BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF SUPERIOR

and

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

Case 150
No. 54499
MA-9704

Appearances:
Ms. Mary Lou Andresen, Human Resources Director, and Mr. Thomas N. Hayden, City Attorney, for the City.
Mr. James E. Mattson, Staff Representative, for the Union.

ARBITRATION AWARD

Under the terms of the parties' 1994-1996 contract, I was assigned by the Wisconsin Employment Relations Commission as arbitrator of a job posting grievance.

Hearing was held in Superior, Wisconsin, on March 19, 1997. No transcript of the hearing was made. The parties filed briefs, the last of which was received May 27, 1997.

ISSUE

The parties could not agree on a statement of the issue, but did agree I could establish the issue after considering their positions.

The Union states the issue as:

> Did the Employer violate the terms of the Collective Bargaining Agreement and the long standing past practice, when the Employer refused to allow the grievants the right to post into and the opportunity to work the 90 day trial period for posted positions?
>
> And if so; the appropriate remedy is for the Employer to allow the Grievants to post into vacant positions and to work the 90 day trial period for the posted positions.

The City believes the issue is:

Did the City violate Article 8.01 of the Local #244 Working Agreement in the process of filling positions within the Street Division of Public Works?

Having considered the parties' positions, I find the issue is:

Did the City violate the contract by denying the grievants the position of Medium Equipment Operator in the Street Division? If so, what remedy is appropriate?

CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

. . .

C) To promote, schedule and assign employes to positions with the City.

. . .

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

. . .

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.

. . .

DISCUSSION

A Street Division Medium Equipment Operator vacancy did not attract any unit bidders from within the Division. Two employes from outside the Street Division applied but were rejected by the City as unqualified following an interview/testing process.

The Union argues that the parties have a mutually understood long standing practice of allowing unit employes to establish their qualifications for a vacant position during a 90-day trial period. The Union contends this practice has risen to the level of being a contractual "benefit". The Union asserts the trial period serves all parties' interests because it is the best way to objectively measure the employe's abilities, aptitudes and qualifications.

The City counters by asserting that when the only applicants for a vacant position are from outside the division in which the vacancy occurs, Article 8.01 B) allows the City to determine whether the applicant is "qualified", and that only "qualified" applicants are entitled to a 90-day

promotional probationary period. The City contends that the two grievants were not qualified.

The Union correctly contends that there are some circumstances in which a practice can become an enforceable part of a contract. However, the evidence presented is not strong enough to establish that such a practice exists here. This is so because at least some of the practice evidence presented involved circumstances in which: (1) the successful bidder was from within the division in which the vacancy occurred; or (2) the successful bidder went through a qualification process before going through a promotional probationary period. Practice as to circumstance (1) above does not support the Union's case because the City correctly concedes that under Article 8.01A), division bidders are entitled to an automatic 90-day probationary period to demonstrate their qualifications. Practice as to circumstance (2) above does not support the Union's case because the bidder was found qualified before serving a 90-day probationary period. Thus, the evidence of practice does not consistently support the Union's position in this case and I find that no binding practice exists.

Within the context of the arguments presented to me, I find that where the bidding employes are not from the division in which the vacancy exists, the City correctly interprets Article 8.01 B) as giving it the right to grant the 90-day probationary period only to employes it finds "qualified".

There remains the question of whether the City violated the contract when it concluded the two grievants were not qualified for the Medium Equipment Operator positions and thus were not entitled to a 90-day probationary period. I am satisfied from the evidence presented that the interview/testing process used by the City was reasonably related to the job in question and that the process was applied fairly to the grievants. Therefore, I conclude that the City did not violate the contract when it determined that the grievants were not qualified for the Medium Equipment Operator position.

Given all of the foregoing, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of August, 1997.

By Peter G. Davis /s/
Peter G. Davis, Arbitrator