar days after notification of his/her selection." The Union points out McMillian was the most senior applicant, she was awarded the position, however she did not commence working in the position until September 3, 1996. The Union asserts the language of the agreement is clear and unambiguous. The City was required to notice the success applicant five (5) working days from the close of the posting, May 8, 1996. The City then had thirty (30) days to place the successful applicant in the position.

The Union asserts the City, by choosing McMillian, albeit tardy, identified her as the successful candidate. The Union concludes the City violated the clear language of the agreement

when it failed to move her into the new position until September 3, 1996. The Union argues this language was duly negotiated between the parties. The Union also asserts the language does not allow the City to play semantical games while postponing the advance of an employe. The Union also points out it was not McMillian's fault the City failed to comply with the collective bargaining agreement and she should not suffer lost wages because of this.

The Union also points out no objective testing took place that would indicate the City had a question concerning McMillian's ability to perform the job. The Union also asserts the June 12th interviews are not a defense to the City dragging its feet and violating the terms of the agreement.

The Union would have the undersigned sustain the grievance and direct the City to make McMillian whole.

City's Position

The City contends it did not violate the collective bargaining agreement when it placed McMillian in the Account/Data Entry Clerk III position on September 3, 1996. The City points out it placed McMillian in the disputed position within thirty (30) days after the City advised her she would be given the opportunity to try out for the position. The City notes that Maller had determined after the interviews that none of the candidates met the job posting requirements. The City contends it was in a dilemma that did not resolve itself until it determined in mid-August to give McMillian an opportunity to see if she could overcome her lack of formal bookkeeping education and accounting experience. The City contends it went beyond its obligation and extended her a thirty (30) day probationary period to allow her to learn the basics of the new position.

The City also asserts the Union presentation that the thirty (30) day probationary period is an employe right ignores the fact the period allows the City to evaluate the employe to determine if the employe is capable of performing the essential tasks of the new position. The City also points out its analysis of the employe's shortcomings were validated when it had to extend the employe's probationary period.

The City concludes it should not be punished for attempting to make a difficult decision that pitted seniority against skill and ability to perform the job without the formal education and experience requirements in a job posting.

The City would have the undersigned deny the grievance.

DISCUSSION

The parties collective bargaining agreement clearly requires the City to notify the successful candidate for a job posting five (5) days after the close of the posting. This language is

clear and unambiguous. There is nothing in the record which would demonstrate that the City has the unilateral authority to extend this time frame. Doing so without the mutual consent of the Union would be a violation of the express terms of Article XIII. Herein there is no evidence the City asked for or received an extension of this timeframe which commenced with the May 8 closing of the job posting for the Account/Date Entry Clerk III position. There is no evidence in the record the City even attempted to determine if any of the candidates met the minimum qualifications for the position until the June 12th interviews. Thus, if the agreement did allow the City to delay making a decision until it had an opportunity to interview candidates for a position, there is no language in the agreement which would allow the City to take longer than five (5) days to determine who, if anyone, was the successful candidate for a posted position. However, nothing in the record allows the City to make a unilateral decision to delay determining who is the successful bidder. Herein the record demonstrates such a determination was not made until mid-August when McMillian was informed she was awarded the position.

The undersigned is aware that the City has claimed it was in a dilemma because it had determined none of the applicants met the minimum qualifications for the position. However, there is no evidence the City ever made the Union or the applicants aware of this. Nor is there any evidence the City asked the Union to waive the time requirements of Article XIII in order to resolve the matter. Absent such a request the City was required by the agreement to make a determination as to who the successful bidder was five (5) days after the closing of the posting. Further, the requirements the City has relied on to claim the candidates did not meet minimum qualifications are identified in the job posting as "desired" qualifications. "Desired" does not mean "must have" absent some evidence that the parties have construed this term to have such a meaning. Further, if these "desired" qualifications were required minimum qualifications the City could have concluded none of the applicants met the qualifications. If the City had done so the affected employees could have grieved the City's actions. This would allow a determination as to whether the "desired" qualifications were in fact required minimum qualifications. The undersigned notes here that if the City is claiming that it in effect reduced the qualifications in order to give McMillian an opportunity to attempt to do the tasks of the position, the City, by its actions has changed the minimum qualifications of the position. Such a change would require the City to notify the Union and to repost the position with the changed qualifications. However, as noted above, there is nothing in the record which demonstrates that the parties have construed the term "desired" to be a term which requires an employee to possess a qualification.

Therefore, based upon the above and foregoing, and the arguments, evidence and testimony presented by the parties, the undersigned concludes the City violated Article XIII when it failed to notify the successful bidder five (5) days after the close of posting and failed to move the successful bidder into the posted position within thirty (30) days after notification. As McMillian was not awarded the position until September 2, 1996 the undersigned directs the City to make her whole for any lost wages she incurred because the City did not award her the position in a timely manner, which would have been to place McMillian into the position thirty-five (35) days after May 8, 1995.

AWARD

The City violated Article XIII when it failed to notify the successful bidder of the Account/Data Entry Clerk III position five (5) days after the May 8, 1996 close of the posting and violated Article XIII when it failed to move the successful bidder into the Account/Data

Entry Clerk III position within thirty (30) days after notification. The City is directed to make Pat McMillian whole for the lost wages she incurred for the time frame between the thirty-five (35) days after the May 8, 1996 closing and the date she entered the position, September 3, 1996.

Dated at Madison, Wisconsin, this 23rd day of June, 1997.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator