

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF FALL RIVER *

-and- *

ARB-13-2673

TEAMSTERS, LOCAL 251 *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kenneth Pacheco - Representing City of Fall River

Douglas Teoli - Representing Teamsters, Local 251

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The City did not violate the collective bargaining agreement when it did not give the grievant the position he bid on, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
March 7, 2014

INTRODUCTION

On March 4, 2013, Teamsters, Local 251 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L., Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield Esq., to act as a single neutral arbitrator with the full power of the Department.¹ The undersigned Arbitrator conducted a hearing at Fall River City Hall on October 28, 2013.

The parties' filed briefs on November 15, 2013.

THE ISSUE

Did the City violate the collective bargaining agreement by not giving the grievant the job he bid on? If so what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement contains the following pertinent provisions:

Article XIII – Seniority

The City agrees to adhere to the principal of seniority whenever possible in the application of this contract and in the administration of employee benefits and employer policy.

Seniority (Permanent Employees): The length of service that a permanent employee has in a particular department or unit shall determine the seniority of the employee within the department or unit.

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations “shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in [chapter 23C](#), [chapter 150](#), [chapter 150A](#), and [chapter 150E of the General Laws](#).”

The principle of seniority shall be the determining factor in promotions and transfers where qualifications and ability are relatively equal. Seniority shall govern in the assignment of shifts and choice of vacation period. See appendix C.

Article XV – Job Posting and Bidding (In Part)

The successful applicant shall be given a ninety (90) day trial and training period in the new position at the applicable rate of pay. If, at the end of the trial and training period, it is determined that the employee is not qualified to perform the work, he shall be returned to his old position and rate.

THE FACTS

The City and the Union are parties to a collective bargaining agreement. The grievant, Herbert Buckley (Buckley), has worked for the City for ten years, driving a trash truck for the last seven years. Prior to February 22, 2013, Buckley applied to fill the posted position of roll-off truck operator/driver.

On February 22, 2013, Kenneth Pacheco (Pacheco), Director of Community Maintenance responded by letter stating that:

This letter is to inform you that your request to fill the posted position of roll-off truck operator/driver has been denied. I have reviewed your personnel record which includes information regarding your driving record. The position which is in question is an extremely complex piece of equipment to operate; it also possesses a multitude of safety concerns for the operator, pedestrians, and property at pick-up locations. This equipment/truck will be responsible for activity of such containers located at schools and businesses as well as hauling different materials from the DPW Complex. Based on the findings from your personnel file it is my opinion that your safety and the safety of others including the risk of future property damage I have rendered my opinion (sic). I wish you well in your future endeavors.

Buckley filed a grievance concerning the denial of the job. The grievance was denied at all steps of the grievance procedure, resulting in the instant Arbitration.

POSITIONS OF THE PARTIES**THE UNION**

The Union begins by stating that the City violated the collective bargaining agreement when it denied the grievant the job he bid on. The grievant was the most senior employee of all bidders. The collective bargaining agreement is very clear that all jobs will be bid for and awarded to the most senior employee. This has also been the past practice, which was confirmed by the City's witness John Perry (Perry). Perry even stated that he had been awarded jobs in the same manner.

The City's reasoning for not awarding the grievant the position was because of his past driving record. All this evidence showed was that the grievant had some accidents, but was no different from other employees, and that he was never disciplined for any accident. In fact to this day, the grievant continues to drive the same vehicle. Finally, the Union points out that the employee who was awarded the job is being trained, as outlined in the collective bargaining agreement, and the grievant was not afforded the same opportunity.

The Union concludes that for the foregoing reasons, the grievance should be sustained, and the grievant should be made whole for all losses.

THE EMPLOYER

The City begins by noting that the job that Buckley bid for is a specialty driving position on a piece of equipment that the City purchased to enhance services throughout the boundaries of the municipality. This particular vehicle is a hauling machine which carries containers ranging from 2 tons to as much as 10 tons. Due to the nature of this piece of equipment, the loading and unloading of

each container is a process requiring concentration, awareness of surroundings and a heightened sense of safety. Buckley's extremely flawed driving record during his tenure with the Department of Community Maintenance Sanitation Division is evident of the fact that he cannot meet the requirements to operate such equipment safely and is a tremendous liability to this particular position.

The City concludes that the awarding of all assignments is carefully reviewed by a multitude of professionals including line supervisors, an assistant manager and the operations manager. These individuals have daily interaction and oversight of all employees and are well vested in the technical demands of each position and the associated equipment. Under the circumstances set forth, a contractual obligation to award this position to the person with the highest seniority is not in the best interest of any party involved. The City has an obligation to protect the safety of its citizens and employees above and beyond any collective bargaining agreement and therefore stands by its decision to deny Buckley the awarding of this position.

OPINION

The issue before me is: Did the City violate the collective bargaining agreement by not giving the grievant the job he bid on? If so what shall be the remedy? For the reasons stated below, I find that the City did not violate the collective bargaining agreement, and the grievance is denied.

Article XIII of the parties' collective bargaining agreement contains the following language:

The City agrees to adhere to the principal of seniority whenever possible in the application of this contract and in the administration of employee benefits and employer policy.

Seniority (Permanent Employees): The length of service that a permanent employee has in a particular department or unit shall determine the seniority of the employee within the department or unit.

The principle of seniority shall be the determining factor in promotions and transfers where qualifications and ability are relatively equal. Seniority shall govern in the assignment of shifts and choice of vacation period. See appendix C.

The Union, in its post hearing brief, argues that the collective bargaining agreement is “very clear that all jobs will be bid for and awarded to the most senior employee.” This is contrary to the clear and unambiguous language of the collective bargaining agreement. The language of Article XIII is a “modified seniority clause” expressed in the form of a “relative ability clause.” Specifically, the language states that: “seniority shall be the determining factor in promotions and transfers where qualifications and ability are relatively equal.” Thus for the Union to prevail solely on a seniority argument, they must prove that Buckley’s qualifications and ability were relatively equal to the successful junior candidate. For the City to prevail it must show that they reviewed Buckley’s qualifications and ability and ultimately found them not to be relatively equal to the successful candidate.

The evidence before me shows that the City reviewed Buckley’s personnel file which included information about his driving record and history of multiple accidents. The City found this driving record to be an “extremely flawed” record that calls into question his ability to meet the requirements to operate the equipment safely. The City also states that prior to a final decision on this

assignment, a line supervisor, an assistant manager, and the operations manager, all of whom have daily interaction and oversight of all employees and are well versed in the technical demands of each position and the associated equipment, carefully reviewed the decision.

The City was able to show a process that met the standards of a “relative ability” seniority clause, and clearly articulated the reasons it found Buckley’s qualifications and ability to be deficient in relation to the successful candidate. John Perry (Perry), a manager with 14 years of experience, testified that Buckley’s file had the most accident reports of any driver in the department and that Buckley has a history of being easily distracted which would be detrimental to his safety and the safety of others in this particular assignment. The Union was unable to provide any evidence to refute the City’s claims that Buckley’s skill and ability were not relatively equal to the successful candidate.

The Union alternatively argues that Buckley should have been given a ninety day trial period as outlined in Article XV. This argument is unpersuasive as Buckley was not deemed to have the qualifications and ability for the position. Article XV does not require that the City provide the most senior candidate a ninety day trial period. Rather the successful applicant, once promoted, is given a ninety day trial period for training and acclimation purposes.

Finally, the Union states that it was the past practice to award positions to the most senior applicants. As I have found the language of Article XIII to be clear and unambiguous, it is inappropriate to consider the accuracy of the Union’s claim of a conflicting practice.

For all the reasons stated above, the grievance is denied.

AWARD

The City did not violate the collective bargaining agreement when it did not give the grievant the position he bid on, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
March 7, 2014