BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2765, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

SCHOOL DISTRICT OF MENOMONEE FALLS

Case 79
No. 66461
MA-13532

(Failure to Post and Fill a Maintenance Position)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, Post Office Box 044316, Racine, Wisconsin appearing on behalf of AFSCME Local 2765.

Mr. James Korom, Attorney at Law, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, appearing on behalf of the School District of Menomonee Falls.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 2765, AFSCME (hereinafter referred to as the Union) and the School District of Menomonee Falls (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute regarding the District's decision not to post and fill a Maintenance position. The undersigned was so assigned. A hearing was held on June 11, 2007 at the District offices in Menomonee Falls, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted the matter on closing arguments, reserving the right to submit a list of cases for the arbitrator's review by June 23. The record was closed at the end of business on June 23.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

ISSUES

The parties were unable to completely agree on the issues before the arbitrator, and stipulated that the arbitrator should frame the issues in his award. The issues may be fairly stated as follows:

1. Is the grievance properly before the arbitrator? If so

2. Did the District violate the collective bargaining agreement by failing to repost the Maintenance position vacated by Ron Kraft, and/or by failing to provide the Union with written notice of intent to eliminate the position? If so,

3. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 - MANAGEMENT RIGHTS

2.1 Rights: The employer possesses the sole right to operate the School District and all management rights repose in it, subject only to the provisions of this contract and applicable laws. These rights include, but are not limited to the following:

A. To direct all operation of the School District;

B. To establish reasonable work rules and schedules of work in accordance with the terms of this Agreement;

C. To hire, promote, transfer, schedule and assign employees in positions with the School District in accordance with the terms of this Agreement;

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

E. To relieve employees from their duties because of lack of work or any other lawful reason;

F. To maintain efficiency of School District operations;

G. To introduce new or improved methods or facilities; or to change existing methods or facilities provided if such affects the wages, hours or working conditions of employees, the Union will be notified in advance and permitted to bargain;

H. To determine the kinds and amounts of services to be performed and pertains to School District operations, and the number and kinds of positions and job classifications to perform such services;

I. To determine the methods, means, and personnel by which School District operations are to be conducted;

J. To take whatever reasonable action is necessary to carry out the functions of the School District in situations of emergency;

K. The Union recognizes the Employer has the right to contract or subcontract for goods or services, provided no regular full time employee shall be laid off or suffer a reduction in hours below forty (40) hours per week as a result of said contracting or subcontracting;

L. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.

2.2 Exercise of Rights: The Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner and further agrees that the rights contained herein shall not be used for the purpose of undermining the Union or discriminating against its members.

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ARTICLE 7 - GRIEVANCE AND ARBITRATION PROCEDURE

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

7.2 Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next within the time limits specified below, unless said time limits are extended by mutual agreement. Grievances shall be filed on AFSCME Council 40 grievance forms in existence as of June 3, 1980.

7.3 Time Limitations: If it is impossible to comply with the time limits specified in the grievance and arbitration procedure because of work schedules, illness, vacations, or other good cause, these time limits shall be extended by the period of time of said work schedule, illness, vacation, or other good cause which created the impossibility.

7.4 Steps in Procedure:

Step 1: The employee, alone or with one (1) Union representative shall orally contact the Director of Buildings and Grounds within twenty-one (21) calendar days, exclusive of Sundays or holidays, after he/she knew of the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task unless the health or safety of the employee is endangered. The Director of Buildings and Grounds shall, within five (5) working days, orally inform the employee of his/her decision.

Step 2: If the grievance is not settled at the first step, the employee and his/her representative shall prepare a written grievance and present it within five (5) working days of the supervisor's response, to the Director of Buildings and Grounds. The Director of Buildings and Grounds shall discuss the grievance with the employee and his/her representative within five (5) working days of the receipt of the notice of appeal, and following the interview, shall respond within five (5) working days in writing.

Step 3: If the grievance is not settled in the second step, the grievance may be appealed in writing to the Superintendent of Schools within five (5) working days after receipt of the written decision of the Director of Buildings and Grounds. The Superintendent of Schools shall discuss the grievance with the employee and his/her representative within five (5) working days of the receipt of the notice of appeal, and shall render a written decision within five (5) working days.

7.5 Appeal to Arbitration: If a satisfactory settlement is not reached in Step 3, the Union must notify the Superintendent of Schools in writing within ten (10) working days of the receipt of the Step 3 answer, that it intends to process the grievance to arbitration.

7.6 Arbitration: Any grievance which cannot be settled through the above procedure may be submitted to a single arbitrator, who shall be mutually selected by the parties. If the Employer and the Union are unable to agree on the arbitrator within ten (10) days, either party may request the Federal Meditation (sic) and Conciliation Service to prepare a list of five (5) impartial arbitrators. The Union and the Employer shall then alternately strike two (2) parties each on the slate, with the party filing the grievance exercising, the first and third strikes. The Employer and the Union shall exercise their strikes within fifteen (15) days following the receipt of slate from the FMCS. The remaining arbitrator shall then be notified of his/her appointment in a joint statement from the Employer and the Union.

7.7 Arbitration Hearing: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the Employer and the Union, which shall be final and binding upon both parties.

7.8 Costs: Both parties shall share equally the costs and expenses of the arbitration proceedings, including transcript fees and the fees of the arbitrator. Each party, however, shall bear its own costs for witnesses and all other out-of-pocket expenses, including possible attorney fees. The District shall allow the grievant and up to two (2) employees to participate in the arbitration proceeding without their suffering any loss of pay, provided, however, that the employees testify as witnesses in the hearing or they are Union officers or stewards who are involved in the grievance at an earlier step. There shall be a transcript prepared for each arbitration hearing, unless the parties mutually agree to waive the transcript or to substitute a tape recorder.

7.9 Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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ARTICLE 9 - PROMOTIONS AND TRANSFERS

9.1 Vacancies: Whenever a vacancy occurs which the District desires to fill due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be made known to all employees through job posting.

9.2 Posting: Job vacancies shall be posted on bulletin boards in convenient locations in each school for at least five (5) working days with a minimum of two (2) days in each week. Each job vacancy shall be posted within fourteen (14) calendar days following the date at which said vacancy occurred, or the District shall notify the president of the Union in writing, that the position has been eliminated.

9.3 Posted Information: The job posting shall set forth the job title, work location, schedule of hours, rate of pay, and a brief description of the job duties, requirements and the qualifications desired.

9.4 Applicants: Any employee interested in such vacancy must submit his/her name through signing of the job posting, to the Director of Buildings and Grounds.

9.5 Selection Procedure: The selection of an applicant to fill a job vacancy shall be made on the basis of skill, ability, and seniority; however, if the skill and ability of two (2) or more employees is relatively equal, the employee with the greatest District wide seniority shall be chosen. When full time vacancies are posted, full time employees shall receive preference over part-time employees where the skill and ability of the full time employee and part-time employee in question are relatively equal. Regular part-time employees as defined in Article V herein shall receive preference over applicants from outside of the bargaining unit. In no event shall temporary assignments of 30 working days or less be considered when assessing the skill of the applicant to fill a job vacancy.

A. Probationary Period: The employee selected shall have a sixty (60) calendar day probationary period in which to prove his/her qualifications for the position. During the first two (2) weeks of said probationary period the employee shall receive on-the-job instruction in the new position. The new wage rate shall be applicable upon beginning new job.

B. Retrocession: If during the sixty (60) calendar day probationary period mentioned above, the selected employee fails to successfully perform the duties of the new position, or if the employee elects to return to his/her former position, he/she may return to the former position and selection shall be made from among the remaining employees who signed the posting in accordance with the criteria set forth in Section 9.05.

C. Disputed Qualifications: Any question about the qualifications of an employee shall be resolved through the grievance procedure.

D. Date of Selection: The District shall make its selection pursuant to Section 9.05 above within fifteen (15) work days following the date that the posting is removed, and shall notify the successful applicant of his/her selection in writing within five (5) work days thereafter.

9.6 Union Copies: A copy of each job posting, as well as a listing of employees who signed the posting, shall be forwarded to the president of the Union. The Union president shall be notified in writing of the name of the person selected to fill any posted position.

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ARTICLE II - HOURS OF WORK

11.1 Work Day: The work day for regular full time employees shall consist of eight (8) consecutive hours, excluding the one-half (1/2) hour lunch period.

11.2 Work Week: The normal work week for regular full time employees shall consist of forty (40) hours, Monday through Friday. Regular part-time employees will work less than forty (40) hours per week on a regularly scheduled basis.

11.3 Tuesday - Saturday Positions: The District may designate a regular full time or regular part-time position having a Tuesday through Saturday normal work week. Tuesday through Saturday position shall be filled by:

A. Volunteers from currently employed personnel;

B. In the event no employee volunteers, the employee with least seniority will be assigned the Tuesday through Saturday position.

11.4 Full time Hours: The shifts for regular full time employees shall be as follows:

A. Day Shift: The starting time for day shift employees shall be between 5:30 a.m. and 8:00 a.m.

B. Maintenance Employees: The starting time for maintenance employees shall be between 6:00 a.m. and 7:30 a.m.

C. Night Shift: The starting time for night shift employees shall be between 2:30 p.m. and 4:00 p.m.

D. Split Shift Position: The starting time for any split shift position will be determined by mutual agreement between the District and the Union.

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BACKGROUND

The District provides educational services to the people of Menomonee Falls in southeastern Wisconsin. The Union is the exclusive bargaining representative for the custodial and maintenance employees of the District. Keith Marty is the Superintendent of the District, Patti Keller is the Director of Human Resources, and Dwight Crouse is the Director of Building and Grounds. At the time this grievance arose, Mike Cira was the Vice-President of Local 2765.

On July 10, 2006, employee Ron Kraft successfully posted to a custodial position, creating a vacancy in his first shift Maintenance Worker position. This was the first Maintenance Worker opening in many years. Dwight Crouse, in consultation with Keller and James Newman, the School Board's Personnel Chair, assessed the needs of the District, and decided that the position should be posted as a second shift position, working a Tuesday through Saturday schedule, to allow access to school rooms when classes were not in session, and to facilitate the many after-hours uses of the school buildings.

The collective bargaining agreement requires that openings be posted within 14 calendar days of the vacancy, and remain posted for at least 5 days spanning two work weeks. Past job openings occurring during the summer had rarely been posted according to that schedule, and were often not posted until the end of the summer, in keeping with the parties generally informal approach to contract administration. In this case, however, Mike Cira approached Crouse to remind him of the contract's requirement that the job either be posted within 14 days, or that he provide notice to the Union that the job was being eliminated. On July 25, Crouse posted a Maintenance Technician position, with flexible hours between 2:30 p.m. and 11:00 p.m., and a Tuesday through Saturday work week. The qualifications called for journeyman status or commensurate experience in building trades, and said the position required a self starter who could work alone, solve problems and handle a wide variety of tools.

When Cira saw the content of the posting, he was concerned that the qualifications were far more stringent than in the past, and that it called for a second shift work schedule, which he believed the contract did not allow. He went to Crouse to protest, and demanded that the hours on the posting be changed. Crouse said he thought the contract did allow for a second shift Maintenance position, but Cira pointed out Section 11.4(B) of the contract: "Maintenance Employees: The starting time for maintenance employees shall be between 6:00 a.m. and 7:30 a.m." In light of this language, Crouse realized that the contract would not allow a second shift posting, and had the posting taken down. At that point, no one had signed the posting.

The week after the posting was taken down, Cira, Keller and Crouse met to discuss the matter. James Newman participated by telephone. Newman expressed the opinion that if a second shift position could not be posted, the job should be eliminated. A meeting was held on August 7th, with the Superintendent, Keller, Crouse, Cira and Union Staff Representative John Maglio. On August 8th, Superintendent Marty sent a letter to Maglio confirming his understanding of the agreements reached at that meeting for further consideration of the Maintenance Worker issue:

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> Dear John:
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> As per our mutual agreement reached at a meeting in Menomonee Falls on August 7th, 2006, we agreed to hold the posting of the open maintenance position until September 30, 2006. During the next seven weeks we will assess the district's budgetary picture for 2006-2007, as well as assess the new custodial staffing plan, which goes into effect on September 30th.
>
> We welcome your input on the proposed 2nd shift change following your discussion with the current maintenance staff. We will also assess the second shift needs more thoroughly.
>
> Thank you for your cooperation.

Maglio replied via e-mail to Patti Keller two weeks later, on August 22nd:

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> Hi Patti:
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> This email serves as a follow up to Keith's letter of August 8. I tried reaching you by phone but understand you are extremely busy this time of the year.

> My understanding of the agreement reached between the parties at our meeting of August 7 was that the issue of grieving the maintenance position, vacated by Ron Kraft, was to be held in abeyance until September 30 - at which time the Union would have up to 40 calendar days to file a grievance over any disputes regarding the posting and/or timely filling of the vacancy.
>
> I trust this meets with the District's understanding. I apologize for not copying Keith on this correspondence but I do not have his email address.

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Further discussions did not bring about a resolution, and in early October, the School Board advised the administration that the position was being eliminated because of budget pressures. Crouse therefore did not re-post the position. Neither did he send a written notice to the Union that the position was being eliminated, although he had already verbally advised Cira that the School Board was going to eliminate the job if it could not be filled as a second shift position. Cira replied that the Union would grieve the failure to properly post the position.

On October 16th, Cira filed a grievance on behalf of Local 2765, stating the grievance as:

> Ron Kraft vacated his position in maintenance. The vacancy was posted incorrectly and taken down. The district failed to repost the position correctly and did not notify the union in writing that the position had been eliminated.

As a remedy, the grievance asked that the vacant position be posted and that the successful applicant be made whole retroactive to July 25th. On that same day, the Secretary of the Local sent a letter to Patti Keller, advising her that the Local was appealing the grievance to arbitration and asking that she contact Maglio about selecting an arbitrator. The letter was copied to Maglio and Keith Marty.

The grievance was not immediately resolved, and on November 8th, James Korom, counsel for the District sent Maglio a letter regarding this grievance, and another dealing with vacations:

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> Dear John:
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> This is a follow up to our telephone call of November 6, 2006, involving the vacation grievance and job posting grievance presently pending in the Menomonee Falls School District. As we discussed, we will be holding the

vacation grievance in abeyance pending a possible mediation session with Karen Mawhinney. The Union will be appealing the job posting grievance to arbitration, and it is our hope that Ms. Mawhinney will pursue settlement discussions concerning both these matters. It is my understanding the vacation grievance will be held in abeyance until such time as the Union chooses to take the matter forward.

As I indicated during our telephone conversation, we have differing views concerning the District's obligations under Article IX concerning the job posting grievance. Specifically, when the Union grieved the job posting by the District, the District immediately put further processing of that job posting on hold until the dispute between the parties could be worked out. Subsequently, the Union has indicated that the District's failure to formally notify the Union in writing that the position has been eliminated has triggered some sort of back pay obligation, to an unnamed and unknown individual. We have indicated that because the posting process was placed on hold during the pendency of the grievance, any such claim for back pay would be inappropriate. Thus, even though the Union had actual knowledge of the precise status of this job posting, and has not been kept in the dark concerning this matter, I want to formally notify you the position has been eliminated, at least until this grievance is resolved. While we believe no claim for back pay can properly be made in this case, this letter, at a minimum, will eliminate any future back pay claim under any theory of the contract.

I acknowledge you disagree with this point of view, and we both hope a determination on this issue may not be necessary. If you have any questions or comments, please contact me at your convenience.

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The matter was not finally resolved in the mediation session between the parties and was thereafter referred to arbitration. At the arbitration hearing, the District for the first time raised several procedural objections to the grievance, including the lack of a named grievant, the collapsing of the grievance steps, and the fact that the appeal to arbitration was directed to Patti Keller rather than the Superintendent as provided in the grievance procedure. Additional facts, as necessary, are set forth below.

The Position of the Union

The Union takes the position that grievance should be granted and relief ordered. The District's various procedural complaints are not entitled to any weight, as they were never raised prior to the arbitration hearing and border on being frivolous. As to the merits, the contract is clear and unambiguous. While management has the right to determine the size and

composition of the work force and decide whether jobs will be filled, Section 9.2 very specifically details how these decisions are to be made in the case of vacant positions. It provides that the District has 14 days to either post a position or provide notice in writing that the position is to be eliminated. The District did neither. It posted a position that was not allowable under the contract, and failed to correct the posting when the Union demanded that it do so. It then failed to provide written notice of a position elimination. Indeed, it provided no notice – written or verbal – within the 14 days specified by the contract. The November 8th letter from the District's attorney purports to be a written notice of elimination, but it is completely untimely. The notice must be given within 14 days, and November 8th falls nearly three months outside of that window.

Although the Union did agree to discuss this matter, and allow the District to do some additional study, at no time did it ever waive its rights to enforce Section 9.2 as written. For these reasons, the Union asks that the arbitrator sustain the grievance, and order the District to post and fill the Maintenance vacancy, with backpay from the date on which the original posting was to be filled – August 24 at the latest – through the date of compliance with the Award.

The Position of the District

The District agrees with the Union that its procedural objections are hyper-technical and would not ordinarily be entertained or even asserted, but it argues that if the Union's hyper-technical reading of Article 9.2 is sauce for the goose, then the District's hyper-technical reading of the grievance procedure should be sauce for the gander. It may be that there was no practical disadvantage to the District in the Union's failure to specify a named grievant or appeal to arbitration through the Superintendent, but the same can be said of the District's failure to post a job it would not fill or provide a written notice of job elimination when it had already repeatedly advised the Union that the position would be eliminated. If the arbitrator finds merit in those claims, then so too should he find merit in the District's procedural objections.

The Union's position is simply absurd. It posits that the 14 days for posting or giving notice of elimination is an island in the contract, and that once that time has passed, the District can never cure the violation – that it has then committed forever to continuing the job. That is completely at odds with the history of informality in the relations between the parties, and with the rest of the contract. The contract defines the obligation to post as arising when a vacancy occurs which the District desires to fill. The District obviously did not desire to fill Ron Kraft's Maintenance Worker job – it posted a Maintenance Technician position, with a different title, different hours, different work days and different job qualifications. More to the point, when a dispute arose, the parties agreed to hold the whole matter in abeyance through the end of September to allow for additional study. When that period ended, the District immediately told the Union the job was being eliminated. The fact that no magic piece of paper with magic words was used does not change the fact that everything that was done was open and above board, and that the Union always knew what the District was planning.

If a violation occurred here, it is purely a technical violation, and the only appropriate remedy would be a cease and desist order. The demand that the District post the position would result in a completely pointless exercise. There is no job, so the District would immediately have the right to layoff the successful bidder and force him or her to go through the layoff and bumping procedures of the contract without ever having worked for a single minute in the position. The Union's claim for retroactive monetary damages cannot be entertained, as it has no basis in the contract, and would be purely punitive. The District points out that the contract has a minimum period of time that the posting must remain open – at least five days across two work weeks – and further requires that the successful bidder be selected within 15 work days after the posting is removed, and notified within five work days after that. However, there is no maximum time limit on how long the posting can remain up. If the arbitrator is going to speculate that some unknown employee might have posted into this job, he should also speculate that the District might have kept the posting up for eleven months before awarding the job and immediately laying that employee off. Again, these are all empty gestures, utterly divorced from the reality of what actually happened in this case. The only defensible remedy if this was a violation is an order to the District not to repeat the violation in the future.

DISCUSSION

Article 9 of the collective bargaining agreement defines the District's options when a vacancy occurs:

> 9.2 Posting: Job vacancies shall be posted on bulletin boards in convenient locations in each school for at least five (5) working days with a minimum of two (2) days in each week. *Each job vacancy shall be posted within fourteen (14) calendar days following the date at which said vacancy occurred, or the District shall notify the president of the Union in writing, that the position has been eliminated*. [emphasis added]

The vacancy in Ron Kraft's Maintenance Worker position occurred on July 10, 2006. The District posted the vacancy on July 25, the last of the 14 days. However, it posted a different job title, with new qualifications and hours that were inconsistent with the negotiated starting times for Maintenance jobs. The Union objected and the posting was promptly removed. The parties then engaged in discussions over the District's desire for a second shift position, and eventually agreed to place the matter in abeyance through the end of September. At the beginning of October, the District verbally advised the Union that the position would be eliminated. The issue in this case is whether the District's failure to provide notice within 14 days of the original vacancy constitutes a contract violation and/or whether the fact that the

eventual notice was verbal violates the contract, and if so, what would be the appropriate remedy.[1]

A. The Merits

Article 9, Section 9.2 is, on its face, clear. The District has the choice of filling a vacant job or eliminating the position, but it must exercise that choice within 14 days by either posting the position or providing written notice to the Union President that the job is to be eliminated. Here the Union advised the District that it wanted compliance with the 14 day time limit. The District posted a job within the 14 days, but it was not the same job that Kraft vacated. Kraft's job was a first shift Maintenance worker position, working Monday through Friday. The posted job was a second shift Maintenance Technician, working Tuesday through Saturday, with more stringent qualifications. The Union objected to the posting since the contract precludes second shift Maintenance positions, and it was withdrawn. However, the District did not thereafter re-post the position, and it did not provide written notice that the job was to be eliminated.

I agree with the Union that the contract provision is clear, and that the District did not comply with the contract. There are nuances and shades of gray as to what occurred in this case, but those do not change the basic fact that a contract violation occurred. The far more substantial issue is what should be done about the violation.

B. The Remedy

The Union argues that the remedy in this case should be a retroactive award of the Maintenance position to an employee, with backpay and benefits from August of 2006 through the date of compliance with the Award, and with the future status of the successful applicant presumably turning on what the District decides to do with the position prospectively. That is certainly a possible remedy, but the issue before the arbitrator is what is the *appropriate* remedy. Given the facts of this case, the posting and monetary remedy sought by the Union would not be an appropriate remedy. There are several reasons for this.

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[1] The District raised procedural objections to the grievance, which it acknowledged were wholly technical and raised solely for the purpose of illustrating the absurd arguments that can be made regarding technical contract violations such as those it believes the Union to be asserting. Given the agreement of both parties that contract administration has been lax, I find that the record will not permit a finding that these objections would bar the consideration of this grievance at the arbitration step. Granting the ingenuity of these objections as a means of highlighting the lengths to which technical arguments can be taken, I would note that the difference between the District's procedural objections and the Union's invocation of its rights under Section 9.2 is that the Union gave the District clear advance notice that it intended to hold it to posting or eliminating the Maintenance job within 14 days of the vacancy, whereas the District gave no notice to the Union that it intended to demand strict compliance with the grievance procedure.

The original posting was to close on August 4. The District then has fifteen work days to decide on a candidate, followed by five work days to make its decision known to the successful bidder. The first day on which the successful bidder would have been in the position would have been September 4. By that time, though, the Union knew that the District had no intention of filling a first shift Maintenance position, and the parties had agreed to place the issue on hold until the end of September. The record is not entirely clear as the effect of this hiatus period. Maglio's e-mail to Keller said that it was an extension of time in which to grieve, while Marty's letter to Maglio characterized it as an agreement to hold the posting of the position until that time. Mike Cira's testimony was also that the issue was to be held in abeyance, and the posting of the job put off, until the end of September.

At the beginning of October, the agreement to hold the posting in abeyance expired. At that point, the Union knew that the District intended to eliminate the job, but had not been given written notice. Assuming for the sake of analysis that the lack of written notice meant that the District had an obligation to re-post the job first thing in October, the first work day in October was Monday, October 2. The contract requires that the posting be up in two work weeks, which means the first day to close the posting would have been the start of the business day on Tuesday, October 10. The District then has 15 work days to decide on a candidate, which means the decision would have to have been made on or about Tuesday, October 31. It then has five work days in which to inform the successful bidder, which would be Tuesday, November 7. The District's attorney sent a letter to Maglio, with a copy to the Local President, on Wednesday, November 8th constituting written notice that the job was eliminated.[2]

If the period of time in August and September during which the matter was held in abeyance is interpreted as tolling the obligation to post – and thus the backpay liability - the District's exposure amounts to whatever hours elapsed on November 8th, between the time at which the successful bidder would have reported for work and the time at which Korom's letter was sent eliminating the job. If the hiatus is interpreted as simply an extension of time to grieve, there would theoretically be back pay liability beginning on September 4th and running through November 8th. I find no reason to resolve that issue, since both parties and all potential bidders knew perfectly well during this period of time that there was no job.

This is not the usual posting violation, where a job is filled improperly and an employee is thereby denied wages he or she otherwise would have earned while a junior or less qualified employee works the job and is paid those wages. There was no job filled, there was no work done, and there were no wages paid. Neither is this a case where the Employer refused to make its intentions known to the Union or acted in bad faith to hold back a job it intended to fill. From the beginning, the District made it clear that it was not interested in posting a first shift Maintenance position, and desired only a second shift position. Once it became apparent that an acceptable agreement could not be reached on a second shift position, the District told the Union that it would not post any position. There was never any genuine uncertainty about

[2] I find no basis in the contract for the Union's argument that the right to eliminate this job somehow evaporated or was frozen as of July 25. The right to eliminate a job continues, albeit with a possible overlay of layoff and bumping.

the status of Kraft's position. The violation here consists of failing to reduce those intentions to writing until Korom's letter was sent. That violation, being technical in nature, goes to the rights of the Union as an institution, not to the rights of any individual employee.

In crafting an appropriate remedy the arbitrator must consider who, if anyone, suffered a loss, who, if anyone, realized an illicit gain, and what is required to return things to what they would have been but for the violation. The Union had the right to be informed, in writing, that the first shift Maintenance vacancy would not be posted and filled. The District failed to do so in writing, though it informed the Union of that decision effectively in late July and expressly at the beginning of October. There is no evidence of any actual loss by an employee, any actual illicit benefit by the District, nor any pattern of conduct reflecting a need for deterrence. I therefore conclude that the appropriate remedy for this wholly technical violation is the declaration of rights made herein, and an order that the District cease and desist from failing to provide written notice of position eliminations within 14 days of a vacancy.[3]

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance is properly before the arbitrator.

2. The District violated the collective bargaining agreement by failing to provide the Union with written notice of intent to eliminate the position vacated by Ron Kraft.

3. The appropriate remedy is that the District cease and desist from failing to provide notice in writing within 14 days of a vacancy when it decides to eliminate a position.

Dated at Racine, Wisconsin, this 12th day of July, 2007.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

[3] Under different facts, the Union could arguably claim that is was damaged as an institution by virtue of losing Fair Share payments from the employee who would eventually have been hired to fill a vacancy resulting from this theoretical posting process. However, that vacancy would probably have been filled sometime in October at the earliest, after actual knowledge of the position elimination. In any event Fair Share does not start until after 120 days of employment, which plainly would have been after Korom's November 8th letter providing written confirmation that the Maintenance job was eliminated. That would reverse the theoretical chain of transactions resulting in the new hire, and terminate the Fair Share liability before it ever actually accrued.

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